UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARINA DEVELOPMENT, INC.	CASE NO. 01-67451 Chapter 11
Debtor	Jointly Administered

IN RE:

FRANKLIN INDUSTRIAL COMPLEX, INC.	CASE NO. 01-67459
Debtor	

IN RE:

CHRISTINE FALLS OF NEW YORK, INC.	CASE NO.01-67458
Debtor	

IN RE:

TRAFALGAR POWER, INC.	CASE NO. 01-67457
Debtor	

IN RE:

PINE RUN OF VIRGINIA, INC.	CASE NO. 01-67456
Debtor	

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is a motion filed on behalf of Marina Development, Inc. ("Marina"), Trafalgar Power, Inc. ("TPI" or "Trafalgar"), Christine Falls of New York, Inc. ("CFC"), Franklin Industrial Complex, Inc. ("Franklin") and Pine Run of Virginia, Inc. ("Pine Run") (collectively the "Debtors") on October 4. 2002, pursuant to § 502(a) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). The Debtors object to the proofs of claim filed on March 4, 2002, on behalf of Hydro Investors, Inc. ("HII"or "Hydro") against Marina, TPI, Franklin and CFC, respectively. In addition to objecting to the proofs of claim filed on behalf of HII, the Debtors also sought relief from the automatic stay to allow CFC and HII to proceed with an appeal pending before the New York State Supreme Court Appellate Division, Third Department ("State Court"). On November 18, 2002, HII filed its objection to the motion. HII also asserted a cross-motion requesting relief from the automatic stay to allow it to proceed with an action in the U.S. District Court for the Northern District of New York ("District Court") pursuant to Rule 60(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."). The Debtors' motion was originally scheduled to be heard on October 22, 2002, and was adjourned several times.

On April 25, 2003, the Court signed an order granting relief from the automatic stay to

allow CFC and HII to proceed with the appeal pending in State Court.[1] The Court's Order of April 25, 2003, also granted HII's cross-motion, allowing it to seek relief from a prior judgment of the District Court pursuant to Fed.R.Civ.P. 60(b).[2] In addition, the Court adjourned the balance of the Debtors' motion to August 26, 2003. At the hearing held at the Court's regular motion term in Utica, New York, on August 26, 2003, the Court further adjourned the motion for control purposes to December 23, 2003. Subsequent adjournments occurred during 2004 until the parties appeared before the Court on January 27, 2005 and on February 25, 2005. On March 31, 2005, the Court heard oral argument from the parties, and the matter was taken under submission.

FACTUAL BACKGROUND

The Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of North Carolina, on August 27, 2001. The cases were transferred to this Court on or about December 26, 2001. On March 4, 2002, HII filed

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[1] On April 15, 2004, the New York Supreme Court, Appellate Division, Third Department, affirmed the lower court's denial of defendants TPI's and CFC's motion for summary judgment dismissing plaintiff HII's complaint, as well as its denial of HII's motion for an accounting and imposition of a constructive trust as to the Christine Falls project located in Hamilton County, New York. *See Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 6 A.D.3d 882 (N.Y. App. Div. 2004). In affirming the lower court, the appellate court found that "the existence of the alleged joint venture, and resulting fiduciary relationship, has not yet been established and, thus, the relief sought by plaintiff is premature." *Id.* at 886.

[2] On June 21, 2004, U.S. District Judge David Hurd, denied HII's Fed.R.Civ.P. 60(b) motion, which sought vacatur of the decision of the District Court of September 3, 1999, or a new trial, on the basis that it had not established by clear and convincing evidence that a fraud upon the court had occurred.

proofs of claims against some of the Debtors. *See* Exhibit A of Debtors' motion. Specifically, HII asserted a claim of $5 million against Marina for misappropriation, which allegedly occurred on January 1, 1988 ("First Claim"). HII also asserted a claim of $3 million against Franklin for misappropriation, which occurred "circa" January 1, 1988/1995 ("Second Claim"). A third proof of claim for $7.3 million was asserted against TPI based on a "non-subordinated joint venture" and allegedly secured by real estate ("Third Claim"). HII indicated that the debt was incurred on January 1, 1989. HII's fourth proof of claim is asserted against CFC in the amount of $3.2 million based on a "non-subordinated joint venture" on January 1, 1989, and also allegedly secured by real estate ("Fourth Claim").

The Court will assume familiarity with the facts set forth in a prior decision of the District Court in *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 63 F.Supp. 2d 225 (N.D.N.Y. Sept. 3, 1999) (D.J. Hurd) ("District Court Decision"), *aff'd in part, vacated in part, remanded in part* 227 F.3d 8 (2d Cir. Sept. 15, 2000) ("Second Circuit Court Decision"). For purposes of addressing the Debtors' motion, the Court notes the following factual determinations in those decisions:

On August 1, 1985, Arthur Steckler ("Steckler"), on behalf of TPI as "Developer," entered into an agreement ("Agreement") with Neal Dunlevy ("Dunlevy"), on behalf of HII as "Manager," whereby TPI was to provide capital and HII was to identify sites to be developed as hydroelectric plants in New York State. The District Court determined that Dunlevy, as principal of HII, had entered into a "partnership/joint venture agreement with TPI regarding the development and future management of the projects." District Court Decision at 227. The sites for possible development were located in Herkimer, Cranberry Lake, Kayuta Lake, Adams,

Forestport and Ogdensburg,[3] all located within New York State. "The specific sites were not identified in the agreement. The agreement did contain attached schedules that conditioned HII's participation in each project on a number of factors, including construction within the budget and meeting the expected energy output." Second Circuit Court Decision at 12. HII asserts that there is no dispute that the Agreement was never terminated by either party. *See* Garramone Affirmation at ¶ 8.

The Agreement expressly provides that

> Developer and Manager wish to set forth the terms and conditions pursuant to which they will agree to form joint ventures to undertake the development and construction, operation and maintenance of hydroelectric generating projects.

Agreement at ¶ C.[4] Included in the Agreement under the heading, "Ownership Plans," is the

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[3] In its Amended Complaint in the District Court action, dated June 24, 1991, HII alleged nine causes of action. The first cause of action sought specific performance with respect to the Cranberry Lake, Herkimer and Ogdensburg sites under the terms of the Agreement, asking that joint ventures be formed, that HII be provided ownership interests in those projects and also be provided with cash distributions. The second cause of action alleged breach of contract based on the defendants' alleged failure to form joint ventures, to provide ownership interests, to provide cash distributions, etc. The third cause of action alleged that TPI had been unjustly enriched and accordingly, HII requested the imposition of a constructive trust. The fourth cause of action sought specific performance with respect to the Adams, Kayuta Lake and Forestport sites, including the payment of the purchase prices for each. The fifth cause of action alleged breach of contract as to the latter three sites. The sixth cause of action requested the imposition of a constructive trust on the basis that defendants had failed or refused to provide an ownership interest, a share of the profits and the purchase price in violation of their fiduciary duty. The seventh cause of action sought an accounting. The eighth and ninth causes of action alleged fraud and misrepresentation with respect to the formation of joint ventures and the transfer of legal ownership in the projects.

[4] The Court of Appeals for the Second Circuit pointed out that the Agreement contained "attached schedules that conditioned HII's participation in each project on a number of factors, including construction within the budget and meeting the expected energy output." Second Circuit Court Decision at 12.

proviso that "[t]he profits and losses from the operation of each Project, as between Developer and Manager, shall be shared according to the Ownership Plans described herein. The ownership share of each project will be specified in the Form of Schedule for each Project." *Id.* at VII. Funds from the sale of equity interests, institutional financing or from the operation of each Project[5], after the payment of all operating expenses, were to be distributed as follows:

> 1. First, to the payment to all third party investors of amounts to be distributed to them in accordance with the organizational documents;
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> 2. Second, to Developer and Manager to the extent of any Additional Funds contributed by them to the capital of such Venture [in excess of the Project Budget].
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> After the payment in full of the amounts set forth in Subparagraphs A.1 and A.2, any additional cash received by the Venture shall, after the payment of all operating expenses be distributed to Manager and Developer in accordance with the percentages set forth in the Form of Schedule.

Id. at VIII. A. and B.

The plants were constructed in 1987 and proved to be "financial disasters." Second Circuit Court Decision at 12. As noted by the Second Circuit,

> TPI has not received any profits from the plants. No equity has been returned to the investors and no cash distributions have taken place. . . . The primary problems associated with the development of these plants are construction cost overruns and inadequate energy production."* * * As a result of claimed deficiencies arising out of the financial difficulties associated with these projects, HII asserted claims in 1989 for breach of contract against TPI, seeking specific performance, an accounting, and the imposition of a constructive trust. TPI in turn sued Stetson-Harza, Dunlevy and HII alleging [*inter alia*] breach of contract [and] professional malpractice.

Id. at 12-13.

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[5] "Project" was defined in the Agreement as "a hydroelectric generating facility with respect to which a preliminary permit application has been filed with FERC." Agreement at ¶ XII.

The District Court entered judgment as a matter of law dismissing TPI's counterclaim of breach of contract and professional malpractice with regard to the Adams and Kayuta Lake sites, as well as TPI's counterclaim of breach of contract regarding the Forestport and Ogdensburg sites. *Id.* at 13. The claims asserted by HII proceeded to a jury verdict. In his charge to the jury, Judge Hurd stated that "[i]t is not disputed that Trafalgar never transferred any ownership interest in any of the projects to Hydro Investors." In addition, Judge Hurd instructed the jury that "if you find by a preponderance of the evidence that performance by Trafalgar was not due under the terms of the agreement as you found them to be, then your verdict will be for defendant Trafalgar." The jury found that TPI and Steckler had a joint venture agreement with the plaintiff, HII, with respect to Kayuta Lake, Adams and Forestport. However, the jury found no liability on the part of TPI based on breach of contract with regard to those plants or the other three hydroelectric plants at Ogdensburg, Herkimer and Cranberry Lake. Accordingly, judgment was entered in favor of TPI, Marina and Steckler, "dismissing the complaint with prejudice on the merits in its entirety pursuant to the jury's verdict and the Order of the Hon. David N. Hurd in open Court on April 14, 1999 at Utica, New York." Exhibit C of Debtors' Motion.

On appeal, HII argued, *inter alia*, that the District Court had erred in dismissing its claims for an accounting and the imposition of a constructive trust. The Second Circuit concluded that "[i]mplicit in the district court's action was its recognition that once the claims for breach of the joint venture contract failed before the jury, the accounting and constructive trust claims were pointless. . . . After the jury's verdict it was clear to all concerned that the accounting and constructive trust claims could not lie." Second Circuit Court Decision at 19.

With respect to TPI's counterclaim for professional malpractice, the jury found Stetson-

Harza and Dunlevy jointly and severally liable for injury to TPI stemming from their engineering malpractice in connection with the licensing and/or development of the Ogdensburg and Forestport plants. The Second Circuit concluded that the legal cause of TPI's injury "was Dunlevy's failure to adequately convey the realities of Ogdensburg and Forestport with a level of professional care that would have allowed TPI to make its business decisions with respect to those sites based on reasonably reliable technical information." *Id.* at 15. The Second Circuit determined that "[a]lthough the parties may have entered into contracts governing some aspects of their relationship, the damages awarded below were for a harm distinct from those contracts, a harm arising out of the failure of Dunlevy and Stetson-Harza, Dunlevy's employer at the time, to provide proper estimates of energy output, adequately gauge the impact of government regulations, and more generally provide appropriate services." *Id.* at 17.

In the interim, on February 4, 1999,[6] prior to the filing of the Debtors' bankruptcy petitions, HII filed a complaint with the Federal Regulatory Energy Commission ("FERC") against TPI, CFC, Franklin *et al.* *See Hydro Investors, Inc. v. Trafalgar Power Inc.,* 98 FERC ¶ 61,272, 2002 WL 389127 (F.E.R.C. March 13, 2002), *reh'g denied*, 99 FERC ¶ 61384, 2002 WL 1435874 (F.E.R.C. June 28, 2002), *petition for review denied sub nom. Hydro Investors, Inc. v. F.E.R.C.*, 351 F.3d 1192 (D.C. Cir. 2003) ("D.C. Circuit Court Decision"). HII alleged that TPI had violated the Federal Power Act by never formally transferring its licenses to Algonquin Power Corporation and related entities("Algonquin") despite the fact that Algonquin had taken control of the projects sometime between 1995 and 1996. *See* D.C. Circuit Court Decision at

[6] HII originally filed its complaint on December 28, 1998 but then refiled it on February 4, 1999.

1194. The issue before the court in November 2003 was "whether Hydro has shown that its interests in these purported joint venture agreements give it Article III standing to bring this petition for review. *Id.* at 1195. Ultimately, the D.C. Circuit Court concluded that Hydro lacked standing to bring the action before the FERC and dismissed the petition. *Id.* at 1198.

The D.C. Circuit found that HII's joint venture interest "appears to be worthless." *Id.* at 1196. The court reached this conclusion based upon the finding that TPI had not recovered its capital investment in the project and that the projects failed to generate the expected energy output. *Id.* Specifically, it found that "[n]either of these conditions has occurred or is remotely likely ever to occur," noting that in the trial in the District Court it was determined that "the projects never did meet, nor could have met, the required energy projections. Again, the projects were financial disasters. Trafalgar defaulted on the debt it used to finance the project, and thus cannot have recovered its investment." *Id.* The court further made a finding that "[t]he record . . . suggests that Trafalgar did not recover its investment because Hydro's owner committed engineering malpractice and vastly overestimated energy output of the projects." *Id.* The court then concluded that "even if Hydro were correct that Trafalgar has recovered its capital investment, Trafalgar still would not have met the energy output requirement. That independent condition precedent would prevent Hydro from receiving profit distributions regardless." *Id.*

ARGUMENTS

With respect to its four proofs of claim, HII asserts that the Debtors have not met their burden to overcome the prima facie validity of its claims because their objections fail to meet the

standard of an answer. In the Affirmation of Devin B. Garramone, Esq., dated March 4, 2002, and filed in support of HII's proof of claims, it is asserted that HII is a secured creditor by virtue of its joint venture interests in the hydroelectric projects. *See* ¶ 5 of Garramone Affirmation, attached to Debtors' Motion at Exhibit D. HII contends that its claims arise from ownership interests in the hydroelectric projects. In this regard, HII argues that ownership of the hydroelectric projects rests with an entity known as "Trafalgar Power Hydro Investments Limited Partnership (the "Partnership")," allegedly formed by TPI and HII, as referenced in the Form of Schedule attached to the Agreement. With respect to its First and Second Claims, HII alleges that subsequent to the trial before Judge Hurd, it obtained proof that there had been a misappropriation of funds from TPI and CFC to Marina and its subsidiaries, as well as Franklin, as a result of a pattern of fraudulent activity by Steckler. It is HII's position that those monies should be returned by Marina and Franklin for the benefit of the joint venture projects with TPI and CFC. *See* ¶ 31 of Garramone Affirmation. According to HII, collateral estoppel and res judicata are inapplicable to these allegations as it did not have a full and fair opportunity to litigate the issues concerning the alleged misappropriation. With respect to its Third and Fourth Claims, HII asserts that the hydroelectric power projects are not property of the estate and that TPI holds the property in trust for HII. Under this theory, HII contends that it has a right to an accounting and a right to recover its share of any profits from the Partnership.

Contrary to its assertion in the proofs of claim that HII is a secured creditor, at the hearing on March 31, 2005, counsel for HII took the position that HII is not a creditor of the Debtors; rather, according to HII, it is a co-owner in the Partnership and has a cause of action against the

Partnership for an accounting and the recovery of its share of profits.[7] HII takes the position that the District Court was simply concerned with the question of whether TPI had violated the Agreement. According to HII, "the verdict of the jury and ruling in that case simply means that the time had not yet come for HII to receive its interests . . . ." *See* Garramone Affirmation at ¶ 10.

The Debtors assert that HII's participation in each project's profits was dependent on a number of factors, including meeting a certain level of energy output. According to the Debtors, HII's interest in the projects never matured. The Debtors also take issue with the existence of any entity known as "Trafalgar Power Hydro Investments Limited Partnership," asserting that its existence is unsubstantiated. It is the Debtors' position that the argument of the existence of the Partnership is merely another attempt on HII's part to avoid the preclusive effect of the District Court Decision, as well as the Second Circuit Court Decision.

In addition, the Debtors question HII's standing to raise questions of misappropriation allegedly suffered by TPI. The Debtors also assert that the because the proofs of claim allege misappropriations occurring between 1988 and 1995 that HII is barred by the statute of limitations. Furthermore, the Debtors contend that the Agreement did not provide for an ownership interest in each of the hydroelectric projects; rather, it provided HII with the right to

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[7] The Court notes that if, as HII alleges, TPI is a co-owner in the Partnership, any effort on the part of HII to recover from the Partnership arguably would be subject to the automatic stay to the extent that it might impact negatively on any rights or property belonging to TPI. In fact, on June 21, 2005, the Debtors filed a motion for an Order finding HII in violation of the automatic stay as a result of its commencement of a lawsuit in New York State Supreme Court, Oneida County, against various alleged joint ventures, seeking an accounting, as well as the imposition of a constructive trust. The motion was heard on August 2, 2005, and the Court found that the lawsuit was in violation of the automatic stay from which relief would have to be sought should HII wish to continue the action or in the alternative face the possibility of sanctions..

"participate" in any positive cash flow after the debt had been retired and TPI/Steckler's equity investment had been returned. It is the Debtors' position that in determining that Dunlevy was liable for malpractice, the jury in the District Court action had also made a finding that HII/Dunlevy had breached the joint venture agreements and was not entitled to receive a distribution of any profits that might be generated insofar as the Ogdensburg and Forestport projects were concerned.

DISCUSSION

A proof of claim that alleges sufficient facts to support liability of the debtor to the claimant is prima facie evidence of validity and amount of the claim and is deemed allowed in the absence of any objection. *In re Rockefeller Center Properties,* 241 B.R. 804, 817 (Bankr. S.D.N.Y. 1999), *aff'd* 266 B.R. 52 (S.D.N.Y. 2001), *aff'd* 46 Fed. Appx. 40 (2d Cir. 2002). To overcome the prima facie validity of the claim, "the objecting party must demonstrate by evidence, a defense to one or more elements of the cause of action asserted in the claim, which defense, if uncontravened [sic], would be sufficient to defeat the legal basis for the claim asserted." *In re Gates*, 214 B.R. 467, 472 (Bankr. D.Md. 1997); *see also In re Admetric Biochem., Inc.*, 284 B.R. 1,7 (Bankr. D.Mass. 2002) (indicating that the objectant to a claim has the burden of proving any affirmative defenses to the claim, "such as usury or the statute of limitations").

HII's First and Second Claims are based on allegations of misappropriation by Marina and Franklin in misdirecting the cash flow derived from the hydroelectric projects to various

entities controlled by Steckler. HII alleges misappropriation by Marina in the amount of $5 million and by Franklin in the amount of $3 million from the hydroelectric projects' operating revenues. According to the proofs of claim, the misappropriation occurred in January 1988 and January 1988/1995, respectively. The Debtors take the position that both the First and Second Claims, filed on March 4, 2002, are barred by the statute of limitations.

Misappropriation is defined as the application of another's property or money dishonestly to one's own use. *See* BLACK'S LAW DICTIONARY 1019 (8th ed. 2004). Conversion is defined as the wrongful disposition of another's property as if it were one's own. *Id.* at 356. Under New York law, a cause of action based on misappropriation or conversion is governed by a three-year statute of limitations. *See In re Fischer*, 308 B.R. 631, 651 (Bankr. E.D.N.Y. 2004); *Demas v. Levitsky*, 291 A.D.2d 653, 658, 738 N.Y.S.2d 402, 408 (N.Y. App. Div. 2002). The statute of limitations begins to run "'when the conversion occurs and not when the conversion is discovered or when plaintiff exercises diligence to discover it.'" *Fischer*, 308 B.R. at 651, quoting *Calcutti v. SBU, Inc.*, 224 F.Supp.2d 691, 702 (S.D.N.Y. 2002). Thus, HII's claim for misappropriation accrued no later than 1991 in the case of Marina and 1998 in the case of Franklin based on the dates set forth in its proofs of claim. However, HII alleges that the statute of limitations was equitably tolled based on a theory of fraudulent concealment.

There does exist a "discovery" exception to the running of the statute of limitations in the case of fraud. *See Ely-Cruikshank Co., Inc. v. Bank of Montreal,* 81 N.Y.2d 399, 403 (N.Y. 1993). However, as pointed out by the Debtors, HII's First and Second Claims were based not on fraud but on misappropriation. However, Garramone's Affirmation, filed on March 4, 2002, in conjunction with the proofs of claim filed on that date, contains allegations to the effect that

in September 2000 HII obtained financial statements previously undisclosed by TPI's counsel that reflected various transactions among the Debtors and other entities controlled by Steckler.

Indeed, extensive discovery occurred in the District Court action, which culminated in a decision on September 3, 1999. According to HII, it did not learn that funds of TPI and CFC had been commingled with funds belonging to Marina and its affiliates, as well as other related entities controlled by Steckler, until September 2000. In connection with its motion before the District Court pursuant to Fed.R.Civ.P. 60(b), HII made similar arguments in support of its allegations of a fraud upon the court. Judge Hurd denied HII's motion based on its failure to provide sufficient proof to the District Court to establish fraud upon the court pursuant to Fed.R.Civ.P. 60(b).

Upon review of Garramone's Affirmation, neither can this Court find any factual basis for concluding that the financial statements were fraudulently withheld from HII such that the statute of limitations should be tolled until September 2000. Other than stating that the financial statements were not disclosed prior to September 2000, HII has failed to allege any fraud on the part of the Debtors that resulted in HII's inability to discover the alleged misappropriations warranting a tolling of the statute of limitations. While HII maintains that this is a factual question that it has not had a full and fair opportunity to litigate before its claims against Marina and Franklin can be disallowed, the Court must disagree. Viewing the First and Second Claims, along with Garramone's Affirmation, as if they constituted a complaint filed in an adversary proceeding, and taking all allegations as true, the Court finds no specific assertions that the nondisclosure of the financial statements prior to September 2000 was in any way fraudulent. HII simply indicates that they were "undisclosed" up until that time. Accordingly, the Court

concludes that it must disallow HII's First and Second Claims based on the statute of limitations, as well as its recent admission that it is not a creditor of any of the Debtors.

HII's Third Claim for $7.3 million is asserted against TPI based on a "non-subordinated joint venture." The Code defines a "claim" as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). "Debt" is defined as "liability on a claim." 11 U.S.C. § 101(12).

In this case, HII asserts that it has a right to payment under the terms of the Agreement and, in this regard, requests an accounting as to any alleged profits generated by the hydroelectric projects found by the District Court to constitute joint ventures formed by TPI and HII.[8] At the hearing on March 31, 2005, HII's counsel acknowledged that it was not TPI that was liable for its claim. Rather, it asserted that its right to seek an accounting and recovery of its share of profits was actually against the Partnership as the alleged true owner of the hydroelectric projects. Based on these assertions alone, the Court must disallow its Third Claim against TPI.

Even if the Court were to acknowledge the possibility of liability on the part of TPI, the District Court, the Second Circuit Court and the D.C. Circuit Court all concluded that the conditions precedent, including meeting the expected energy output at the six project locations,

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[8] Under New York law, a "'[a] joint-venture agreement is defined as a 'special combination of two or more persons where in some specific venture a profit is jointly sought without actual partnership or corporate designation.' It is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge." *Forman v. Lumm*, 214 A.D. 579, 583 (N.Y. App. Div. 1925).

had not been met which would have entitled HII to share in any net profits.[9] Indeed, as noted above, the D.C. Circuit Court found that HII's joint venture interest appeared to be "worthless." *See* D.C. Circuit Court Decision at 1196. The D.C. Circuit Court pointed out that the District Court had found that the six projects had not generated sufficient profits to allow TPI to recover its capital investment in them and that "the projects never did meet, nor could have met, the required energy projections." *Id.* The D.C. Circuit Court determined that this latter "independent condition precedent would prevent Hydro from receiving profit distributions . . . ." *Id.* These findings lead this Court to conclude that Hydro has no right to payment from TPI based on the Agreement and that HII's Third Claim against TPI in the amount of $7.3 million must be disallowed.

With respect to the Debtors' objection to HII's Fourth Claim in which it asserts a secured claim of $3.2 million against CFC, also based on a joint venture agreement, Debtors' counsel indicated at the hearing on March 31, 2005, that it was willing to delay any determination by this Court until the parties had an opportunity to go back to State Court where the action is awaiting trial. The Court concurs that this represents the most appropriate course at this time.

Based on the foregoing, it is hereby

ORDERED that the Debtors' motion seeking disallowance of HII's First, Second and

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[9] At the hearing on August 2, 2005, in connection with the Debtors' recent motion for sanctions against HII for violation of the automatic stay, HII's counsel made the argument that the jury in the District Court Action had not been asked to consider whether the conditions precedent had been met. However, a review of Judge Hurd's charge to the jury includes instructions that "you must determine what the content of the representation [by Steckler] was, and if there were any conditions placed upon the transfer of ownership interest. * * * if you find that plaintiff Hydro Investors was already compensated for services it rendered, or that any transfer of ownership interest to plaintiff Hydro Investors were conditioned on events that did not occur, then your verdict will be for defendant Arthur Steckler."

Third Claims against Marina, Franklin and TPI, respectively, filed on March 4, 2002, is granted.

ORDERED that the Debtors' motion seeking disallowance of HII's Fourth Claim, asserted against CFC, is adjourned indefinitely, pending a determination of the action pending in State Court (*Hydro Investors, Inc. v. Christine Falls Corporation and Trafalgar Power, Inc.*, Index No. 3913).[10]

Dated at Utica, New York

this 16th day of August 2005

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[10] The Court's prior Order of April 25, 2003, granted relief from the automatic stay to allow CFC and HII to proceed with the appeal pending in State Court. Given the determination by the appellate court in April 2004 and in view of the Debtors' apparent willingness to go forward with that litigation, the Court believes it appropriate that the relief from the automatic stay be expanded to allow the trial of the matter in State Court involving CFC to go forward.