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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
TERRESTAR CORPORATION, *et al.*,[1]	Case No. 11-10612 (SHL)
Debtors.	Jointly Administered
	Adv. Proc. No. 13-01334 (SHL)
ALDO ISMAEL PEREZ	
Plaintiff,	
vs.	
TERRESTAR CORPORATION, et al.,	
Defendants.	

THE TSC DEBTORS' MOTION TO DISMISS ADVERSARY COMPLAINT

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal taxpayer-identification number, are: (a) TerreStar Corporation [6127] ("***TSC***") and TerreStar Holdings Inc. [0778] (collectively, the "***February Debtors***"); (b) TerreStar New York Inc. [6394]; Motient Communications Inc. [3833]; Motient Holdings Inc. [6634]; Motient License Inc. [2431]; Motient Services Inc. [5106]; Motient Ventures Holding Inc. [6191]; and MVH Holdings Inc. [9756] (collectively, the "***Other TSC Debtors***" and, collectively with the February Debtors, the "***TSC Debtors***").

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INTRODUCTION

The TSC Debtors submit this motion to dismiss the adversary proceeding complaint (the "***Complaint***") filed by Aldo I. Perez ("***Perez***") [Adv. Proc. No. 13-01334 (SHL)**,** Docket No. 1]. In support of this Motion, the TSC Debtors respectfully submit as follows:

PRELIMINARY STATEMENT

As this Court is aware, Perez is a former common shareholder of the TSC Debtors that has attempted, in countless letters, motions, and appearances before this Court, to convince the Court that the TSC Debtors and their advisors have deliberately and maliciously undervalued their assets and that, but for their misdeeds, common shareholders could have received a recovery in the bankruptcy. The Court has explained, time and again, that Perez has presented no evidence to support his allegations, and the value of the TSC Debtors' assets was such that a recovery for common shareholders was not possible. Now, Perez is attempting, again, to turn the clock back, seeking revocation of the Court's order approving the TSC Debtors' plan of reorganization (the "***Plan***") by alleging that the order confirming the Plan (the "***Confirmation Order***") was procured by fraud.

First, as found by the District Court for the Southern District of New York (the "***District Court***"), which dismissed Perez's appeal of the Court's decision to deny appointment of an examiner, the TSC Debtors' Plan is substantially consummated, and an action that would reverse such consummation—such as the instant action to revoke the Confirmation Order—is thus equitably moot. Second, the allegations in the Complaint are not new—they are the same allegations Perez has raised in numerous pleadings and at hearings before this Court. Perez is collaterally estopped from initiating a new action to revoke the Plan based on allegations that the Court has already considered and rejected. Finally, the Complaint is wholly inadequate in that it

does not meet the pleading standard for revocation on the basis of fraud under section 1144 of the Bankruptcy Code. For all these reasons, the Complaint should be dismissed with prejudice.[2]

BACKGROUND

The TSC Debtors filed petitions with this Court under chapter 11 of the Bankruptcy Code on October 19, 2010 and February 16, 2011. During the course of these chapter 11 cases, the TSC Debtors operated their business and managed their property as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

A. The TSC Debtors' Plan and Disclosure Statement[3]

The TSC Debtors filed their second amended disclosure statement in January 2012 (as amended and supplemented from time to time, the "***Disclosure Statement***") [Docket Nos. 338, 564, 569]. Perez filed numerous objections to the Disclosure Statement [Docket Nos. 207, 216, 331, 386] and appeared at the hearing on the TSC Debtors' motion to approve the Disclosure Statement. The Court heard and overruled Perez's objections, approving the Disclosure Statement by order entered on August 24, 2012 [Docket No. 591].

On June 27, 2012, the TSC Debtors filed the Plan. Perez also filed numerous objections to the Plan [Docket Nos. 556, 607, 638, 639, 661, 664] (collectively, the "***Plan Objections***"), along with several other common shareholders. The TSC Debtors responded to Perez's objection in their memorandum of law in support of confirmation of the Plan [Docket No. 650].[4]

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[2] Given that Perez has filed multiple pleadings and is prosecuting two appeals, all based on similar allegations and seeking essentially the same relief, and given that this Court has found on multiple occasions that these allegations are baseless, if the Court grants this motion to dismiss, Perez should not be permitted to file an amended pleading seeking to revoke the Plan.

[3] During the course of the cases, the Court considered and denied requests by several parties, including Perez, for appointment of an examiner. [Docket Nos. 157, 216, 232, 246, 264, 287].

[4] In addition, on or about September 27, 2012, Perez directed discovery requests to the TSC Debtors in the form of a letter to the Court. [Docket No. 638]. Despite objecting to Perez's requests, as a courtesy, the TSC Debtors provided Perez with certain documents provided in response to document requests from another *pro se* shareholder, Jeffrey Swarts, in connection with his confirmation objections.

In addition, on September 27, 2012, Arik Preis, counsel to the TSC Debtors, and CJ Brown, financial advisor to the TSC Debtors, met with Perez and his counsel to discuss with Perez and his counsel any questions Perez had regarding the Plan and the materials on which the TSC Debtors intended to rely in connection with Plan confirmation.

On October 10, 2012, the Court held a hearing on confirmation of the TSC Debtors' Plan (the "***Confirmation Hearing***"). At the Confirmation Hearing, Perez appeared and voiced his objections to the Plan.[5] *See* Oct. 10, 2012 H'rg Tr., Docket No. 675. Such objections largely centered around the valuation of the TSC Debtors' assets and the fact that the Plan did not provide for a recovery to TSC's common shareholders. Indeed, Perez actively participated in the hearing by, among other things, cross examining the TSC Debtors' financial advisor regarding valuation. In addition, in his Plan Objections and at the Confirmation Hearing, Perez raised issues and made allegations regarding, among other things, alleged insider transactions related to the sale of the TSC Debtors' interest in the 1.6 GHz spectrum and the sale of certain assets of TSN. The Court overruled all objections and confirmed the Plan on the record. The Court entered the Confirmation Order on October 24, 2012 [Docket No. 668].

B. Substantial Consummation of the TSC Debtors' Plan

Following confirmation of the Plan, the TSC Debtors prepared closing documents and coordinated with the TSC Debtors' preferred shareholders to consummate the Plan, including by preparing the requisite FCC application, finalizing the exit facility and related documents, and performing the restructuring transactions contemplated by the Plan. The effective date of the Plan occurred on March 7, 2013 [Docket No. 734]. As provided in the Plan, among other things, "***Reorganized TSC***" has emerged as a new corporation, pursuant to an amended and restated

[5] In all proceedings before the Bankruptcy Court, Perez or his counsel appeared on behalf of Perez only, and not on behalf of other common shareholders.

certificate of incorporation filed with the Delaware Secretary of State, and the process of the issuance of New Common Stock has been initiated for holders of Series A and B preferred shares. *See Declaration of Douglas Brandon in Support of the TSC Debtors' Motion to Dismiss Adversary Complaint* (the "***Brandon Decl.***"), at ¶¶ 5–6. Reorganized TSC's Board of Directors has met and taken official action. *Id*. at ¶ 7. As contemplated in the Plan, mergers of other TSC entities have occurred, and the property of each TSC Debtors' estate has been transferred to the respective reorganized entity. *Id*. at ¶ 8. Finally, Reorganized TSC has made distributions to substantially all creditors with allowed claims, including cash payments of approximately $6.3 million. *Id*. at ¶ 9.

C. Perez's Appeals of Two Court's Orders

Perez has appealed this Court's orders to the District Court for the Southern District of New York (the "***District Court***").[6] First, on February 3, 2012, Perez appealed the Court's order denying reconsideration of Perez's motion seeking appointment of an examiner (the "***Examiner Appeal***"). Case No. 12-cv-00857 (RA). After a six-month delay in which he made no attempt to pursue the appeal, followed by a series of extensions, Perez filed an opening brief on February 14, 2013 [Examiner Appeal Docket No. 16]. On April 24, 2013, the District Court dismissed the appeal as equitably moot [Examiner Appeal Docket No. 33 (the "***Examiner Appeal Op***."), attached as Exhibit A to the Brandon Decl.].[7] Specifically, the District Court found that the TSC Debtors had provided evidence that was "more than sufficient to support a finding that the Plan has been substantially consummated." Examiner Appeal Op. at 8. Because the relief Perez was seeking would cause the consummated Plan to be unwound, which would be difficult, costly, and

[6] In both appeals, Perez is now represented by counsel.

[7] On May 8, 2013, Perez moved for reconsideration of the District Court's decision. [Examiner Appeal Docket No. 35]. The TSC Debtors opposed the motion via a letter filed on June 10, 2013. [Examiner Appeal Docket No. 40].

inequitable, and would not benefit the TSC Debtors' equity holders, the District Court found that the appeal was moot. *Id.*

Second, on January 25, 2013, Perez appealed the Confirmation Order (the same order he seeks to revoke in this proceeding) (the "***Confirmation Appeal***"). Case No. 13-cv-00562 (GBD). Briefing is currently in progress in the Confirmation Appeal.

D. The Adversary Proceeding Complaint

On April 22, 2013, Perez filed the Complaint, seeking revocation of the Confirmation Order under Bankruptcy Code section 1144 [Adv. Proc. No. 13-01334 (SHL)**,** Docket No. 1]. In the Complaint, Perez alleges that the TSC Debtors violated a duty to disclose certain facts in the Plan and Disclosure Statement and seeks revocation of the Confirmation Order pursuant to Bankruptcy Code section 1144 on that basis.

ARGUMENT

I. THE ADVERSARY PROCEEDING COMPLAINT IS EQUITABLY MOOT

Perez filed the Complaint over six months after the Confirmation Order was entered on October 24, 2012. In the eight months since confirmation, the Plan has been substantially consummated, and thus, the TSC Debtors have the benefit of the strong presumption that the Complaint is moot. Perez cannot overcome this presumption because any relief the Court could order—even if possible to effectuate—would be wholly inequitable to all parties. Therefore, the Court should dismiss the Complaint on the basis of equitable mootness alone, and need not even reach the merits.

A. Actions to Revoke a Confirmation Order Are Presumed Equitably Moot and Must be Dismissed if the Plan Has Been Substantially Consummated

Because federal courts are empowered only to decide live cases and controversies, courts will dismiss a case as constitutionally moot when events occur during the pendency of the case

that would prevent the court from fashioning effective relief. *In re Texaco, Inc*., 92 B.R. 38, 45 (S.D.N.Y. 1988). In addition, bankruptcy courts have the power to dismiss a case as equitably moot when, even if effective relief could be fashioned, implementation of that relief would be inequitable. *In re Delta Airlines, Inc.*, 386 B.R. 518, 537 (Bankr. S.D.N.Y. 2008) (citing *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005). Courts routinely dismiss actions in bankruptcy matters in which the remedy sought would upset a consummated plan of reorganization. *See, e.g*., *In re Charter Commc'ns, Inc*., 691 F.3d 476, 481 (2d Cir 2012) (upholding dismissal of confirmation appeal as moot where plan of reorganization already implemented); *see also In re Calpine*, 390 B.R. 508, 518 (S.D.N.Y. 2008) (same). Although the doctrine of equitable mootness is often applied on appeal, it also applies to proceedings under section 1144. *In re Delta*, 386 B.R. at 537 (dismissing claims for revocation of a confirmation order under section 1144 as moot where plan had been substantially consummated); *In re Trico Marine Servs*., 337 B.R. 811, 815 (Bankr. S.D.NY. 2006) (same).

When a plan of reorganization is "substantially consummated," a presumption arises that an action to reverse confirmation of the plan is equitably moot. *Id*. at 538; *In re Chateaugay Corp.*, 10 F.3d 944, 952 (2d Cir.1993); *In re Texaco*, 92 B.R. at 46. The presumption of mootness is based on the fact that, once a plan is consummated, "it is inherently improbable . . . that a [] court will be able to fashion effective relief." *In re Texaco*, 92 B.R. at 46. This is because reversing a consummated plan involves costly, difficult unraveling of intricate transactions and can harm innocent parties that relied on the finality of the confirmation order. *Id*. Therefore, a party seeking to overturn a confirmation order where a plan has been substantially consummated can overcome the presumption of mootness only by demonstrating that five circumstances, established by the Second Circuit in *In re Chateaugay*, are present:

> (a) the court can still order some effective relief. . . (b) such relief will not affect the reemergence of the debtor as a revitalized corporate entity . . . (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court . . . (d) the parties who would be adversely affected by the modification have notice. . . and an opportunity to participate in the proceedings . . . and (e) the [party seeking to reverse confirmation] pursued with diligence all available remedies to obtain a stay of execution of the objectionable order. . . . "

In re Chateaugay, 10 F.3d at 952-953 (emphasis added); *see also In re Delta Airlines, Inc.*, 374 B.R. 516, 522 (S.D.N.Y. 2007) (dismissing appeal as moot).

B. The TSC Debtors' Plan Has Been Substantially Consummated and Perez Cannot Overcome the Presumption of Equitable Mootness.

Bankruptcy Code section 1101(2) provides that a plan of reorganization is "substantially consummated" where there has been: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." The Bankruptcy Code provides that a plan of reorganization cannot be modified once it is substantially consummated. 11 U.S.C. 1127(b).

As described above, and as found by the District Court in the Examiner Appeal, the Plan has been substantially consummated. Among other things: the TSC Debtor' property has been transferred to the reorganized entities; the process of distributing the New Common Stock is in progress; and the Board of Directors of Reorganized TSC has taken official action. Further, the TSC Debtors have made distributions to substantially all creditors holding allowed claims. Accordingly, the Court may presume that the request to revoke the confirmation order is equitably moot.

Perez cannot meet the *Chateaugay* factors to overcome the presumption of equitable mootness. First, there is no effective relief the Court can order, as required under the first prong of *Chateaugay*. Section 1144 only allows the Court to revoke the Plan if, in doing so, it can protect innocent parties who acquired rights in reliance on the confirmation order. *In re Delta*, 386 B.R. at 532.; *see also In re Trico*, 337 B.R. at 814 (explaining that "the Court cannot revoke the plan unless it can . . . restore the status quo existing before confirmation and protect those who relied in good faith on confirmation"). Revocation of the Confirmation Order would void releases on which innocent parties relied, require the TSC Debtors to claw back over $6 million in payments to creditors, and strip the rights of former preferred shareholders with the right to claim the New Common Stock. Thus, revocation cannot be accomplished under section 1144, and there is no effective relief the Court can order.

Even if the Court could provide any relief, doing so would necessarily result in an unraveling of all the transactions consummated since entry of that order. As the District Court found in the Examiner Appeal, such unwinding would be highly difficult and, to the extent possible, wholly inequitable. To nullify even a few of the transactions that occurred prior to and since consummation of the Plan would be costly to the TSC Debtors' estates and would give rise to complicated legal, financial and operational questions that neither the TSC Debtors nor the Bankruptcy Court is in a position to address, creating an unmanageable situation for the Bankruptcy Court. Moreover, revocation of the Confirmation Order would jeopardize the TSC Debtors' emergence from Chapter 11 as a revitalized corporate entity because it would leave the TSC Debtors without DIP financing, exit financing, or a new plan of reorganization. And, as the District Court found, reversing the confirmation order would not even benefit Perez because common shareholders were so far "out of the money" that any additional value resulting from

such reversal would be unlikely to lead to a distribution to common shareholders. The relief Perez seeks would undermine a consummated plan of reorganization, unravel intricate transactions, create an unmanageable situation for the Bankruptcy Court, and jeopardize the TSC Debtors' emergence from chapter 11. Therefore, Perez cannot meet the second or third prongs of *Chateaugay*, and cannot overcome the presumption that this case is equitably moot.[8] Therefore, the Court should dismiss the Complaint.

II. PEREZ IS COLLATERALLY ESTOPPED FROM MAKING ALLEGATIONS ALREADY RAISED BEFORE THIS COURT IN THESE PROCEEDINGS.

Collateral estoppel applies in bankruptcy matters and bars a party from relitigating an issue where: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998); *see also In re MF Global Holdings LD.*, No. 11-15059, Docket No. 907, at 7 (Bankr. S.D.N.Y. Nov. 14, 2012) (finding *pro se* plaintiff collaterally estopped from raising issues already decided in prior bankruptcy proceedings).[9]

Collateral estoppel applies where a party-in-interest attempts to base a section 1144 action on allegations already raised and considered at the confirmation hearing. *In re Hertz*, 38 B.R. 215, 219 n.5 (Bankr. S.D.N.Y. 1984) (declining to entertain an objection to a confirmed plan that had already been heard during the confirmation hearing); *see also In re Genesis Health*

[8] It is the TSC Debtors' position that Perez also failed to meet the fourth *Chateaugay* factor because he has not served the Complaint on all parties who would be adversely affected by revocation of the Confirmation Order. Moreover, as the District Court found, Perez did not meet the fifth *Chateaugay* factor because he did not seek to stay the Confirmation Order.

[9] In a separate opinion in the MF Global proceedings, the Bankruptcy Court imposed sanctions on the same *pro se* claimant for filing repeated frivolous pleadings after her claim was expunged. *In re MF Global Holdings LD.*, No. 11-15059, Docket No. 1457 (Bankr. S.D.N.Y. May 29, 2013).

Ventures, Inc., 355 B.R. 438, 449-50 (Bankr. D. Del. 2006) (finding plaintiffs' section 1144 allegations to be "so close to the factual underpinnings . . . litigated in the confirmation hearing so as to be barred by claim preclusion").

Here, Perez is collaterally estopped from attempting to again assert allegations that he has raised, repeatedly, at various stages in these bankruptcy proceedings. Perez raised the allegations in the Complaint, not only at the Confirmation Hearing, but in his Plan Objections, his requests for an examiner, and his objections to the Disclosure Statement. This court necessarily resolved his claims in prior proceedings when it denied appointment of an examiner, approved the Disclosure Statement and confirmed the Plan. Perez is collaterally estopped from raising them now, and therefore, the Complaint must be dismissed.

III. PEREZ FAILS TO PLEAD THAT THE CONFIRMATION ORDER WAS PROCURED BY FRAUD

Even if the Court finds that the Complaint is not moot and Perez is not collaterally estopped from re-litigating his claims, the Complaint should be dismissed on the merits under Federal Rule of Civil Procedure 12(b)(6)[10] because it does not sufficiently allege that the Confirmation Order was procured by fraud.

A. Standard of Review

Courts will grant a motion to dismiss under Rule 12(b)(6) if, even accepting as true all material facts alleged in the complaint and drawing all reasonable inferences in favor of the plaintiff, no set of facts can be established to entitle the plaintiff to relief. *In re XO Commc'ns, Inc.*, 330 B.R. 394, 418 (Bankr. S.D.N.Y. 2005). To survive a motion to dismiss, claims must be supported by specific and detailed factual allegations. *Id*. The Court is not bound to accept as true a legal conclusion couched as a factual allegation or to accept every statement in a complaint

[10] Federal Rule of Civil Procedure 12(b)(6) is applicable in adversary proceedings, pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

as true. *In re Delta*, 386 B.R. at 531. The allegations must be "well pleaded, and thus the court need not accept sweeping and unwarranted averments of fact" or "credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation." *Id*.

B. A Complaint Seeking Revocation Under Bankruptcy Code Section 1144 Must Plead That the Confirmation Order Was Procured Through Actual Fraud.

Bankruptcy Code section 1144 provides: "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and (2) revoke the discharge of the debtor."

Revocation under Bankruptcy Code section 1144 requires a showing that the confirmation order was procured through fraud. *In re Calpine*, 389 B.R. 323, 324 (S.D.N.Y. 2008). To survive a motion to dismiss, a claim under section 1144 must plead facts sufficient to establish that the confirmation order was procured through fraud on the court. *In re Motors Liquid. Co.*, 462 B.R. 494, 505 (Bankr. S.D.N.Y. 2012); *In re Circle K Corp.*, 181 B.R. 457, 463 (Bankr. D. Ariz. 1995) ("fraud upon the court is at the heart of section 1144").[11] Without a specific showing of actual fraud, "the bankruptcy court has no authority under section 1144 to revoke its confirmation order." *In re Nyack Autopartstores Holding Co*., 98 B.R. 659, 661–62 (Bankr. S.D.N.Y. 1989) (dismissing claim for revocation in the absence of a showing of actual fraudulent); *In re Motors*, 462 B.R. at 505 (same).

[11] "Fraud upon the court" refers to fraud that attempts to "defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *In re Trico Marine Servs., Inc*., 360 B.R. 53, 57 (Bankr. S.D.N.Y. 2007) (dismissing claim for fraud on the court on basis of alleged witness testimony where there was no allegation that an officer of the court committed fraud).

The plan proponents' intent to defraud the court is a specific prerequisite for revoking a confirmation order pursuant to section 1144. *In re Nyack*, 98 B.R. at 662; *In re Motors*, 462 B.R. at 505. Moreover, claims for revocation must meet the heightened pleading standard for fraud under Federal Rule of Civil Procedure 9(b).[12] *See In re Motors*, 462 B.R. at 505. Conclusory allegations or knowledge or intent are not sufficient under Rule 9(b). *Id.* at 506. Rather, "to secure relief under section 1144 of the Code, a movant must point to specific acts of the debtor evidencing actual fraudulent intent." *Id*. The requisite "strong inference" of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. *Id*.

Courts will dismiss a section 1144 claim that does not include facts sufficient to allege that the debtors acted with specific fraudulent intent to procure the confirmation order. For example, in *In re Nyack*, the bankruptcy court found that the following allegations did *not* establish a claim for fraud: (1) the creditors' committee chairman failed to disclose that he made a personal loan to the debtors' operating officer and accepted a prepetition return of merchandise from the debtors; (2) the debtors disclosure statements were "grossly inaccurate and inconsistent"; (3) insiders exerted undue influence on other parties in interest to confirm the plan and, in doing so, "succeeded to assets of the debtors for less than fair value"; and (4) such insiders thus received a voidable preference. 98 B.R. at 662. None of these allegations established that the debtors acted with specific intent to defraud the court or suggested that the alleged fraud hampered the ability of the court or creditors that voted for the plan to make an informed judgment. *Id*. Thus, the claim under section 1144 was dismissed. Similarly, in *In re*

[12] Federal Rule of Civil Procedure 9(b) is applicable in adversary proceedings, pursuant to Federal Rule of Bankruptcy Procedure 7009.

Hertz, the plaintiff sought revocation on the basis that a single creditor's improper, late-filed claim provided the votes needed to confirm the plan. *In re Hertz*, 38 B.R. 215, 218–19 (Bankr. S.D.N.Y. 1984). Despite noting that the allegations of claim inflation were "of great concern," the court found that the allegations did not establish actual fraud by the debtors because there was no showing that the creditors' vote was improperly solicited or that the creditor's motive in filing its claim was anything other than economic self interest. *Id*. at 220. In the absence of a showing of actual fraud, the court dismissed the claim. *Id*.

Relief under Bankruptcy Code section 1144 "rests in the sound discretion of the court," and a court need not revoke a confirmation order, even if it finds that the order was procured by fraud. *In re Delta*, 386 B.R. at 532. (Indeed, as discussed above, section 1144 provides that a court *may not* do so, unless it can protect innocent parties who acquired rights in reliance on the confirmation order.).[13]

C. Perez Does Not Plead the Confirmation Order Was Procured By Fraud

In the Complaint, Perez makes myriad factual allegations regarding alleged "material omissions" perpetrated by the TSC Debtors. Most of the "facts" in the Complaint fall somewhere on the spectrum between misunderstanding and total fabrication. For instance, Perez alleges that the TSC Debtors were engaged in a "premeditated scheme of stealing" TSC's assets, Cplt. ¶ 39, and misrepresented the value of sales of their property, but provides nothing but broad speculation in support of these claims. As explained above, the Court is not required to give weight to these sweeping, unsubstantiated allegations, especially at this stage in the proceedings, when the TSC Debtors have publically filed numerous, detailed disclosures about their business

[13] Courts strictly construe the 180-day limitation on section 1144 actions and will dismiss an action brought outside of that window. *See, e.g.*, *In re Olsen*, 2008 WL 4298586, at *4 (S.D.N.Y. Sept. 19, 2008). While technically within the letter of the law, Perez has "certainly failed to comply with its spirit" by waiting until 181 days—the absolute last day allowed under section 1144—to file his Complaint. *In re Delta*, 386 B.R. at 533 (where plaintiff filed suit on 180th day, delay "cut against the Court's exercise of its discretion to revoke the Plan").

and finances, all of which have been scrutinized and accepted by the Court. Nor is the Court required to countenance conclusory statements of law couched as factual allegations, such as Perez's claim that the TSC Debtors failed to disclose that an affiliate was sold to an "insider," as well as his claim that the TSC Debtors had a duty to disclose that an individual associated with of an entity that once held preferred shares of TSC engaged in "insider trading." Cplt. ¶¶ 36, 37.

Further, even setting aside the dubious nature of the "facts" in the Complaint and treating these allegations as truth, Perez fails to plead that the confirmation order was procured by fraud. Perez provides nothing to support his claim that the TSC Debtors knowingly engaged in material omissions designed to induce the Court's reliance in approving the Confirmation Order, nor that they had any motive to commit fraud on the court. Nor does Perez allege facts constituting strong circumstantial evidence of conscious misbehavior or recklessness on the part of the TSC Debtors. Perez's allegations relate to transactions that took places prior to and during the bankruptcy; actions taken by the TSC Debtors' investors; and transactions that took place during the bankruptcy of TSC's affiliate, TerreStar Networks. None of these allegations are sufficient to establish that the TSC Debtors fraudulently procured the Confirmation Order—in fact, none of Perez's allegations has *anything* to do with the Plan or Confirmation Order at all. Because Perez makes no allegations whatsoever giving rise to a strong inference that TSC Debtors intended to defraud the Court—or that the TSC Debtors engaged in any sort of fraud—in procuring the Confirmation Order, Perez has failed to allege that the Confirmation Order was procured by fraud, and the Complaint should be dismissed.

In addition, Perez's allegation that "the Court and all parties in interest reasonably relied on the material misrepresentations and omissions of TSC when entering the Confirmation Order," Cplt. ¶ 38, is conclusory and is belied by Perez's own filings in these bankruptcy cases

and by the Court's statements at the Confirmation Hearing. As discussed above, at the Confirmation Hearing and in other proceedings before the Court, Perez raised the issues contained in the Complaint, including the transfer of the TSC Debtors' interest in SkyTerra and the sale, at a bankruptcy-approved auction, of TSN's assets. At the Confirmation Hearing, the Court specifically explained to Perez that the issues to be determined at Confirmation were "what assets are left in the corporation. . . how they should be divided, what they should be valued at, and who should get what." Oct. 10, 2012 Hr'g Tr., Docket No. 675 at 111–112. Further, the Court explained that, when deciding whether to enter the Confirmation Order, the Court would not consider or rely on allegations related to "historical facts about corporate governance and things that happened or didn't happen in 2009 and 2010" or events in the TSN bankruptcy. *Id*. at 111. Perez's conclusory allegations that the Court "relied on" omissions of facts contained in the Complaint cannot possibly overcome the Court's clear statements at the Confirmation Hearing that it had before it, but would not consider, the very issues Perez raises here.

CONCLUSION

For the foregoing reasons, the TSC Debtors respectfully request that the Court dismiss the Complaint with prejudice and grant any other and further relief as is just to the TSC Debtors.

New York, New York
Dated: July 1, 2013

/s/ Ira S. Dizengoff

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