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Common Sense and Protecting Depository Accounts

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Chapter 11 Debtors and their Banks are reminded that Congress enacted 11 USC § 345 to ensure that the Estate's funds are handled with care in recognition of the creditors' interest in preserving value and maximizing prospects for recovery. The statute provides safeguards which were once mandatory. However, as of 1994, a statutory amendment provides for a waiver from its requirements for "cause."

A recent decision of Bankruptcy Court Judge, Hon. James L. Garrity, Jr., out of the Southern District of New York will be of interest to our clients for at least two reasons.

First, Judge Garrity, in an opinion issued this month in the matter of *in re Ditech Holding Corporation, et al.*, reflected upon a decision issued by the Middle District of Tennessee, Bankruptcy Court 20 years ago [i.e. – *In re Service Merchandise Co., Inc.*, 240 B.R. 894 (Bankr. M.D. Tenn. 1999)].

The *Service Merchandise* Court held that the requirements of § 345(b) could be waived for "cause." That Court went on to propound a "totality of the circumstances" test, going so far as to list relevant factors to be considered. The *Ditech* Court, in its recent decision, not only agreed with the reasoning of the *Service Merchandise* court, but went so far as to state that it would "not be bound by the factors considered by that court."

However, while the *Service Merchandise* court found that the Debtor had demonstrated "cause" sufficient to allow the requirements of § 345(b) to be waived, the *Ditech* court came to a different conclusion. Despite the Debtor in *Ditech* taking the position that the cost of compliance would be overly burdensome, requiring them to pay a negotiated sum of $80,000 per month, the Court disagreed. Specifically, Judge Garrity, taking into consideration the monthly cost compared to the interest being earned on the accounts in question, as well as the anticipated brief timeframe for confirmation of a Plan of Reorganization and the expense of requiring the Debtor to move the accounts to a compliant financial institution, found the cost of compliance with § 345(b) to be *de minimis* and denied Debtor's motion seeking to waive the section's requirements.

Therefore, secondly, we are reminded by both Courts, two decades apart, that, reduced to its basics, Bankruptcy Law involves the application of common sense.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at 312.860.4230

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