SO ORDERED,

Judge Edward Ellington
United States Bankruptcy Judge
Date Signed: December 18, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:
FRANCHISE SERVICES OF NORTH AMERICA, INC.

CHAPTER 11
CASE NO. 1702316EE

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Edward Ellington, Judge

MEMORANDUM OPINION

THIS MATTER came before the Court on the *Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been Filed Without Proper Corporate Authority* (Dkt. #121) filed by Macquarie Capital (USA) Inc., Michael John Silverton, and Daniel Raymond Boland; *Joinder of Boketo LLC to the Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been Filed Without Proper Corporate Authority* (Dkt. #168); *Response and Objection of Franchise Services of North America Inc. to the Motion of the Macquarie Parties to Dismiss the Chapter 11 Case and the Joinder of Boketo LLC [Dkt. # 121; 168]* (Dkt. #186); *The Macquarie Parties' Reply to the Debtor's Response and Objection to their Motion to Dismiss the Chapter 11 Case and the Joinder of Boketo LLC* (Dkt. #206) filed by Macquarie Capital (USA) Inc. Michael John Silverton and Daniel Raymond Boland; and *Debtor's Response to the Macquarie Parties' Reply to the Debtor's Response and Objection to their Motion to Dismiss the Chapter 11 Case and the Joinder of Boketo LLC [Dkt. ## 121; 168; 186; 206]* (Dkt. #221). Having considered same, the evidence presented at trial, and the respective briefs filed by the parties, the Court finds that the *Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been Filed Without Proper Corporate Authority* (Dkt. #121) filed by Macquarie Capital (USA) Inc., Michael John Silverton, and Daniel Raymond Boland is not well-taken and is not granted. The Court finds, however, that the case should be dismissed on the *Joinder of Boketo LLC to the Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been Filed Without Proper Corporate Authority* (Dkt. #168).

FINDINGS OF FACT[1]

Franchise Services of North America (FSNA) is related to a previous Chapter 11 bankruptcy case filed in this Court, *Simply Wheelz d/b/a Advantage Rent-A-Car* (Simply Wheelz), Case No. 1303332EE, filed on November 5, 2013. The history between FSNA, Simply Wheelz, Macquarie Capital (USA) Inc., Michael John Silverton, Daniel Raymond Boland, and Boketo LLC, to name a few, is complicated, but it began with the transaction to purchase Advantage Rent-A-Car from The Hertz Corporation (Hertz).

FSNA was created and incorporated in 1998 in Canada. FSNA is in the business of renting automobiles, mainly through the grant of franchises. FSNA owns U-Save Holdings. U-Save Holdings owns 100% of the stock of U-Save Auto Rental. U-Save Auto Rental owns 100% of the stock of Auto Rental Resource Center, Inc., U-Save Car Sales, Inc., Practical Rent-A-Car System, Inc., Hollywood Call Center, Inc., U-Save Leasing, Inc., and Peakstone Financial Services, Inc. The following brands are owned by FSNA and it subsidiaries: U-Save Car & Truck Rental, U-Save Car Sales, Auto Rental Resource Center, Xpress Rent A Car, Sonoran National Insurance Group, and Peakstone Financial Services. "These franchisees, along with independent car rental associates under the ARRC model, operate more than 650 locations throughout the United States, which makes U-Save one of North America's largest franchise car rental companies. U-Save currently services

[1]These findings of fact and conclusions of law constitute the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. To the extent any of the following findings of fact are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

25 airport markets in 10 different states and 15 countries."[2]

The *Agreement and Plan of Merger by and among Adreca Holdings Corporation, Boketo LLC, Franchise Services of North America, Inc. and Advantage Company Holdings, Inc.* (Trial Exh. 9A) (Merger Plan) was entered into on July 13, 2012. This is when the process began for Adreca Holdings Corporation (Adreca) to acquire Simply Wheelz, LLC from Hertz and to eventually merge into FSNA. Adreca is an affiliate of Macquarie Capital (USA) Inc. (Macquarie). This acquisition (Advantage Acquisition) was for the purpose of acquiring Advantage Rent-A-Car (Advantage) from Hertz.[3]

Pursuant to the Merger Plan, Adreca acquired 100% of Simply Wheelz from Hertz in December of 2012. (Trial Exh. 9A).

Boketo LLC (Boketo) was incorporated in 2012 in Delaware in order to implement an investment in FSNA. "Boketo invested $15 million in FSNA in order to allow FSNA to acquire a business called Advantage from Hertz." (Trial Tr. at 18). Boketo is 100% indirectly owned by Macquarie. (*Id.* at 16). In exchange for this investment, Boketo was given a 49.76% interest in FSNA in the form of Series A Preferred Stock. Boketo became the largest single shareholder of FSNA. (*Id.* at 18).

With the closing of the Advantage Acquisition in May of 2013, Adreca merged into FSNA. FSNA operated the Advantage business via its subsidiary Simply Wheelz. FSNA was then re-

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[2]*Declaration of Thomas P. McDonnell, III, in Support of the Debtor's Chapter 11 Petition and First Day Pleadings and Applications*, Case No. 1702316EE, Dkt. #7, p. 9, June 27, 2017.

[3]Hertz was merging with Dollar Thrifty Automotive Group, Inc. Hertz was required to divest itself of certain assets due to antitrust concerns. One of the assets Hertz divested itself of was Advantage. Trial Tr. at 18.

domiciled as a Delaware corporation and a *Certificate of Incorporation of Franchise Services of North America Inc.* (Certificate of Incorporation) was filed with the Secretary of State of the State of Delaware on May 2, 2013. (Trial Exh. 36).

As a result of the Advantage/Simply Wheelz transaction, FSNA agreed to pay Macquarie a *Financial Advisory Fee* of $500,000.00, and an *Arrangement Fee* of $2,500,000.00. On March 28, 2013, Macquarie issued an *Invoice* to FSNA for the *Arrangement Fee* of $2,500,000.00.[4] Neither of the fees has been paid by FSNA and are the subject of litigation between FSNA and Macquarie in the State of New York and related litigation in the United States District Court in the Southern District of Mississippi.

While not relevant to the resolution of the litigation pending before the Court, as noted above, Simply Wheelz filed a Chapter 11 in this Court on November 5, 2013 (Case No. 1303332EE). In its Chapter 11 case, Simply Wheelz sold substantially all of its assets to Advantage Opco, LLC. Subsequent to the sale of its assets and a conclusion of pending litigation, an order approving the dismissal of the case was entered on January 28, 2016.

On June 26, 2017, FSNA (hereafter, Debtor) filed a petition for relief under Chapter 11 of the Bankruptcy Code. According to the testimony of Jonathan Nash, the Debtor's turnaround and restructuring agent, the board of the Debtor met in late June and adopted a resolution to file bankruptcy.[5] An undated[6] *Certified Resolution* memorializing the decision of the Debtor's board

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[4]*Exhibit D, Proof of Claim*, Case No. 1702316EE, Claim 7-1, Oct. 24, 2017, filed by Macquarie Capital (USA) Inc.

[5]Trial Tr. at 92-98.

[6]The last page of the *Certified Resolution* is a *Certificate* signed by the Debtor's secretary. The *Certificate* is dated August 15, 2017, however, the date the FSNA Board of Directors adopted the resolution to file bankruptcy is not disclosed in the *Certified Resolution.*

to file bankruptcy was admitted as Trial Exhibit #1.

The Debtor filed various first day motions on June 27, 2017. On June 28, 2017, Macquarie's attorneys filed a *Notice of Appearance and Request for Notices* (Dkt. #28). The attorneys for Macquarie appeared at the June 28, 2017, hearing on the first day motions. Interim orders were entered on most of the first day motions and a final hearing was set for July 17, 2017.

At a July 11, 2017, status conference, the attorney for Macquarie raised the question of whether the Debtor had shareholder consent to file bankruptcy, and stated if it did not, Macquarie might file a motion to dismiss the case. Subsequently on August 10, 2017, Macquarie Capital (USA) Inc., Michael John Silverton, and Daniel Raymond Boland[7] filed a *Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been filed Without Proper Corporate Authority* (Dkt. #121) (Motion). In its Motion, the Macquarie Parties state that in violation of its Certificate of Incorporation, the Debtor failed to get the consent of Boketa before it filed its bankruptcy petition. Consequently, the Macquarie Parties state that the case should be dismissed because the case was filed without the proper corporate authority, and therefore, the Court lacked jurisdiction to hear the case.

A two page *Joinder of Boketo LLC to the Motion of the Macquarie Parties to Dismiss the Chapter 11 Case for Petition Having Been Filed Without Proper Corporate Authority* (Dkt. #168) (Joinder) was filed on August 31, 2017. In the Joinder, Boketo fully adopted the Motion filed by the Macquarie Parties.

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[7]As noted, the Motion was filed by Macquarie, Michael John Silverton, and Daniel Raymond Boland. Silverton, Boland and Bruce Donaldson were the initial managers of Boketo. All three are either current employees of Macquarie or are former employees of Macquarie. (Trial Tr. at 43-44.) When referring to the specific parties who filed the Motion, the Court will refer to them as Macquarie Parties. Any use of Macquarie refers to Macquarie Capital (USA) Inc.

On September 18, 2017, the Debtor filed *Response and Objection of Franchise Services of North America Inc. to the Motion of the Macquarie Parties to Dismiss the Chapter 11 Case and the Joinder of Boketo LLC* (Response) (Dkt. #186). In its Response, the Debtor's main assertion is that any provision restricting the right to file a bankruptcy petition is void as a matter of public policy.

The Motion, Joinder, and Response were set for trial on October 5, 2017. At the trial, Mr. Tobias Bachteler testified on behalf of Boketo. In addition to being a managing director of Macquarie, Mr. Bachteler is one of the current managers of Boketo. The other two managers are Duncan Murdoch and Jin Chun.[8] Mr. Bachteler testified that Boketo never approved or consented to the Debtor filing bankruptcy.[9] The Debtor did not present any testimony or evidence to refute Mr. Bachteler's testimony.

At the conclusion of the trial, the parties agreed upon a briefing schedule. When the final briefs were filed, the Court took the matter under advisement.

CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(1).

II. Waiver, Estoppel, and/or Laches

The Debtor filed its petition on June 26, 2017. Forty-five days later, on August 10, 2017, the Macquarie Parties filed their Motion. Sixty-six days after the petition was filed, Boketo filed

[8]Trial Tr. at 15-18.

[9]*Id.* at 30-31.

its Joinder in the Motion on August 31, 2017. The Debtor argues that by failing to file the Motion and Joinder when the case was initially filed, the Motion and Joinder should be denied because of the principals of waiver, estoppel, and/or laches. For the reasons adeptly explained by the Honorable Jason D. Woodard, in *In re Mid-South Business Associates, LLC* the Court disagrees.

> It is well-settled that objections to subject matter jurisdiction may be made at any time, and may even be raised and decided by the Court on its own motion if the parties overlook or elect not to press such an objection. *Henderson v. Shinseki*, 562 U.S. 428, 434–35, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). If the Court finds that Dr. Windham did not have sufficient corporate authority to file the Debtor's petition, then the Court lacks subject matter jurisdiction over this bankruptcy case and has no alternative but to dismiss it. *See id.*
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> The Debtor's claim that, by failing to file the Motion earlier in the case, Thompson waived his right to challenge the corporate authority under which the petition was filed is not well-taken. The Court acknowledges that the United States Court of Appeals for the Fifth Circuit has previously held that such a waiver could be a defense against a motion to dismiss for lack of corporate authority. *See Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.)*, 857 F.2d 1061, 1064 (5th Cir. 1988)(delay in seeking dismissal of 14 months from petition date)(citing *Alexander v. Farmers' Supply Co. (In re Farmers' Supply Co.)*, 275 F. 824 (5th Cir. 1921)(delay in seeking dismissal of only 4 months)). In a later case, however, the Fifth Circuit acknowledged that a bankruptcy court lacks subject matter jurisdiction over a bankruptcy petition filed without the required corporate authority. *Treen v. Orrill, Cordell, & Beary, LLC (In re Delta Starr Broad., LLC)*, 422 Fed. Appx. 362, 368 (5th Cir. 2011)("Any suit lacking subject matter jurisdiction must be dismissed regardless of how long a case has been pending.")(citing *Temple Drilling Co. v. La. Ins. Guar. Ass'n.*, 946 F.2d 390 (5th Cir. 1991)).
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> Although *Delta Starr* is an unpublished Fifth Circuit case, and therefore of limited precedential value, its holding was premised on the United States Supreme Court case, *Price v. Gurney*, 324 U.S. 100, 106, 65 S.Ct. 513, 89 L.Ed. 776 (1945), which is, of course, binding authority. In *Price*, the Supreme Court held that if the trial court "finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative to dismiss the petition." *Id.* at 106, 65 S.Ct. 513. *See also Hager v. Gibson*, 108 F.3d 35, 39 (4th Cir. 1997); *Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255, 1259 (8th Cir. 1994). Accordingly, if Dr. Windham lacked authority under Mississippi law to file the petition on behalf of the Debtor, then this case must be dismissed.

In re Mid-S. Bus. Assocs., LLC, 555 B.R. 565, 570 (Bankr. N.D. Miss. 2016).

Consequently, the Motion and Joinder are not barred by waiver, estoppel and/or laches. If the Court finds that the Debtor filed its bankruptcy petition without the sufficient corporate authority, the Court does not have jurisdiction over the case, and the case must be dismissed.

III. Corporate Authority to File Bankruptcy

A. Specific Provisions of Debtor's *Certificate of Incorporation*

For the purposes of this Opinion, the relevant provision of the Certificate of Incorporation is § 4(j). Section 4(j) provides:

> [T]he Corporation shall not and, in the case of clause (2) below, shall not permit any subsidiary to, directly or indirectly (whether through merger, consolidation, amendment to this Certificate of Incorporation or otherwise), do any of the following without first obtaining the written consent or affirmative vote of (i) the holders of a majority of the shares of Series A Preferred Stock then outstanding, voting separately as a class (a "Preferred Majority"), and (ii) the holders of a majority of the shares of Common Stock then outstanding, voting separately as a class:
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> . . . .
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> (3) effect any Liquidation Event;[10]

Section 9.1 of the Certificate of Incorporation states that a *Liquidation Event*: "means any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Corporation or the Corporation taking any preparatory steps towards or filing a petition for bankruptcy, insolvency, receivership or similar relief."[11]

Boketo is the holder of the Debtor's Preferred Stock, and if § 4(j) is valid and enforceable,

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[10]Trial Exh. 36, *Certificate of Incorporation of Franchise Services of North America Inc.*, p. 18-19.

[11]*Id.* at 29.

Boketo would have to approve the filing of a bankruptcy petition by the Debtor.

B. Legal Authorities

In *Price v. Gurney*, the United States Supreme Court held that a bankruptcy petition filed on behalf of a corporation may only be filed by those who have authority to act for the corporation under state law. If the corporate authority to file bankruptcy is lacking, the bankruptcy court does not acquire jurisdiction and the case must be dismissed.[12] Since the Debtor was incorporated in the State of Delaware, the Court must look to Delaware law to determine if § 4(j) is valid.

Provisions similar to § 4(j) are sometimes referred to as the grant of golden shares or blocking provisions. The inclusion of blocking provisions in articles of incorporation and LLC operating agreements is relatively new. As one court explained, the reason for these provisions is because

> a simpler, absolute prohibition against filing for bankruptcy will likely be deemed void as against public policy. As corporate entities have been held to have, in certain instances, rights akin to that of natural person, see, e.g., *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), prohibiting such entities from availing themselves of the bankruptcy laws—laws so seminally important that they were specifically authorized under the Constitution—is generally considered bad form. *Gen. Growth*, 409 B.R. at 49. In the same way that individuals may not contract away their bankruptcy rights, corporations should be similarly constrained. *See, e.g.*, 11 U.S.C. 362(e); *Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy."); *In re Shady Grove Tech Ctr. Assocs. Ltd. P'ship*, 216 B.R. 386, 390 (Bankr. D.Md. 1998), supplemented, 227 B.R. 422 (Bankr. D.Md. 1998) (corporate contractual "prohibitions against the filing of a bankruptcy case are unenforceable").
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> Bankruptcy law, however, is equally clear that corporate formalities and state corporate law must also be satisfied in commencing a bankruptcy case. *NNN 123 N. Wacker*, 510 B.R. at 858. Except in very specific circumstances not at play here, an improperly authorized corporate bankruptcy filing is infirm. *Id.* (citing *Price v.*

[12] *Price v. Gurney*, 324 U.S. 100, 106, 65 S.Ct. 513, 89 L.Ed. 776 (1945).

Gurney, 324 U.S. 100, 106, 65 S.Ct. 513, 89 L.Ed. 776 (1945)).

> Put another way, the long-standing policy against contracting away bankruptcy benefits is not necessarily controlling when what defeats the rights in question is a corporate control document instead of a contract. *See Klingman*, 831 F.2d at 1296; *see also 203 N. LaSalle St. P'ship*, 246 B.R. at 331 (As "bankruptcy is designed to produce a system of reorganization and distribution different from what would obtain under nonbankruptcy law, it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply.").[13]

The parties and the Court found seven (7) cases addressing golden shares or blocking provisions. In six (6) cases, the debtors are limited liability companies, and in one (1) case, the debtor is a partnership. The Court notes that all of the cases begin with the premise that the waiving or contracting away the right to file for relief under the bankruptcy code is contrary to federal public policy.

In re Global Ship Systems, LLC.

The first case to address the validity of golden shares or blocking provisions was *In re Global Ship Systems, LLC*. In *Global Ship*, the debtor owned a shipyard. The debtor was engaged in litigation with Drawbridge, an equity owner of the debtor and a creditor of the debtor. The debtor's operating agreement granted Drawbridge a blocking provision. An involuntary petition was filed against the debtor, however, the court eventually found that due to the debtor's acts in orchestrating the filing, the involuntary was in reality a voluntary Chapter 11. Drawbridge filed a motion to dismiss based upon its lack of consent to the filing of the bankruptcy case. The court based its ruling on 11 U.S.C. § 1112(b)(1).[14]

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[13] *In re Lake Mich. Beach Pottawattamie Resort, LLC*, 547 B.R. 899, 911-12 (Bankr. N.D. Ill. 2016).

[14] Hereafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

The court first determined that Drawbridge held both an equity and debt interests in the debtor. The court then found that "[a]n absolute waiver of the right to file bankruptcy is violative of public policy if asserted by a lender. However, since Drawbridge wears two hats in this case, as a Class B shareholder, it has the unquestioned right to prevent, by withholding consent, a voluntary bankruptcy case."[15] Consequently, the court dismissed the case.

In re Bay Club Partners-472, LLC.

The next case was *In re Bay Club Partners-472, LLC.* In *Bay Club*, the creditor financed the purchase of an apartment complex. The debtor agreed to add a bankruptcy waiver provision in favor of the creditor to the debtor's operating agreement. The debtor filed bankruptcy without the creditor's approval. The creditor filed a motion to dismiss for cause pursuant to § 1112(b). In denying the motion, the court found that "[t]he bankruptcy waiver in . . . the Operating Agreement is no less the maneuver of an 'astute creditor' to preclude [the debtor] from availing itself of the protections of the Bankruptcy Code prepetition, and it is unenforceable as such, as a matter of public policy."[16]

In re Lake Michigan Beach Pottawattamie Resort, LLC.

In re Lake Michigan Beach Pottawattamie Resort, LLC was the third opinion to address the issue of a golden share or blocking provision. In *Lake Michigan Beach*, the creditor financed the purchase of a resort. After the debtor defaulted on the loan, the debtor's operating agreement was modified to make the creditor a special member with the power to block the filing of any bankruptcy

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[15] *In re Global Ship Systems, LLC*, 391 B.R. 193, 203 (Bankr. S.D. Ga. 2007)(citations omitted).

[16] *In re Bay Club Partners-472, LLC*, Case No. 14-30394, 2014 WL 1796688, at *5 (Bankr. D. Or. May 6, 2014)

petition. The debtor filed bankruptcy. The creditor moved to dismiss for bad faith under § 1112(b) and because the creditor argued that the bankruptcy was filed without corporate authority.

The court found that the special member was kept totally separate from the debtor: it had no interest in profits or losses; it was not required to make capital contributions; it had no rights to distributions; and had no duty or obligation to the debtor in any manner.[17] Further, as a member of a Michigan limited liability company, the court found that the special agent had to consider the interests of the debtor. The court found that the blocking provision was void because it allowed the special agent to consider only its interests. Giving that power to a creditor would undermine not only Michigan corporate governance but also the bankruptcy code,[18] and therefore, the Court denied the motion to dismiss.

In re Intervention Energy Holdings, LLC.

On June 3, 2016, a bankruptcy court in Delaware entered its opinion in *In re Intervention Energy Holdings, LLC.* Intervention Energy Holdings, LLC. was a corporation organized under the laws of Delaware. In *Intervention Energy*, the debtor was an oil and gas exploration and production company mainly doing business in North Dakota. The creditor entered into an agreement to loan the debtor up to $200 million. The debtor defaulted on the loan and in exchange for the creditor waiving all defaults, the debtor agreed to give the creditor one share in order to make the creditor a common member of the LLC. The debtor also amended its operating agreement to require unanimous consent of all members in order to file bankruptcy.

After the debtor filed bankruptcy, the creditor filed a motion to dismiss arguing that the

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[17] *In re Lake Michigan Beach*, 547 B.R. at 904.

[18] *Id.* at 914.

debtor lacked authority to file bankruptcy because it had not consented to the filing. The debtor cited *Lake Michigan Beach* to argue that the blocking member or holder of the golden share could not abrogate its fiduciary duties and "must retain a duty to vote in the best interest of the potential debtor to comport with federal bankruptcy policy."[19]

The court, however, decided the case on federal public policy grounds and declined to address the debtor's fiduciary duty argument.[20] The court found the blocking provision to be void because

> the sole purpose and effect of which is to place into the hands of a single, minority equity holder the ultimate authority to eviscerate the right of that entity to seek federal bankruptcy relief, and the nature and substance of whose primary relationship with the debtor is that of creditor–not equity holder–and which owes no duty to anyone but itself in connection with an LLC's decision to seek federal bankruptcy relief, is tantamount to an absolute waiver of that right, and, even if arguably permitted by state law, is void as contrary to federal public policy.[21]

The court distinguished the creditor in *Intervention Energy* from the creditor in *Global Ship Systems, LLC.*[22] The *Global Ship* court found that the creditor wore two hats: it was initially a 20% equity holder in addition to being a creditor of *Global Ship*. The *Intervention Energy* court found that there was no comparison to the *Global Ship* creditor who had a 20% equity interest and the

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[19]*In re Intervention Energy Holdings, LLC.*, 553 B.R. 258, 262 (Bankr. D.Del. 2016) (footnote omitted).

[20]The court stated: "In light of my disposition of the federal public policy issue which follows, and reluctant to accept the parties' invitation to decide what may well be a question of first impression of state law (i.e., determining the scope of LLC members' freedom to contract under applicable state law provisions) when an alternate ground for decision is present, I find it unnecessary to address these arguments." *Id.* at 262-63.

[21]*Id.* at 265. (footnote omitted).

[22]*Supra* note 15, at 12.

Intervention Energy creditor who had one (1) share of the debtor.[23]

In re Tara Retail Group, LLC.

The next court to address the validity of a golden share or blocking member was *In re Tara Retail Group, LLC*. *Tara Retail*, however, had a different wrinkle than the prior four (4) cases. In *Tara Retail*, the debtor, a Georgia LLC, managed a shopping center. The creditor was secured by a lien on the shopping center. The debtor's operating agreement states that as long as a mortgage exists on the shopping center, the debtor "shall have as its manager a single purpose entity that owns at least zero percent of the membership interests of the limited liability company ('SPC Party'). . . there shall be in place at all times an Independent Director who serves as either a manager of the Debtor or a director of the SPC party;"[24] and that in order to file bankruptcy, the debtor had to have the unanimous consent of its board or managers including the independent director.

On the eve of filing bankruptcy, the debtor attempted to obtain the approval from the independent director[25] to file bankruptcy. The Debtor filed bankruptcy without obtaining the approval of the independent director. Despite repeated efforts, the independent director failed to respond to the debtor or the court regarding the issue of the debtor's bankruptcy filing.

Ultimately, the court rejected the debtor's argument that the blocking provision violated public policy. The court did find, however, that the independent director "had full knowledge of all

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[23]*In re Intervention Energy*, 553 B.R. at 265 n 25.

[24]*In re Tara Retail Group, LLC*, Case No. 17-bk-57, 2017 WL 1788428, at *2 (Bankr. N.D. WV May 4, 2017) appeal dism'd 2017 WL 2837015 (N.D. WV June 30, 2017).

[25]At this point, the independent director was a company who provided independent trustees or directors for single-asset entities. The company was run by an attorney.

facts pertinent to exercising a veto to the bankruptcy filing,"[26] and the independent director's continued silence ratified the debtor's bankruptcy filing, therefore, the court denied the motion to dismiss.

In re Squire Court Partners Limited Partnership.

On July 7, 2017, *In re Squire Court Partners Limited Partnership* was issued. The partnership in *Squire Court*, established under Arkansas law, was created to acquire and operate an apartment complex. Centerline contributed $1.3 million in exchange for a 99.98% interest in the debtor. Another entity became a limited partner and was given a .01% interest in the debtor. The general partner was NHDC Texas and was given a .01% interest in the debtor. NHDC Texas had exclusive authority to control the debtor's assets and affairs, but the partnership agreement required unanimous consent of all partners before any bankruptcy filing.

After a default on the promissory note on the apartment complex (owed to Wells Fargo Bank, N.A.), NHDC Texas filed a bankruptcy petition on behalf of Squire Court. NHDC Texas sought the consent of the other partners, but they declined to consent. Centerline filed a motion to dismiss the bankruptcy case arguing that the debtor lacked corporate authority to file the petition.

The court distinguished *Lake Michigan Beach* (blocking provision invalid because given to a creditor), *Intervention Energy* (golden share invalid because given to a creditor), and *Bay Club Partners* (blocking provision invalid because given to a creditor) from the facts before it in *Squire Court.* The court found that in those three cases, the blocking provisions violated federal public policy because as a condition for supplying credit to a debtor, the creditor was attempting to limit the debtor's rights to file bankruptcy. In distinguishing *Squire Court,* the court held that "[t]he

[26] *Id.* at *4.

limited partners [of Squire Court], however, are owners, not creditors of Squire Court."[27]

In re Lexington Hospitality Group, LLC.

The most recent case to address the golden share/blocking provision is *In re Lexington Hospitality Group, LLC* which was entered on September 15, 2017. In *Lexington Hospitality*, the debtor was created as a Kentucky Limited Liability Company and owned and operated a hotel. PCG Credit Partners (PCG) provided the financing to purchase the hotel. Contemporaneously with the execution of the loan documents, an amended operating agreement was executed admitting 5532 Athens, an entity wholly owned by PCG, as a member of the debtor LLC with a 30% membership interest (a later amendment to the operating agreement granted 5532 Athens a 50% membership interest). The amended operating agreement also included several provisions which limited the debtor's ability to file bankruptcy and required a 75% vote of the members. The debtor defaulted on the loan and filed a bankruptcy petition. PCG filed a motion to dismiss arguing that the debtor did not have the corporate authority to file the bankruptcy petition.

The court acknowledged that the authority to file bankruptcy is governed by Kentucky law, but that the validity of the restriction on filing bankruptcy is controlled by federal law. In reaching its decision, the court cited *Intervention Energy*,[28] *Lake Michigan Beach*,[29] and *Bay Club Partners*[30] with approval. The court likewise held that the prepetition granting of an absolute block to a creditor

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[27] *In re Squire Court Partners Ltd P'ship*, 574 B.R. 701, 707 (Bankr. E.D. Ark. 2017).

[28] *Supra* note 18, at 12.

[29] *Supra* note 12, at 9.

[30] *Supra* note 15 at 11.

"violate[d] federal public policy and [is] void."[31]

Looking to the facts before it, the court held that while the amended operating agreement required that an independent manager "help decide the need for a bankruptcy filing,"[32] in reality, the independent manager was "not a truly independent decision maker."[33] The court found that PCG's complete control over 5532 Athens gave it total control to block any bankruptcy filing. "Unlike a member or manager, PCG has no restrictions and no fiduciary duties to [the debtor] that might limit self-interested decisions that ignore the best interests of the [debtor]."[34] Consequently, the court denied the motion to dismiss the case.

C. Application to Case at Bar

It is clear from the seven (7) cases which have addressed golden shares or blocking provisions, either provision will be upheld as valid if it is held by an equity holder. If either provision is held by a creditor, however, the provision will be void as a matter of public policy.[35]

1. The Macquarie Parties

As stated above, on March 28, 2013, Macquarie issued an *Invoice* to FSNA for the *Arrangement Fee* of $2,500,000.00.[36] Further, as is evident by the proofs of claims filed by the

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[31] *In re Lexington Hospitality Group, LLC*, Case No. 17-51568, 2017 WL 4118117, at *6 (Bankr. E.D. Ky. Sept. 15, 2017).

[32] *Id.*

[33] *Id.*

[34] *Id.* at *7 (citation omitted).

[35] In *Global Ship* and *Squire Court*, the provisions were upheld because they were held by equity holders. In *Bay Club, Lake Michigan Beach, Intervention Energy,* and *Lexington Hospitality* the provisions were declared void because they were held by creditors.

[36] *Exhibit D, Proof of Claim*, Case No. 1702316EE, Claim 7-1, Oct. 24, 2017, filed by Macquarie Capital (USA) Inc.

Macquarie Parties,[37] when the petition was filed on June 26, 2017, the Macquarie Parties were creditors of the Debtor. Therefore, to the extent that the Macquarie Parties claim to hold a golden share or blocking provision, it is void as a matter of public policy. Consequently, the Motion filed by the Macquarie Parties should be denied.

2. Boketo

As for Boketo's Joinder in the Motion, no evidence was presented to prove that Boketo was a creditor of the Debtor. To the contrary, the only evidence introduced at trial showed that Boketo invested $15,000,000.00 in the Debtor in order to finance the Advantage Acquisition. In exchange for this capital infusion, Boketo was given a 49.76% interest in the Debtor and § 4(j) was included in the Certificate of Incorporation. Since the only hat[38] Boketo wears is that of a substantial equity holder, the rights give to Boketo in § 4(j) are valid and enforceable and are not contrary to public policy under federal law.

a. Are Boketo and Macquarie One Entity

The Debtor asserts that Macquarie and Boketo are in reality the same entity. Indeed at trial, in response to a question from the Court that "at the end of the day . . . when [Macquarie] says 'Do something,' Boketo is going to do it,"[39] the attorney for Macquarie, Kevin H. Marino, stated "I couldn't agree with that more completely, Your Honor."[40]

Assuming that the control Macquarie has over Boketo is such that there is no practical

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[37]Claim 7-1 and Claim 8-1 were filed by Macquarie Capital (USA) Inc. Claim 9-1 was filed by Daniel R. Boland. Claim 10-1 was filed by Michael J. Silverton.

[38]*Global Ship*, 391 B.R. at 203.

[39]Trial Tr. at 126.

[40]*Id.* at 126-27.

difference between the two entities, the result would not change. Like the creditor Drawbridge in the *Global Ship*[41] case, Macquarie would be wearing "two hats." Macquarie's one hat is as the creditor owed $3,000,000.00, and the other hat as the equity holder Boketo with a $15,000,000.00 stake in the Debtor. "[S]ince [Macquarie] wears two hats in this case . . . it has the unquestioned right to prevent, by withholding consent, a voluntary bankruptcy case."[42]

b. Fiduciary Duty

The Debtor argues that under Delaware law the affairs of a corporation must be managed by a board of directors who are subject to fiduciary duties. In this case, the FSNA Board of Directors (FSNA Board) decided that it was in the best interest of the Debtor and all shareholders for it to file bankruptcy. Therefore, the Debtor asserts that the blocking provision in § 4(j) is invalid under Delaware law because it gives that authority to Boketo instead of the FSNA Board.

The Debtor cites *McMullin v. Beran* to support its position that only the FSNA Board has the authority to decide whether to file bankruptcy. *McMullin* is factually distinguishable from the case at bar– *McMullin* involved a dispute among shareholders over the merger of a chemical plant. What is applicable to the case at bar, however, is that in *McMullin*, the Supreme Court of Delaware discussed Del. Code Ann. tit. 8, § 141(a)[43] and the business judgment rule.

Section 141(a) provides: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Del. Code Ann. tit. 8, §

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[41]*Supra* note 15, at 12.

[42]*Global Ship*, 391 B.R. at 203. (citations omitted).

[43]Hereafter, all citations refer to title 8 of the Delaware Code unless specifically stated otherwise.

141(a).

In addressing § 141(a) and the business judgment rule, the *McMullin* court stated:

> One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors. The business judgment rule is a corollary common law precept to this statutory provision. The business judgment rule, therefore, combines a judicial acknowledgment of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders. The business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[44]

As permitted by § 141(a), the FSNA Board agreed to add § 4(j) to its Certificate of Incorporation. Consequently, the Court will presume that when the FSNA Board agreed to add § 4(j) to its Certificate of Incorporation, the FSNA Board "'acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'"[45] The Debtor did not offer any proof to rebut this presumption, therefore, the Court finds that when the FSNA Board made the decision to include § 4(j) in the Debtor's Certificate of Incorporation, the FSNA Board was acting in good faith and in the best interest of the Debtor.

With a 49.76% interest in the Debtor, Boketo may be the largest single shareholder of the Debtor, but Boketo does not own a majority of the stock. As the court found in *Feldheim v. Sims,* a case from Illinois applying Delaware corporate law, "[a] majority shareholder, or a group of shareholders who combine to form a majority, has a fiduciary duty to the corporation and to its minority shareholders if the majority shareholder dominates the board of directors or controls the

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[44]*McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000)(footnotes omitted).

[45]*Id.*

corporation."[46] No proof was introduced to show that Boketo had joined other shareholders in order to form a majority to control the FSNA Board. Consequently, as a minority shareholder, Boketo does not owe a fiduciary duty to the Debtor.

c. Contrary to the Laws of Delaware?

The Debtor also asserts that § 4(j) violates § 102(b)(1) of the Delaware Code. Section 102(b)(1) provides for the contents of a certificate of incorporation, and states:

> (b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:
>
> > (1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.[47]

In other words, under § 102(b)(1), a certificate of incorporation may contain a provision limiting or restricting the powers of a corporation, its board of directors or stockholders as long as such provision is not contrary to the laws of the State of Delaware.

Sections 102(b)(1) and 141(a) were addressed in a decision from a chancery court in Delaware. In *Jones Apparel Group v. Maxwell Shoe Company,* the chancery court considered the validity of a provision in the Maxwell Shoe Company's charter. The court held:

> First, I begin by noting that Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct

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[46]*Feldheim v. Sims,* 800 N.E.2d 410, 421 (Ill. App. 1 Dist. 2003)(citations omitted).

[47]Del. Code Ann. tit. 8, § 102.

> through equitable review. As Professor Folk noted in his comments on the 1969 amendments to the [Delaware General Corporation Law (DGCL)], and particularly on the enabling feature of § 141(a), "the Delaware corporation enjoys the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise." Sections 102(b)(1) and 141(a) are therefore logically read as important provisions that embody Delaware's commitment to private ordering in the charter. By their plain terms, they are sections of broad effect, which apply to a myriad of issues involving the exercise of corporate power.
>
> In this connection, the approach of *Sterling [v. Mayflower Hotel Corp.*[48]*]* in defining the words "contrary to the laws of this State" has much to commend it. That approach is a cautious one, which does not lightly find that certificate provisions are unlawful. Although *Sterling* dealt with a supposed conflict between a charter provision and a common law rule, its approach is equally valid where, as here, the "law" to which the charter provision is assertedly [*sic*] contrary is a statute. In that situation, the court must first apply settled rules of statutory construction to determine whether the provision violates the statute, and, if those rules do not yield a clear result, the court must next carefully consider the statutory text at issue and the policy values at stake as reflected not only in the DGCL but also in our common law, and only invalidate a certificate provision if it "transgress [es]"-i.e., vitiates or contravenes-a mandatory rule of our corporate code or common law. Although the identification of what is mandatory might at times be difficult, the *Sterling* approach leaves the space for private ordering that the General Assembly's adoption of §§ 102(b)(1) and 141(a) clearly contemplated.
>
> . . . .
>
> [T]he court must determine, based on a careful, context-specific review in keeping with *Sterling*, whether a particular certificate provision contravenes Delaware public policy, i.e., our law, whether it be in the form of statutory or common law.

Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845–46, 848 (Del. Ch. 2004)(footnotes omitted).

While not applying Delaware law, the debtor in *Squire Court*[49] also argued that the board of directors had the authority to file bankruptcy and not the shareholders with the golden share. The

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[48]93 A.2d 107 (Del. 1952).

[49]*Supra* note 27, at 17.

debtor argued that "a bona fide equity owner must hold a fiduciary position before it can vote on whether to file a bankruptcy petition."[50] The debtor, however, failed to provide the court with any authority on this point. In response to the debtor's argument, the court in *Squire Court* stated:

> A corporation typically delegates the board of directors authority to manage the business and affairs of the corporation. The authority does not originate with the board of directors but comes to it by corporate delegation, whether by default statutory provisions or corporate governance documents. Cases holding that the decision to file for bankruptcy rests with a corporation's board of directors focus on the delegation of authority, not the fact that the directors have fiduciary duties. In other words, a board of directors has authority to decide whether the entity will file for bankruptcy because that authority is delegated to the board.
>
> Just as the authority of a board of directors is delegated, likewise a general partner has authority delegated to it to act on behalf of the partnership. Sometimes that authority may include the power to file for bankruptcy. Here, however, Squire Court did not delegate to NHDC Texas the power to file for bankruptcy on its own initiative. Instead, the partners retained for themselves, acting by unanimous consent, the decision whether to file a bankruptcy petition.
>
> It is one thing to look past corporate governance documents and the structure of a corporation when a creditor has negotiated authority to veto a debtor's decision to file a bankruptcy petition; it is quite another to ignore those documents when the owners retain for themselves the decision whether to file bankruptcy. It is one thing for the courts to overrule a creditor that seeks to block a debtor from filing bankruptcy; it is quite another for the courts to overrule the owners of the entity.

In re Squire Court, 574 B.R. at 707–08 (citations omitted).

Like the partners in *Squire Court*, when the FSNA Board included § 4(j) in its Certificate of Incorporation, the FSNA Board made the decision to take the authority for filing bankruptcy out of its hands and give it to Boketo. In other words, as authorized by § 102(b)(1), the FSNA Board made the decision to delegate to an equity holder its authority to decide whether the Debtor would file bankruptcy.

The Debtor has not cited to a case which holds that a golden share or blocking provision

[50] *Squire Court*, 574 B.R. at 707.

given to an equity holder contravenes Delaware law. Since it appears that the validity of a golden share/blocking provision has not been addressed by the courts in Delaware, this Court will not find that an golden share/blocking provision is invalid under Delaware law. Instead, this Court will leave it to the courts of the State of Delaware to decide that issue.

The Debtor has not show where § 4(j) "contravenes Delaware public policy . . . in the form of statutory or common law."[51] For these reasons, the Court will not look past the Debtor's Certificate of Incorporation which gives the decision to file bankruptcy to Boketo. Instead, the Court will uphold the validity of § 4(j) as an act taken "'on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'"[52]

CONCLUSION

The Debtor asserts that the Motion was untimely filed and should be dismissed. The Court found, however, that the question of whether a court has jurisdiction over a debtor may be raised at any time. Therefore, the Motion and Joinder were not untimely filed nor are they barred by the doctrines of waiver, estoppel or laches.

A review of the case law shows that a golden share/blocking provision will be invalid and contrary to federal public policy if it is in the hands of a creditor. If a substantial equity owner holds such a provision, however, the golden share/blocking provision will be enforced. At the time the petition was filed, the Macquarie Parties clearly were creditors of the Debtor. Consequently, to the extent they claim a golden share/blocking provision under § 4(j), that provision is contrary to federal public policy and is not enforceable. Boketo, however, is a substantial equity owner and not a

[51] *Id.* at 848.

[52] *McMullin*, 765 A.2d at 916 (footnote omitted).

creditor. Therefore, § 4(j) is valid and enforceable unless contrary to Delaware law.

The FSNA Board made the decision to take the authority to file bankruptcy from the FSNA Board and give it to one of its substantial equity holders, Boketo. The Debtor failed to prove that § 4(j) contravenes Delaware law and failed to provide the Court with case law which holds that a golden share/blocking provision is contrary to Delaware law. Consequently, the Court finds that § 4(j) is not contrary to Delaware law and is valid.

At trial, the Debtor did not present proof to show that Boketo consented to the bankruptcy filing. For these reasons, the Court finds that the bankruptcy was filed without corporate authority, and therefore, the case should be dismissed on Boketo's Joinder. *Price*, 324 U.S. at 106.

To the extent the Court has not addressed any of the parties' other arguments or positions, it has considered them and determined that they would not alter the result.

A separate judgment consistent with this Opinion will be entered in accordance with Rule 7054 and Rule 9014 of the Federal Rules of Bankruptcy Procedure.

##END OF FINDINGS##

Form ntcdsm (Rev. 12/15)

UNITED STATES BANKRUPTCY COURT
Southern District of Mississippi

Case No.: 17−02316−ee
Chapter: 11

In re:
Franchise Services of North America Inc.
1052 Highland Colony Parkway
Suite 204
Ridgeland, MS 39157

Last four digits of Social−Security or Individual Tax−Payer−Identification (ITIN) No(s)., (if any):

Employer Tax Identification No(s). (if any):
98−0559163

Notice of Dismissal

You are hereby notified that an Order Dismissing the above case was entered on December 18, 2017.

Dated: 12/18/17

Danny L. Miller, Clerk of Court
501 East Court Street, Suite 2.300
P.O. Box 2448
Jackson, MS 39225−2448
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