Return Date: October 23, 2007
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re:<br><br>Petition of Anthony James McMahon and Philip Wedgewood Wallace, as Joint Provisional Liquidators of SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LIMITED<br><br>Debtor in Foreign Proceedings. | An Ancillary Case under Section 304 of the Bankruptcy Code<br><br>Case No. 97-B-44652 (JMP) |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY PERMANENT INJUNCTION ORDER**

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY PERMANENT INJUNCTION ORDER**

Michael Steven Walker and John Mitchell Wardrop (the "Petitioners")[1], the Scheme Administrators of Sovereign Marine & General Insurance Company Limited ("Sovereign Marine"), through their United States counsel, Allen & Overy LLP, respectfully submit this Memorandum of Points and Authorities pursuant to Local Bankruptcy Rule 9013-1 in support of their Motion for relief pursuant to sections 304 and 105 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 7065 of the Federal Rules of Bankruptcy Procedure and Rule 65 of the Federal Rules of Civil Procedure.[2]

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

[2] Section 304 of the Bankruptcy Code was repealed as of the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCA"), October 17, 2005, and replaced by chapter 15 of the Bankruptcy Code. Accordingly, the case law applicable to consideration of Petitioners' Motion will be comprised of section 304 cases, and to the extent relevant, cases decided under chapter 15 of the Bankruptcy Code.

## PRELIMINARY STATEMENT

The Petitioners bring this motion pursuant to sections 105 (a) and 304 (b) of the Bankruptcy Code to modify this Court's Permanent Injunction Order, entered on December 30, 1999 (the "Permanent Injunction Order"), in order to aid the enforcement of the WFUM Pools Scheme of Arrangement, dated July 31, 2006 (the "Amended Scheme"), which was promulgated pursuant to Section 425 of the Companies Act 1985 of Great Britain (the "Companies Act"). A copy of the Amended Scheme and accompanying explanatory statement (the "Explanatory Statement" and together with the Amended Scheme, the "Scheme Document") are attached as Exhibit B to the Petitioners' Motion.

Sovereign Marine is currently running-off its business pursuant to a scheme of arrangement sanctioned by the High Court of Justice of England and Wales (the "High Court") on December 20, 1999 (the "Original Scheme"). As more fully discussed in the Motion, the Amended Scheme was proposed as an amendment of the Original Scheme to enable a greater and earlier distribution to be made to Sovereign Marine's creditors (the "Scheme Creditors") than would occur otherwise in conjunction with the closing schemes of arrangement for the other Scheme Companies in the WFUM Pools. The relief sought in the Petitioners' Motion will support the implementation of the Amended Scheme and best assure an economical and expeditious administration of Sovereign Marine's affairs consistent with the factors set forth in section 304(c) of the Bankruptcy Code.

## BACKGROUND

Sovereign Marine is an insurance company incorporated under the laws of the United Kingdom, with its principal place of business in London, England. On July 11, 1997, a petition seeking the winding up of Sovereign Marine ("the Winding–Up Petition") was presented in the High Court under the Insolvency Act 1986 of England, Scotland and Wales.

In connection with the proceeding commenced with the Winding–Up Petition, the High Court appointed Anthony James McMahon and Philip Wedgewood Wallace as Sovereign Marine's Joint Provisional Liquidators. Pursuant to the High Court order that appointed them, the Joint Provisional Liquidators were required to consider whether a scheme of arrangement for Sovereign Marine would be in the best interests of its general body of creditors. The Joint Provisional Liquidators subsequently determined that the Original Scheme was the best approach to running-off Sovereign Marine's liabilities. Accordingly, the Joint Provisional Liquidators presented the Original Scheme to the Scheme Creditors for approval at a meeting held on November 29, 1999, whereupon it was approved in the requisite statutory majorities (*i.e.*, a majority in number representing 75% in value in each class present and voting in person or by proxy). Pursuant to the Original Scheme, the Joint Provisional Liquidators were appointed as Sovereign Marine's Scheme Administrators (the "Scheme Administrators"). Mr. Wardrop has since replaced Mr. Wallace as a Scheme Administrator and Mr. Walker has replaced Mr. McMahon.

Several thousand Scheme Creditors are located in the United States and Sovereign Marine has assets in the United States, principally in the form of reinsurance recoverables due from US-based reinsurers. Therefore, on behalf of Sovereign Marine and in support of the Original Scheme, the Joint Provisional Liquidators sought and obtained this Court's Permanent Injunction Order, entered December 31, 1999 (the "Permanent Injunction Order"), under section 304 of the Bankruptcy Code. The effect of the Permanent Injunction Order, *inter alia*, was to make the provisions of the Original Scheme enforceable in the United States.

The Scheme Administrators of Sovereign Marine, supported by the current Creditors' Committee, have determined that it is no longer cost-effective and not in the best interests of its creditors to continue the run-off under the Original Scheme. As discussed more

fully below, the Scheme Administrators proposed a “closing” scheme by way of amendment to the Original Scheme, which Amended Scheme will have the effect of estimating and crystallizing all of Sovereign Marine’s contingent liabilities apart from the Protected Scheme Claims of Sovereign Marine’s Protected Policyholders. Protected Scheme Claims will continue to be dealt with in much the same way as under the Original Scheme and will, subject to eligibility, still be entitled to receive payment from the Financial Services Compensation Scheme Limited whenever they become payable.

The majority of Sovereign Marine's and its subsidiaries' liabilities (approximately 95%) arise from their participation in a certain insurance and reinsurance pooling arrangement formerly administered by WFUM (the "WFUM Pools"). The WFUM Pools consisted of a group of insurers (the "WFUM Participants") that now seek to disband Scheme Companies that underwrote Sovereign Marine and its two solvent subsidiaries, Sovereign Insurance (UK) Limited and Greyfriars Insurance Company Limited, account for approximately 50% of the WFUM Pool liabilities. Accordingly, Sovereign Marine, its subsidiaries and the other Scheme Companies decided to promote schemes or arrangement to present a unified resolution of WFUM Pools. The scheme of arrangement for Sovereign Marine will be implemented through amendment of the Original Scheme. The Scheme Administrators believe that this will create significant benefits to Scheme Creditors, principal among these being: (i) acceleration and increase of the dividends to be paid by Sovereign Marine; (ii) valuation and settlement of Scheme Claims under the Scheme much earlier than would be the case in the normal course of run-off; (iii) realization of the value embedded in Sovereign Insurance (UK) Limited and Greyfriars Insurance Company Limited for the benefit of its SCIS; and (iv) avoidance of the fragmentation of the WFUM Pools and the associated costs and disruption which would result. Such costs and disruption would affect both the Scheme Companies and Scheme Creditors.

The Scheme Administrators have a duty to close the Sovereign Marine estate and distribute its assets to creditors at a time when the ultimate Payment Percentage is expected to be maximized. There would be many difficulties for policyholders, reinsurers, and all of the Scheme Companies should the WFUM Pools fragment, including the duplication of effort and increased costs to all parties, and the likely reduction in Sovereign Marine's ultimate dividend. If the WFUM Pools remain unified, claims handling and reinsurance collection can remain cohesive and costs can be minimized and shared between the Scheme Companies in the WFUM Pools.

The High Court issued an Order, dated June 27, 2006 (the "Meeting Order"), authorizing the Scheme Administrators to conduct the meeting of Scheme Creditors (the "Meeting") on October 27, 2007. In a letter dated July 31, 2006, the Scheme Administrators notified Scheme Creditors of the High Court's authorization for the Scheme Administrators to convene the Meeting to consider and, if found appropriate, to approve the Amended Scheme (the "Notice Letter"). The Notice Letter stated that information on the Amended Scheme and the Scheme Documents were or would be made available on the WFUM Pools' website at www.wfumpools.com, and also provided additional methods of requesting the documents. Enclosed with the Notice Letter was a copy of the Scheme Documents in electronic form, a paper copy of the Notice covering the Meeting, a map detailing the meeting location and description of the voting process. The Notice Letter was sent to each of the parties whose names and addresses are recorded on the Address List.

In addition, between July 31, 2006 and September 10, 2006, the Petitioners published notice of their intention to apply for leave to convene the Meeting in *The Financial Times* (London and Global editions), *Insurance Day* (London), *The Wall Street Journal* (New York and European editions), *Business Insurance* and the *London Gazette*. These publication

notices provided details on obtaining information on the Amended Scheme, including copies of all relevant documentation, either via the Scheme Company's website or from the Petitioners.

The Amended Scheme was overwhelmingly approved by Sovereign Marine's Scheme Creditors (96.46% by value and 95.72% by number voting in favor of the Amended Scheme). The Amended Scheme was sanctioned by the High Court on September 17, 2007, and the Scheme Administrators now seek to modify the Permanent Injunction Order previously entered by this Court.

Moreover, in accordance with this Court's Service Order dated September 20, 2007, specifying the form and manner of service of notice of the Motion, the Petitioners intend to send United States Scheme Creditors a copy of a notice of the Motion, which also describes the relief sought therein (the "Notice") by no later than September 24, 2007. The Notice will also be published in *Insurance Day, The New York Times* (National Edition), *The Wall Street Journal* (National Edition) and *Business Insurance* on October 1, 2001, as is required by this Court's Service Order.

## FACTS

The Court is respectfully referred to the Motion which provides the relevant facts in greater detail.

## ARGUMENT

### THE PETITIONERS ARE ENTITLED TO THE RELIEF THEY SEEK UNDER SECTION 304

### A. The Petitioners Have Standing To Seek Section 304 Relief

Section 304 of the Bankruptcy Code authorizes a "foreign representative" appointed in a "foreign proceeding" to commence "[a] case ancillary to [that] foreign proceeding" by filing a petition in the United States Bankruptcy Court. 11 U.S.C. § 304(a). *See*

*In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 348 (2d Cir. 1992), *cert. denied*, 506 U.S. 865 (1992); *In re Bd. of Dirs. of Hopewell Int'l Ins., Inc.*, 238 B.R. 25 (Bankr. S.D.N.Y. 1999), *aff'd* 238 B.R. 699, 705 (S.D.N.Y. 2002); *In re Rubin*, 160 B.R. 269, 274 (Bankr. S.D.N.Y. 1993).

**(i) The process leading to implementation of the Amended Scheme is a "foreign proceeding"**

At the time of commencement of Sovereign Marine's section 304 proceeding, the Bankruptcy Code defined "foreign proceeding" as:

> [a] proceeding, whether judicial or administrative . . . in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

11 U.S.C. § 101(23).

The process of sanctioning and implementing a scheme of arrangement, such as the Original Scheme or the Amended Scheme, is conducted under the supervision of the High Court pursuant to the Companies Act. As such, it is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code. *See In re Bd. Of Dirs. Of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25, 52 (Bankr. S.D.N.Y. 1999), *aff'd*, 275 B.R. 699 (S.D.N.Y. 2002) (A scheme of arrangement and a pre-packaged chapter 11 case are similar, so that no argument can be made that qualifying a Bermuda scheme of arrangement as a foreign proceeding under the Bankruptcy Code would offend any of our notions of fairness or due process, particularly since the scheme process involved more, rather than less, judicial oversight at the inception of the proceedings than does a pre-packaged chapter 11 case). *See also In re Kingscroft Ins. Co.*, 138 B.R. 121, 125 (Bankr. S.D. Fla. 1992) (a final winding-up may be roughly analogized to liquidation under

Chapter 7 of the Bankruptcy Code; while operation under a Scheme of Arrangement may be analogized to adoption of a plan of reorganization under Chapter 11 of the Bankruptcy Code). Moreover, proceedings in other jurisdictions with insolvency laws that derive from English law, have been uniformly recognized as foreign proceedings within the meaning of section 304 and chapter 15 of the Bankruptcy Code. *See*, *e.g.*, *In re AXA Ins. UK PLC, et al.*, Case Nos. 07-12110 to 07-12113 (Bankr. S.D.N.Y. August 15, 2007) (granting chapter 15 relief to solvent schemes of arrangement by members of a reinsurance pool for common pool business); *In re Arion Ins. Co. Ltd.*, Case No. 07-12108 (Bankr. S.D.N.Y. January 22, 2007) (granting chapter 15 relief to a solvent scheme of arrangement); *In re Gordian Runoff (UK) Ltd.*, No. 06-11563 (RDD) (Bankr. S.D.N.Y. August 28, 2006) (granting permanent injunction to enforce scheme of arrangement in the United States to prevent irreparable harm to the detriment of scheme creditors and other parties in interest); *In re Lion-City Runoff Private Ltd.*, No. 06-10461 (SMB) (Bankr. S.D.N.Y. April 13, 2006) (granting permanent injunction); *In re TXU Europe Limited*, Case No. 04-11335 (SMB) (Bankr. S.D.N.Y 2005) (recognizing a company voluntary arrangement in an English administration proceeding); *In re Brierely*, 145 B.R. 151, 163 (Bankr. S.D.N.Y. 1992) (recognizing English proceeding, "where the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, exceptions to the doctrine of comity are narrowly construed.") (*citation omitted*); *see also*, *In re Axona Int'l Credit & Commerce, Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988) (Hong Kong proceeding), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990); *In re Lines*, 81 B.R. 267, 270 (Bankr. S.D.N.Y. 1988) (Bermuda proceeding); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) (Bahamian proceedings).

**(ii) The Petitioners are "foreign representatives"**

A "foreign representative" is defined as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." 11 U.S.C. § 101(24). The Petitioners

are "foreign representatives" within the meaning of section 101(24) of the Bankruptcy Code, by virtue of their appointment by the High Court and their role as Scheme Administrators pursuant to the Original Scheme. *See*, *e.g.*, *Brierley*, 145 B.R. 151. Thus, the Petitioners should be recognized as the authorized representatives of Sovereign Marine in the United States pursuant to section 304, and as having the requisite standing to bring this Motion pursuant to section 304.

**(iii) The Scheme Administrators will be "foreign representatives" on and after the effective date of the Amended Scheme**

This Court previously recognized the Scheme Administrators as "foreign representatives" in connection with the Original Scheme. *See Sovereign Marine & General Insurance Company Limited*, Case No. 97-B-44652 (CB) (Bankr. S.D.N.Y. Dec. 30, 1999). If the Amended Scheme is sanctioned by the High Court, the Scheme Administrators will be appointed to oversee the administration of the Amended Scheme. As such, on and after the effective date of the Amended Scheme, the Scheme Administrators will continue to be the "foreign representative" of the estate within the meaning of section 101(24) of the Bankruptcy Code.

## B. The Relief Requested By The Petitioners Is Within The Scope Of Section 304(b)

In their Motion to modify the Permanent Injunction Order, the Petitioners have requested broad injunctive relief that in many respects resembles the relief afforded by section 1141 of the Bankruptcy Code when a plan of reorganization is confirmed.

Section 304(b) authorizes the Bankruptcy Court to: (1) enjoin the commencement or continuation of (A) any action against the (i) foreign debtor with respect to property involved in the foreign proceeding or (ii) such property; or (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any

judicial proceeding to create or enforce any lien against property of the foreign estate; (2) order turnover of the property of the foreign estate, or the proceeds of such property, to the foreign representative; or (3) order other appropriate relief. 11 U.S.C. § 304(b). The relief sought by the Petitioners is within the broad power of this Court as contemplated in section 304. *See In re Bd. of Dirs. of Hopewell Int'l. Ins*., 272 B.R. 396, 411 (Bankr. S.D.N.Y. 2002); *A.P. Esteve Sales, Inc. v. Manning (In re Manning),* 236 B.R. 14, 21 (B.A.P. 9th Cir. 1999) (noting that section 304 provides a flexible approach to international insolvencies); *In re Culmer*, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982) (stating that under section 304, "the Court is free to broadly mold appropriate relief in near blank check fashion").

The relief is also consistent with the permanent injunctive relief permitted under section 1141 of the Bankruptcy Code. In *In re Bd. of Dirs. of Hopewell Int'l. Ins.*, 238 B.R. 25, 64, former Chief Judge Brozman granted a permanent injunction in connection with a scheme of arrangement, analogizing the relief to that afforded by section 1141(a). Judge Brozman stated that the statutory effect of the scheme of arrangement is no different from the effect of a confirmed chapter 11 plan, which may modify prepetition claims and rights and bind all creditors to those new terms in the confirmed plan.

The requested relief is consistent with the relief granted in other section 304 cases involving companies subject to schemes of arrangement under English law. *See In re Board of Directors of Jazztel, p.l.c.*, Case No. 02-B-14695 (CB) (Bankr. S.D.N.Y. 2002); *In re Brunner Mond Group plc*, Case No. 01-B-42802 (PCB) (Bankr. S.D.N.Y. 2001); *In re Osiris Insurance Limited*, Case No. 98-B-45518 (SMB) (Bankr. S.D.N.Y. 1998). Injunctive relief is necessary "to prevent individual American creditors from arrogating to themselves property belonging to the creditors as a group." *In re Banco Nacional de Obras y Servicios Publicos, S.N.C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988). *See also In re Bird*, 222 B.R. 229, 233 (Bankr. S.D.N.Y. 1998)

(finding that the purpose of filing under section 304 is to prevent local creditors from dismembering assets located in the United States.) It is also necessary so that Sovereign Marine's affairs in respect of its Scheme Creditors can be centralized in a single forum in order to harmonize those creditors' interests. *See Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, *reh'g denied*, 430 U.S. 976 (1977).

Moreover, since the effective date of chapter 15 of the Bankruptcy Code, the Courts in this District have granted permanent injunctive relief to give effect to schemes and plans in the United States that arise in foreign bankruptcy proceedings. *See*, *e.g.*, *Arion Insurance Company Limited*, No. 07-12108 (RDD) (Bankr. S.D.N.Y. August 9, 2007) (granting permanent injunction); *In re Gordian Runoff (UK) Ltd.*, No. 06-11563 (RDD) (Bankr. S.D.N.Y. August 28, 2006) (granting permanent injunction to enforce scheme of arrangement in the United States to prevent irreparable harm to the detriment of scheme creditors and other parties in interest); *In re Lion-City Runoff Private Ltd.*, No. 06-10461 (SMB) (Bankr. S.D.N.Y. April 13, 2006) (granting permanent injunction).

In addition, the Petitioners also request relief under section 304(b) to assist in the effective implementation of the Amended Scheme.[3] To ensure the continued unified winding up of the WFUM Pools business, the Amended Scheme provides that where (as will generally be the case), a Scheme Creditor is a Scheme Creditor of more than one Scheme Company, it must

[3] Newly enacted section 1521 of the Bankruptcy Code provides additional assistance to foreign debtors to aid in the effective implementation of their foreign "plan." Section 1521 provides that upon recognition of a foreign proceeding, at the request of the foreign representative, the Court may grant, with certain express exceptions, "any appropriate relief," including "any additional relief that may be available to a trustee" and injunctive relief provided that the Court determines that doing so is necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of the creditors. 11 U.S.C. § 1521(a). The Court may grant such relief only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected. *See* 11 U.S.C. § 1522.

abide by the terms of the schemes of arrangement for each other Scheme Company that have been sanctioned by the High Court and have become effective.[4] Accordingly, a Scheme Creditor that, by virtue of the relief granted in Sovereign's section 304 proceeding, becomes bound by Sovereign's Amended Scheme, must also abide by the terms of the sanctioned and effective schemes of arrangement of the other Scheme Companies.

Given that the Schemes contain long-term stay provisions enjoining Scheme Creditors from taking certain actions against the Scheme Companies, binding Sovereign's Scheme Creditors to the schemes of arrangement for the other Scheme Companies is akin to binding creditors to plans that contain third-party, non-debtor injunctions in plenary cases under the Bankruptcy Code. Courts have held that such injunctions are proper under certain circumstances, including where the injunction would assist a reorganization. *See*, *e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.") (*citations omitted*), *cert. dismissed*, 113 S. Ct. 1070 (1993); *Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694, 700-02 (4th Cir.) (upholding an injunction under 11 U.S.C. § 105(a) against suits by creditors against certain third parties including the debtor's directors and lawyers), *cert. denied*, 493 U.S. 959, 107 L. Ed. 2d 362, 110 S. Ct. 376 (1989); *Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 184 B.R. 648, 655 (S.D.N.Y 1995) ("[c]ourts consistently have recognized that bankruptcy courts may issue injunctions enjoining creditors from suing third parties including officers and directors of the debtor in order to resolve finally all claims in connection with the estate and to give finality to a

[4] In particular, clause 2.8.4 of the Amended Scheme provides, in pertinent part, that "[i]t is a requirement of the Scheme between each scheme Company and its Scheme Creditors that such creditors shall, insofar as they are Scheme Creditors of any other Scheme Company, abide and be bound by the terms of the Scheme as it relates to that other Scheme Company."

reorganization."); *In re Keene Corp.*, 164 Bankr. 844, 849 (S.D.N.Y. 1994) (bankruptcy court has the power to issue an appropriate injunction to ensure orderly reorganization); *In re Lazarus Burman Assocs., L.B.*, 161 Bankr. 891, 897 (Bankr. E.D.N.Y. 1993) ("When an action by a creditor of a debtor against a non-debtor third party threatens a debtor's reorganization, the creditor's action may be enjoined pursuant to section 105(a). The Bankruptcy Court has the power to issue an injunction to preserve the orderly conduct and integrity of reorganization proceedings.") (*citations omitted*).

The ability of Sovereign's Scheme Creditors to challenge or act in contravention of the schemes of arrangement of the other Scheme Companies would impair the unified effort of the Scheme Companies to wind up their involvement in the WFUM Pool at the same time. If fragmentation of the WFUM Pools occurred, Scheme Creditors would need to file separate claims in relation to each of the applicable Scheme Companies, and those claims would need to be separately agreed by the relevant Scheme Companies. Collection of the WFUM Pools remaining reinsurance would need to be done separately, making collection burdensome and less efficient for reinsurers, brokers and the Scheme Companies, including Sovereign. Such a result would deprive Sovereign and its Scheme Creditors of significant savings in administrative expenses and receipt of a higher final dividend much sooner than they would under the Original Scheme if it were not amended, or under a stand-alone "cut-off" scheme for Sovereign. This result would also be in direct contravention of the intention of Sovereign's Scheme Creditors who voted overwhelmingly in favor of the Amended Scheme, which was sanctioned by the High Court on September 17, 2007. Consequently, binding Sovereign's Scheme Creditors to the terms of the sanctioned schemes of arrangement of the other Scheme Companies is appropriate under the circumstances. *See, e.g.*, *Deutsche Bank AG v. Metromedia Fiber Network*, 416 F.3d 136,

141 (2d Cir. 2005) (noting "a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.") (c*itations omitted*).

Moreover, in the absence of the injunctive relief requested, Sovereign's Scheme Creditors located in the United States could obtain judgments without regard to the schemes of arrangement for the other Scheme Companies, leading to the unequal treatment of certain creditors. Such an outcome would be contrary to the schemes of arrangement as well as to the fundamental purpose of the Bankruptcy Code. *See Cunard Steamship Co. Ltd. v. Salen Reefer Services A.B.*, 773 F.2d 452, 459 (2d Cir. 1985) (explaining that the "guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors.)

**C. All Relevant Factors In Section 304(c) Support The Relief Requested**

Section 304(c) of the Bankruptcy Code provides that, in determining whether to grant relief, "the court shall be guided by what will best assure an economical and expeditious administration of [the foreign] estate." 11 U.S.C. § 304(c); *see also In re Maxwell Communications Corp. Plc*, 93 F.3d 1036, 1048 (2d Cir. 1996); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 109, 713 (2d Cir. 1987); *Cunard*, 773 F.2d at 455. Section 304(c) further provides that the court's decision must be consistent with six factors, five of which are relevant here:

> (1) just treatment of all holders of claims against or interests in Sovereign Marine's estate;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of Sovereign Marine's estate;

(4) distribution of proceeds of Sovereign Marine's estate substantially in accordance with the order prescribed by the Bankruptcy Code; and

(5) comity.

11 U.S.C. § 304(c).[5] As demonstrated below, and for the reasons set forth in the Motion, all relevant considerations weigh strongly in favor of granting relief here.

**(i) Relief Under Section 304 Will Ensure Just Treatment Of All Scheme Creditors**

As the legislative history makes clear, the purpose of section 304 is to "prevent dismemberment by local creditors of assets located here." S. Rep. No. 989, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5821. Congress realized that if "equality of distribution of assets among creditors" is to be achieved in a foreign bankruptcy case, domestic claimants cannot be permitted to commence or continue the race to the court house. *Culmer*, 25 B.R. at 629 ("bankruptcy courts are not obliged to protect the positions of fast-moving American and foreign attachment creditors over the policy favoring uniform administration in a foreign court"). Injunctive relief under section 304 promotes "just treatment of all creditors by preventing the so-called 'race to the courthouse' and preserve[s] estate assets for the benefit of all creditors." *In re Davis*, 191 B.R. 577, 584 (Bankr. S.D.N.Y. 1996). In granting injunctive relief, the court in *Davis* sought to "facilitate a prompt and efficient resolution of all claims against the debtors and an equitable distribution of assets to all creditors." *Id*. at 585. Thus, the relief sought herein is exactly the type of relief that Congress anticipated would be necessary to ensure just treatment of all holders of claims in a foreign estate.

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[5] Before the effective date of BAPCA, comity was just one of the factors taken into consideration under section 304(C) of the Bankruptcy Code. In implementing section 1507 of the Bankruptcy Code, Congress's intent that comity be the focus of the inquiry can be gleaned from the plain language of the statute, whereby "comity is raised to the introductory language to make it clear that it is the central concept to be addressed." H.R. Rep. No. 109-31, pt. 1 at 109 (2005).

In addition, the Scheme Creditors will receive just treatment in the foreign proceeding. The laws of the United Kingdom and the United States share both the same common law traditions and fundamental principles of law. Consequently, United States federal courts have repeatedly granted comity to proceedings in the United Kingdom or in countries whose laws were derived from those of the United Kingdom. *See, e.g., In re Brunner Mond Group plc*, Case No. 01-B-42802 (PCB) (Bankr. S.D.N.Y. 2001) (United Kingdom scheme of arrangement); *In re Board of Directors of Jazztel, p.l.c.*, Case No. 02-B-14695 (CB) (Bankr. S.D.N.Y. 2002) (United Kingdom scheme of arrangement); *In re Ashanti Capital* Limited, Case No. 02-B-12516 (CB) (Bankr. S.D.N.Y. 2002) (Cayman Islands scheme of arrangement); *In re Maxwell Communications Corp. Plc*; 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (United Kingdom proceeding); *In re Brierley*, 145 B.R. 151 (United Kingdom proceeding); *In re Gercke*, 122 B.R. 621 (Bankr. D.C. 1991) (United Kingdom proceeding); *In re Kingscroft*, 138 B.R. 121 (Bankr. S.D.N.Y. 1992) (United Kingdom and Bermuda proceedings); *Cornfeld v. Investors Overseas Services. Ltd.*, 471 F. Supp. 1255 (S.D.N.Y.), *aff'd*, 614 F.2d 1286 (2d Cir. 1979) (Canadian proceeding); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238 B.R. 25 (Bankr. S.D.N.Y. 1999) *aff'd* 257 B.R. 699 (S.D.N.Y. 2002) (Bermuda proceeding); *In re MMG LLC*, 256 B.R. 544 (Bankr. S.D.N.Y. 2000) (Cayman Islands proceeding); *In re Axona Int'1 Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) (Hong Kong proceeding); *Universal Casualty & Surety Co. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985) (Cayman Islands proceeding); *Culmer*, 25 B.R. 621 (Bahamian proceedings).

**(ii) The Relief Requested Will Neither Prejudice Nor Inconvenience United States Creditors**

The requested relief will neither prejudice nor unduly inconvenience Sovereign Marine's creditors in the United States. As stated by the Supreme Court in *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527, 537-38 (1883):

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of its contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

Similar reasoning was applied in *In re Maxwell Communications Corp*., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996). In concluding that the laws of the United Kingdom should apply to determine whether certain transfers made by the debtor, a United Kingdom company, could be avoided as preferential, the court noted that the United States creditors "had to know" they were dealing with a United Kingdom entity.

In this case, Sovereign Marine's creditors in the United States will not be prejudiced or unduly inconvenienced by the relief requested. First, similar to the bankruptcy laws of the United States, the terms of the Amended Scheme do not prefer the claims of creditors in the United Kingdom over others.

Second, given the similarity between United States and United Kingdom proceedings, any purported prejudice or inconvenience resulting from the injunction would be typical of that encountered by a United States creditor in a United States bankruptcy. *In re Gercke*, 122 B.R. at 629. In granting an injunction, the court in *In re Gercke* stated that "[i]t is doubtful that under [Section] 304 Congress expected a foreign bankruptcy proceeding to be less prejudicial and inconvenient than a United States bankruptcy case before injunctive relief would be granted." *Id*.

Moreover, as noted by this Court in *In re Rubin*, the prejudice and inconvenience Sovereign Marine's creditors in the United States will face if an injunction is granted is typical of what every foreign creditor in a domestic case encounters when forced to litigate its claim in the United States. *In re Rubin*, 160 B.R. at 282. "It is thus difficult to label as so prejudicial and inconvenient to U.S. creditors as to warrant denial of injunctive relief that which we require of foreign creditors in our own cases." *Id*. *See also Hopewell*, 238 B.R. at 63.

**(iii) The Relief Requested Will Prevent Inequitable Disposition Of Assets**

The relief requested herein will prevent the preferential distribution of assets to certain creditors to the disadvantage of others. In the absence of an injunction in support of the Amended Scheme, claims may proceed against Sovereign Marine's assets without regard to the proceeding pending in the United Kingdom, leading to the unequal treatment of certain creditors and the dismemberment of the estate. Such an outcome would be contrary to the fundamental purpose of United States bankruptcy laws. *Cunard*, 773 F.2d at 459 ("The guiding premise of the Bankruptcy Code, like its predecessor, the Bankruptcy Act, is the equality of distribution of assets among creditors."). *See also In re MMG LLC*, 256 B.R. at 555.

**(iv) The Proceeds Of The Estate Under The Amended Scheme Are Distributed In A Manner Substantially In Accordance With The Order Prescribed By The Bankruptcy Code**

The laws of the United Kingdom have previously been found to be similar to the Bankruptcy Code. *See In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1999) and *In re Ionica, plc*, 241 B.R. 829 (Bankr S.D.N.Y. 1999); *In re Polly Peck*, 143 B.R. 807 (S.D.N.Y. 1992). The Amended Scheme, which has been formulated pursuant to the Companies Act, provides for the distribution of proceeds and a claims process similar to that provided for in the Bankruptcy Code.

**(v) The Foreign Proceeding Is Entitled To Comity**

Comity is often cited as the most important of the section 304(c) factors. *In re Treco*, 240 F.3d 148, 156-157 (2d Cir. 2001); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd*., 272 B.R. 396, 407 (Bankr. S.D.N.Y. 2002); *In re Koreag, Controle et Revision S.A*., 130 B.R. 705, 712 (Bankr. S.D.N.Y. 1991), *vacated on other grounds*, 961 F.2d 341 (2d Cir. 1992), *cert. denied*, 506 U.S. 865 (1992); *In re Gee*, 53 B.R. at 901. The decision of the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), provides "[t]he starting point for any discussion of the doctrine of international comity." *Cornfeld v. Investors Overseas Svcs., Ltd.*, 471 F. Supp. 1255, 1258, *aff'd*, 614 F.2d 1286 (2d Cir. 1979). In *Hilton*, the Supreme Court defined comity as:

> [T]he 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.

*Hilton*, 159 U.S. at 164. It is well settled that comity should be accorded to foreign law "as long as the laws and public policy of the forum state are not violated." *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993); *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 238

B.R. 25, 52 (Bankr. S.D.N.Y. 1999) *aff'd* 238 B.R. 699 (S.D.N.Y. 2002); *Culmer*, 25 B.R. at 629. Moreover, courts in New York narrowly construe exceptions to the comity doctrine:

> [F]oreign-based rights should be enforced unless the judicial enforcement of such a [right] would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.

*International Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13 (1964).

In this case, the relevant considerations bear heavily in favor of affording comity to the process required in the United Kingdom in respect of sanctioning the Amended Scheme. First, recognizing the United Kingdom proceeding and granting the relief requested herein will not violate the laws or public policy of the United States. *See In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd*., 238 B.R. at 66 ("And, when the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings."). On the contrary, "the firm policy of American courts is the staying of actions against a corporation which is the subject of a bankruptcy proceeding in another jurisdiction" (*Cornfeld*, 471 F. Supp. at 1259), and that policy is embodied in section 304 of the Bankruptcy Code. Second, from a practical standpoint, recognition of the foreign proceeding is a necessity here if the Petitioners are to succeed in their difficult task of implementing a fair and equitable resolution of Sovereign Marine's affairs. *See IIT v. Cornfeld*, 462 F. Supp. 209, 217 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 619 F.2d 909 (2d Cir. 1980). Finally, the United States courts have consistently recognized that there is a distinct judicial preference for deferring to the foreign tribunal litigation respecting the validity or the amount of the claims against the foreign debtor. *See Rubin*, 160 B.R. at 283; *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd*., 238 B.R. at 66; *Cunard*, 773 F.2d 452, 458 (2d Cir. 1985).

As demonstrated by the foregoing, consideration of all relevant factors set forth in section 304(c) compels the modification of the Permanent Injunction Order in order to assure an economical and expeditious administration of Sovereign Marine's estate.

## CONCLUSION

The Petitioners have satisfied the requirements for injunctive relief requested. Without modification of the Permanent Injunction Order to enforce the Amended Scheme, the orderly proceeding designed to accelerate and increase distributions to Sovereign Marine's creditors will be disrupted. For the foregoing reasons, the Petitioners respectfully request that this Court grant the relief requested.

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