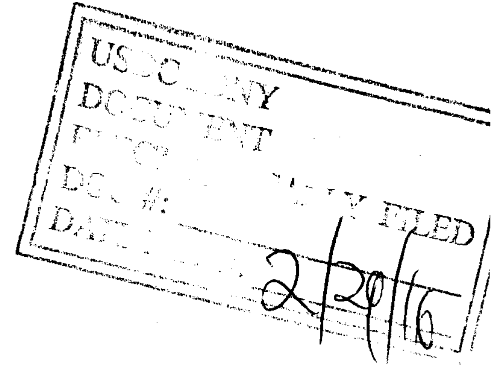

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

AMPAL - AMERICAN ISRAEL CORPORATION

MERHAV (M.N.F.) Limited and YOSEF A. MAIMAN,

Appellants,

-v-

MERHAV AMPAL GROUP, LTD, formerly known as MERHAV-AMPAL ENERGY, LTD.

Appellee.

15-cv-7949 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Appellants Merhav (M.N.F.) Limited ("MNF") and Yosef A. Maiman appeal from an Order and Judgment entered in the United States Bankruptcy Court for the Southern District of New York granting summary judgment to Appellee Merhav Ampal Group, Ltd. ("MAG"). See Opinion Granting Plaintiff's Motion for Summary Judgment, Appellant's Appendix at 362 ("A-362"), ECF No. 6; Order Granting Plaintiff's Motion for Summary Judgment, A-391; Judgement, A-395. The Bankruptcy Court determined that it had jurisdiction over this adversary proceeding and awarded MAG $28,085,157 plus costs and interest on its collection action on a note executed in favor of Ampal-American Israel Corporation ("Ampal"), MAG's assignor and the debtor below, by MNF and personally guaranteed by Maiman.

On December 25, 2007, Ampal loaned MNF $20 million to finance an ethanol production project in Colombia (the "Project"), and MNF issued a note (the "2007 Note") in Ampal's favor maturing on the earlier of December 25, 2008, or the "Financing Date," defined as the date on which MNF obtained third-party debt financing and 25% third-party equity financing in the Project. See A-37, 39. On the same day, the parties executed an agreement granting Ampal an option to convert the 2007 Note into a 35% equity interest in the project (the "Option Agreement"). A-44.

MNF did not obtain third-party financing or pay back the 2007 Note by December 25, 2008. Instead, the parties executed an amended and restated promissory note on that date (the "2008 Note"). A-69. The 2008 Note was essentially the same as the 2007 Note, but with a higher interest rate and a maturity date of the earlier of December 31, 2009, or the Financing Date. Id.; A-71. By a separate letter, the parties extended the expiration of the Option Agreement to June 30, 2009. A-89. Also on December 25, 2008, Maiman executed a personal guaranty on the 2008 Note favor of Ampal (the "Guaranty"). A-77.

MNF did not obtain financing or pay back the 2008 Note by December 31, 2009. Instead, pursuant to the "Option Exercise Agreement," Ampal exercised its option to convert the Note into an equity stake in the Project. A-92. Specifically, Ampal agreed to take a 25% equity stake in Merhav Renewable Energies Limited, a Cypriot corporation which was developing the Project, in exchange

for the balance of the 2008 Note. A-97. This conversion was explicitly conditioned on the occurrence of the Qualified Financing Date, now defined as the date on which long-term third-party debt financing was obtained and a disbursement made under the facility. A-96; A-99. The Option Exercise Agreement also included a "drop-dead" date of December 31, 2010, by which the conversion had to occur. A-97; A-99.

MNF failed to obtain financing by the first drop-dead date of December 31, 2010. On that date, Ampal and MNF executed the "2010 Letter Agreement" that extended the drop-dead date and the maturity date of the 2008 Note to December 31, 2011. A-131. Also on December 31, 2010, Ampal assigned its interests in the 2008 Note and all the other agreements to MAG's predecessor, Merhav-Ampal Energy Ltd. A-127-28. Finally, on December 8, 2011, pursuant to the "2011 Letter Agreement," Ampal and MAG agreed to extend the drop-dead date and the maturity date of the 2008 Note one last time to December 31, 2012. A-134.

Ampal commenced a Chapter 11 proceeding on August 29, 2012. At that point, Maiman controlled Ampal and MAG as Ampal's Chairman, President, and Chief Executive Officer. On May 2, 2013, the Bankruptcy Court converted the case to Chapter 7, and, on May 29, 2013, appointed Alex Spizz as the Chapter 7 Trustee (the "Trustee"). On July 25, 2013, the Court authorized the Trustee to exercise Ampal's shareholder rights with respect to subsidiaries like MAG.

On July 14, 2014, MAG made written demands on MNF and Maiman for payment of the 2008 Note. A-137, 139. Neither complied, and MAG filed a state court action against them to collect. On September 24, 2014, defendants removed the action to the Bankruptcy Court, and, on October 23, 2014, MAG filed a complaint in the present adversary proceeding to recover the $20 million principal on the 2008 Note plus interest. On September 21, 2015, pursuant to an Opinion issued on September 2, 2015, the Bankruptcy Court determined it had jurisdiction and granted MAG's motion for summary judgment.[1]

Appellants challenge the Bankruptcy Court's decision on various grounds and also question its jurisdiction. The Court considers the jurisdictional question first. There is no doubt that this is a non-core proceeding: it is a proceeding between two non-debtors on claims that arose before the bankruptcy under non-bankruptcy law. See 28 U.S.C. § 157. Accordingly, the Bankruptcy Court only had jurisdiction if this case is "related" to the Ampal bankruptcy. An adversary proceeding is "related" to a bankruptcy action if "its outcome might have any 'conceivable effect' on the bankruptcy estate." In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992). The effect on the bankruptcy estate cannot be "speculative, indirect or incidental." In re Balensweig, 410 B.R. 157, 164 (Bankr. S.D.N.Y. 2008). However, "'[c]ertainty, or even likelihood, is not required' to satisfy the 'conceivable effect' test; 'jurisdiction

[1] The parties consented to entry of final judgment by the Bankruptcy Court.

will exist so long as it is possible that the proceeding may affect the debtor's rights or the administration of the estate.'" Ritchie Capital Mgmt., L.L.C. v. BMO Harris Bank, N.A., 2015 WL 1433320 at *5 (S.D.N.Y. March 30, 2015) (collecting cases).

MAG submitted a declaration from Shlomi Kelsi, the Trustee's appointed representative in control of MAG, stating that MAG is not operating and is in the process of winding up. A-195-96. Kelsi's Declaration states that MAG's liabilities, other than approximately $8.7 million owed to the Israeli tax authorities and approximately $2 million owed to third-party creditors unrelated to Ampal, are to Ampal or affiliates thereof. Id. Specifically, MAG owes Ampal $61.9 million, Ampal (Israel) Ltd. $266.8 million, and Ampal Holdings (1991) Ltd. $54.2 million. Id. Appellants claim that Ampal in turn owes MAG $6 million; but after subtracting this amount, MAG would still owe Ampal tens of millions of dollars. After subtracting the entirety of MAG's third-party liabilities from its $28,085,157 award in this case, well over $10 million should be available for Ampal and its affiliates. Id. Even if only $10 million were left over and distributed proportionally to MAG's creditors, Ampal itself would directly receive $1.6 million of the judgment in this case. Accordingly, there is a considerable likelihood, if not an outright certainty, that the outcome of this action will have an effect on the Ampal bankruptcy estate. A considerable likelihood is more than sufficient to establish the jurisdiction of the Bankruptcy Court. See Ritchie Capital Mgmt., L.L.C. v. BMO Harris Bank, N.A., 2015 WL

1433320 at *5 (S.D.N.Y. March 30, 2015). Accordingly, the Bankruptcy Court had jurisdiction in this case.

Appellants raise various substantive objections to the Bankruptcy Court's decision. First, appellants argue that their obligations to repay the loan were excused by New York's doctrine of frustration of purpose. "Discharge under [the frustration of purpose] doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974). "In order to invoke the [frustration of purpose] defense, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." In re Merrill Lynch Auction Rate Sec. Litig., 2010 WL 1924719 at *7 n.3 (S.D.N.Y. May 11, 2010).

Appellants claim that the purpose of the agreements between Ampal and MNF was not to make a loan but rather an equity investment in the Project. They also claim that this purpose was frustrated by a "smear campaign" conducted by Ampal's bondholders against Maiman and MNF in the Israeli press. See A-223-24. However, the unambiguous language of the agreements demonstrate that their purpose was to make a loan with an option to convert the loan into equity. Specifically, the stated purpose of the agreements was "to provide [MNF] the required funding [to purchase real property in Colombia] and Ampal . . . additional required time to complete its due

diligence on the [Colombian] [p]roject." A-46.[2] The agreements accomplished their unambiguous purpose. Moreover, appellants' arguments about a different purpose are based on extrinsic evidence, such as an affidavit from Maiman dated January 20, 2015, see A-220, that cannot be used to determine the meaning of unambiguous contracts. See Omni Quartz, Ltd. v. CVS Corp., 287 F.3d 61, 64 (2d Cir. 2002). Finally, even if the Court were to accept appellants' proposed purpose and their account of a "smear campaign," articles in the press by or about a troubled company's disgruntled lenders does not amount to a "a virtually cataclysmic, wholly unforeseeable event." United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974). Accordingly, appellants' frustration of purpose argument fails.

Second, appellants argue that Ampal breached its obligations under the agreements by not taking action to prevent the alleged smear campaign by Ampal's bondholders. Appellants base this argument on a "Further Assurances" provision in the Option Agreement and the Option Exercise Agreement:

> Further Assurances Subject to the terms and conditions herein, each of the Parties agrees to take, or use reasonable commercial efforts in order to cause be taken, all Necessary Actions and to do, or use reasonable commercial efforts in order to cause to be done, all things necessary, proper or

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[2] Appellants claim that the fact that Ampal exercised its option to convert the loan into equity demonstrates that its true purpose was to make an equity investment. But this conversion was explicitly conditioned on MNF securing $185 million in outside debt financing and an initial disbursement from such a facility. See A-96, A-99. If, as appellants argue, Ampal's purpose was to make an equity investment, it could have done so with conditions.

> advisable under all applicable Legal Requirements to consummate and make effective the transactions contemplated by the Transaction Documents to which it is a party.

A-52; A-101. "Necessary Actions" are defined as "all actions . . . reasonably necessary to cause [a result required to be caused.]" A-48, A-96. Appellants again argue that the purpose of the agreements was an equity investment by Ampal into the Project. According to appellants, because Ampal failed to oppose the third-party smear campaign, it thwarted its own equity investment in the Project.

As discussed above, appellants' proposed purpose for the agreements is contrary to their unambiguous language. The Further Assurances Provision required only that the parties make efforts "to consummate and make effective the transactions" contemplated in the agreements, namely a loan with an optional conversion to equity. A-52; A-101. The loan was successfully consummated. Even if the Further Assurances provision did obligate Ampal to make reasonable efforts to consummate an equity investment to which it had only conditionally agreed, these reasonable efforts would not extend to stopping one set of third parties, the bondholders, from dissuading another set of third parties from financing the Project. Standard Further Assurances provisions such as the one here do not create novel obligations for parties. See, e.g., 97th Street Holdings, LLC v. East Side Tenants Corp., 918 N.Y.S.2d 421, 422 (N.Y. App. Div. 2011). Accordingly, Ampal did not breach its obligations, and appellants' second argument fails.

Third, appellant Maiman argues that he should be released from the Guaranty on the above grounds of frustration of purpose and breach and because the underlying obligations have been extinguished. However, for the reasons discussed above, there was no frustration of purpose, and Ampal did not breach its obligations. Accordingly, the underlying obligations have not been extinguished, and the Guaranty remains in effect. Moreover, the Guaranty contains the following provision:

> Guaranty of Obligation. Guarantor hereby irrevocably and unconditionally guarantees to Lender and its successors and assigns the payments and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise. Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor.

A-77-8. "Absolute and unconditional guaranties have . . . been found to preclude guarantors from asserting a broad range of defenses under New York law." Compagnie Financiere de Cic et de L'Union Europeene v. Merrill Lynch, Pierce, Fenner & Smith Inc., 188 F.3d 31, 35 (2d Cir. 1999). Even if Maiman's defenses had merit, they would not be available to him in light of his irrevocable and unconditional guaranty.

Finally, appellants claim they are entitled to additional discovery under Fed. R. Civ. P. 56(d). Specifically, they seek further discovery related to the bondholders' smear campaign against them. However, the actions of the third-party bondholders are irrelevant to whether the loan and Guaranty are enforceable. The

agreements are unambiguous as to their purpose and terms, and it would be unnecessary to discover any more facts related to the smear campaign or any other issue.

For the foregoing reasons, the decision of the Bankruptcy Court is AFFIRMED.

SO ORDERED.

Dated: New York, NY
February 28, 2016

JED S. RAKOFF, U.S.D.J.