Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: William Neal McBrayer

Office Address: 150 Third Avenue South, Suite 1600
(including county)

Nashville, Davidson County, TN 37201

Office Phone: (615) 651-6722 Facsimile: (615) 651-6701

Email Address: neal.mcbrayer@butlersnow.com

Home Address: [redacted]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney. Member of Butler, Snow, O'Mara, Stevens & Cannada, PLLC.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1989. BPR #013879.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I am only licensed in Tennessee.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Trabue, Sturdivant & DeWitt (Sept. 1989 – Dec. 1998)

Miller & Martin PLLC (Jan. 1999 – June 2012)

Butler, Snow, O'Mara, Stevens & Cannada PLLC (June 2012 – Present)

In addition to practicing law, I am also a book author for which I receive annual royalties.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My current practice emphases are commercial litigation and bankruptcy. I also handle some transactional work for clients. Commercial litigation constitutes approximately 60% of my workload, with bankruptcy accounting for 30% and other areas accounting for 10%.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

My practice has changed over the years. When initially hired as an associate for Trabue, Sturdivant & DeWitt in 1989, I handled insurance defense and subrogation cases, almost exclusively for Tennessee Farmers Mutual Insurance Company, and collections matters. In the first few years, my work took place primarily in general sessions court, but as I became more experienced and the amounts at issue became more substantial, I appeared more frequently in circuit and chancery courts.

In addition to insurance defense and collections work, I represented creditors in bankruptcy cases. Eventually, I took on work as debtor's counsel in Chapter 11 reorganization cases. I also

handled individual Chapter 7 bankruptcy cases as part of my commitment to the Nashville Bar Association Pro Bono Program.

In the late 1990's, due in part to a client's desire to start an air charter operation, I developed some expertise in aviation law. I represented parties to various types of transactions involving aircraft, including purchases, leases, and management agreements. I advised clients on the requirements of the Federal Aviation Regulations and appeared on behalf of clients before the Federal Aviation Administration. I have also tried cases involving aircraft transactions.

I have always had an interest in code law, so I am often called on within my firm as a resource on the Uniform Commercial Code. My particular area of interest is secured transactions (Article 9), and I have co-authored a book on the subject that I update annually. I also have a good background in sales and leases, Articles 2 and 2A.

My current clientele ranges from individuals to an advocacy group for American holders of defaulted bonds issued by the Republic of China, and I appear in both state and federal courts. Some of my most significant litigation matters have involved the defense of preference actions filed by debtors and trustees in bankruptcy. In 2009, I obtained a dismissal following trial of a $16,886,289 avoidance action filed in the Western District of Oklahoma.

Although I consider myself primarily a litigator, I occasionally work on corporate/transactional matters. I advise financial institutions on the documentation of secured transactions and on the enforcement of security interests. Recently, I served in an interim general counsel role for a client that develops and sells software for health, training, safety and compliance programs.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Recent significant matters include the following:

Valley Commercial Capital, LLC v. Averitt Air, Inc., First Circuit for Davidson County, Tennessee, Case No. 09C3849. This was a suit over storage of a business jet in which the plaintiff sought damages in excess of $3 million, plus treble damages and attorneys' fees. Following a trial in 2012, the case against my client, Averitt Air, Inc., was dismissed.

Equipment Finders, Inc. of Tennessee v. Fireman's Fund Ins. Co., 473 B.R. 720 (Bankr. M.D. Tenn. 2012). Representing the insurer, obtained dismissal of a post-confirmation adversary proceeding for lack of subject matter jurisdiction.

Rocin Liquidation Estate v. Comdata Network, Inc., United States Bankruptcy Court for the Western District of Oklahoma, Adv. Pro. No. 04-1244. This was an avoidance action filed

against my client, Comdata Network, Inc., seeking recovery of $16,886,289.48 in alleged preferential transfers. This case was tried in 2009 and concluded with a judgment of dismissal.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have served as a private mediator on a few occasions.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

None.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

From March 17, 2003, until March 17, 2009, I served as a hearing committee member for the Tennessee Board of Professional Responsibility.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

None. However, I was a candidate for a bankruptcy judgeship in 2011.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Maryville College, Maryville, TN (1982-1986). Graduated with a Bachelor of Arts (Political Science), *magna cum laude*. Recipient of the Alumni Association's Outstanding Senior Award. Member of Alpha Gamma Sigma (Honor Society). Recipient of Tennessee Political Science Association's John W. Burgess Award. Chairman of the Judicial Council.

Marshall-Wythe School of Law, The College of William and Mary, Williamsburg, VA (1986-1989). Graduated with a Juris Doctor. Student Articles Editor for the *William & Mary Law Review*. Served on the Board of Directors of the William & Mary Public Service Fund.

PERSONAL INFORMATION

15. State your age and date of birth.

Age 49. August 14, 1963.

16. How long have you lived continuously in the State of Tennessee?

Except for my time in law school, I have lived in Tennessee since 1970.

17. How long have you lived continuously in the county where you are now living?

I have lived in Williamson County, Tennessee since 1996.

18. State the county in which you are registered to vote.

Williamson County.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

City of Brentwood Environmental Advisory Board (2010-Present).

City of Brentwood Environmental Quality Coordinating Committee (2009)

Leadership Brentwood Steering Committee (2004-2006)

Member of Forest Hills Baptist Church.

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

I have never belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

American Bar Association – 1989 – Present

Tennessee Bar Association – 1989 – Present

Twentieth Judicial Circuit Delegate to the TBA House of Delegates (2001 – Present); Vice Chair of the Business Law and Bankruptcy Section (2003-2004); Chair of the Bankruptcy Law Section (2004-2005); Member of the TBA Joint Article 9 Committee – Responsible for studying and proposing legislation adopting the 2010 version of amendments to Article 9 of the Uniform Commercial Code (2011-2012).

Nashville Bar Association – 1989 – Present

Chair of the Bankruptcy Court Committee (2001); Member of the Facilities Committee

(2008-2011).

Mid-South Commercial Law Institute – 2007 – 2012

Member of the Board of Directors (2007 – 2012); President (2011-2012). As president, I was responsible for producing the 32nd Annual Mid-South Commercial Law Institute Seminar. The Mid-South Commercial Law Institute seminar is an advanced two-day CLE on commercial and bankruptcy topics held annually in Nashville.

Defense Research Institute – 2007 - Present

American Bankruptcy Institute – 2002 – Present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

Listed in *Best Lawyers*.

Martindale-Hubbell AV rating.

Named to Mid-South Super Lawyers 2008-2009, 2012.

Named a Fellow of the Nashville Bar Foundation in 2001.

Certificate of Appreciation from the Board of Professional Responsibility in 1991.

30. List the citations of any legal articles or books you have published.

W. Neal McBrayer & James H. Porter, *Tennessee Secured Transactions Under Revised Article 9 of the Uniform Commercial Code: Forms and Practice Manual* (2001 & Supp. 2012).

Contributing Author, *Inside the Minds: Chapter 15 Bankruptcy Strategies* (2012).

Contributing Author, *Inside the Minds: Navigating Recent Bankruptcy Law Trends* (2010).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

"Lawyers and Social Media – Avoiding Self-Inflicted Wounds," Tennessee Valley Public Power

Association Legal Conference, February 10, 2012.

"Bankruptcy Litigation 101," Nashville Business Institute, December 15, 2011.

"Ethics for the Commercial Lawyer," Mid-South Commercial Law Institute, December 2, 2011.

"Representing Organizational Clients," Tennessee Valley Public Power Association Legal Conference, February 11, 2011.

"Litigating the Preference Case," Mid-South Commercial Law Institute, December 3, 2010.

"Ethics Update," Mid-South Commercial Law Institute, December 3, 2009.

"Teleconference: Ethical Conduct in Bankruptcy Cases," National Business Institute, May 6, 2009.

"2009 Bankruptcy Law Update: Ethical Conduct in Bankruptcy Cases & Focus on the New Local Court Rules," National Business Institute, March 17, 2009.

"A Bankruptcy Overview for the General Practitioner," Tennessee Bar Association, August 22, 2008.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In March of 2009, I was appointed to a three year term on the City of Brentwood Planning Commission. I was reappointed in March of 2012. My current term expires on March 31, 2015.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

The attached documents represent my own personal effort. With both the brief and article, editorial assistance was provided by others.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I have three reasons for seeking a position on the Court. First and foremost, the opportunity to serve the public and the State in this capacity is appealing. As a lawyer in private practice, my work directly benefits my clients, but rarely is there a direct benefit beyond my clients. As a judge, I would have the opportunity to benefit litigants, the profession and the public by upholding the rule of law. Second, the challenge of the position is motivating. Having served in the role of a decision maker, I know deciding disputes can be difficult and, sometimes, agonizing. However, such challenges motivate me to my best efforts. Third, the opportunity for a career change is an exciting prospect. I have been in private practice for nearly twenty-four years, and until two years ago, I never imagined doing anything else. I look forward to taking on a new career.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Since I was admitted to the bar, I have accepted cases from the Nashville Bar Association Pro Bono Program. I have also provided legal services pro bono for the Legal Aid Society of Middle Tennessee and the Cumberlands.

In 2011, I participated in a pilot program of the Nashville Bar Association to provide assistance to pro se litigants in bankruptcy court.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek a position on the twelve member Court of Appeals as a resident of the Middle Tennessee grand division. If selected, I would be one of five judges on the court without prior experience as either a jurist or working for the government in some capacity. I believe it is important for the court to have a diverse makeup of professional backgrounds.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I currently serve on the City of Brentwood Planning Commission and on the City's Environmental Advisory Board. I also participate annually in the Walk to Defeat ALS. If appointed judge, I would resign from the Planning Commission, but I would like to continue serving the City on one of its volunteer boards. My ability to do so will be dependent, however, on the Board of City Commissioners.

If appointed, I would not continue to raise funds for the Walk to Defeat ALS, but I would look for other ways to lend assistance by volunteering my time.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Although I have been actively engaged in the private practice of law since graduating from law school, I believe my resume reflects that I have always looked for ways to serve my profession and my community. My application for a position on the Court of Appeals is a natural result of my desire to help others.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I would uphold a law even if I personally disagreed with the substance of the law. In 2010, as a member of the City of Brentwood Planning Commission, I was faced with a vote on a rezoning request to construct a mosque. Supporters of the rezoning request relied on the Tennessee Religious Freedom Restoration Act (T.C.A. § 4-1-407) to argue that denying a change in zoning would substantially burden a religiously motivated practice. In light of the statute, I felt obligated to vote in favor of the requested rezoning. Despite disagreeing with the very broad definition of "substantially burden" found in the statute, I applied the definition, putting the City to a standard and burden of proof it ultimately could not meet.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Betsy S. Crossley, Mayor of the City of Brentwood, P.O. Box 788, Brentwood, TN 37024. (615) 371-2200 ext. 2770.

B. Dan Elrod, Executive Committee Member, Butler, Snow, O'Mara, Stevens & Cannada PLLC, The Pinnacle at Symphony Place, 150 Third Avenue South, Suite 1600, Nashville, TN 37201. (615) 651-6702.

C. Steve Gregory, Executive Vice President, Averitt Air, Inc., 625 Hangar Lane, Hangar #4, Nashville, TN 37217. (615) 399-8077.

D. William R. O'Bryan, Jr., Butler, Snow, O'Mara, Stevens & Cannada PLLC, The Pinnacle at Symphony Place, 150 Third Avenue South, Suite 1600, Nashville, TN 37201. (615) 651-6724.

E. Lisa Peerman, Senior Vice President, General Counsel and Secretary, Comdata Network, Inc., 5301 Maryland Way, Brentwood, TN 37027. (615) 371-3172.

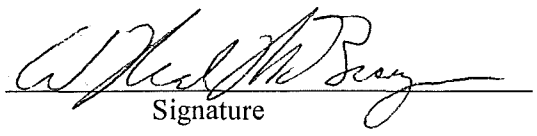
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 11, 2013.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

William Neal McBrayer
Type or Printed Name

W. Neal McBrayer
Signature

6/11/13
Date

013879
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Case No. 13-5115
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PUREWORKS, INC.,

Plaintiff – Appellant

v.

UNIQUE SOFTWARE SOLUTIONS, INC.,

Defendant – Appellee

On Appeal From The United States District Court
for The Middle District Of Tennessee Nashville Division
U.S. District Court Docket No. 3:10-cv-00846

Brief of Appellant PureWorks, Inc.

W. Neal McBrayer
Taylor B. Mayes
Travis Swearingen
BUTLER, SNOW, O'MARA, STEVENS
& CANNADA, PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219-2433
Telephone: (615) 503-9100
Fax: (615) 503-9101

Attorneys for Plaintiff-Appellant, PureWorks, Inc.

ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5115 Case Name: PureWorks v Unique Software Solutions

Name of counsel: W. Neal McBrayer

Pursuant to 6th Cir. R. 26.1, PureWorks, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

A former shareholder of PureWorks, Inc. is Fisher Scientific Company, LLC, which is a wholly owned subsidiary of Thermo Fisher Scientific, Inc., a publicly owned corporation. In 2011, all the shares of PureWorks, Inc., including those of Fisher Scientific Company, LLC, were purchased by UL PS Holdings LLC. The outcome of the litigation will impact the consideration paid for Fisher Scientific Company's shares in PureWorks, Inc.

CERTIFICATE OF SERVICE

I certify that on February 13, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ W. Neal McBrayer

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FOR PUREWORKS, INC.

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT REGARDING ORAL ARGUMENT

Given that the record is composed entirely of exhibits to pleadings and motions filed in the District Court, to the extent the Court finds any of the disputes presented arbitrable under the parties' agreement, oral argument likely would aid this Court in understanding the scope of such disputes.

STATEMENT REGARDING JURISDICTION

Jurisdiction is proper under 28 U.S.C.A. § 1332. Plaintiff-Appellant PureWorks, Inc. and Defendant-Appellee Unique Software Solutions, Inc. are citizens of different states, and the amount in controversy exceeds $75,000, exclusive of interest and costs. (Notice of Removal, RE 1, Page ID # 2-3; Complaint, RE 2, Page ID # 18, 23). This Court has jurisdiction by virtue of 28 U.S.C.A. § 1291. The District Court entered its order confirming the arbitration award on December 28, 2012 (Order, RE 52), and Plaintiff-Appellant PureWorks, Inc. timely appealed on January 28, 2013. (Notice of Appeal, RE 60).

STATEMENT OF THE ISSUES

At issue before the Court is whether the District Court erred in its interpretation of a narrow arbitration clause providing for a thirty day arbitration process before an accountant-arbitrator by holding that the parties had agreed to arbitrate all disputes raised by Defendant-Appellee Unique Software Solutions, Inc. Also at issue is whether the District Court erred in confirming the arbitration award in light of the disputes actually decided by the accountant-arbitrator and the manner in which the disputes were decided.

INTRODUCTION AND STATEMENT OF THE CASE

This dispute stems from an "earn-out" payment provision of an asset purchase agreement. Following a challenge to the amount of the "earn-out" payment and a demand for arbitration, on July 23, 2010, Plaintiff-Appellant PureWorks, Inc. ("PureWorks") filed a complaint for declaratory relief in the Chancery Court of Tennessee seeking a determination of the scope of the arbitration clause in the asset purchase agreement and a declaration that that it had complied with terms of the asset purchase agreement. (Complaint, RE 2). On September 9, 2010, Defendant-Appellee Unique Software Solutions, Inc. ("USS") removed the case to the district court. (Notice of Removal, RE 1). On September 22, 2010, USS moved to stay the district court case pending arbitration, which the district court granted on November 1, 2010, ordering that PureWorks participate in arbitration for "all disputes regarding the Earn-out Report." (Motion to Stay Proceeding, RE 11; Order, RE 25, Page ID # 356).

Once the issues for the arbitration were refined by USS, on January 10, 2012, PureWorks asked the district court to reconsider its previous ruling staying the litigation and for a finding that the arbitrator did not have jurisdiction over the issues raised by USS. (Motion for Reconsideration, RE 26). The district court denied the motion for reconsideration by order entered on February 2, 2012. (Order, RE 31).

On April 18, 2012, the arbitrator entered an interim opinion and order, and on August 21, 2012, the arbitrator entered his final opinion and order. (Application for Order Confirming Arbitration Award, RE 36, Page ID # 557-570, 582-590). USS moved to confirm the arbitration awards, and PureWorks moved to vacate the awards. (Application for Order Confirming Arbitration Award, RE 36; Motion to Vacate Arbitration Award, RE 42). The district court confirmed the award on December 28, 2012. (Memorandum, RE 51; Order, RE 52). PureWorks filed its notice of appeal on January 28, 2013. (Notice of Appeal, RE 60).

STATEMENT OF FACTS

USS provided software solutions for managing employee safety, health safety, and environmental compliance. Michael Hunter and Valerie Hunter were the principal owners of USS. (Complaint, RE 2, Page ID # 28). On December 23, 2008, PureWorks, USS, Michael Hunter, and Valerie Hunter entered into the *Asset Purchase Agreement by and among PUREWORKS, Inc. d/b/a PureWorks, Unique Software Solutions, Inc., Michael Hunter and Valerie Hunter dated December 23, 2008* (the "APA") in which USS agreed to sell and PureWorks agreed to purchase substantially all of USS' assets (the "Business"). (Complaint, RE 2, Page ID # 27-81).

The parties agreed that the APA would be governed by Delaware law, but they submitted themselves:

> TO THE EXCLUSIVE JURISDICTION OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLORADO AND THE MIDDLE DISTRICT OF TENNESSEE AND THE STATE COURTS OF THE STATE OF COLORADO IN THE CITY OF COLORADO SPRINGS AND THE STATE COURTS OF THE STATE OF TENNESSEE IN DAVIDSON COUNTY, TENNESSEE, IN ANY ACTION, SUIT OR PROCEEDING BROUGHT AGAINST IT AND RELATED TO OR IN CONNECTION WITH THIS AGREEMENT OR THE TRANSACTION CONTEMPLATED HEREBY . . . .

(Complaint, RE 2, Page ID # 73-74 (emphasis in original)). The parties also agreed not to assert by way of any motion that "THIS AGREEMENT OR ANY DOCUMENT OR INSTRUMENT REFERRED TO HEREIN OR THE SUBJECT MATTER HEREOF MAY NOT BE LITIGATED IN OR BY SUCH COURTS." (Complaint, RE 2, Page ID # 73-74 (emphasis in original)).

In addition to a payment of $7 million (subject to certain adjustments), the consideration for the sale included two potential earn-out payments for calendar years 2009 and 2010 based on the revenues of the Business to be calculated in accordance with Generally Accepted Accounting Principles ("GAAP"). (Complaint, RE 2, Page ID # 32-36). The 2009 earn-out payment could range from

$0 for revenues less than or equal to $4.5 million up to $1.7 million for revenues greater than $5.4 million, and the 2010 earn-out payment could range from $0 for revenues less than or equal to $4.8 million up to $1.1 million for revenues greater than $6 million. (Complaint, RE 2, Page ID # 32-33). In the event that revenues of the Business exceeded $6 million in 2010 (thus earning the maximum 2010 earn-out payment), the 2009 earn-out payment would be adjusted upward as if those excess revenues had been earned in 2009, but only to the extent the maximum 2009 earn-out payment had not been reached. (Complaint, RE 2, Page ID # 34).

In determining the amount of the earn-out, the APA required PureWorks, within sixty days of the end of each calendar year, to submit "a reasonably detailed report" of the revenues of the Business, including a break-down by service/product and by specific customer name, and a determination of the appropriate earn-out payment. The reasonably detailed report was defined in the APA as the "Earn-out Report." (Complaint, RE 2, Page ID # 34-35). Disputes regarding the "Earn-out Report" were subject to an arbitration procedure employed elsewhere in the APA for "disagreements as to any item included in the Final Balance Sheet" of the Business. (Complaint, RE 2, Page ID # 34-35, 37). USS had ten business days to challenge any item of the detailed report of revenues, specifying in the writing "the amount, nature and basis of the dispute." (Complaint, RE 2, Page ID # 34-35, 37). In the event the parties were unable to resolve the dispute on their own, the APA

provided for the selection of an accounting firm to decide, within thirty days, the dispute. (Complaint, RE 2, Page ID # 34-35, 37). To aid the accounting firm in its work, the parties agreed to "use their best efforts to cooperate with the Accounting Firm, including providing (or providing access to) any documents or personnel reasonably requested." (Complaint, RE 2, Page ID # 37). The decision of the accounting firm was to be in writing and to include a copy of the detailed report of revenues modified to reflect the decision of the accounting firm. (Complaint, RE 2, Page ID # 34-35, 37).

On February 26, 2010, PureWorks sent USS an earn-out determination summary and a detailed report of revenues for 2009 showing total revenues of $4,353,564, which was too low to trigger an earn-out payment. (Motion to Vacate, RE 42-1, Page ID # 616). On May 13, 2010, USS submitted a notice of claims and demand for arbitration.[1] (Complaint, RE 2, Page ID # 84-87). Specifically, USS identified the following disputes:

Notice of Claims

PUREWORKS' Earn-out calculation violates the Agreement and Delaware law (which was identified as controlling in the Agreement).

I have reviewed and endorse the specifically-identified violations

[1]Prior to the demand for arbitration, on March 12, 2010, the Hunters had sent a letter in which they alleged the manner in which PureWorks had conducted the Business was inconsistent with its obligation to operate and fund the business with a view towards maximizing revenues. (Complaint, RE 2, Page ID # 82-83).

identified in Sellers' correspondence dated December 12, 2009 and March 12, 2010.

As you know, among other promises, PUREWORKS agreed to:

- Determine the Earn-out using GAAP revenue (§1.3(c)(i));
- Continue to make available to customers the Existing Products (§1.3(c)(vii)(B));
- Operate and fund the business with a view towards maximizing revenues (consistent with [Sellers'] past practices) (§1.3(c)(vii)(C)); and
- [sic] shifting revenue model from up-front payments to long-term (e.g., after earn out) model;
- [sic] deferring recognizable revenues into a post-Earn-out period; and
- [sic] effectively failing to maintain sales support employees by reducing headcount and imposing business shift towards maintenance agreement.

On the Earn-out calculation side, PUREWORKS has failed to calculate the Earn-out fairly or in accordance with GAAP. This includes the following:

- failing to account for set-up fees under FASB Code 985-605 (Software Revenue Recognition); and
- failing to utilize or recognize training revenue in a timely manner.

Each of these actions not only violates the spirit of the Agreement, it contradicts the express provision to operate and fund the business with a view towards maximizing revenues consistent with Sellers' past practices (§1.3(c)(vii)).

(Complaint, RE 2, Page ID # 86-87). The demand for arbitration led PureWorks to file suit in state court to determine the scope of the arbitration clause and to request a declaration that it had complied with the terms of the APA. USS ultimately removed the state court action to the district court. (Notice of Removal, RE 1).

While the notice of claims alleged that PureWorks failed to account for set-up fees under FASB Code 985-605 and failed to recognize training revenue, USS' self-labeled "Earn-out calculation" claims, the focus of the arbitration was PureWorks' alleged breach of a post-closing covenant of the APA. (Motion for Reconsideration, RE 26-1, Page ID # 387). Specifically, as described by the expert hired by USS to testify at the arbitration, USS alleged that the post-closing covenants found in Section 1.3 of the APA required PureWorks to operate the Business identically to how it was operated by USS and that "Pureworks changed its business practices by signing customers to longer . . . contracts," "Pureworks

offered . . . customers discounts for signing three and five year agreements," and "Pureworks increased the time to deliver training to customers relative to contract implementation." (Motion for Reconsideration, RE 26-2, Page ID # 403). In summary, USS' claims revolved entirely around the "cumulative impact of changes in PureWorks' business practices" post-closing. (Motion for Reconsideration, RE 26-2, Page ID # 403).

The arbitration took place on February 22-24, 2012, in the Denver offices of USS' attorneys. (Application to Confirm Arbitration Award, RE 36-3, Page ID # 582-590). Rather than technical accounting issues, the arbitration "turn[ed]" on the proper interpretation of the post-closing covenant in the APA requiring PureWorks to "operate and fund the Business with a view towards maximizing revenue (consistent with Seller's past practices)." (Application to Confirm Arbitration Award, RE 36-3, Page ID # 585). Mr. William Carey,[2] a certified public accountant who possessed no legal training, presided. (Reply Brief in Support of Motion to Stay, RE 22-2, Page ID # 344-345). During the arbitration, the accountant-arbitrator considered "witnesses, exhibits stipulated as to their

[2] Mr. Carey was not selected by the parties. Because the parties could not agree on the scope of the arbitration provision in the APA, USS requested that the American Arbitration Association ("AAA") select the accounting firm in accordance with the terms of the APA. The AAA selected Mr. Carey, an accountant, to select the accounting firm. The parties then agreed to have Mr. Carey act as the arbitrator. (Application to Confirm Arbitration Award, RE 36-5, Page ID # 596-97; Memorandum in Support of Motion to Stay, RE 12-2, Page ID # 118-19).

admissibility, demonstrative exhibits, and arguments." (Application to Confirm Arbitration Award, RE 36-3, Page ID # 583). He also determined the weight of evidence and admitted expert testimony. (Application to Confirm Arbitration Award, RE 36-3, Page ID # 586-588).

On April 18, 2012, nearly a year and one-half after the district court entered its stay order, the accountant-arbitrator entered his interim opinion and order ("Interim Opinion") finding USS was entitled to an earn-out payment for 2009 of $700,000. (Application to Confirm Arbitration Award, RE 36-3, Page ID # 582-590). The Interim Opinion contains no references to or consideration of accounting methodology or deviations from GAAP. Instead, the accountant-arbitrator made factual findings and legal conclusions, which he summarized as follows:

- The language of the APA 1.3(c) is unambiguous;
- [PureWorks] did not ". . . operate . . . the Business with a view towards maximizing revenue (consistent with Seller's past practices)" in accordance with the covenant in APA 1.3(c)(viii)(C) (or, the "covenant)";
- [PureWorks] departed from "Seller's past practices" in changing the Business's [sic] operating model to emphasize multi-year ASP

contracts and, as an integral part of that process, using discounts as an incentive for its customers to accept the change;

- There is insufficient evidence that Respondent departed from "Seller's past practices" in providing training.

(Application to Confirm Arbitration Award, RE 36-3, Page ID # 583). As a result, the accountant-arbitrator ruled that USS was entitled to "an adjustment of 2009 Includable Revenues of *approximately* $48,000, and an adjustment of 2010 Includable Revenues of *approximately* $447,000." (Application to Confirm Arbitration Award, RE 36-3, Page ID # 583 (emphasis added)).

In the Interim Opinion, the accountant-arbitrator reserved two issues: attorneys' fees and prejudgment interest. On the issue of attorneys' fees, the accountant-arbitrator requested that USS provide documentation of its reasonable expenses, including attorney fees." (Application to Confirm Arbitration Award, RE 36-3, Page ID # 583). On the issue of prejudgment interest, he noted the APA was silent and requested briefs of applicable law. (Application to Confirm Arbitration Award, RE 36-3, Page ID # 583).

On August 21, 2012, the accountant-arbitrator entered his final opinion and order ("Final Opinion") in which he found PureWorks liable to USS for a total award of $1,360,759 ($700,000 for the 2009 earn-out plus "reasonable" attorneys' fees of $490,144, costs of $126,616 and prejudgment interest of $43,999).

(Application to Confirm Arbitration Award, RE 36-1, Page ID # 557-570). In deciding to award almost $620,000 in attorney's fees and expenses, the accountant-arbitrator made note that, although "the language of the APA and its application to . . . [PureWorks'] calculation of the Earn-out -theoretically is not complicated," to support its claims, USS "had to perform extensive discovery and work with experts to determine how . . . [PureWorks] operated the business after the sale, and how that affected . . . [PureWorks'] accounting for the business and Earn-out." (Application to Confirm Arbitration Award, RE 36-1, Page ID # 564).

The accountant-arbitrator also awarded post-judgment interest. The accountant-arbitrator found that post-judgment interest should be awarded on all amounts awarded to USS, including prejudgment interest, at the Delaware statutory rate of 5.75%. (Application to Confirm Arbitration Award, RE 36-1, Page ID # 568-569).

USS moved to confirm the arbitration awards, and PureWorks moved to vacate the awards. (Application to Confirm Arbitration Award, RE 36; Motion to Vacate Arbitration Award, RE 42). The district court confirmed the awards on December 28, 2012. (Order, RE 52).

SUMMARY OF ARGUMENT

The agreement of the parties contained a specialized arbitration provision under which PureWorks and USS only agreed to arbitrate a narrow range of disputes in a limited manner. Although federal policy favors arbitration, the parties must still agree to arbitrate a given dispute. The dispute raised by USS, whether PureWorks operated the purchased Business consistent with USS' past practices, was outside the narrow range of matters the parties agreed to arbitrate.

The proper interpretation of the arbitration clause is that the parties only agreed to arbitrate accounting disputes with two financial reports that PureWorks was required to produce and provide to USS. Such a reading of the arbitration clause is supported by the plain language of the arbitration clause, the limits placed on the arbitration procedure, and the context of the parties' agreement as a whole. First, the arbitration provision calls for an accounting firm to resolve the disputes over the financial reports. Second, the arbitration process is limited to thirty days. Third, the arbitration process makes no provision for fact finding beyond securing the cooperation of the parties and requiring the parties to make available documents or personnel reasonably requested. Finally, the parties agreed to the jurisdiction of state and federal courts for suits related to or in connection with the asset purchase agreement or the transactions contemplated herein.

The arbitration awards should be vacated under 9 U.S.C.A. § 10. The accountant-arbitrator exceeded his powers by deciding disputes beyond the scope of and in a manner inconsistent with the arbitration clause. The accountant-arbitrator's decision was based on a determination that PureWorks breached a post-closing covenant of the asset purchase agreement rather than on an accounting error in the financial reporting. Even if the parties had agreed to permit an accountant-arbitrator to decide breach of contract claims, there was no agreement to permit an accountant to arbitrate the reasonableness of attorneys' fees or entitlement to pre or post-judgment interest.

The accountant-arbitrator also exceeded his powers by the manner in which the arbitration was conducted. The arbitration was to be concluded within thirty days of the appointment of the arbitrator, and the arbitrator was given no authority to conduct an evidentiary hearing or consider expert testimony.

STANDARD OF REVIEW

In reviewing a district court's decision to confirm an arbitration award, the Court of Appeals reviews findings of fact for clear error and questions of law *de novo*. *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135 (6th Cir. 1996). Although arbitrators are given considerable leeway in their decision making, reviewing courts do not give additional deference to district courts when they confirm arbitration awards. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

ARGUMENT

I. The Parties Did Not Agree To Arbitrate the Dispute Raised by USS.

The first principal underscoring all United States Supreme Court arbitration cases is that "arbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. International Brotherhood of Teamsters,* 130 S. Ct. 2847, 2857 (U.S. 2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Consequently, courts should not order arbitration of a dispute that the parties have not agreed to arbitrate. *Id.* at 2859. The presumption favoring arbitration should apply "only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and *best construed to encompass the dispute.*" *Id.* at 2859-2860 (emphasis added). The presumption should not apply at all where, as here, the arbitration clause is not ambiguous. *See Id.* at 2859 ("applying the presumption of arbitrability *only* where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." (emphasis added))[3]

[3] Because the arbitration clause in the APA is not ambiguous, there is no need for this Court to apply "a thumb on the scale in favor of arbitration." *See Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 478 (6th Cir. 2006).

The arbitration provision at issue in this case does not commit the parties to arbitrate the issues raised by USS. The plain language of the APA shows that the agreement to arbitrate was limited to narrow types of disputes, specifically disputes related to two types of financial reports to be made by PureWorks. The scope of the arbitration was further limited by the choice of arbitrator, an accounting firm, which has specialized skills. The arbitration procedure itself was also limited – the accounting firm had only thirty days from its appointment to decide the dispute and the parties' role in the arbitration was limited to cooperating with the arbitrator by providing access to documents and personnel reasonably requested by the arbitrator.

The best construction of the arbitration provision is that it does not include the dispute raised by USS. Courts that have considered similar arbitration provisions, including this Court, have construed such provisions to exclude collateral issues such as breach of contract claims.

The best construction of the arbitration provision also would take into account the expertise of the arbitrator mandated by the APA. The construction of the arbitration provision advocated by USS and adopted by the district court requires the arbitrator to decide issues outside of his specialty of accounting and to undertake activities typically performed by lawyers.

A. The Arbitration Provision of the APA is Narrow, Applicable in Only Certain, Limited Circumstances

Under Delaware law, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997). Contract language is examined "as a whole" and each provision and term is given effect "so as not to render any part of the contract mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d. 393, 396-97 (Del. 2010).

The APA contemplated that most disputes would be resolved in the courts. The parties stipulated in the APA to the exclusive jurisdiction of the United States District Courts of the District of Colorado and the Middle District of Tennessee and the state courts of Colorado and Tennessee for any action, suit or proceeding "RELATED TO OR IN CONNECTION WITH THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY." (Complaint, RE 2, Page ID # 73-74 (emphasis in original)). The APA also contemplated that the parties could seek injunctive relief from the courts to prevent breaches or to enforce specific provisions of the APA. (Complaint, RE 2, Page ID # 72).

The APA contains a narrow arbitration provision for two categories of financial reports: the closing or final balance sheet and the earn-out reports. (Complaint, RE 2, Page ID # 34-35, 36-37). In connection with determining an

adjustment to the purchase price, the APA requires PureWorks to prepare, within sixty days of closing, a closing balance sheet, including a supplemental schedule of working capital, and submit it to USS. (Complaint, RE 2, Page ID # 41-42). Working capital is defined within the APA and included a number of highly technical accounting items such as transferred cash, credits, prepaid expenses, deferred charges, advance payments, security deposits, and deferred charges. (Complaint, RE 2, Page ID # 32). In the event that USS "disagree[d] as to any item included in the Final Balance Sheet" (Complaint, RE 2, Page ID # 37), the APA set forth the following alternative dispute resolution procedure:

> (b) The Final Balance Sheet shall become final and binding upon the parties hereto solely for the purpose of calculating the adjustment to the Initial Purchase Price under Section 1.3 hereof ten (10) business days after completion and delivery thereof, unless [USS] within such time period delivers written notice to [PureWorks] of its disagreement as to any item included in the Final Balance Sheet. In the event [USS] disputes the Final Balance Sheet, it shall notify [PureWorks] in writing (the "Dispute Notice"), setting forth the amount, nature and basis of the dispute.
>
> (c) Within fifteen (15) days following the delivery of the Dispute Notice, the parties shall use their best efforts to resolve such

dispute. Upon their failure to do so, the parties shall, within ten (10) days from the end of such fifteen (15) days period, select an accounting firm that has no existing or previous relationship with either party or their respect Affiliates (the "Accounting Firm"). If the parties fail to agree upon or are unable to retain (for whatever reason) an Accounting Firm, the American Arbitration Association shall, upon the request of either party, select an Accounting Firm (or any other accounting firm, if necessary; in which event, hereinafter the "Accounting Firm"). The Accounting Firm shall be engaged jointly by the parties to decide the dispute with respect to the Final Balance Sheet within thirty (30) days from its appointment. The parties shall use their best efforts to cooperate with the Accounting Firm, including providing (or providing access to) any documents or personnel reasonably requested. The decision of the Accounting Firm shall be final and binding upon the parties, and, accordingly, a judgment by a court of competent jurisdiction may be entered in accordance therewith. Such decision shall be set forth in writing and shall be accompanied by a copy of the Final Balance Sheet modified to the extent necessary to give effect to such decision, and shall be confirmed as the Final Balance Sheet by the Accounting Firm. A

> copy thereof shall be delivered to each of the parties. Incident to such decision, the Accounting Firm shall determine whether the Buyer or the Seller is the non-prevailing party in the dispute.

(Complaint, RE 2, Page ID # 37).

In conjunction with determining "earn-out" payments, the APA requires PureWorks, within sixty days of the end of each calendar year, to submit "a reasonably detailed report" of the revenues of the Business, including a break-down by service/product and by specific customer name, and a calculation of the appropriate earn-out payment based upon the previous year's revenues. The parties defined this document in the APA as the "Earn-out Report." (Complaint, RE 2, Page ID # 34-35). Like the closing balance sheet, the earn-out provisions contain specific instructions on how Business revenue is to be calculated in accordance with GAAP for the calendar years 2009 and 2010. (Complaint, RE 2, Page ID # 34-35). The earn-out provisions of the APA do not contain a separate dispute resolution procedure. Instead, for "resolving disputes regarding the Earn-out Report" the dispute resolution procedures specified for objections to items included in the closing balance sheet apply "as if the references therein to the Final Balance Sheet were references to the Earn-out Report and as if the reference therein to the Initial Purchase Price were deleted." (Complaint, RE 2, Page ID # 34-35).

The arbitration provision for disputes concerning the Earn-out Report, therefore, contains several limitations on the process that are indicative of its narrow scope. The procedures specify that the arbitrator will be an accounting firm. (Complaint, RE 2, Page ID # 34-35, 42). The entire arbitration procedure was to occur over a period of thirty days from the date of appointment of the accountant-arbitrator. (Complaint, RE 2, Page ID # 34-35, 42). In addition, after selection of the arbitrator, the parties' role in the arbitration was only to cooperate with the accountant-arbitrator, including providing "any documents or personnel reasonably requested." (Complaint, RE 2, Page ID # 34-35, 37). The procedures are more consistent with the performance of an audit than an arbitration.

B. Narrow Arbitration Provisions Are Addressed Differently By the Courts

Despite the general policy favoring arbitration, arbitration provisions, such as the specialized arbitration provision at issue in this case, which is limited in scope by its plain terms and the APA's general choice of jurisdiction for disputes, should not be given broad application by the Court beyond the parties' intent. Where there is not a clear referral of all disputes to arbitration, "courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." *Paladino v. Avnet Computer Techs., Inc.,* 134 F.3d 1054, 1057 (11th Cir. 1998). The general presumptions and

rules in favor of arbitration do not broaden the scope of a specialized arbitration provision:

> A longstanding principle of this Circuit is that no matter how strong the federal policy favors arbitration, arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration. This Court has drawn a clear line between the extensive applicability of general arbitration provisions and the more narrow applicability of arbitration clauses tied to specific disputes. When faced with a broad arbitration clause, such as one covering any dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration .... However, when an arbitration clause by its terms extends only to a specific type of dispute, then a court cannot require arbitration on claims that are not included.

Twin City Monorail, Inc. v. Robbins & Myers, Inc., 728 F.2d 1069, 1072 (8th Cir. 1984) (internal citations omitted.)

In the Second Circuit, the analysis of whether a particular dispute falls within the scope of an arbitration clause begins by classifying the arbitration clause as either broad or narrow. *Louis Dreyfus Negoce S.A. v. Blystad Shipping &*

Trading Inc., 252 F.3d 218, 224 (2nd Cir. 2001). If the arbitration clause is narrow, the court then determines "whether the dispute is over an issue that 'is on its face within the purview of the clause,' or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause." *Id.* (quoting *Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1295 (2nd Cir. 1979)). Collateral issues generally are considered beyond the purview of narrow arbitration clauses. *Id.*

This Court has previously considered the issues within the purview of accountant arbitration clause similar to the one at issue in this case. *Bratt Enters., Inc. v. Noble Int'l Ltd.*, 338 F.3d 609 (6th Cir. 2003). In *Bratt*, as part of the purchase price, the buyer Noble agreed to assume accounts payable up to a certain amount. *Id.* at 611. To quantify fluctuating values in the purchase price, including the accounts payable as of the closing date, the parties agreed to a post-closing adjustment, which would be based upon a closing date balance sheet prepared by Noble. *Id.* The asset purchase agreement provided the following mechanism for disputes raised by the seller Bratt to the closing date balance sheet:

> Within 30 days after the delivery of the Closing Balance Sheet, [Bratt] will notify [Noble] as to whether it disagrees with any of the amounts included in the Closing Balance Sheet. If such notice is not given, the Closing Balance Sheet will be final and conclusive for all

> purposes. If the parties are unable to resolve their differences within 60 days of their receipt of the Closing Balance Sheet, [Noble] and [Bratt] agree to retain a national accounting firm, other than the independent auditors used by Noble or [Bratt], to arbitrate the dispute and render a decision within 30 days of such retention, which decision will be final and binding for all purposes. Any award pursuant to this Section 1.3(c)(iii) may be entered in and enforced by any court having jurisdiction over the matter. [Noble] and [Bratt] will each pay one-half of the costs of the services rendered by said accounting firm.

Id. at 611 n.3.

The parties ultimately had numerous disputes over the closing balance sheet, and the seller Bratt filed suit, claiming in part that the cap placed on the assumption of account payables was the result of a mutual mistake. The buyer Noble filed a counterclaim alleging, among other things, that the seller had breached the asset purchase agreement. *Id.* at 612. Finding that the buyer's breach of contract claim was related to adjustments in the closing balance sheet, the district court ordered arbitration on the breach of contract claim in addition to the dispute over the actual accounts payable balance. *Id.* This Court reversed, holding that:

> [w]hile Noble's claim would obviously require reference to the closing balance sheet to determine matters of valuation should Noble prevail on this issue, the dispute regarding the validity of the [$1.2 million] limitation provision does not itself involve a "disagree[ment] with any of the amounts included in the Closing Balance Sheet." Rather, it involves a determination of whether the parties' intent regarding Bratt's retained liabilities was based upon the parties' sharing a misunderstanding about an essential term of the agreement. Thus, this aspect of Noble's breach of contract claim is not within the scope of the arbitration clause and is, therefore, not arbitrable.

Id. at 613. The fact that ordering arbitration on the dispute over the proper amount of accounts payable and refusing to order arbitration on the breach of contract claim resulted in "piecemeal litigation" did not alter the result. *Id.* at 613.

The Sixth Circuit's decision in *Bratt* is in line with decisions of other circuit courts examining specialized arbitration provisions.[4] In *Fit Tech, Inc. v. Bally*

[4] Decisions of lower courts also align with *Bratt*. *See e.g.*, *Harker's Distrib., Inc. v. Reinhart Foodservice, L.L.C.,* 597 F. Supp. 2d 926, 940 (N.D. Iowa 2009) (in an accountant arbitration clause, "it makes sense to read the agreement to entrust the accountant any *accounting matters* involved in determining "'Total Intangible Value.'" (emphasis in original)); *Powderly v. MetraByte Corp.,* 866 F. Supp. 39, 42-43 (D. Mass. 1994) (finding accounting remedy inapplicable to claim of breach of covenant of good faith and fair dealing because "[i]nasmuch as [the plaintiff's] allegations challenge the defendants' business practices regarding MetraByte, and not the integrity of the accounting techniques used to calculate the

Total Fitness Holding Corp., the First Circuit addressed what issues should be subject to arbitration in an arguably broader specialized arbitration provision. 374 F.3d 1 (1st Cir. 2004). Bally Total Fitness entered into an asset purchase agreement to acquire eight health and fitness centers operated under the Fit Tech name. *Id.* at 2-3. The purchase price for the centers was subject to an adjustment based upon earnings of the centers post-closing defined as "EBITDA." *Id.* at 3. The amount due to sellers was calculated from quarterly and annual "earn-out schedules" prepared by Bally. In the event of a dispute concerning the schedules, the asset purchase agreement specified the following procedure:

> (e) *Protest Notice.* Within sixty (60) days after delivery to the Sellers of the Advance Earn-Out Schedule or the Earn-Out Schedule, as applicable, the Sellers may deliver written notice (each, a "Protest Notice") to the Buyer of any objections, and the basis therefor, which the Sellers may have to the Advance Earn-Out Schedule or the Earn-Out Schedule, as applicable. Any such Protest Notice shall specify the basis for the objection, as well as the amount in dispute. The failure of the Sellers to deliver a protest notice within the prescribed

---

Net Operating Profit, the defendants' motion to compel arbitration will be denied."); *Parker v. Twentieth Century-Fox Film Corp.,* 118 Cal. App. 3d 895, 904, (Cal. Ct. App. 1981) (holding that accounting firm arbitration provision dealing with "accounting of receipts and disbursements relating to a distribution" did not reach the principal issues of "fraud . . . [and] breach of contract . . . .").

time period will constitute the Sellers' acceptance of the Advance Earn-Out Schedule and the Earn-Out Schedule set forth therein, as applicable.

(f) *Resolution of the Sellers' Protest.* If the Buyer and the Sellers are unable to resolve any disagreement with respect to the Advance Earn-Out Schedule or the Earn-Out Schedule within twenty (20) days following the Buyer's receipt of any Protest Notice, then the items in dispute will be referred to the Accountants for final determination within forty-five (45) days, which determination shall be final and binding on all of the parties hereto. The Accountants shall be engaged by the Sellers and the Buyer regarding the Advance Earn-Out Schedule or the Earn-Out Schedule, as applicable, based upon the written submissions of the Sellers and the Buyer, and the Accountants may, but shall not be required to, audit the Advance Earn-Out Schedule or the Earn-Out Schedule or any portion thereof. The Advance Earn-Out Schedule and the Earn-Out Schedule as ultimately prepared and finalized in accordance with this Section 3.5(f) shall thereafter be deemed to be and constitute the "Advance Earn-Out Schedule" and the "Earn-Out Schedule" respectively, for all purposes.

Id.

Post-closing disagreements developed between the sellers and Bally, resulting in the sellers filing suit. *Id.* at 4. Like USS' notice of claims, the suit alleged breach of contract. The suit also alleged breach of the implied covenant of good faith and fair dealing. Bally moved to dismiss the suit on the grounds that, under the dispute procedures agreed to by the parties, all claims must be submitted to binding arbitration by the accountants. *Id.* The district court disagreed. The district court grouped the sellers' claims in to two categories: accounting violations related to the EBITDA calculations, which it found within the purview of the accountants, and allegedly wrongful actions taken by Bally to reduce the post-closing earnings of the centers, which the court found were properly reserved for disposition by the court. *Id.*

On an interlocutory appeal, the First Circuit upheld the district court's decision not to send all claims to an arbitration before accountants. *Id.* at 8. The court reasoned that, although a literal reading of the dispute resolution procedures supported Bally's request, referring disputes over operational issues to an accountant ignored the context of the dispute resolution provisions and made no sense. *Id.*

> The phrase "any disagreement" refers to earning schedules whose components are defined in detail in the purchase agreement in accounting terms: specifically, the EBITDA formula for earnings of

> the eight centers before certain other costs (*e.g.*, interest, taxes, depreciation) are taken into account. And, the unresolved disagreements are to be referred to "accountants." In context, it therefore makes most sense to read "any disagreements" as referring to disagreements about accounting issues arising in the calculations that underpin the schedules.
>
> Conversely, it makes no sense to assume that accountants would be entrusted with evaluating disputes about the operation of the business in question. Yes, operational misconduct may well affect the level of earnings and therefore the schedules, but the misconduct itself would not be a breach of proper accounting standards. Nor would one expect accountants to have special competence in deciding whether business misconduct unrelated to accounting conventions was a breach of contract or any implied duty of fair dealing.

Id. In making its decision, the First Circuit rejected Bally's argument that the term "any disagreement" included claims of operational misconduct because operational misconduct, like accounting errors, could alter the amounts in the schedules and reduce the post-closing earn-out payment, in effect the same argument presented by USS and adopted by the district court. *Id.*

The Second Circuit applied a similar analysis in *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825 (2nd Cir. 1988). The case involved a specialized arbitration procedure for the resolution of disputes over a redemption provision in a preferred stock purchase agreement. The owners of the preferred stock were entitled to an indemnity payment if they lost the benefit of preferred tax treatment on stock dividends. However, the company, Pennsylvania Power & Light, could redeem the preferred stock "upon a good faith determination that there is substantial risk that it would be required to make any indemnity payments." *Id.* at 827. Because the preferred stock provided high yields, the stock owners wanted to avoid redemption, so the preferred stock purchase agreement included a procedure for the stock owners to challenge the company determination of substantial risk:

> If the Company should disagree with any Owner's computation of the amount of the required indemnity payment or refund thereof . . . or if any Owner should disagree with such good faith determination of the Company that there is substantial risk, then the Company and the Owner shall appoint an independent tax counsel to resolve the dispute . . . and the Company shall not be obligated to pay, and such Owner shall not be obligated to refund, the disputed portion of such amount

> until and only to the extent such dispute is resolved adversely to the party required to make payment.

Id.

Changes in the tax code led Pennsylvania Power & Light to the conclusion that there was a substantial risk that it would be required to make indemnity payments, so the company informed the stock owners of its intent to redeem the preferred shares. *Id.* at 827-28. In response, the stock owners filed suit alleging Pennsylvania Power & Light acted in bad faith by exercising its right of redemption and that the real reason for redemption was to avoid payment of future dividends. *Id.* at 828. In reliance upon the specialized resolutions procedures, Pennsylvania Power & Light moved to compel arbitration before the tax counsel. *Id.* at 829. In opposition, the stock owners argued that "the clause calling for the appointment of an independent tax counsel was only intended to cover disputes regarding relevant tax law issues and not disputes as to the utility's good faith." *Id.*

The district court agreed with the stock owners, concluding that the parties did not intend that the arbitration clause apply to disputes over Pennsylvania Power & Light's good faith. *Id.* at 829. The Second Circuit Court of Appeals affirmed. *Id.* at 832. The court of appeals found significant the designation in the arbitration clause of a specialized type of arbitrator, tax counsel, "rather than an arbitrator of

more generalized expertise." *Id.* As the court explained, "[t]he specific and limited intent indicated by that choice is evident throughout the rest of the clause." *Id.* Although conceding that arbitration procedure could be read literally to encompass all aspects of Pennsylvania Power & Light's good faith determination of substantial risk, the court concluded "the overall context of the passage indicates that it applies only to those aspects of the utility's determination that rest on PP&L's interpretation of tax law . . . ." *Id.* Although the court reached its conclusions based on the context of the specialized resolution procedures and the expertise of the proposed arbitrator, it also relied on common sense in divining the intent of the parties stating "[h]ad the parties intended to submit all issues regarding the utility's good faith to an arbitrator, we do not believe that they would have chosen a tax counsel." *Id.*

As noted above, the arbitration provision in the APA before this Court is a narrow one. The Court should not permit the federal policy favoring arbitration to serve "as a substitute for party agreement." *Granite Rock Co.*, 130 S. Ct. at 2859. Viewing the arbitration procedure in context of the entire APA, the arbitration clause applies only to accounting issues pertaining to "disputed amounts" shown on the earn-out reports. First and perhaps most important to this conclusion is the fact that the arbitration provision calls for an accounting firm to resolve the dispute. (Complaint, RE 2, Page ID # 34-35, 37). Accounting issues are properly

within the area of an accounting firm's expertise, and it defies logic that the parties would select an accounting firm to decide a breach of contract claim. In addition, specifying an accountant firm, rather than an accountant, is significant. An accountant might be a decision maker, but an accounting firm provides a service, like an audit. Second, the arbitration process is limited to thirty days. (Complaint, RE 2, Page ID # 34-35, 37). Thirty days is, and has proven to be, insufficient to assert claims outside of accounting issues, such as claims of breach of contract. Third, the arbitration process makes no provision for fact finding beyond securing the cooperation of the parties and requiring the parties to make available documents or personnel reasonably requested. (Complaint, RE 2, Page ID # 34-35, 37). The accountant-arbitrator found that extensive fact finding plus the use of experts was required to resolve USS' claim of breach of contract. (Application to Confirm Arbitration Award, RE 36-1, Page ID # 564). Finally, the parties agreed to the jurisdiction of the courts for suits related to or in connection with the APA or the transactions contemplated herein. (Complaint, RE 2, Page ID # 73-74). The interpretation of the arbitration procedure must give some effect to the jurisdiction provision. In light of these points, the arbitration procedure in the APA cannot objectively be read to require the submission of the legal issues ultimately decided by the accountant-arbitrator in this case.

II. The Court Should Vacate the Arbitration Award Because the Arbitrator Exceeded His Powers

The Federal Arbitration Act provides the following bases for vacating an arbitration award:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10 (West 2009). In this case, the arbitration awards should be vacated because the accountant arbitrator exceeded his powers in two respects.

A. The Accountant-Arbitrator Exceeded His Powers By Deciding Whether There Was a Breach of a Post-Closing Covenant

The arbitrator exceeded his powers by deciding issues beyond the dispute over the detailed report of revenues. Where an arbitrator decides a dispute that the parties did not agree to arbitrate, as here, it can be the basis for vacating an award under 9 U.S.C.A. § 10(a)(4). *See Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 478 n.6 (6th Cir. 2006). The terms of the contract define the powers of the arbitrator. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). The Sixth Circuit follows the Supreme Court's oft-quoted guidance that "if the arbitrator's award 'draws its essence from the . . . agreement,' and is not merely the arbitrator's 'own brand of industrial justice,' the award is legitimate." *Solvay Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960)). An arbitrator's award fails to draw its essence from the agreement when:

> (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on "general considerations of fairness and equity" instead of the exact terms of the agreement.

Id. (internal citations omitted). "To allow a third party, especially a third party charged with conducting the arbitration according to the terms of the arbitration agreement, to ignore the terms of the agreement at issue would undermine confidence in the integrity of arbitration as a legitimate forum for the vindication of public claims." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 680 (6th Cir. 2003).

Here, the APA provides that an accounting firm shall be engaged to decide the dispute with respect to the earn-out report, which is defined as the "reasonably detailed report as to the Revenue of the Business for the applicable year (including a break-out by service/product and by specific customer name) as well as a determination as to the earn-out payment for such year." (Complaint, RE 2, Page ID # 34-35, 37). The accounting firm was also charged with determining whether PureWorks or USS was the non-prevailing party in the dispute. (Complaint, RE 2, Page ID # 34-35, 37). The resources to be employed in resolving the dispute over the earn-out report were also specified. The parties were to cooperate with the accounting firm and "provid[e] (or provide access to) any documents or personnel reasonably requested." (Complaint, RE 2, Page ID # 34-35, 37). Finally, the accounting firm was required to decide the dispute within thirty days of its appointment. (Complaint, RE 2, Page ID # 34-35, 37).

The limitations to arbitration agreed to by the parties contrast sharply with what actually took place in the arbitration ordered by the district court. The plain language of the APA reserves arbitration for "disagreement as to any item included in the Final Balance Sheet" and "resolving disputes regarding the Earn-out Report." (Complaint, RE 2, Page ID # 34-35, 37). The APA does not provide that issues of contract interpretation and breach will be submitted to arbitration. However, contract interpretation and breach were the issues upon which the arbitration was decided. As noted by the accountant-arbitrator,

> This case turns on the language of the covenant, which reads as follows
>
> Covenants Regarding Post-Closing Operation of Business. During 2009 and 2010, Buyer: . . . (C) shall operate and fund the Business with a view towards maximizing revenue (consistent with Seller's past practices)

(Application to Confirm Arbitration Award, RE 36-3, Page ID # 585). The accountant-arbitrator next spends several pages of his Interim Opinion analyzing the parties' divergent views on the meaning of the covenant before adopting the interpretation offered by USS and making factual findings as to how PureWorks' business practices differed from the practices of USS. (Application to Confirm Arbitration Award, RE 36-3, Page ID # 585-587). The dispute arbitrated ran

beyond a dispute over the "Earn-Out Report" and into questions of law. *See Klair v. Reese*, 531 A.2d 219, 222 (Del. Super. 1987) (Under Delaware law, the interpretation of an unambiguous contract is a question of law both in the trial court and on appeal). Having an accountant act so outside his area of expertise resulted in the anomaly of an accountant performing legal research. (Reply in Support of Motion to Vacate, RE 50-2, Page ID # 685-688).

There is no reason why the parties would have agreed to have an accounting firm decide compliance with the post-closing covenants. Besides being required to "operate and fund the Business with a view towards maximizing revenues (consistent with Seller's past practices)," post-closing PureWorks was required to:

a) "maintain the Business as a separate and distinct division;"

b) "continue to make available to customers the Existing Products (including project management and training services);"

c) "not terminate (whether directly or constructively) any of the following individuals without having first consulted with the Seller Shareholders in good faith: Tom Saunders; Jen Marquette; Eddie Perez; and Anna Fitzpatrick;"

d) "maintain technical and sales support employees in order to reasonably support the Business;"

e) "timely update the 'Occupational Health Manager" software for changes and updates to applicable governmental regulations . . . ;" and

f) "not dispose of any software that is a commercially substantial asset of the Business."

(Complaint, RE 2, Page ID # 35). While breach of any of the post-closing covenants could arguably have had some impact on post-closing revenues and, in turn, the Earn-Out Report, an accounting firm possesses no specialized skills that would aid in determining whether PureWorks breached any of the covenants. Rather, the context of the arbitration clause indicates that it only applies to disputes that rest on an accounting firm's specialized skills, accounting.

B. Even if the Accountant-Arbitrator Acted Properly By Deciding Whether There Was a Breach of the Post-Closing Covenant, the Accountant-Arbitrator Exceeded His Powers In Other Respects

The Court should vacate the award pursuant to 9 U.S.C. § 10(a)(4) because the arbitrator exceeded his powers by conducting the arbitration in a manner inconsistent with the provision of the APA. In conducting the arbitration, the arbitrator went far afield from the provisions of the APA. He adopted his own method for resolving the dispute, permitting significant discovery, considering expert testimony, conducting a three-day evidentiary hearing, directing the submission of briefs, and taking well over the thirty days allotted for resolving the dispute. (Application to Confirm Arbitration Award, RE 36-1, Page ID # 564

(USS "had to perform extensive discovery and work with experts to determine how the [PureWorks] operated the business after the sale, and how that affected the [PureWorks'] accounting for the business and the Earn-out."); Reply in Support of Motion to Vacate, RE 50-2, Page ID # 685-688).

Additionally, the arbitrator exceeded his power by addressing in his decision matters beyond that permitted by the parties' agreement. The arbitration provision is specific as to what should be included in the accounting firm's decision. Reading sections 1.3(c)(v) and 1.5(c) of the APA together, the accounting firm's decision is to contain "a copy of the [Earn-out Report] modified to the extent necessary to give effect to such decision" and a determination as to "whether the Buyer or the Seller is the non-prevailing party in the dispute." (Complaint, RE 2, Page ID # 34-35, 37). In this case, accountant-arbitrator included a number of determinations in his written decision beyond what was specified in the parties' agreement. He decided when earn-out payments should be made, whether pre-judgment interest should be awarded and the appropriate amount of such interest, whether post-judgment interest should be awarded and the appropriate amount of such interest, what constitutes reasonable expenses for the prevailing party, and what constitutes reasonable attorneys' fees for the prevailing party. (Application to Confirm Arbitration Award, RE 36-1, Page ID # 557-570). Nowhere in the APA is the accounting firm granted such power.

CONCLUSION

The district court erred in its interpretation of the arbitration clause. The specialized arbitration provision agreed to by the parties is limited to a narrow range of accounting disputes and required such disputes to be decided in a specified manner. Although federal policy favors arbitration, the parties still must agree to arbitrate a given dispute. Because the parties did not agree to arbitrate the dispute in this case, the arbitration awards should be vacated under 9 U.S.C.A. § 10, and this Court should find that the parties' agreement limits arbitration to disputes over any amounts included in the Earn-out Report that might violate general accounting principles.

By: s/ W. Neal McBrayer
W. Neal McBrayer
Taylor B. Mayes
Travis Swearingen
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219-2433
Telephone: (615) 503-9100
Fax: (615) 503-9101

Attorneys for Plaintiff-Appellant, PureWorks, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [x] this brief contains 10,063 words, excluding only the Corporate Disclosure Form, or

   [ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman, *or*

   [ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: March 13, 2013

s/ W. Neal McBrayer
W. Neal McBrayer
neal.mcbrayer@butlersnow.com
Attorney for Appellant PureWorks, Inc.
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219-2433
Telephone: (615) 503-9100
Fax: (615) 503-9101

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via the Court's electronic filing system upon *attorneys for Unique Software Solutions, Inc.,* Gary Kevin Grooms and Corinne Elizabeth Martin, Stites & Harbison, Suntrust Plaza, 404 Commerce Street, Suite 800, Nashville, TN 37219, and Randall H. Miller and Andrew B. Mohraz, Bryan Cave HRO, 1700 Lincoln Street, Suite 1400, Denver, CO 80203, this 13th day of March, 2013.

s/ W. Neal McBrayer
W. Neal McBrayer

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

District Court Record Entry No.	Document	Page ID Nos.
1	Notice of Removal by Unique Software Solutions, Inc. from Chancery Court of Davidson County, Tennessee	1-16
2	Complaint for Declaratory Relief with Exhibits	17-89
11	Motion to Stay Proceeding Pending Arbitration	105-106
22	Reply Brief in Further Support of Motion to Stay Proceeding Pending Arbitration	328-345
25	Order Granting Defendant's Motion to Stay Proceeding Pending Arbitration	355-356
26	Application for Reconsideration of Order Granting Defendant's Motion to Stay Proceeding Pending Arbitration	357-436
31	Order Denying Plaintiff's Motion for Reconsideration	526
36	Motion for an Order Confirming Arbitration Award	551-597
42	Motion to Vacate Arbitration Award	614-617
50	Reply to Response to Motion to Vacate Arbitration Award	676-709
51	Memorandum of the Court	710-713

District Court Record Entry No.	Document	Page ID Nos.
52	Order Denying Plaintiff's Motion for Oral Argument, Granting Defendant's Application for Order Confirming Arbitration Award and Denying Plaintiff's Motion to Vacate Arbitration Award	714
60	Notice of Appeal	826-827

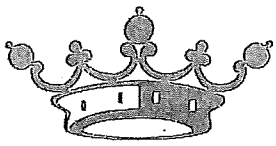
ButlerSnow 15494375v1

Achieving Recognition and Relief Pending Recognition in a Chapter 15

W. Neal McBrayer

Member

Butler Snow O'Mara Stevens & Cannada PLLC



ASPATORE

Introduction[1]

Chapter 15 does not share the same objectives as other chapters of the Bankruptcy Code. When requesting relief other than under Chapter 15, the objective is either liquidation or restructure of debt. A Chapter 15 has two objectives: obtaining comity from a United States court for a foreign insolvency proceeding and obtaining cooperation in the form of the relief necessary to carry out the objectives of the foreign insolvency proceeding. The client's ultimate objective may be liquidation or restructuring of its debt, but the Chapter 15 is ancillary to the foreign proceeding, where the ultimate objective is being pursued. In some respects, Chapter 15 is the bankruptcy analogue to domesticating a foreign judgment. Rather than a proceeding to determine whether a final judgment is entitled to full faith and credit, a Chapter 15 proceeding determines whether the foreign insolvency proceeding should be recognized, thereby giving representatives of the foreign proceeding access to the United States courts.

Focusing on the Key Goal of a Chapter 15 Filing

The ultimate goal of a Chapter 15 filing, therefore, is obtaining recognition of a foreign insolvency proceeding from the United States bankruptcy court. The bankruptcy court can rule on a petition for recognition of a foreign insolvency proceeding in one of three ways: (1) granting recognition of the foreign proceeding as a foreign main proceeding, (2) granting recognition of the foreign proceeding as a foreign nonmain proceeding, or (3) denying recognition.[2] Recognition as a foreign main proceeding means that the debtor has its center of main interests in the jurisdiction where the foreign insolvency proceeding is pending.[3] Recognition as a foreign nonmain proceeding means that the debtor has an establishment, but not its center of main interests, in the jurisdiction where the foreign insolvency proceeding is pending.[4] Although there are certain advantages to recognition as a foreign

---

[1] The opinions expressed in this article are mine and not necessarily those of Butler Snow O'Mara Stevens & Cannada PLLC or its clients. I thank Robert F. Parsley for his editorial assistance.

[2] *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008) (denying recognition despite no objection to recognition).

[3] 11 U.S.C.A. § 1502(4) (West 2004 & Supp. 2012).

[4] *Id.* at § 1502(5).

main proceeding over recognition as a foreign nonmain proceeding, recognition as either type is preferable to denial of recognition, which implies that, to be entitled to comity and assistance in the United States, "the debtor's liquidation or reorganization should be taking place in a country other than the one in which the foreign proceeding was filed."[5]

Recognition means "entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding" under Chapter 15.[6] Recognition is the prerequisite to the foreign representative's access to United States courts. Absent recognition, the foreign representative may not obtain "comity[7] or cooperation from courts in the United States."[8] With recognition, the foreign representative "has the capacity to sue and be sued in a court in the United States" and "may apply directly to a court in the United States for appropriate relief in that court;" and the court "must grant comity and cooperation to the foreign representative."[9] Additionally, recognition permits the foreign representative to commence an involuntary bankruptcy case or, if the recognition is as a foreign main proceeding, a voluntary bankruptcy case.[10] The foreign representative may also participate as a party-in-interest in a pending bankruptcy case.[11]

Once recognition has been achieved, the goal shifts from gaining to maintaining recognition and obtaining the relief necessary to carry out the

---

[5] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 334 (S.D. N.Y. 2008).
[6] 11 U.S.C.A. § 1502(7).
[7] *Hilton v. Guyot*, 159 U.S. 113, 163-64(1895) (Defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").
[8] 11 U.S.C.A. § 1509(d) (West 2012); In the case of *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, the bankruptcy court notes that a foreign representative whose petition for recognition is denied is not without any remedy. Under 11 U.S.C. § 303(b)(4), the foreign representative may commence an involuntary case under Chapter 7 or 11, and under 11 U.S.C. § 1509(f), denial of recognition may not affect any right the foreign representative may have to sue in the United States to collect or recover a claim that is property of the debtor. 374 B.R. at 132-33. However, the exception found in section 1509(f) to obtaining recognition prior to seeking relief in United States courts should be read narrowly. *In re Loy*, 380 B.R. 154, 165 (Bankr. E.D. Va. 2007)
[9] 11 U.S.C.A. § 1509(b).
[10] *Id.* at § 1511.
[11] *Id.* at § 1512.

objectives of the cross-border insolvency. Recognition may be modified or terminated "if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist."[12]

The requirements for achieving recognition have been described as "procedurally quite rigid"[13] and "formulaic,"[14] but in application, they have been anything but formulaic. Section 1517,[15] which details the requirements for recognition, presumes that the application is filed by a foreign representative seeking recognition of a foreign proceeding. Therefore, the initial inquiry is whether a "foreign proceeding" and "foreign representative" are involved.[16] "Foreign proceeding" is defined as "a collective judicial or administrative proceeding in a foreign country...under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation."[17] A "foreign representative" is "a person or body...authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a foreign representative of such foreign proceeding."[18] The Bankruptcy Code's definitional section specifies that a foreign representative appointed on an interim basis or in an interim proceeding would also qualify.[19]

Assuming that a "foreign representative" is seeking recognition of a "foreign proceeding," Section 1517 provides that an order of recognition "shall" be entered if the following requirements are met: (1) the foreign proceeding is a either a foreign main proceeding or a foreign nonmain proceeding as defined by the Bankruptcy Code; (2) the foreign representative is either a person or body;[20] and (3) the petition complies with Section 1515.[21] In effect, because

---

[12] *Id.* at § 1517(d).
[13] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 46 (Bankr. S.D. N.Y. 2008).
[14] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008).
[15] 11 U.S.C.A. § 1517
[16] H.R. REP. NO. 109-31, at 133 (2005), *reprinted in* 2005 U.S.C.C.A.N. 175-76 (requirements incorporate the definitions in 11 U.S.C.A. § 101(23) and § 101(24)).
[17] 11 U.S.C.A. § 101(23) (West 2012).
[18] *Id.* at § 101(24).
[19] *Id.* at § 101(23), (24).
[20] This requirement is redundant in that, by definition, a foreign representative must be a person or body.
[21] 11 U.S.C.A. § 1517.

the "person or body" and petition requirements are easy to satisfy and may even be presumed,[22] the hurdle narrows to Section 1517(a) and whether the debtor has at least an "establishment" in the place where the foreign proceeding is pending, which is what defines a "foreign nonmain proceeding;"[23] thus satisfying the first requirement. The drafters of the Model Law on Cross-Border Insolvency "understood that only a main proceeding or a nonmain proceeding meeting the standards of Section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition...."[24] Proving that the foreign proceeding is nonmain requires a lesser showing than a main proceeding.[25] The debtor need only have a place of operations carrying out a non-transitory economic activity in the jurisdiction where the foreign insolvency proceeding is pending.[26]

There is one variation to the recognition formula noted above, which adds some elasticity to the procedure. Recognition is subject to a public policy exception that allows a bankruptcy court to deny recognition "if the action would be manifestly contrary to the public policy of the United States."[27] This exception, however, has been described as "narrow" and intended only for "exceptional circumstances concerning matters of fundamental importance for the United States."[28] No creditor has successfully challenged recognition based upon the public policy exception.

Helping Clients Achieve Recognition of Their Foreign Proceeding

Achieving recognition starts by gathering information about the debtor's connection to the country where the foreign proceeding is pending. The

[22] *Id.* at § 1516(a) (providing that if the decision commencing the foreign proceeding and appointing the foreign representative or the certificate of the foreign court affirming the foreign proceeding's existence and the appointment of the foreign representative "indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative," the US bankruptcy court may so presume.); *See id.* at § 1516(b) (The availability of this presumption highlights the need for early coordination with foreign counsel for the debtor. The US bankruptcy court may also presume that the documents submitted in support of the petition are authentic.).
[23] *Id.* at § 1502(5).
[24] H. Report No. 109-31, at 133 (2005), *reprinted in* 2005 U.S.C.C.A.N. 175-76.
[25] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 50 (Bankr. S.D. N.Y. 2008)..
[26] 11 U.S.C.A. § 1502(2) (West 2012).
[27] *Id.* at § 1506.
[28] *In re Ran*, 607 F.3d 1017, 1021 (5th Cir. 2010).

foreign representative must prove the requirements for recognition[29] by a preponderance of the evidence.[30] Although recognition may be achieved by showing that the debtor only has an establishment where the foreign proceeding is pending, counsel can make information-gathering easier by first explaining to the client the concepts of center of main interests and establishment and by identifying the kind of evidence that might lead to a finding of either. Due to logistics, language barriers, or the need to act quickly, the client sometimes is the attorney's primary source of information concerning the debtor and its relationship to the country where the foreign proceeding is pending. Independent investigation of the debtor is often limited to the most rudimentary checks.

The breadth of the inquiry depends on whether recognition is being sought as a foreign main or a foreign nonmain proceeding. If the client insists that its foreign insolvency proceeding is pending in the location of its center of main interests and therefore the foreign insolvency proceeding should be recognized as a foreign main proceeding, the inquiry must be broader. The initial client interview should attempt to identify all the places where the debtor conducts its business or, in the case of an individual, all the places where the debtor maintains a residence. All the places identified are potential locations for the center of main interests. If multiple countries are identified, the attorney must understand the debtor's connection to each country identified, not just the country where the foreign insolvency proceeding is pending, to properly assess if recognition as a foreign main proceeding is likely.

If the foreign proceeding is pending in the country where the debtor has its center of main interests, it can be recognized as a foreign main proceeding,[31] satisfying Section 1517(a)(1).[32] "Center of main interests" is not defined in the Bankruptcy Code. The Bankruptcy Code does provide that, absent countervailing evidence, the debtor's registered office or an individual's habitual residence is presumed to be the debtor's center of main interest.[33] But the

[29] H. Report No. 109-31, at 112-13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 175; *see e.g., In re Ran*, 607 F.3d. at 1021 (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 334 (S.D. N.Y. 2008)); *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006).
[30] *In re Betcorp Ltd.*, 400 B.R. 266, 285-86 (Bankr. D. Nev. 2009).
[31] *Id.* at § 1502(4).
[32] *See* 11 U.S.C.A § 1517(a) (West 2012).
[33] *.Id.* at § 1516(c).

presumption, as Section 1516 suggests, is rebuttable and does not shift the burden to those opposing recognition.[34] The statutory presumption "may be of less weight in the event of a serious dispute,"[35] but even where there are no objections to recognition as a main proceeding, the foreign representative may still be required to put on proof to address questions raised by the court.[36] Courts do not consider recognition a "rubber stamp exercise."[37]

International sources must be considered when interpreting Chapter 15 terms, such as center of main interests,[38] which comes from the Model Law on Cross-Board Insolvency. The UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Guide) defines the term as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties."[39] The definition "generally equates with the concept of a 'principal place of business' in United States Law."[40] Several factors, either standing alone or taken together, may be relevant to determining the center of main interest, including:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.[41]

---

[34] FED. R. EVID. 301 ("[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.")

[35] *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D. N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D. N.Y. 2007).

[36] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008).

[37] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 40 (Bankr. S.D. N.Y. 2008).

[38] *See* 11 U.S.C.A. § 1508 (West 2012) ("[T]he court shall consider its international origin, and the need to promote an application of similar statutes adopted by foreign jurisdictions.")

[39] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 4, U.N. Sales No. E.05.V.10 (2005) *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (citing European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, recital 13.).

[40] *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006).

[41] *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D. N.Y. 2006), *aff'd*, 371 B.R. 10

The debtor's type and place of incorporation can also be factors. For example, notwithstanding incorporation as an "exempted company" under Cayman Islands law and despite having a registered office there, the center of main interests might lie elsewhere, because operations of an exempted company under Cayman Islands law must be conducted mainly outside of the Islands.[42]

The Bankruptcy Code also does not define "habitual residence." This phrase is interpreted almost identically to the concept of domicile in the United States.[43] Habitual residence "largely depends on whether the debtor intends to stay in the location permanently."[44] Other considerations include "(1) the length of time spent in the location; (2) the occupational or familial ties to the area; and (3) the location of the individual's regular activities, jobs, assets, investments, clubs, unions, and institutions of which he is a member."[45]

If the jurisdiction of the foreign proceeding is not the debtor's center of main interests and, therefore, recognition as a foreign main proceeding is inappropriate, the question becomes whether the foreign proceeding can be recognized as nonmain. A "foreign nonmain proceeding" is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."[46] The Bankruptcy Code does define "establishment," which is "any place of operations where the debtor carries out a non-transitory economic activity."[47] According to the UNCITRAL Guide, an establishment is essentially "a place of business, which is not necessarily the center of main interests."[48]

The relevant time period of the debtor's connection to the country where the foreign proceeding is pending may be an open question. The debtor's connection to the foreign country might have changed over the years, being stronger in some years than in others. A few reported decisions have held

(S.D. N.Y. 2007).

[42] *In re Basis Yield Alpha Fund (Master)*, 381 B.R. at 48-49; *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129-30 (Bankr. S.D. N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D .N.Y. 2008). (finding interests of Cayman Islands exempted limited liability companies conducted in the United States).

[43] *In re Ran*, 607 F.3d 1017, 1022 (5th Cir. 2010).

[44] *Id.*

[45] *Id.*

[46] 11 U.S.C.A. at § 1502(5) (West 2012).

[47] *Id.* at § 1502(2).

[48] UNCITRAL, *supra* note 39, at 42.

that the connection should be examined as of the date of the filing of the Chapter 15 petition,[49] but events following the filing of the petition might also be considered,[50] so the attorney must inquire about any anticipated changes to the connection. Even other time periods might be considered "where there may have been an opportunistic shift to establish [center of main interests]."[51] More recently, a court has held that "[t]he substantive date for the determination of the . . . [center of main interests] issue is at the date of the opening of the foreign proceeding for which recognition is sought."[52]

Developing an Effective Chapter 15 by Focusing on Timing and the Relief Required

The initial step in developing an effective Chapter 15 case, as discussed above, is addressing the issues of recognition and whether the foreign proceeding is entitled to comity and cooperation from United States courts. In the event recognition appears likely, the next step is determining what cooperation is required from the United States courts and, perhaps more importantly, when it is needed. The timing of a Chapter 15 petition can be critical, given notice requirements and the heightened standards for relief before recognition. Consideration should also be given to the relief that may be available following recognition.

Timing and Provisional Relief

Chapter 15 requires a petition for recognition to "be decided upon at the earliest possible time,"[53] but the decision comes only "after notice and a hearing"[54] Under Rule 2002, notice of the petition for recognition must be given by mail at least twenty-one days prior to the hearing on the petition.[55]

---

[49] *In re Ran*, 607 F.3d 1017, 1025-26 (5th Cir. 2010); *In re Betcorp Ltd.*, 400 B.R. 266, 290-91 (Bankr. D. Nev. 2009).

[50] *In re British American Ins. Co. Ltd.*, 425 B.R. 884, 910 (Bankr. S.D. Fla. 2010) (advocating examining the connection as of a date as close as possible to the date of the recognition hearing).

[51] *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 66 (Bankr. S.D. N.Y. 2010).

[52] *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D. N.Y. 2011) (rejecting the examining of the connection as of the date of the petition for recognition because the date of the petition can be "a matter of happenstance").

[53] 11 U.S.C.A. § 1517(c) (West 2012).

[54] *Id.* at § 1517(a).

[55] FED. R. BANKR. P. 2002(q).

Section 1520 specifies the effects of recognition, and Section 1521 lists the relief that may be granted upon recognition.[56] Relief is not granted automatically upon the filing of the petition. In considering timing, therefore, the client must determine if comity and cooperation from the United States court can await the outcome of a recognition hearing that will not take place until at least twenty days following the filing of the petition.

If twenty days is too long to wait for relief, the foreign representative may request provisional relief pending recognition, including:

- a stay of execution against the debtor's assets;[57]
- an order "entrusting the administration or realization of all or parts of the debtor's assets located in the United States to the foreign representative or another person authorized by the court;"[58]
- a suspension of the right to transfer, encumber or otherwise dispose of any assets of the debtor;[59]
- an order authorizing "the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, rights, obligations or liabilities;"[60] and
- an order granting any rights that could be exercised by a trustee with the exception of avoidance powers.[61]

The list found in Section 1519, which addresses the relief that may be granted upon the filing of a petition for recognition, is non-exhaustive.[62] The UNCITRAL Guide describes the relief that may be available upon application for recognition under the Model Law on Cross-Border Insolvency as "somewhat more narrow" than the relief that may be granted upon

[56] *See* 11 U.S.C.A. §§ 1520, 1521.
[57] *Id.* at § 1519(a)(1).
[58] *Id* at § 1519(a)(2).
[59] *Id* at §§ 1519(a)(3), 1521(a)(3).
[60] *Id* at §§ 1519(a)(3), 1521(a)(4).
[61] *Id* at §§ 1519(a)(3), 1521(a)(7).
[62] *In re Ran*, 607 F.3d 1017, 1021 (5th Cir. 2010). (holding 1519 contains a "non-exhaustive list of relief available to a foreign proceeding's representative in a Chapter 15"); *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 866 (Bankr. C.D. Cal. 2008); *see also In re Vitro, S.A.B. de C.V.*, 455 B.R. 571, 579 (Bankr. N.D. Tex. 2011).

recognition.[63] Elsewhere, however, the UNCITRAL Guide provides that, other than being restricted to "urgent and provisional measures," the relief available pre-recognition and post-recognition "are essentially the same."[64]

As suggested by the UNCITRAL Guide, there are limitations to provisional relief. The showing required for relief prior to recognition is more exacting, the duration of the relief is finite, and the relief may be conditioned, modified, or terminated. Relief that may be granted is limited to relief that "is urgently needed to protect the assets of the debtor or the interests of creditors." Section 1519(e) further provides that "[t]he standards, procedures, and limitations applicable to an injunction shall apply to relief [granted prior to recognition]."[65] But despite its plain language, Section 1519(e) has been held to apply only where the relief being sought before recognition is injunctive relief,[66] and even in the case of injunctive relief, not all procedures may be applicable in a Chapter 15 filing. For example, under Rule 7001(7), "a proceeding to obtain an injunction or other equitable relief, except when a Chapter 9, Chapter 11, Chapter 12, or Chapter 13 plan provides for the relief" is an adversary proceeding,[67] but Rule 1018, which governs contested petitions commencing Chapter 15 cases, does not include Rule 7001 as one of the applicable Part VII rules.[68]

Although it may be extended, relief granted before recognition "terminates when the petition for recognition is granted."[69] Provisional relief in the form of an injunction granted before recognition would be subject to the time limits found in Rule 65 with the result that a temporary restraining order may not exceed fourteen days.[70] Consequently, when provisional relief includes injunction relief, to avoid any time gap, two court hearings may be necessary before the hearing on recognition: one hearing on the request for a temporary restraining order, and a second hearing on the request for a preliminary injunction.

---

[63] UNCITRAL, *supra* note 39, at 341.
[64] *Id.* at 342.
[65] 11 U.S.C.A. § 1519(e) (West 2012).
[66] *In re Pro-Fit Int'l Ltd.*, 391 B.R. at 861.
[67] FED. R. BANKR. P. 7001(7).
[68] *Id.* at 1018; *see also In re Ho Seok Lee*, 348 B.R. 799, 801 (Bankr. W.D. Wash. 2006) (granting post-recognition injunction relief on a motion).
[69] 11 U.S.C.A. at § 1519(b).
[70] FED. R. BANKR. P. 7065; FED. R. CIV. P. 65(b)(2).

The timing limitation applicable to injunctive relief has necessitated a creative approach to enjoining actions against the debtor's property before recognition. One court has held that a provisional request for application of the automatic stay of 11 U.S.C. § 362 is not injunctive relief and, therefore, the standards applicable to injunctions do not apply.[71]

Provisional relief is permissible only "if the interest of the creditors and other interested entities, including the debtor, are sufficiently protected."[72] The court may condition the relief, including requiring the "giving of security or the filing of a bond."[73] Relief granted before recognition may be modified or terminated upon request by the foreign representative or by an entity affected by the relief or the court's own initiative.[74]

Timing and Relief Following Recognition

Following recognition, the relief available and the timing for such relief depends on whether the foreign proceeding is recognized as a foreign main or foreign nonmain proceeding. Section 1520 contains relief available only in the case of foreign main proceedings.[75] The moment the foreign proceeding is recognized as a main proceeding, the automatic stay of 11 U.S.C. § 362 applies to the debtor, and the automatic stay and adequate protection provisions of the Bankruptcy Code apply to the debtor's property located within the territorial jurisdiction of the United States.[76] Recognition as a foreign main proceeding also automatically grants the foreign representative authority to operate the debtor's business and to exercise the rights and powers of a trustee under Section 363 regarding the use, sale or lease of property; and under Section 552, regarding post-petition effect of security interests.[77] Property of the debtor located within the territorial jurisdiction of the United States and transfers related to such property are made subject to Sections 363, 549, and 552.[78]

---

[71] *See In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 867 (Bankr. C.D. Cal. 2008).
[72] 11 U.S.C.A. § 1522(a) (West 2012).
[73] *Id.* at § 1522(b).
[74] *Id.* at § 1522(c).
[75] *Id.*at § 1520.
[76] *Id.* at § 1520(a)(1).
[77] *Id.* at 1520(a)(3).
[78] 11 U.S.C.A. §§ 1520(a)(2), (a)(4).

Recognition as a foreign nonmain proceeding does not include any "automatic" relief; rather, the foreign representative must seek relief under Section 1521.[79] Therefore, to prevent a delay in relief, foreign representatives should consider requesting a hearing on Section 1521 relief to coincide with the hearing on recognition. This approach is advisable whether recognition is expected as a foreign main or foreign nonmain proceeding. Section 1521 relief is available to both foreign main and nonmain proceedings.[80] Although in some instances, the relief authorized under Section 1521 is duplicative of the relief that automatically applies to a foreign main proceeding under Section 1520,[81] Section 1520 includes unique relief as well. For instance, relief under Section 1521 is discretionary with the court.[82] To obtain relief under Section 1521, the relief must be "necessary to effectuate the purpose of . . . [Chapter 15] and to protect the assets of the debtor or the interests of creditors."[83] Like provisional relief before recognition, the relief is permissible "only if the interest of the creditors and other interested entities, including the debtor, are sufficiently protected,"[84] and the court may condition the relief on the posting of security or a bond.[85] Section 1521 relief is also subject to modification or termination upon the request of the foreign representative or an entity affected by the relief or the court's own initiative.[86]

Conclusion

Recognition of the foreign insolvency proceeding is the primary goal of a Chapter 15. Recognition grants access to the United States courts. Denial of recognition can effectively prevent a foreign representative from obtaining any relief on behalf of a debtor in the United States. Therefore, the first consideration in a Chapter 15 is whether recognition of the foreign insolvency proceeding is likely. To achieve recognition, the debtor at a minimum must have an establishment where the foreign insolvency proceeding is pending. An establishment includes "any place of operations where the debtor carries out a non-transitory economic activity."

[79] *Id.* at § 1521.
[80] *Id.*
[81] *See e.g. id.* at § 1521(a)(1), (a)(2), (a)(3) (limiting relief to the extent not already provided for under section 1520(a)).
[82] *In re Condor Ins. Ltd.*, 411 B.R. 314, 317 (S.D. Miss. 2009)
[83] 11 U.S.C.A. § 1521(a)(1) (West 2012).
[84] *Id.* at § 1522(a).
[85] *Id.* at § 1522(b).
[86] *Id.* at § 1522(c).

Recognition of the foreign insolvency proceeding can be either as a foreign main proceeding or as a foreign nonmain proceeding. If the debtor has no more than an establishment in the place where the foreign insolvency proceeding is pending, the foreign insolvency proceeding is recognized as a foreign nonmain proceeding. If the debtor has its center of main interests, which is similar in concept to principal place of business, where the foreign insolvency proceeding is pending, the foreign insolvency proceeding is recognized as a foreign main proceeding. The type of recognition, foreign main or foreign nonmain, dictates whether any relief is granted automatically upon recognition.

Once the requirements for recognition are evaluated and recognition is determined to be likely, the focus should shift to what cooperation is required from the United States court and when is it needed. Timely relief is the key to an effective Chapter 15. No relief is granted automatically upon the filing of a petition under Chapter 15, and because a hearing on recognition requires twenty days' notice, timing of the petition is important. Relief may be granted pending recognition, but such relief is limited to that "urgently needed to protect the assets of the debtor or the interests of creditors." Upon recognition, certain relief is granted automatically to foreign main proceedings. Relief for foreign nonmain proceedings and relief beyond that granted automatically to foreign main proceedings is discretionary with the court and limited to relief "necessary to effectuate the purpose of . . . [Chapter 15] and to protect the assets of the debtor or the interests of creditors."

Key Takeaways

- Begin the Chapter 15 filing process by addressing the issue of recognition, determining whether the foreign proceeding is entitled to comity and cooperation from United States courts. Gather information about the debtor's connection to the country where the foreign proceeding is pending, focusing on both when the foreign proceeding was filed and the anticipated date of the Chapter 15 petition. Inquire about any recent changes, positive or negative, in the connection to the foreign country.
- In the initial interview, explain to the client the concepts of both center of main interests and establishment and also explain the differences between the relief granted to a recognized foreign main proceeding and the relief granted to a recognized foreign nonmain proceeding.

- If recognition as a foreign main proceeding is sought, inquire about the debtor's connection to countries other than where the foreign insolvency proceeding is pending. In the case of an entity, the inquiry should extend to all countries where the debtor conducts business. In the case of an individual debtor, the inquiry should extend to all countries where the debtor maintains a residence.
- Be aware of the factors that may be relevant to determining the center of main interests, including the location of the debtor's headquarters; the location of those who actually manage the debtor; the location of the debtor's primary assets; the location of the majority of the debtor's creditors; and the jurisdiction whose law would apply to most disputes.
- Keep in mind that the timing of a Chapter 15 petition can be critical, given the notice requirements and the heightened standards for relief prior to recognition. Explore what relief may be necessary prior to recognition, and evaluate whether such relief is urgently needed to protect the assets of the debtor or the interests of creditors.
- If relief prior to recognition is necessary to protect assets, consider whether imposition of the automatic stay might be a better alternative to seeking injunction relief.

W. Neal McBrayer is a member of Butler Snow O'Mara Stevens & Cannada PLLC, concentrating in the areas of commercial litigation, bankruptcy, and aviation law. He represented a group of creditors challenging recognition in the Lehman Re, Ltd. Chapter 15 (In re Petition of Peter C.B. Mitchell and D. Geoffrey Hunter, as Joint Provisional Liquidators of Lehman Re Ltd., case no. 09-14884-JMP, Bankr. S.D.N.Y.) and filed the first Chapter 15 in the Northern District of Georgia (In re CellFor Corp., case no. 11-86263-PWB). Mr. McBrayer received his BA magna cum laude from Maryville College in 1986. He received a JD from the College of William & Mary in Virginia in 1989 where he was also a member and editor of the William & Mary Law Review.

Mr. McBrayer is a member of the Nashville (former chair of the Bankruptcy Court Committee), Tennessee (former chair of the Bankruptcy Law Section) and American Bar Associations. He is a 20th Judicial Circuit delegate to the Tennessee Bar Association House of Delegates and a Fellow of the Nashville Bar Foundation. Mr. McBrayer is co-author of Tennessee Secured Transactions Under Revised Article 9 of the Uniform Commercial Code: Forms and Practice Manual *and a contributing author to* Inside the Minds: Navigating Recent Bankruptcy Law Trends *for Aspatore Books.*