

controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). To demonstrate that there is substantial ground for a difference of opinion, appellants must show that "the issue is difficult and of first impression and involves more than just a strong disagreement among the parties." In re T.R. Acquisition Corp., No. M47, 1997 U.S. Dist. LEXIS 1186, 1997 WL 51500, at *2 (S.D.N.Y. Feb. 6, 1997).⁵ The district court should genuinely doubt the bankruptcy court's decision. See Irving H. Picard, Tr. for the Liquidation of Bernard L. Madoff Inv. Sec. LLC v. Cohmad Sec. Corp., No. 11 MISC. 337, 2012 U.S. Dist. LEXIS 163137, 2012 WL 5511952, at *3 (S.D.N.Y. Nov. 14, 2012).⁶

⁴ McEvoy does not assert that the bankruptcy court's decision was a final ruling from which he can appeal as of right under 28 U.S.C. § 158(a)(1). Cf. In re Fugazy Express, 982 F.2d 769, 776-77 (2d Cir. 1992).

⁵ Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, footnotes, and citations are omitted.

⁶ Even when these criteria are met, only "exceptional circumstances" justify departure from the favored policy of postponing appellate review until after judgment. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Getione Motonave Achille Lauro In Amministrazione Straordinaria, 921 F.2d 21, 25 (2d Cir. 1990).

McEvoy does not contest the bankruptcy court's holding that, under Cayman Island law, directors and majority owners generally have a fiduciary duty only to the corporation itself, not to any individual shareholders. See Stay Order at 21-22. Instead, he challenges the court's conclusion that he did not plausibly allege facts from which one could conclude that he had an exceptional relationship with either Apollo or the directors that would give rise to a director-to-shareholder or shareholder-to-shareholder fiduciary duty. But a preliminary examination of the [*6] merits shows that there is no meaningful doubt that the bankruptcy court was correct. Thus the motion for leave to appeal must be denied, even assuming that McEvoy has shown that this issue presents a controlling question of law the resolution of which would materially advance the termination of the litigation.

The "special relationship" necessary to create a direct duty between directors and shareholders was described by Lord Justice Mummery of the English Civil Court of Appeal in *Peskin v. Anderson*, which has been held to also describe Cayman law:

Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities, which have been acquired by the directors in that office, for the benefit of the shareholders, and not to prefer and promote their own interests at the expense of the shareholders.

These duties may arise in special circumstances which replicate the salient features of well established categories of fiduciary [*7] relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person.

[2001] EWCA (Civ) 1 BCLC 372, 379; see also *Hayat v. Al-Mazeedi*, No. 08-1004, 2011 Mass. Super. LEXIS 73, 2011 WL 1532109, at *3-*4 (Mass. Super. Ct. Jan. 10, 2011) (applying *Peskin* to Cayman law); *Feiner Family Tr. v. Xcelera.com, Inc.*, No. 07-cv-1914, 2008 U.S. Dist. LEXIS 102019, 2008 WL 5233605, at *7 (S.D.N.Y. Dec. 15, 2008), *aff'd* sub nom. *Feiner Family Tr. v. VBI Corp.*, 352 F. App'x 461 (2d Cir. 2009) (same).

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