

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

HSF HOLDING, INC., et al.,²

Debtors.

)
) Chapter 11
)

) Case No. 09-11901 (PJW)
)

) Jointly Administered
)

) Requested Hearing Date: July 1, 2009 at 2:00 p.m.
)

) Requested Objection Deadline: June 29, 2009 at 12:00 p.m.
)
)

**MOTION OF THE STATE OF HAWAII FOR ORDER
TRANSFERRING VENUE OF THESE CASES TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF HAWAII**

The State of Hawaii (the "State"), a party in interest in the above captioned cases (the "Cases"), hereby moves this Court (the "Motion") to enter an order, pursuant to 28 U.S.C. § 1412 and Rule 1014 of the Federal Rules of Bankruptcy Procedure, transferring the venue of the Cases filed by HSF Holding, Inc. ("HSF") and its affiliated debtor and debtor-in-possession Hawaii Superferry, Inc. ("Superferry," and together with HSF, the "Debtors") to the United States District Court for the District of Hawaii (the "Hawaii Court"). In support of this Motion, the State respectfully states as follows:

INTRODUCTION

1. This court should transfer venue of these Cases to the Hawaii Court because it is: (a) necessary to protect the strong interests of the State; and (b) in the interests of justice and the convenience of the parties. At their essence, these Debtors are nothing more than the product of a public / private partnership to develop and operate a transit system **solely** within

² The Debtors are the following entities (last four digits of EIN in parentheses): (i) HSF Holding, Inc., a Delaware Corporation (9413) and (ii) Hawaii Superferry, Inc., a Hawaii corporation (2152). The mailing address for both Debtors is Pier 19 Ferry Terminal, Honolulu, HI 96817.

Hawaii. Just as one would expect a regional transit authority to file its bankruptcy case in its own region, the same is expected of these cases.

2. This is a case of strong public interest and that public interest rests solely within the State of Hawaii. The State will be unable to protect this interest in a bankruptcy proceeding taking place approximately 4,900 miles from Hawaii, in the State of Delaware. Moreover, the Debtors have no nexus whatsoever with Delaware except for the corporate charter of one of the Debtors. All of the Debtors' business took place in Hawaii; the Debtors provided service only to customers in Hawaii. In the interests of justice and convenience of the parties, the State respectfully submits that this Court must transfer venue to where these Cases belong, in the Hawaii Court.

BACKGROUND

3. On or about May 30, 2009 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtors operated a high-speed passenger and vehicle ferry service between the four principal Hawaiian Islands – Oahu, Maui, Hawaii and Kauai (collectively, the "Islands"). For the past several years, the Debtors were the preeminent local transport ferry carrier among the Islands. The Debtors took delivery of two high-speed aluminum-hulled catamarans for use in transporting passengers and vehicles between the Islands, the "Alakai" on June 30, 2007 and "Hull 616" on April 21, 2009.

5. HSF is the parent corporation and direct owner of 100% of the voting equity in Superferry. HSF is a Delaware corporation. Superferry is a Hawaii corporation through which the Debtors conduct all of their business.

6. On or about September 7, 2005, Superferry entered into an operating agreement (the "Harbors Operating Agreement") with the Harbors Division of the State of Hawaii Department of Transportation ("DOT"). The Harbors Operating Agreement provides for the use by Superferry of specific pier areas at the Honolulu, Nawiliwili, Kahului, Kawaihae Harbors and the use of certain equipment to be provided by DOT, consisting primarily of vehicle ramps and barges. In addition to payment of published dockage fees, the Harbors Operating Agreement requires Superferry to pay fees to DOT based on the number of passengers and vehicles transported along with a percentage of gross receipts.

7. On or about March 21, 2005 a lawsuit was filed by special interest plaintiffs challenging the DOT's decision that the harbor improvements related to the Debtors' ferry operations were exempt from an environmental review pursuant to Chapter 343 of the Hawaii Revised Statutes. On or about August 31, 2007, the Hawaii Supreme Court held that the DOT erred in concluding that the DOT improvements were exempt from the environmental requirements pursuant to Chapter 343. In response to this decision, on or about November 2, 2007, the Hawaii Legislature amended Chapter 343 with a bill known as Act 2 ("Act 2") which permitted operation of a large capacity ferry company while the required environmental study was being undertaken. On or about March 16, 2009, the Supreme Court of Hawaii ruled in favor of a challenge to the constitutionality of Act 2, finding that the law violated the Hawaii state constitution because it was crafted specifically to benefit the Debtors and allowed the Debtors to operate prior to completing the environmental study mandated by state law. Between the

passage of Act 2 and the Hawaii Supreme Court's March 16 ruling, the Debtors operated pursuant to the terms of the Harbors Operating Agreement. As of March 16, 2009, the Debtors have ceased all business operations.

RELIEF REQUESTED

8. By this Motion, the State respectfully requests that this Court enter an order, substantially in the form attached hereto: (i) transferring the venue of the Cases filed by the Debtors to the Hawaii Court; and (ii) granting such further relief as may be appropriate and just.

BASIS FOR RELIEF REQUESTED

9. For the protection of the State's interest and in the interest of justice and convenience, the State respectfully submits that this Court must transfer venue to where these Cases belong, in the United States Bankruptcy Court for the District of Hawaii. The State believes that applicable law requires this result.

10. Under 28 U.S.C. § 1412, "[a] district court may transfer a case or proceeding under title 11 to a district court from another district, in the interest of justice or for the convenience of the parties." While the Debtors' choice of forum is entitled to deference and venue of a bankruptcy proceeding is technically proper in a corporate debtor's state of incorporation, the decision of whether to transfer venue is entirely within the court's discretion. 28 U.S.C. § 1408; In re Enron Corp., 284 B.R. 376, 386 (Bankr. S.D.N.Y. 2002). In determining whether transfer of venue is appropriate, courts generally examine "the proximity of the court to interested parties as well as the location of assets, the economics of administering the estate and the relative economic harm to the debtor and other interested parties." In re Ocean Props. of Delaware, Inc., 95 B.R. 304, 305 (Bankr. D. Del. 1988). However, the court is not limited to

considering only these factors. Courts may "consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995) (internal quotations omitted).

A. Venue Should Be Transferred to Protect the Interests of the State

11. When the debtor's choice of forum is outweighed by other relevant factors, this Court has transferred cases to the more appropriate venue. See, e.g., In re Centennial Coal, Inc., 282 B.R. 140, 148 (Bankr. D. Del. 2002) (noting that it would be especially burdensome and expensive for defendants to litigate in Delaware); In re Ocean Props., 95 B.R. at 304 (finding it would be more economical to administer the cases in Florida where the majority of creditors were located and when Florida law would be used in adjudicating contested matters); In re First New England Dental Ctrs., Inc., No. 98-347, letter op. at 9-10 (Bankr. D. Del. March 20, 1998) (granting motion to transfer when case was a "regional" matter with its "center of gravity" in Massachusetts).

12. In this case, the Debtors choice of forum is outweighed by the State's responsibility of ensuring that its interests under the Harbors Operating Agreement are adequately protected. The Harbors Operating Agreement constitutes a significant public/private partnership between the State and the Debtors aimed at developing an efficient and sustainable intra-state transportation system which serves the citizens of Hawaii. The prominent interest of the State and the citizens of Hawaii is demonstrated by the fact that the Harbors Operating Agreement is funded through approximately \$40 million of State appropriations. Clearly, the State and its residents stand to absorb substantial damages based upon the disposition of the Harbors Operating Agreement in the administration of the Debtors' Cases. Therefore, the State

and its citizens possess an important interest in preserving the interests of itself and its residents that should be accounted for heavily with respect to transfer of the Debtors' Cases.

13. Furthermore, the liquidation of the Debtors' businesses has a tremendous affect on the State, beyond mere monetary injury, in that the void left by the elimination of the Debtors' operations will force the State to achieve its critical objective of providing a reliable intra-state transportation system through alternate means. It is evident that the loss of the critical transportation services provided by the Debtors pursuant to the Harbors Operating Agreement will cause a significant detriment to the citizens of Hawaii.

14. Moreover, the validity of the Harbors Operating Agreement depends solely upon interpretation of relevant Hawaii state law.³ The Harbors Operating Agreement represents one of the most significant liabilities of the Debtors' estates and its treatment within the bankruptcy proceedings could have a considerable impact on the successful administration of the Debtors' estates. The State submits that the interpretation of the Harbors Operating Agreement under Hawaii law represents an important state interest in that the validity of such agreements greatly impacts the State's ability execute similar agreements in pursuit of its legitimate state objective in creating a sustainable intra-state ferry transportation system. Since these issues are intertwined intimately with the State's interest in providing critical services to its citizens, the Debtors' Cases are clearly "regional matters" with their "center of gravity" in

³ By way of further explanation, there are several complex issues surrounding the Harbors Operating Agreement that are relevant to the Debtors' bankruptcy, including: (1) whether the Hawaii Supreme Court's decision renders the Harbor Operating Agreement void *ab initio* in light of Superferry's performance pursuant to the terms of the agreement between the passage of Act 2 and the Hawaii Supreme Court's decision; (2) that the Hawaii Supreme Court has yet to enter any judgment with respect to its March 16, 2009 decision and that the prior injunction issued by the lower court with respect to the declaration that the Harbors Operating Agreement was void as to the Island of Maui was set aside, and therefore, in light of the automatic stay there is no current order on record which addresses the Harbors Operating Agreement, thus making Superferry's cessation of business operations on March 16, 2009 essentially voluntary in nature; and (3) the treatment of the State's claims under the Harbors Operating Agreement during those periods in which Superferry operated pursuant to the terms of the Agreement and was not otherwise prohibited by any court order or judgment.

Hawaii, and thus the State's interest should weigh heavily in the determination of the proper venue for these Cases.

15. Due to the significant affect that the Debtors' bankruptcy will have on the State, it is imperative for the State to both monitor and participate in the Debtors' bankruptcy proceedings. Due to the six-hour time difference between Hawaii and Delaware and the approximately 4,900 miles between the two states, the State's ability to participate and protect the interest of the State and its citizens could be substantially compromised.

16. The unique nature of the public/private partnership between the State and the Debtors resulting from the Harbors Operating Agreement dictates that the State's interest should weigh heavily in the calculus of whether transfer of the Debtors' Cases is permissible. The Debtors businesses were interwoven with the interests of the State and its residents in that the Debtors operated as a quasi-public entity that received substantial governmental support. By way of example, the Debtors choice of filing in such a remote location with which they have essentially no contacts, and which is exceptionally distant from a home state that has a critical interest in the Debtors' business operations, is akin to SEPTA filing a bankruptcy petition in San Francisco bankruptcy court. The inherently interconnected nature of the Debtors operations and the interests of the State and its citizens strongly militates in favor of transferring venue to Hawaii.

B. Venue Should Be Transferred to Permit Creditor Participation in these Cases

17. The Hawaii Court's proximity to interested parties strongly supports transfer of these Cases. Almost two-thirds of the Debtors' thirty largest unsecured creditors reside in Hawaii, and of the remaining thirty largest unsecured creditors, none reside in a contiguous state or are located in relative proximity to Delaware. See In re Enron Corp., 274

B.R. 327, 345 (Bankr. S.D.N.Y. 2002) (stating that in considering the proximity of creditors in calculating the transfer of venue, a court "must examine both the number of creditors as well as the amount of claims held by such creditors"). Moreover, Hawaii is the primary location of the Debtors' trade creditors and counterparties to the Debtors' executory contracts and leases.

18. If the Debtors' estates were to be administered in Delaware, it would be more difficult for individual creditors to participate in the case. The distance and the related travel costs unquestionably would hamper individual creditor participation, which is "a fundamental predicate of Chapter 11." In re B.L. of Miami, Inc., 294 B.R. 325, 334 (Bankr. D. Nev. 2003) (citing 11 U.S.C. § 1109(b)). Unless individual creditors incur the additional expense of retaining Delaware counsel, substantially all of the Debtors' creditors will be deprived of the "general benefits that come from attending hearings in person such as the ability to observe the court, witnesses and other parties in interest." In re Dunmore Homes, Inc., 380 B.R. 663, 675 (Bankr. S.D.N.Y. 2008). Further, in this case, there is not only a vast geographical impediment to creditor participation, there is also a significant time difference. Such a large time difference will make personal participation impossible for most creditors.

C. Venue Should be Transferred to the State Able to More Efficiently Administer these Cases

19. The Debtors' management personnel, employees, business records, and accounts are located in Hawaii making it more economical to administer the Debtors' estates in the Hawaii Court. See In re Innovative Commun. Co., LLC, 358 B.R. 120, 128 (Bankr. D. Del. 2006) (concluding that transfer of venue was proper since the combined factors of location of the Debtors' assets, the public interest, local interest and convenience of potential witnesses all favored a competing forum); In re Borden Chems. & Plastics Operating Ltd. P'ship, 2004 Bankr. LEXIS 1251, 5-6 (Bankr. D. Del. Aug. 23, 2004) (holding that transfer of venue to Louisiana

was proper where the debtor's principal place of business was in Louisiana, potential witnesses, including the debtor's employees were located in Louisiana, the Louisiana court was more familiar with applicable Louisiana state law, relevant evidence and documents were located in Louisiana and all the relevant transactions related to the debtor's liability occurred in Louisiana). The Debtors, creditors, witnesses and other interested parties will save on legal fees and travel costs by transferring venue to Hawaii. The time and money saved will directly benefit the estate, as the Debtors will not deplete the estates' assets with unnecessary expenses. Additionally, the Debtors' few remaining employees, who live and work in Hawaii, may be required to participate in these Cases. Thus, the travel to and from Delaware will serve only to distract the Debtors' remaining employees and further dissipate the assets of the estate.

20. The fact that the bulk of the Debtors' remaining operating assets are located in Hawaii also strongly supports transfer of venue. See In re Commonwealth Oil Ref. Co., 596 F.2d 1239, 1248 (5th Cir. 1979) (noting that the location of the debtor's assets is a more important factor in determining venue in a liquidation rather than a rehabilitation case); Enron Corp., 274 B.R. at 347-348; see also In re B.L. of Miami, 294 B.R. at 325 ("Because Debtor's sole major asset is in Florida, venue is more proper there."); In re Laguardia Assocs., L.P., 316 B.R. 832, 839 (Bankr. E.D. Pa. 2004) (noting that "cases involving real estate should be heard where the real estate is located"). As one court reasoned, "it [makes] much more sense to locate the bankruptcy in a venue where the judge presiding would more likely have active familiarity with the community and the milieu in which the [asset] operated, for such a judge would be in a much better position to gauge the likelihood of an effective reorganization." In re Abacus Broadcasting Corp., 154 B.R. 682, 683 (Bankr. W.D. Tex. 1993). As of the Petition Date, the majority of the Debtors' remaining assets were located in Hawaii. Although the Debtors two

most significant assets, Alakai and Hull 616, are docked in Alabama rather than Hawaii, it is more significant that these assets have absolutely no nexus to Delaware. Upon information and belief, the Debtors have absolutely no assets in Delaware.

21. The nature of the Harbors Operating Agreement, the constitutionality of Act 2 and the resolution of the Debtors' corresponding environmental liabilities dictate that the Hawaii Court is better suited to handle these matters. The Hawaii Courts' increased familiarity with Hawaii law means transfer to the District of Hawaii fulfills the goals of judicial economy. To the extent that these Cases involve novel issues of Hawaiian law, the Hawaii Court has an interest in having these matters adjudicated locally. See In re Shorts Auto Parts, Inc., 136 B.R. 30, 37 (Bankr. N.D.N.Y. 1991) (finding that it is difficult to justify how requiring the debtor's out-of-state creditors to travel to a district where the court will be applying another jurisdiction's law would be in the interest of justice); First New England, letter op. at 9 (noting that "[e]ven though there are creditors in other states who will possibly invoke their respective states' laws, the relevance of Massachusetts law to most of the parties puts a Massachusetts bankruptcy judge in a much better position than this Court to handle a substantial portion of the matters arising in this case."). Thus, since the validity of the Harbors Operating Agreement invariably rests on the interpretation and application of novel and untested issues of Hawaii state law, bankruptcy courts within the state are better suited to address such issues and thus the interests of justice will be better served by a transfer of venue.

22. It is not only the overwhelming contacts of the Debtors with Hawaii that support transfer, but also the conspicuous lack of contacts with Delaware. It appears that the only material contact with Delaware in these Cases is the fact that one of the two Debtors is incorporated in Delaware. As a result, transfer of venue would not prejudice any interested

party. Although the Debtors' choice of venue is entitled to deference, there is no indication that any of the Debtors' interest or the estates' interest would be harmed by transfer of venue. Moreover, one court has suggested that a case where the Debtor has minimal contacts with one venue and overwhelming contacts with another, as here, "raise[s] serious questions whether the Court would abuse its discretion if it denied the motion to transfer venue in the interests of justice." In re Dunmore, 380 B.R. at 675-676.

23. The Motion will be served by overnight mail or hand delivery on (a) the United States Trustee; (b) counsel to the Debtors (c) counsel to the Official Committee of Unsecured Creditors; and (d) all parties requesting notice pursuant to Bankruptcy Rule 2002, in accordance with Local Rule 2002-1(b). In light of the nature of the relief requested, the State submits that no further notice is required.

WHEREFORE, the State respectfully requests that the Court grant the Motion and grant such other further relief as the Court deems proper.

Dated: Wilmington, Delaware
June 19, 2009

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