



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
December 15, 2017

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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| In re: |) | Case No. 17-12642-MKN |
| |) | Chapter 11 (Involuntary) |
| EB HOLDINGS II, INC., a Nevada corporation, |) | Date: July 20, 2017 |
| Alleged Debtor. |) | Time: 9:30 a.m. |
| |) | |

MEMORANDUM DECISION ON MOTION TO DISMISS INVOLUNTARY PETITION, OR, IN THE ALTERNATIVE, TO ABSTAIN, AND RESERVATION OF RIGHTS UNDER 11 U.S.C. § 303(i)¹

On July 20, 2017, the court heard the Motion to Dismiss Involuntary Petition, or, in the Alternative, to Abstain, and Reservation of Rights Under 11 U.S.C. § 303(i) (“Dismissal Motion”), brought by EB Holdings II, Inc.² The appearances of counsel were noted on the

¹ In this Memorandum Decision, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

² EB Holdings II, Inc. (“EBH”) filed a Request for Judicial Notice along with the Dismissal Motion. (ECF No. 74). The opposition to the Dismissal Motion also is accompanied by a Request for Judicial Notice filed by the “PIK Lender Group.” (ECF No. 90). Both requests are granted. In this Memorandum Decision, the exhibits attached to those requests will be referenced, respectively, as “RJN-EBH Ex.” and “RJN-PIK Ex.” Where necessary, the reference to specific exhibits also will include specific page numbers.

1 record. After arguments were presented, the matter was taken under submission.³

2 BACKGROUND

3 In addition to the above-captioned involuntary bankruptcy proceeding, the Dismissal
4 Motion concerns two civil proceedings pending in the Eighth Judicial District Court for the State
5 of Nevada in Clark County, Nevada (“State Court”). The apparent overlap between the parties
6 to this involuntary bankruptcy proceeding and the two civil proceedings in State Court is
7 described below.

8 **1. The Involuntary Bankruptcy Proceeding.**

9 On May 18, 2017, an involuntary petition under Chapter 11 (ECF No. 1) was filed
10 against EBH.⁴ The involuntary petition (“Petition”)⁵ was filed on behalf of seven entities: (1)

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12 ³ The parties to these proceedings subsequently attempted to supplement the record, and
13 the Dismissal Motion was retaken under submission as of September 29, 2017. See note 13,
14 infra.

15 ⁴ EBH is incorporated in the State of Nevada. See Corporate Ownership Statement.
16 (ECF No. 27). EB Holdings, Inc., a Delaware corporation, was the borrower under a certain
17 “PIK Loan Agreement” dated March 23, 2007. (RJN-PIK Ex. “A,” 005-122). The last 46 pages
18 of the PIK Loan Agreement consists of an “Annex” setting forth various additional terms
19 governing the agreement (“PIK Loan Annex”). (RJN-PIK Ex. “A,” 077-122). According to the
20 PIK Loan Agreement, EB Holdings, Inc. borrowed €600,000.00 from Credit Suisse International
21 and Citibank N.A., New York Branch, with Credit Suisse, London Branch (“Credit Suisse”)
22 named as the administrative agent. EBH apparently is the successor in interest to EB Holdings,
23 Inc.

24 ⁵ Numerous documents were filed concurrently with the Petition. GLAS USA LLC
25 (“GLAS”) filed a “Statement of Petitioning Creditor GLAS USA LLC, in its Capacity as
26 Administrative Agent in Support of Involuntary Chapter 11 Petition under Section 303 of the
27 Bankruptcy Code” (“GLAS Statement”). (ECF No. 3). All of the Petitioning Creditors,
28 including GLAS, filed a disclosure required by FRBP 1010(b) and FRBP 7007.1 (ECF Nos. 4, 8,
11, 14, 17, 21, and 24) along with declarations of their representatives under FRBP 1003(a).
(ECF Nos. 5, 7, 10, 12, 15, 19, and 22). An additional “Statement of the PIK Lender Group in
Support of Their Involuntary Chapter 11 Petition Under Section 303 of the Bankruptcy Code”
 (“PIK Lender Group Statement”) was filed. (ECF No. 6). The PIK Lender Group apparently
 holds 77 percent of the principal issue face amount of the “PIK Loan.” The PIK Lender Group is
 an unofficial collective that consists of the following six entities: GoldenTree Asset Management
 LP, Alcentra Limited, Fortress Investment Group/Mount Kellet Capital Management, HIG
 Capital International Advisors LLP/Bayside Capital, Sound Point Capital Management, LP, and
 Varde Partners Europe Limited. The six entities apparently are, or are affiliates of, the managers
 and/or advisors of the funds and/or accounts that hold beneficial interests in the PIK Loan. See

1 GLAS in its capacity as Administrative Agent on behalf of each of the “PIK Lenders,”⁶ (2)
2 GoldenTree Master Fund, Ltd. (“GoldenTree”), (3) Kneiff Tower SARL, (4) Mount Kellett
3 Master Fund II-A, LP, (5) Grace Bay III Holdings S.a.r.l., (6) Arvo Investment Holdings S.a.r.l.,
4 and (7) Sound Point Montauk Fund, L.P. (collectively “Petitioning Creditors”). The Petition
5 follows Bankruptcy Official Form 205, and Part 3, at Paragraph 11, alleges that “The debtor is
6 generally not paying its debts as they become due, unless they are the subject of a bona fide
7 dispute as to liability or amount.”

8 On May 19, 2017, a summons was issued by this court requiring EBH to respond to the
9 Petition within 21 days after service. The summons also indicated that an initial status
10 conference had been scheduled for June 21, 2017. (ECF No. 55). On May 24, 2017, an order
11 was entered approving a stipulation to continue the initial status conference to June 27, 2017.
12 (ECF No. 67).

13 On June 9, 2017, EBH timely responded to the Petition by filing the instant Dismissal
14 Motion. (ECF No. 73). The request for judicial notice accompanying the motion includes thirty-
15 two separate exhibits. Those exhibits consist entirely of papers filed in connection with the
16 previously mentioned civil actions pending in State Court.⁷ A hearing on the Dismissal Motion
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18 PIK Lender Group Statement at 2 n.1. GLAS represents that there are 61 participants in the PIK
19 Loan. See GLAS Statement at 2:7-8.

20 ⁶ GLAS apparently is the successor in interest to Credit Suisse, as the result of an
assignment dated May 17, 2017. See GLAS Statement at 2:15-23.

21 ⁷ One of the two State Court actions is entitled GoldenTree Master Fund, Ltd., et al. v.
22 Howard Meyers, et al., denominated Case No. A-16-742507-B (“GoldenTree Action”). With the
23 exception of GLAS, all of the Petitioning Creditors appear to be named plaintiffs in the
24 GoldenTree Action. The participants in the PIK Loan who commenced the GoldenTree Action
25 are commonly referred to as the “GoldenTree Group,” but may also be referred to as the
26 “GoldenTree Plaintiffs” or “GoldenTree Parties” as the context requires in this Memorandum
27 Decision. Defendants named in the GoldenTree Action include EBH, its principal Howard
28 Meyers (“Meyers”), Eco-Bat Technologies Ltd. (“Eco-Bat”), Quexco Inc. (“Quexco”), RSR
Corporation (“RSR”), and others. The other State Court action is entitled EB Holdings II, Inc. v.
Goldentree Master Fund Ltd., et al., denominated Case No. A-16-745669-B (“EBH Action”).
With the exception of GLAS, all of the Petitioning Creditors appear to be named defendants in
the EBH Action. On December 15, 2016, the State Court entered an order coordinating the two
actions. (RJN-EBH Ex. 22). Where appropriate, the GoldenTree Action and EBH Action will

1 was noticed to be held on July 20, 2017. (ECF No. 75). The motion requests this bankruptcy
2 court to terminate this involuntary bankruptcy case by dismissing the Petition. In the alternative,
3 the motion requests that this bankruptcy court abstain from further proceedings on the Petition to
4 permit the completion of the State Court Litigation.

5 On June 22, 2017, an opposition to the Dismissal Motion was filed on behalf of GLAS
6 (“GLAS Opposition”). (ECF No. 81).⁸

7 On June 26, 2017, an opposition to the Dismissal Motion also was filed on behalf of the
8 “PIK Lender Group.” (ECF No. 89). The request for judicial notice accompanying that
9 opposition (“PIK Lender Opposition”) includes three exhibits.

10 On June 27, 2017, this court entered an order approving a stipulation granting relief from
11 the automatic stay to permit all of the parties in the coordinated civil actions to continue with the
12 State Court Litigation, including any appeals. (ECF No. 97).⁹

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14 be referred to jointly as the “State Court Litigation.”

15 ⁸ On the same date GLAS filed its opposition to the Dismissal Motion, it also filed its
16 Motion for Summary Judgment and Entry of an Order for Relief, etc. (“Summary Judgment
17 Motion”) (ECF No. 80), accompanied by the Declaration of Daniel R. Fisher. (ECF No. 82).
18 GLAS’ written argument in support of its Summary Judgment Motion is included in the GLAS
19 Opposition. GLAS concurrently filed an ex parte motion seeking to schedule an expedited
20 hearing so that the Summary Judgment Motion would be argued concurrently with the Dismissal
21 Motion. (ECF No. 85). The court delayed ruling on the ex parte request until the initial status
22 conference was held on June 27, 2017. At the status conference, EBH requested that its
Dismissal Motion be heard before the completion of briefing and presentation of arguments on
the GLAS Summary Judgment Motion. After oral arguments were presented, the ex parte
motion for an expedited hearing on the Summary Judgment Motion was denied. As a result,
EBH was able to present the instant Dismissal Motion on July 20, 2017, and a separate hearing
on the Summary Judgment Motion was held on August 17, 2017. (ECF No. 98).

23 ⁹ The relief from automatic stay stipulation (“RAS Stipulation”) approved by that order
24 had been filed on June 6, 2017. (ECF No. 71). The RAS Stipulation purports to be between
25 EBH on one hand, and certain Petitioning Creditors “[T]ogether with a group of alleged holders
26 of interests in a payment-in-kind loan . . .” That description includes a footnote stating that the
27 description “[I]s not intended as an admission by EB Holdings that any one of the Petitioning
28 Creditors is a lender to EB Holdings or that the GLAS USA LLC, in its capacity as successor
administrative agent (“Administrative Agent”), was properly appointed. EB Holdings reserves
its right to contest the standing of the Petitioning Creditors and/or the Administrative Agent.”
RAS Stipulation at 1 n.1. The RAS Stipulation was approved by counsel for EBH and counsel
for the PIK Lender Group. Attached to the RAS Stipulation as Exhibit “1” was a proposed form

1 On July 6, 2017, a “Limited Statement of LEG Q LLC in Support of Involuntary Chapter
2 11 Petition under Section 303 of the Bankruptcy Code” (“LEG Statement”) was filed by an
3 entity described as LEG Q LLC (“LEG”).¹⁰ (ECF No. 106).¹¹

4 On July 13, 2017, EBH filed a consolidated reply (“EBH Reply”).¹² (ECF No. 111).¹³

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6 of order approving the RAS Stipulation. The introductory paragraph of the proposed order
7 recites that the RAS Stipulation is filed by “EB Holdings II, Inc., the PIK Lender Group, and
8 GLAS-USA, by and through their counsel of record” The order approving that RAS
9 Stipulation entered on June 27, 2017, is identical to the proposed order except for the insertion of
10 the docket number for the Stipulation. Again, the introductory paragraph of the docketed order
11 indicates that the parties who stipulated to relief from stay, so that the State Court Litigation
could proceed, included EBH, the PIK Lender Group, and GLAS. The docket indicates that
electronic notice of the filing of both the RAS Stipulation and the order approving the stipulation
was sent to both lead and local counsel for GLAS.

12 ¹⁰ LEG does not identify itself as a creditor of EBH, but apparently is in favor of this
13 involuntary proceeding because of LEG’s relationship to Eco-Bat. As mentioned in note 7, Eco-
14 Bat was a named defendant in the GoldenTree Action. Eco-Bat and related entities apparently
15 are the world’s largest producer and recycler of lead (including from lead-acid car batteries).
16 EBH apparently owns approximately 87 percent of the equity interests in Eco-Bat while LEG
17 holds nearly 7 percent. See LEG Statement at 3:7-12. On or about January 18, 2017, Eco-Bat
18 was dismissed from the GoldenTree Action for lack of personal jurisdiction inasmuch as Eco-Bat
19 was formed under the laws of the United Kingdom and lacks sufficient contacts with the State of
Nevada. (RJN-EBH Ex. 10). LEG represents that it will be proceeding with a shareholder
derivative action in the English High Court addressing various improper and allegedly illegal
acts of Meyers, either directly or through his control of EBH. See LEG Statement at 3:21 to 4:13
& nn. 5 and 7.

20 ¹¹ On July 18, 2017, EBH filed a motion to strike the LEG Statement (ECF No. 132)
21 along with a notice scheduling the motion to be heard on August 17, 2017, i.e., concurrently with
22 the Summary Judgment Motion. (ECF No. 136). Additionally, EBH filed an ex parte motion
23 (ECF No. 133) to advance the hearing on its motion to strike to July 20, 2017, i.e., the same date
24 as the Dismissal Motion. On July 18, 2017, LEG filed an objection to the ex parte motion. (ECF
No. 135). At the July 20, 2017, hearing on the instant Dismissal Motion, the court orally denied
the ex parte motion. Accordingly, the motion to strike the LEG Statement was not vacated from
the August 17, 2017, calendar.

25 ¹² The EBH Reply is accompanied by a supplemental request for judicial notice that
26 includes two additional exhibits (“Supp. RJN-EBH”). (ECF No. 112). That request is granted.

27 ¹³ The Summary Judgment Motion was heard on August 17, 2017, and taken under
28 submission. On August 22, 2017, the PIK Lenders filed a “Notice of Clarification of the Record
in Connection with The Alleged Debtor’s Representation Regarding the Status of the State Court
Litigation at the August 17, 2017 Hearing on the Motion for Summary Judgment Filed by GLAS

1 **2. The State Court Proceedings.**

2 On August 26, 2016, the GoldenTree Action was commenced.¹⁴ On October 24, 2016,
3 the EBH Action was commenced. Although the GoldenTree Action was commenced before the
4 EBH Action, certain rulings by the State Court require that the actions be viewed in reverse
5 order.

6 **a. The EBH Action.**

7 The initial complaint in the EBH Action asserted claims against the various PIK Lender
8 defendants in the form of four separate causes of action: (1) a declaration that improper
9 acceleration of the PIK Loan results in cancellation,¹⁵ (2) promissory fraud with respect to

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11 USA LLC.” (“Clarification Notice”) (ECF No. 181). That document included a letter addressed
12 to this court from the PIK Lenders’ bankruptcy counsel conveying information obtained from
13 counsel for the GoldenTree Plaintiffs as to the status of the State Court Litigation. On August
14 30, 2017, GLAS filed a “Motion to Reopen the Record in Connection with GLAS USA LLC’s
15 Motion for Summary Judgment” (ECF No. 188), along with a request for an expedited hearing.
16 EBH filed opposition to both requests, as well as the request for an expedited hearing. (ECF
17 Nos. 187, 192, and 196). On September 12, 2017, the court entered an Order Regarding: (1)
18 Notice of Clarification of the Record in Connection with the Alleged Debtor’s Representation
19 Regarding the State [sic] of the State Court Litigation at the August 17, 2017 Hearing on the
20 Motion for Summary Judgment Filed by GLAS USA LLC, (2) Motion to Reopen the Record in
21 Connection with GLAS USA LLC’s Motion for Summary Judgment, and (3) Ex Parte
22 Application for Order Shortening Time to Hear Motion to Reopen the Record on GLASS[sic]
23 USA, LLC’s Motion for Summary Judgment. (ECF No. 193). For reasons set forth in that
24 order, the court struck the Clarification Notice without prejudice to the parties stipulating to
25 supplement the record as to the status of the State Court Litigation. The order also established a
26 deadline of September 29, 2017, for briefing to be completed on the motion of GLAS to reopen
27 the record on its Summary Judgment Motion. The order also provided that upon completion of
28 that briefing, both the Dismissal Motion and the Summary Judgment Motion are resubmitted for
decision.

¹⁴ The original complaint was filed on August 26, 2016. Before that complaint was
served, an amended complaint (“Amended Complaint”) was filed on September 9, 2016. (RJN-
EBH Ex. 1).

¹⁵ Whether improper acceleration of a promissory note results in a complete or partial
cancellation of the obligations under the note is clearly raised in the EBH Action. See EBH
Complaint at ¶¶ 51-52. As required by the PIK Loan Agreement, that issue will be decided
under New York law. At the hearing, GLAS submitted copies of several court opinions on the
acceleration issue, e.g., Fleet National Bank v. Liuzzo, 766 F.Supp. 61 (D. R.I. 1991), Shawmut
Bank, N.A. v. Lafazia, 1992 WL 139003 (D. R.I. 1992), and United States v. 1300 Lafayette
East, 455 F.Supp. 988 (E.D. Mich. 1978), but none of those decisions were decided based on

1 modification of the PIK Loan Agreement, (3) breach of the acceleration¹⁶ provision of the PIK
2 Loan Agreement, and (4) breach of the waiver¹⁷ and “no-action”¹⁸ clauses contained in the PIK
3 Loan Agreement. (RJN-EBH Ex. 15). There are thirteen defendants named in the complaint
4 (“EBH Complaint”).

5 On December 14, 2016, in response to the EBH Complaint, the GoldenTree Parties filed
6 a special motion to dismiss under NRS 41.660 (“GoldenTree Special Motion”). (Supp. RJN-
7 EBH Ex. 33). The special motion alleged that commencement of the EBH Action violated NRS
8 41.660.¹⁹ The GoldenTree Parties asserted that the commencement of the EBH Action violated

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10 New York law. Moreover, it does not appear that EBH is asserting the allegedly improper
11 acceleration as a basis for recoupment or setoff to reduce the amount of the GoldenTree Parties’
12 claims. Compare In re Focus Media, Inc., 378 F.3d 916, 924-27 (9th Cir. 2004)(alleged debtor’s
13 counterclaim for “post-analysis” invoice adjustments to reduce the amount of petitioners’
14 claims); In re Seko Investment, Inc., 156 F.3d 1005, 1008-1010 (9th Cir. 1998)(alleged debtor’s
15 counterclaim to offset amount due under separate title insurance policy against amount
16 separately due under promissory notes).

17 ¹⁶ Section 4.02 of the PIK Loan Annex provides in pertinent part that in certain
18 continuing events of default, the administrative agent or PIK Lenders holding at least 25 percent
19 of the principal amount outstanding “[M]ay declare the entire amount of the Loans then
20 outstanding to be due and payable immediately.” Certain other events of default render the
21 entire amount outstanding immediately due and payable without further action or notice.

22 ¹⁷ Section 4.04 of the PIK Loan Annex provides in pertinent part that PIK Lenders
23 holding a majority of the outstanding principal amount may waive a non-continuing default or
24 event of default, and may rescind an acceleration of the obligation.

25 ¹⁸ Section 4.06 of the PIK Loan Annex is entitled “Limitation on Suits.” That section
26 lists five separate requirements that apparently must be met before a PIK Lender may take action
27 to pursue a remedy to enforce the PIK Loan. Those requirements include the Lender giving
28 notice to the administrative agent of a continuing violation, a written request to the
administrative agent to pursue the remedy from PIK Lenders holding at least 25 percent of the
principal amount outstanding, and an offer from the requesting PIK Lenders to provide
satisfactory indemnity to the administrative agent.

¹⁹ With respect to the declaratory relief claim based on allegations of improper
acceleration of the PIK Loan, the GoldenTree Parties argued to the State Court, in pertinent part,
that “EB Holdings does not, and cannot, present any facts to show that it is solvent to supports its
claims that Defendants improperly accelerated the PIK Loan . . .The declaratory judgment and
breach of contract claims based on Defendants’ alleged violation of the Acceleration Clause are
defective for that reason alone.” GoldenTree Special Motion at 8:12-15. The GoldenTree
Parties further argued to the State Court that “EB Holdings does not, and cannot, point to any

1 the “anti-SLAPP”²⁰ protections of the aforementioned Nevada statute.²¹

2 On February 2, 2017, the State Court entered an order denying the GoldenTree Special
3 Motion (“EBH Special Order”). (RJN-EBH Ex. 18). In that order, the State Court found that
4 “Defendants did not meet their burden on the Special Motion to Dismiss.” EBH Special Order at
5 2:25-26. The order further stated that “In addition, the Court finds genuine issues of material
6 fact that preclude granting the Special Motion to Dismiss.” *Id.* at 2:26-27.²²

7 On February 7, 2017, the GoldenTree Parties filed a notice appealing the EBH Special
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11 contract provision that prohibits lenders from exercising their rights to accelerate the PIK Loan
12 or that grants EB Holdings a remedy if it believes the PIK Loan was improperly accelerated.
13 Without such a contract provision, EB Holdings has no remedy based on the alleged improper
14 acceleration of the PIK Loan, and certainly not a remedy that the entire PIK Loan must be
15 cancelled. *See Suzy Phillips Originals, Inc. v. Colville, Inc.*, 939 F.Supp. 1012, 1017 (E.D. N.Y.
16 1996) (“[U]nder New York law a party to a contract action is generally confined to the remedies
17 found in the contract.”) GoldenTree Special Motion at 8:21 to 9:1. It appears that the
18 GoldenTree Parties expressly argued to the State Court that EBH’s claim for a declaration
19 canceling the PIK Loan based on improper acceleration is invalid under New York law.

20 ²⁰ SLAPP is an acronym for “Strategic Litigation Against Public Participation.” The term
21 generally refers to lawsuits that are targeted against certain persons for the purpose of silencing
22 or discouraging the named defendants from voicing their concerns to the government or on
23 matters of public interest. This can occur, for example, when a party takes steps to raise a matter
24 of public interest only to be greeted by a lawsuit intended to quell or discourage the original
25 effort. The plaintiff who files the SLAPP lawsuit achieves its purpose by draining the financial
26 resources of the named defendants.

27 ²¹ To prevail on a special motion to dismiss under the anti-SLAPP statute, the defendant
28 is required to demonstrate by a preponderance of the evidence that its original claims were
“based upon a good faith communication in furtherance of the right to petition or the right to free
speech in direct connection with an issue of public concern.” NRS 41.660(3)(a). If that burden
is met, the trial court then must determine whether the plaintiff has established with prima facie
evidence a probability of prevailing on its claim. *See Delucchi v. Songer*, 396 P.3d 826, 831 &
n.4 (Nev. 2017), *citing* NRS 41.660(3)(b).

²² The State Court’s findings apparently mean that: (1) the GoldenTree Parties did not
establish that the claims they asserted in the GoldenTree Action were based on a good faith
communication or right to free speech encompassed by NRS 41.660(3)(a), and (2) there were
genuine factual disputes preventing a determination that EBH had established with prima facie
evidence a probability of prevailing on the claims asserted in the EBH Complaint.

1 Order to the Nevada Supreme Court. (RJN-EBH Ex. 30).²³

2 **b. The GoldenTree Action.**

3 The Amended Complaint in the GoldenTree Action was filed by thirteen plaintiffs and
4 asserted claims against six named defendants on the following legal theories: (1) fraudulent
5 inducement, (2) breach of fiduciary duty, (3) aiding and abetting breach of fiduciary duty, (4)
6 breach of contract,²⁴ (5) racketeering, (6) actual fraudulent transfer,²⁵ (7) constructive fraudulent
7 transfer,²⁶ (8) transfer made by insolvent,²⁷ and (9) alter ego/piercing the corporate veil. The

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10 ²³ Denial of a special motion to dismiss under the Nevada anti-SLAPP statute is subject to
11 an immediate appeal to the Nevada Supreme Court (rather than the Nevada Court of Appeals).
12 See Delucchi v. Songer, 396 P.3d at 830 n.3, citing NRS 41.679(4).

13 ²⁴ The GoldenTree Plaintiffs allege that EBH is in breach of the PIK Loan Agreement
14 through the insolvency event of default set forth in Section 4.01(g) of the PIK Loan Annex. See
15 Amended Complaint at ¶ 133. They further allege that as a result of the insolvency default the
16 PIK Loan has been accelerated without notice or demand under Section 4.02 of the Annex and
17 that “the entire amount of the loan outstanding is immediately due and payable.” Id. at ¶ 134.
18 The GoldenTree Plaintiffs further allege that they “have been damaged in an amount not less
19 than €787.71 million, which represents their holdings of the €1.6 billion outstanding due under
20 the EB Holdings Loan Facility as of March 31, 2016.” Id. at ¶ 136. In the prayer, the
21 GoldenTree Plaintiffs seek compensatory damages on the breach of contract claim “in an amount
22 to be proved at trial.” Id. at 51:22-23. Even though the GoldenTree Plaintiffs alleged in the
23 Amended Complaint that the entire amount of the loan outstanding is immediately due, the
24 alleged damages were less than the entire amount, and the prayer sought only to recover their
25 damages according to proof at trial. Whether acceleration of a promissory note is a binary result
26 akin to pregnancy, i.e., the entire loan is either due or not due, it is arguable that the GoldenTree
27 Plaintiffs are seeking to recover as compensatory damages only the portions of the PIK Loan in
28 which they have an interest. What happens to the remaining portions of the accelerated PIK
Loan is not alleged.

22 ²⁵ The GoldenTree Plaintiffs allege that EBH transferred certain assets to defendants
23 Meyers, Quexco, and RSR, with intent to hinder, delay, and defraud creditors, and that the
24 alleged transfers are avoidable for actual fraud under the Nevada version of the Uniform
Fraudulent Transfer Act, NRS 112.180(1)(a). See Amended Complaint at ¶¶ 187 through 191.

25 ²⁶ The GoldenTree Plaintiffs also allege that EBH, Meyers, Quexco and RSR caused the
26 transfer of certain assets of Eco-Bat to defendants Meyers, Quexco, and RSR, without EBH
27 receiving reasonably equivalent value, that are avoidable as constructive fraudulent transfers
under NRS 112.180(1)(b). See Amended Complaint at ¶¶ 193 through 197.

28 ²⁷ The GoldenTree Plaintiffs allege that EBH was insolvent at all relevant times prior to
the commencement of the GoldenTree Action, see Amended Complaint at ¶¶ 77-81 and Second

1 named defendants filed various motions to dismiss the Amended Complaint.

2 On December 23, 2016, after the State Court adjudicated various other motions to
3 dismiss, the GoldenTree Plaintiffs filed a second amended complaint (“Second Amended
4 Complaint”)²⁸ asserting the same legal theories as the Amended Complaint. (RJN-EBH Ex.
5 11).²⁹ Eco-Bat, Quexco, and RSR are named as “relevant parties” but no longer as defendants in
6 the GoldenTree Action. See Second Amended Complaint at ¶¶ 31, 32, and 33.

7 On January 13, 2017, EBH filed its answer to the Second Amended Complaint that
8 included the EBH Counterclaim. The counterclaim and third-party complaint alleges
9 substantially the same four causes of action asserted in the EBH Action, but also includes a fifth
10 cause of action alleging that the GoldenTree Plaintiffs have intentionally interfered with EBH’s
11 contractual relations to other PIK Lenders.³⁰ There are thirty counter-defendants and third-party
12 defendants named by EBH in its counterclaim and third-party complaint.

13 On March 17, 2017, the GoldenTree Plaintiffs, counterclaim defendants, and third party
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15 Amended Complaint at ¶¶ 98-102, while EBH denies that it was, and is, insolvent. See EB
16 Holdings II, Inc.’s Answer to Second Amended Complaint, Counterclaim and Third-Party
17 Complaint (“EBH Counterclaim”) at ¶¶ 98-102. (RJN-EBH Ex. 28). If EBH was not and is not
18 insolvent, then arguably Section 4.01(g) of the PIK Loan Annex does not apply, and the PIK
19 Loan was not accelerated automatically under Section 4.02 of the Annex.

19 ²⁸ Apparently in response to the various motions to dismiss, the GreenTree Plaintiffs
20 added an allegation that prior to commencing the GoldenTree Action, they complied with
21 Section 4.06 of the PIK Loan Annex, i.e., the “no action” clause discussed in note 18, supra. In
22 particular, the GoldenTree Plaintiffs alleged in pertinent part that they “provided written notice
23 of the Administrative Agent on September 2, 2016, in compliance with Section 4.06 of Annex 1
24 to the PIK Loan Agreement, requesting that the Administrative Agent pursue this claim.” See
25 Second Amended Complaint at ¶ 160.

23 ²⁹ The fourth cause of action still alleges a breach of contract and still alleges that “the
24 entire amount of the loan outstanding is immediately due and payable by EB Holdings . . .”
25 Second Amended Complaint at ¶ 157. It then alleges that the GoldenTree Plaintiffs have been
26 damaged “in an amount in excess of \$10,000 based on their €787.71 million in holdings, as of
27 September 5, 2016, of the €1.6 billion outstanding amount due under the PIK Loan Agreement
28 as of March 31, 2016.” Id. at ¶ 159.

27 ³⁰ EBH again alleged the improper acceleration under the PIK Loan Agreement as a basis
28 for complete or partial cancellation of the PIK Loan. See EBH Counterclaim at ¶¶ 87-88 and
122.

1 defendants, filed a special motion to dismiss the EBH Counterclaim under NRS 41.660 (“Golden
2 Tree EBH Special Motion”). (Supp. RJN-EBH Ex. 34).³¹

3 On April 17, 2017, the State Court entered an order approving the parties’ stipulation that
4 the rulings entered in connection with the GoldenTree Special Motion apply with equal force to
5 the EBH Counterclaim, except as to the fifth cause of action. (RJN-EBH Ex. 20).³²

6 On April 25, 2017, the State Court conducted a hearing on the Golden Tree EBH Special
7 Motion consistent with its April 17 Order.

8 On May 15, 2017, the State Court entered an order denying the Golden Tree EBH Special
9 Motion with respect to the counterclaim and third party complaint (“GoldenTree Special
10 Order”). (RJN-EBH Ex. 21). In that order, the State Court found that “[T]he Moving Parties
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12 ³¹ As in their prior GoldenTree Special Motion, see note 19, supra, the GoldenTree
13 Plaintiffs argued that improper acceleration would not result in cancellation of the PIK Loan. In
14 pertinent part, they argued that “There are no remedies available to EB Holdings if it thinks
15 acceleration occurred but was improper . . . In fact, the only remedy set forth in the Acceleration
16 Clause gives the lenders an ability to rescind the acceleration . . . This is fatal to EB Holdings’
17 declaratory relief and breach of contract claims, as New York law provides that a party’s
18 ‘obligations’ do not ‘go beyond those intended and stated in the language of the contract.’ *Wolff*
19 *v. Rare Medium, Inc.*, 210 F.Supp.2d 490, 497 (S.D. N.Y. 2002, *aff’d*, 65 Fed.Appx. 736, 738
20 (2d Cir. 2003); *see also Terwilliger v. Terwilliger*, 206 F.3d 240, 246 (2d Cir. 2000) (rejecting
21 breach of contract claim where the agreement ‘contains no language’ prohibiting conduct or
22 creating remedy); *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV)(JMA), 2011 WL 684083,
23 at *6 (E.D. N.Y. Feb. 16, 2011) (no breach where ‘the plain language’ of the agreement ‘did not
24 prohibit’ the conduct); *Ari & Co., Inc. v. Regent Int’l Corp.*, 273 F.Supp.2d 518, 523 (S.D. N.Y.
25 2003) (improper to imply ‘obligations that were not explicitly part of the Agreement’); *Ehag*
26 *Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniel*, 306 N.Y. 242, 249,
27 117 N.E.2d 346 (1954)(no breach where agreement ‘clearly establish[ed] that no duty was
28 imposed upon, or assumed by [defendants]”). EB Holdings cannot establish a probability of
prevailing on its declaratory relief and breach of contract claims for this reason alone.” Golden
Tree EBH Special Motion at 13:25 to 14:12. It again appears that the GoldenTree Plaintiffs
expressly argued to the State Court that under New York law, EBH’s claim for a declaration
canceling the PIK Loan based on improper acceleration is invalid.

³² As discussed at 8 and note 22, supra, the written order setting forth the State Court’s
ruling on that special motion to dismiss only specified that the Defendants in the EBH Action did
not meet their burden on the special motion and that genuine issues of material fact precluded the
motion from being granted. Moreover, there was no written finding under NRS 41.660(3)(b)
that EBH had demonstrated with prima facie evidence the probability of prevailing on the four
causes of action alleged in the EBH Complaint.

1 have not established, at this time, by a preponderance of the evidence that the Claim is based
 2 upon a good faith communication in furtherance of the right to petition or the right to free speech
 3 in direct connection with an issue of public concern.” Golden Tree Special Order at 3:12-14
 4 (emphasis added). The order further stated that as a result, “[T]he Court cannot, at this time, find
 5 that the Moving Parties have met their burden under NRS 41.660(3)(a).” Id. at 3:14-16.
 6 Moreover, the order denying the special motion to dismiss states as follows: “Alternatively, even
 7 assuming for the sake of argument that the Moving Parties met their burden, the non-moving
 8 party, EB Holdings, has demonstrated with prima facie evidence the probability of prevailing on
 9 its Claim. Therefore, the Court finds that EB Holdings met its burden under NRS 41.660(3)(b).”
 10 Id. at 3:17-20.³³ The order concludes by permitting discovery to proceed unabated.³⁴

11 On May 15, 2017, the GoldenTree Plaintiffs filed a motion for leave to file a third
 12 amended complaint (“Third Amended Complaint”) to include a substantial number of additional
 13 plaintiffs that allegedly hold an interest in the PIK Loan. (RJN-EBH Exs. 13 and 14).³⁵ The

15 ³³ The order denying the special motion to dismiss is unclear. The term “Claim” is used
 16 in the State Court’s findings numbered 1 and 2 set forth on page 3 of the order. “Claim” is
 17 previously defined in the order to mean “[T]he fifth cause of action of EB Holdings’
 18 Counterclaim and Third-Party Complaint (the “Claim”).” See Golden Tree Special Order at 3:2-
 19 3. The State Court’s finding number 2 clearly pertains to the fifth cause of action in EB
 20 Holdings’ counterclaim and third party complaint. The State Court’s finding number 1,
 21 however, presumably refers to claims for relief asserted in the amended complaints filed in the
 22 GoldenTree Action. This order is, however, far more specific than the EBH Special Order.

23 ³⁴ It appears that the State Court’s determination that EBH has demonstrated a probability
 24 of prevailing on the fifth cause of action cannot be admitted later in the GoldenTree Action nor
 25 will it impact EBH’s burden of proof on that cause of action. See Delucchi v. Songer, 396 P.3d
 26 at 831, citing NRS 41.660(3)(1-2).

27 ³⁵ The face of the motion indicates that it would be considered by the State Court on June
 28 15, 2017. A copy of the Third Amended Complaint is attached as an exhibit to a motion for
 leave to file third amended complaint in the GoldenTree Action. (RJN-EBH Ex. 13). That
 motion for leave to amend was filed in the GoldenTree Action on May 15, 2017. The additional
 plaintiffs sought to be added are Absalon II Limited, Credit Fund Golden Ltd., GN3 SIP LP,
 GoldenTree Distressed Master Fund 2014, Ltd., GoldenTree Distressed Debt Master Fund LP,
 GoldenTree Master Fund II, Ltd., GoldenTree High Yield Value Fund Offshore (Strategic), Ltd.,
 GoldenTree E Distressed Debt Master Fund II LP, GoldenTree Entrust Distressed Debt Master
 Fund LP, GoldenTree Entrust Master Fund SPC on behalf of and for the account of Segregated
 Portfolio I, GoldenTree High Yield Value Fund Offshore II, Ltd., GoldenTree High Yield Value

1 proposed Third Amended Complaint asserts the same legal theories as the prior complaints. The
2 breach of contract cause of action, however, alleges an additional event of default under Section
3 4.01(b) of the Annex to the PIK Loan. See Third Amended Complaint at ¶ 178. The alleged
4 additional event of default is the failure to pay the outstanding amount by March 31, 2017, i.e.,
5 the maturity date of the PIK Loan.³⁶ The increased number of GoldenTree Plaintiffs allege that
6 the “entire amount of the loan outstanding is immediately due and payable by EB Holdings.”
7 Third Amended Complaint at ¶ 179. They further allege that they have been damaged “in an
8 amount in excess of \$10,000 based on their €1.373 billion in holdings, as of March 31, 2017, of
9 the approximately €1.8 billion outstanding under the PIK Loan Agreement as of March 31,
10 2017.” Id. at ¶ 181.³⁷

11 On May 18, 2017, the GoldenTree Plaintiffs filed a notice appealing the Golden Tree
12 Special Order to the Nevada Supreme Court. (RJN-EBH 31). On the same date, some of the
13 GoldenTree Plaintiffs joined in filing the involuntary Petition.

14 **3. The Overlapping Parties.**

15 As discussed above, there are seven Petitioning Creditors in this involuntary Chapter 11
16 proceeding, twenty-eight proposed plaintiffs in the GoldenTree Action, thirty counter-defendants
17 and third-party defendants alleged in the EBH Counterclaim, thirteen defendants named in the

18 _____
19 Master Unit Trust, GoldenTree High Yield Value Fund Offshore 110 Ltd., GoldenTree Asset
20 Management Lux S.a.r.l., and Stichting PGGM Depositary acting in its capacity as title holder
21 for PGGM High Yield Fund. There are twenty-eight proposed plaintiffs named in the Third
22 Amended Complaint.

22 ³⁶ Paragraph 178 still alleges an insolvency default under Section 4.01(g) of the PIK Loan
23 Annex. When the parties filed the RAS Stipulation on June 6, 2017, see note 9, supra, a maturity
24 default on the PIK Loan already had been alleged as a basis for the breach of contract claim in
25 the GoldenTree Action. At the hearing on the Dismissal Motion, counsel for GLAS argued that
26 the GoldenTree Action is not based on a loan maturity default, but apparently was not aware that
27 the GoldenTree Plaintiffs had amended their complaint to allege the same maturity default that
28 serves as the basis for GLAS’s asserted claim in this involuntary proceeding.

27 ³⁷ €1.373 billion would represent slightly more than 76 percent of the €1.8 billion
28 outstanding amount of the PIK Loan. So even if the GoldenTree Plaintiffs are now asserting that
the entire amount of the PIK Loan is due without acceleration, compare discussion at 13 and
note 36, supra, they now seek to collect more than three-quarters of the loan balance.

1 EB Action, and apparently fifty-five parties who have participation interests in the PIK Loan.³⁸
 2 From the information provided in connection with the Dismissal Motion, the identifiable parties
 3 apparently are as follows:

| Involuntary Petitioner ³⁹ | GoldenTree Plaintiffs ⁴⁰ | GoldenTree Counter-Defendants and Third-Party Defendants ⁴¹ | EB Holdings Defendants ⁴² | PIK Loan Beneficial Interest Holders ⁴³ |
|--------------------------------------|--|--|--|--|
| GLAS USA LLC | | | | |
| Golden Tree Master Fund, Ltd. | GoldenTree Master Fund, Ltd. | GoldenTree Master Fund, Ltd. | GoldenTree Master Fund, Ltd. | GoldenTree Master Fund, Ltd. |
| Kneiff Tower SARL | Kneiff Tower S.a.r.l. | Kneiff Tower S.A.R.L | Kneiff Tower S.a.r.l. | Kneiff Tower S.a.r.l. |
| Mount Kellett Master Fund II-A, LP | Mount Kellett Master Fund II-A, L.P. | Mount Kellett Master Fund II-A, L.P. | Mount Kellett Master Fund II-A, L.P. | Mount Kellett Master Fund II-A, L.P. |
| Grace Bay III Holdings S.a.r.l. | Grace Bay III Holdings S.a.r.l. | Grace Bay III Holdings S.a.r.l. | Grace Bay III Holdings S.a.r.l. | Grace Bay III Holdings S.a.r.l. |
| Arvo Investment Holdings S.a.r.l. | Arvo Investment Holdings S.a.r.l. | Arvo Investment Holdings S.A.R.L. | Arvo Investment Holdings S.a.r.l. | Arvo Investment Holdings S.a.r.l. |
| Sound Point Montauk Fund, L.P. | Sound Point Montauk Fund, L.P. | Sound Point Montauk Fund, L.P. | Sound Point Montauk Fund, L.P. | Sound Point Montauk Fund, L.P. |
| | Absalon II Limited | Absalon II Limited | | Absalon II Limited |
| | Alcentra Global Special Situations Luxembourg S.a.r.l. | Alcentra Global Special Situations Luxembourg S.a.r.l. | Alcentra Global Special Situations Luxembourg S.a.r.l. | Alcentra Global Special Situations Luxembourg S.a.r.l. |
| | Alcentra MS S.a.r.l. | Alcentra MS S.a.r.l. | Alcentra MS S.a.r.l. | Alcentra MS S.a.r.l. |

19
 20 ³⁸ GLAS originally asserted that there are 61 participants in the PIK Loan. See note 5, supra. In response to the Dismissal Motion and at the hearing, GLAS represented that there are 55 participants in the PIK Loan. See GLAS Opposition at 4:12-13. The court will use the latter figure for purposes of this Memorandum Decision.

22 ³⁹ Petition at 3-9. There are seven Petitioning Creditors.

23 ⁴⁰ Third Amended Complaint at ¶¶ 14 to 41. There are twenty-eight named plaintiffs.

24 ⁴¹ EBH Counterclaim at ¶¶ 9 to 38. There are thirty named counterclaim and third-party
 25 defendants.

26 ⁴² EBH Complaint at ¶¶ 8 to 20. There are thirteen named defendants.

27 ⁴³ Appendix of Exhibits in Support of Special Motion to Dismiss (RJN-PIK Ex. A).
 28 There are twenty-eight parties identified in the declarations filed in connection with the special motion to dismiss filed by the GoldenTree Plaintiffs in the GoldenTree Action.

| | | | | |
|--|--|--|--|--|
| | Clareant SCF S.a.r.l. | Clareant SCF S.a.r.l. | Clareant SCF S.a.r.l. | Clareant SCF S.a.r.l. |
| | Credit Fund Golden Ltd. | Credit Fund Golden Ltd. | | Credit Fund Golden Ltd. |
| | GN3 SIP LP | GN3 SIP LP | | GN3 SIP LP |
| | GoldenTree Distressed Master Fund 2014 Ltd. | GoldenTree Distressed Master Fund 2014 LP | | GoldenTree Distressed Master Fund 2014 LP |
| | GoldenTree Distressed Debt Master Fund LP | | | GoldenTree Distressed Debt Master Fund LP |
| | GoldenTree Master Fund II, Ltd. | GoldenTree Master Fund II, Ltd. | | GoldenTree Master Fund II, Ltd. |
| | GoldenTree High Yield Value Fund Offshore (Strategic) Ltd. | GoldenTree High Yield Value Fund Offshore (Strategic) Ltd. | | GoldenTree High Yield Value Fund Offshore (Strategic) Ltd. |
| | GoldenTree E Distressed Debt Master Fund II LP | GoldenTree E Distressed Debt Master Fund II LP | | GoldenTree E Distressed Debt Master Fund II LP |
| | GoldenTree Entrust Distressed Debt Master Fund LP | GoldenTree Entrust Distressed Debt Master Fund LP | | GoldenTree Entrust Distressed Debt Master Fund LP |
| | GoldenTree Entrust Master Fund SPC | GoldenTree Entrust Master Fund SPC | | GoldenTree Entrust Master Fund SPC |
| | GoldenTree High Yield Value Fund Offshore II, Ltd. | GoldenTree High Yield Value Fund Offshore II, Ltd. | | GoldenTree High Yield Value Fund Offshore II, Ltd. |
| | GoldenTree High Yield Value Master Unit Trust | GoldenTree High Yield Value Master Unit Trust | | GoldenTree High Yield Value Master Unit Trust |
| | GoldenTree High Yield Offshore 110 Ltd. | GoldenTree High Yield Offshore 110 Ltd. | | |
| | GoldenTree Asset Management Lux S.a.r.l. | GoldenTree Asset Management Lux S.a.r.l. | | GoldenTree Asset Management Lux S.a.r.l. |
| | Sound Point Credit Opportunities Master Fund, L.P. | Sound Point Credit Opportunities Master Fund, L.P. | Sound Point Credit Opportunities Master Fund, L.P. | Sound Point Credit Opportunities Master Fund, L.P. |
| | SPC Lux S.a.r.l. | SPC Lux S.a.r.l. | SPC Lux S.a.r.l. | SPC Lux S.a.r.l. |
| | Stichting PGGM Depositary | Stichting PGGM Depositary | | Stichting PGGM Depositary |
| | Vista Fund I, L.P. | Vista Fund I, L.P. | Vista Fund I, L.P. | Vista Fund I, L.P. |
| | Vista Fund II, L.P. | Vista Fund II, L.P. | Vista Fund II, L.P. | Vista Fund II, L.P. |

| | | | | |
|--|--|------------------------------------|--|--------------------------------------|
| | | GoldenTree Asset Management LP | | |
| | | GoldenTree Distressed Debt Fund LP | | |
| | | Stellar Performer Global Series | | |
| | | | | BOATS Investments (Netherlands) B.V. |

Out of the fifty-five participants in the PIK Loan, only thirty of them appear to be identifiable from the documents filed in connection with the Dismissal Motion.⁴⁴

DISCUSSION

In its current response to the Petition, EBH seeks to dismiss this bankruptcy proceeding entirely while reserving its ability to seek entry of a judgment against the Petitioning Creditors for recovery of costs, or reasonable attorney's fees, or damages, or punitive damages.⁴⁵ If the involuntary bankruptcy case is not dismissed, EBH alternatively requests that the bankruptcy court abstain from conducting further proceedings until the coordinated State Court Litigation is concluded.

I. The Requirements for Involuntary Relief.

Under Section 303(a), an involuntary Chapter 11 case may be commenced against a

⁴⁴ Apparently, EBH is a holding company with no business operations, no creditors other than holders of interests in the PIK Loan, and no employees. See Dismissal Motion at 28:24-25; EBH Reply at 9:16-18.

⁴⁵ The title of the Dismissal Motion includes a "Reservation of Rights under 11 U.S.C. § 303(i)." The penultimate section of the text also includes that reservation. See Dismissal Motion at § V. Under that statute, if an involuntary case is dismissed without the consent of all parties, the alleged debtor can seek entry of relief against either all of the petitioners under Section 303(i)(1), or, against any petitioner who filed the petition in bad faith under Section 303(i)(2). As to the former, the relief may consist of either an award of costs, or an award of reasonable attorneys fees under Section 303(i)(1)(A). As to the latter, the relief may consist of any damages proximately caused by the commencement of the involuntary proceeding, or, punitive damages under Section 303(i)(2)(B). Only the alleged debtor may obtain a judgment for relief under Section 303(i). See, e.g., Vibe Micro, Inv. v. SIG Capital, Inc., 2017 WL 2225569 (D. Nev. May 22, 2017) (shareholder of involuntary debtor did not have standing to seek relief under either part of Section 303(i)).

1 corporation only if the corporation may be a debtor under Chapter 11. Under Section 303(b), an
2 involuntary petition may be filed “by three or more entities, each of which is . . . a holder of a
3 claim against such person that is not contingent as to liability or the subject of a bona fide
4 dispute as to liability or amount . . . , if such noncontingent, undisputed claims aggregate at least
5 \$15,775 more than the value of any lien on property of the debtor . . .” 11 U.S.C. § 303(b)(1)
6 (emphasis added).

7 Alternatively, “if there are fewer than 12 such holders,” then an involuntary petition may
8 be filed “by one or more of such holders” that hold aggregate debts of at least \$15,775. 11
9 U.S.C. § 303(b)(2) (emphasis added). “Since section 303(b)(1) requires that claims not be
10 contingent as to liability or the subject of bona fide dispute as to liability or amount, those
11 requirements also apply to the holders referred to in section 303(b)(2).” See 2 COLLIER ON
12 BANKRUPTCY, ¶ 303.14[3] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2017).

13 As discussed below, the parties in this involuntary proceeding have focused on whether
14 the claims asserted by the Petitioning Creditors are eligible for consideration under Section
15 303(b). A threshold problem also may exist, however, with respect to the number of eligible
16 claims required by Section 303(b).

17 There allegedly are fifty-five participants in the PIK Loan. GLAS is the administrative
18 agent on behalf of each lender, and apparently has authority to pursue any available collection
19 remedy on behalf of all of the PIK Lenders. See PIK Loan Agreement at § 2.4(e) and PIK Loan
20 Annex at § 4.03. In the event of a maturity default under Section 4.01(b) of the PIK Loan
21 Annex, GLAS allegedly has authority as administrative agent to pursue recovery of the entire
22 PIK Loan in its own name. See PIK Loan Annex at § 4.08. There are seven Petitioning
23 Creditors, including GLAS,⁴⁶ and six of them are participants in the PIK Loan.

24
25
26 ⁴⁶ EBH and GLAS dispute whether GLAS is a qualified petitioning creditor in connection
27 with two arguments: (1) that GLAS acquired the position of Credit Suisse for the actual purpose
28 of filing the involuntary petition in violation of FRBP 1003(a), compare Dismissal Motion at
20:16 to 21:4, with GLAS Opposition at 13 n.8, and (2) that GLAS joined in the Petition in
violation of the majority control requirements of Section 4.05 of the Annex to the PIK Loan.
Compare Dismissal Motion at 21:5-18, with GLAS Opposition at 13:5 to 14:17.

1 Attachment “A” to the Petition consists of a table offered under penalty of perjury setting
2 forth the alleged amount of each claim of the Petitioning Creditors. The table first lists the
3 GLAS claim to be in the amount of €1,802,961,230.23. That figure is footnoted to explain,
4 however, that it includes the claims of the six PIK Lender creditors that follow. See Petition,
5 Attachment “A” at n.1. The aggregate amount of the claims of those other six Petitioning
6 Creditors⁴⁷ is €773,186,974.39.⁴⁸ The table then concludes with a “TOTAL AMOUNT” figure
7 of €1,802,961,230.23.

8 It is not entirely clear to the court how the amount of the GLAS claim can be identical to
9 the TOTAL AMOUNT figure for all of the claims appearing in the table. Perhaps that is an error
10 in the construction of the table. What is more important, however, is that if the GLAS claim
11 figure includes the claims of the other six Petitioning Creditors, a bona fide dispute as to the
12 amount of any of those six claims would create a bona fide dispute as to the amount of the GLAS
13 claim. Likewise, if the GLAS claim amount includes the claims of all fifty-five holders of
14 interests in the PIK Loan, a bona fide dispute of any one of those fifty-five claims also would
15 create a bona fide dispute as to the alleged amount of the GLAS claim.⁴⁹ For Section 303(b)(1)
16 to apply, the claims of at least three of the seven Petitioning Creditors must not be contingent as
17
18

19
20 ⁴⁷ The lowest amount of the claims of the Petitioning Creditors is €1,577,591.08. See
21 Petition, Attachment “A.” If converted to U.S. dollars, that figure presumably exceeds \$15,775.

22 ⁴⁸ The difference between the GLAS claim and the aggregate amount of the other six
23 claims is €1,029,774,255.84. It therefore appears that most of the GLAS claim alleged in the
24 Petition represents sums owed to other participants in the PIK Loan. It is not clear, however, on
25 whose behalf the €1,029,774,255.84 difference is being asserted by GLAS “solely in its capacity
26 as Administrative Agent” inasmuch as the other six Petitioning Creditors have asserted their
27 separate claims. This uncertainty is heightened because the ad hoc PIK Lender Group has
28 implied that only some of its members are amongst the Petitioning Creditors in this proceeding,
see PIK Lender Group Statement at 5 n.5, and the identified members of the PIK Lender Group,
see id. at 1 n.1, are not identical to the names of the Petitioning Creditors.

⁴⁹ GLAS has acknowledged that it filed the Petition “[O]n behalf of itself as
Administrative Agent and in its capacity as agent for each of the 55 PIK Lenders, each of whom
have a separate and independent claim against the Debtor . . .” GLAS Opposition at 7:8-9.

1 to liability or subject to bona fide dispute as to liability or amount.⁵⁰

2 But what if the seven Petitioning Creditors, including GLAS, assert that at least one of
3 their claims is not contingent or subject to bona fide dispute as to liability or amount?⁵¹ Under
4 the language of Section 303(b)(2), a single petitioning creditor is sufficient, but only if the total
5 number of such creditors is less than 12.⁵² In this instance, neither the Petition nor Attachment
6 “A” to that petition alleges that the EBH has fewer than 12 creditors holding qualifying claims.
7 In fact, both GLAS and the PIK Lenders allege only that the petition satisfies the requirements of
8 Section 303(b)(1). See GLAS Opposition at 7:1-12; PIK Lender Opposition at 10:8-25. So even
9 if GLAS has authority under the PIK Loan to pursue any available remedy on its own, including
10 an involuntary bankruptcy proceeding against EBH, its claim would not be enough to satisfy
11

12
13 ⁵⁰ In this case, there may be an actual dispute over whether a sufficient number of
14 qualifying creditors have joined in the involuntary petition, rather than a bona fide dispute as to
15 liability or amount of the claims. Compare In re Datacom Systems, Incorporated, Case No. 14-
16 11096-ABL, Memorandum and Order Regarding Involuntary Petition and Motion to Dismiss,
17 Docket No. 228, at 20-27 (Bankr. D.Nev. June 25, 2015) (concluding after a contested
18 evidentiary hearing that an involuntary Chapter 7 petition was filed by three qualified creditors
19 under Section 303(b)(1)).

20 ⁵¹ See GLAS Opposition at 7 n.6 (“Because the Debtor has no debts other than the PIK
21 Loan, GLAS alone can satisfy the creditor numerosity requirement under section 303, either as
22 agent for each of the remaining PIK Lenders (of which there are more than 3), or as a single
23 creditor asserting claims in its own name.”).

24 ⁵² The language of Sections 303(b)(1) and 303(b)(2) creates an anomalous situation for an
25 alleged debtor having 12 creditors whose claims are not contingent nor subject to bona fide
26 dispute as to liability or amount. If only two active creditors file an involuntary petition under
27 Section 303(b)(1), the case will be dismissed because the petition was not filed by the minimum
28 of three eligible creditors. See Rothery v. Cunningham (In re Rothery), 211 B.R. 929, 934-35
(B.A.P. 9th Cir. 1997), rev'd on other grounds, 143 F.3d 546 (9th Cir. 1998). If one or even all
of the creditors file an involuntary petition under Section 303(b)(2), the case will be dismissed
because the debtor did not have less than twelve creditors. Compare 7H Land & Cattle Corp., 6
B.R. 29 (Bankr. D.Nev. 1980)(eligible claim of one creditor is sufficient when fewer than twelve
claim holders was alleged in petitions and not controverted), with In re Zapas, 530 B.R. 560, 567
(Bankr. E.D. N.Y. 2015)(petitioning creditors failed to show that alleged debtor had fewer than
12 creditors and therefore the three creditor minimum under 303(b)(1) applied, rather than the
single creditor requirement under 303(b)(2)). Specific numbers appearing in a statute normally
are not considered to be ambiguous and therefore should not be subject to court interpretation
even if the surrounding language may have different meanings.

1 Section 303(b)(2). The same would be true for any one of the other six Petitioning Creditors.⁵³

2 Whether the Petitioning Creditors have met the pleading requirements to satisfy Section
3 303(b) is an issue separate and apart from the proof requirements under Section 303(h). The
4 latter is discussed below.

5 Of course, an alleged debtor may choose not to controvert the allegations of an
6 involuntary petition, thereby permitting an order for relief to be entered. See 11 U.S.C. § 303(h).
7 If the alleged debtor does contest the allegations of an involuntary petition, however, an order for
8 relief is entered under the applicable chapter only if the debtor is “generally not paying such
9 debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute
10 as to liability or amount.” 11 U.S.C. § 303(h)(1) (emphasis added).⁵⁴ As one might guess,
11 involuntary petitions typically are contested, if at all, over whether the alleged debtor is
12 “generally not paying” its debts, see, e.g., Hayes v. Rewald (In re Bishop, Baldwin, Rewald,
13 Dillingham & Wong, Inc.), 779 F.2d 471, 475 (9th Cir. 1985), or, whether the unpaid debts “are
14 the subject of a bona fide dispute.” See, e.g., Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc.
15 (In re Vortex Fishing Sys., Inc.), 277 F.3d 1057, 1066-70 (9th Cir. 2002).⁵⁵ There may be an
16 admixture of both contests because a bona fide dispute as to the liability or amount of a debt

17
18 ⁵³ In this instance, EBH did not file an answer asserting the existence of 12 or more
19 creditors having qualifying claims along with a list of such creditors under FRBP 1003(b). This
20 may be the preferred method of challenging the number of petitioning creditors, see 2 COLLIER
21 ON BANKRUPTCY, supra, ¶ 303.14[9], but arguably nothing prevents the issue from being
22 considered in connection with a motion to dismiss.

23 ⁵⁴ Alternatively, an order for relief may be entered against a debtor in a contested
24 proceeding if a custodian was appointed or took possession of substantially all of the debtor’s
25 property within 120 days before the involuntary petition was filed. See 11 U.S.C. § 303(h)(2).

26 ⁵⁵ Section 303(h)(1) refers to “such debtor’s debts.” Section 303(h)(1) then imposes
27 conditions on “such debts.” “Such debts” are required to be ones that the alleged debtor
28 generally is not paying as they become due. The alleged debtor’s failure to pay “such debts”
apparently is then excused if those debts are subject to a bona fide dispute as to liability or
amount. Because the phrase “such debtor’s debts” refers to all of the alleged debtor’s
obligations, the inquiry required by Section 303(h)(1) apparently extends beyond the claims of
the petitioning creditors. Thus, an alleged debtor’s undisputed failure to pay a petitioning
creditor’s debt is not determinative of whether the debtor generally is not paying all of its debts
as they become due.

1 arguably means that the alleged debt is not currently due at all.⁵⁶ See generally 2 COLLIER ON
 2 BANKRUPTCY, supra, ¶ 303.11.⁵⁷

3 Like many circuits, the Ninth Circuit applies a “totality of the circumstances” approach to
 4 whether an alleged debtor is generally not paying its debts when due. See Vortex Fishing, 277
 5 F.3d at 1072. Under this approach, the court should consider a variety of factors, including the
 6 number of unpaid claims, the amount of the unpaid claims, the materiality of the nonpayments,
 7 and the debtor’s overall conduct of its financial affairs. See Datacom Systems, Inc., at 29, citing
 8 Laxmi Jewel, Inc. v. C & C Jewelry Mfg., Inc. (In re C & C Jewelry Mfg., Inc.), 2001 WL
 9 36340326, at *12 (B.A.P. 9th Cir. Apr. 14, 2009). See, e.g., In re International Teledata Corp.,
 10 12 B.R. 879, 883 (Bankr. D.Nev. 1981)(payment of significant long-term debts versus periodic
 11 payment of small debts); In re St. Marie Dev. Corp., 334 B.R. 663, 671 (Bankr. D. Mont.
 12 2005)(number of creditors and amount due).

13 For a majority of the federal circuits, including the Ninth Circuit, a “bona fide dispute”
 14 exists if “there is an objective basis for either a factual or legal dispute as to the validity of a
 15 debt.” See Vortex Fishing, 277 F.3d at 1064. A “bona fide dispute as to liability” exists “if
 16 there is either a genuine issue of material fact that bears upon the debtor’s liability, or a
 17 meritorious contention as to the application of law to undisputed facts.” Id. (citation and
 18 footnote omitted). The same objective test applies for determining a bona fide dispute as to the

19
 20 ⁵⁶ A more unusual situation may occur where a debtor pays all of its debts as they are
 21 incurred subject to a reservation of rights. In such circumstances, a contested involuntary
 petition apparently would not satisfy the threshold requirement of Section 303(h)(1).

22 ⁵⁷ Section 303(b)(1) refers to claims that are not the subject of a bona fide dispute while
 23 303(h)(1) refers to debts that are not the subject of a bona fide dispute. Under Section 101(12),
 24 the term “debt” means liability on a “claim.” Under Section 101(5)(A), the term “claim” means,
 25 inter alia, a right to payment, whether or not such right is disputed or undisputed. So under the
 26 Bankruptcy Code, a claim or a debt can be a right to payment regardless of whether it is subject
 27 to dispute. This broad definition of debt is important to a debtor who voluntarily seeks
 28 bankruptcy relief because it maximizes the scope of the bankruptcy discharge. When a debtor is
 subjected to an involuntary petition, this broad definition also is important because it identifies
 the type of debt that will prevent a debtor from having its property taken under a bankruptcy
 court’s jurisdiction without the debtor’s consent. Thus, when it comes to involuntary bankruptcy
 cases, the existence of a dispute over the claims of the petitioning creditors raises a due process
 concern over the nonconsensual taking of a debtor’s property.

1 amount of a debt. See Marciano v. Chapnick (In re Marciano), 708 F.3d 1123, 1126 (9th Cir.
2 2013).⁵⁸

3 **II. EBH's Requests for Dismissal, or, Abstention.**

4 **A. Dismissal of the Bankruptcy Proceeding.**

5 EBH's primary argument is that the debts asserted by the Petitioning Creditors arising
6 out of the PIK Loan Agreement are subject to bona fide dispute as evidenced by the ongoing
7 State Court Litigation.⁵⁹ See generally Dismissal Motion at 18:8 to 20:7. Moreover, EBH
8 maintains that the obligations under the PIK Loan are not currently due because of the conduct
9 of the GoldenTree Plaintiffs prior to the maturity date of the PIK Loan, as alleged in the
10 GoldenTree Action and the EBH Action. Id. at 19:4-10. EBH therefore argues that the
11 eligibility requirements for a petitioning creditor under Section 303(b)(1) have not been met and
12 the prerequisites for entry of an order for relief under Section 303(h)(1) do not exist. Under this

13
14 ⁵⁸ A bona fide dispute as to any amount of the petitioning creditor's claim also
15 disqualifies the claim under Section 303(b). See In re Timothy Blixseth, Case No. 11-15010-
16 BAM, Order Granting Motion to Dismiss Involuntary Case, Docket No. 528, at 13:11 to 14:2
17 (Bankr. D. Nev. July 10, 2013). The order in the Blixseth proceeding was appealed to the United
18 States District Court for the District of Nevada ("USDC") and denominated Case No. 2:13-cv-
19 01324-JAD. At the request of the appellant, the USDC certified the matter for direct appeal to
20 the Ninth Circuit on whether the presence of a bona fide dispute as to any amount of a
21 petitioning creditor's claim disqualifies the claim under Section 303(b). See Montana Dept. of
22 Revenue v. Blixseth, 2013 WL 5408668 (D. Nev. Sep. 25, 2013). On June 11, 2014, the circuit
23 court entered an order denying permission for direct appeal, thereby returning the matter to the
24 USDC for disposition. An appellate decision on the dismissal order has not been entered, but the
25 underlying Blixseth bankruptcy proceeding has been reassigned to the above-signed. While the
26 bankruptcy court's prior decision dismissing the involuntary petition in Blixseth remains on
27 appeal, its conclusion that even a dispute as to part of the claim disqualifies the petitioning
28 creditor is supported by many other court decisions. See 2 COLLIER ON BANKRUPTCY, supra, ¶
303.11[2] & nn.32, 33. The absence of a Ninth Circuit determination on this issue was observed
by the Bankruptcy Appellate Panel for this circuit in 2009, see In re C & C Jewelry Mfg., Inc.,
2001 WL 36340326, at *7, and a list of diverging lower court decisions was provided by the
USDC. See Montana Dept. of Revenue v. Blixseth, 2013 WL 5408668, at *2-3. The continued
absence of a Ninth Circuit decision resolving this issue was more recently noted in In re Clignett,
567 B.R. 583 (Bankr. C.D. Cal. 2017).

⁵⁹ Where litigation between parties to a common agreement has gone to a final, non-
appealable judgment, the existence of such a judgment may be sufficient to carry a petitioning
creditor's initial burden of proving the absence of a bona fide dispute. See, e.g., In re Datacom
Systems, at 25:10 to 26:21.

1 view, EBH maintains that the Petition fails to state a claim for which relief may be granted.

2 GLAS represents that it joined in the Petition in two capacities: on behalf of itself as the
3 administrative agent under the PIK Loan,⁶⁰ and in its capacity as agent for “[E]ach of the 55 PIK
4 Lenders, each of whom has a separate and independent claim against the Debtor for amounts
5 totaling at least €1.77 billion as of the filing of the involuntary petition.” GLAS Opposition at
6 7:8-10. As previously indicated at note 51, supra, GLAS also argues that its claim alone satisfies
7 the requirements for an involuntary petition presumably because it allegedly exceeds \$15,775.
8 GLAS also maintains that it is not a party to the GoldenTree Action nor the EBH Action, and
9 that the PIK Lenders it represents as agent in this involuntary proceeding also are not parties to
10 those coordinated actions. Id. at 9:4-17.⁶¹

11 FRBP 1011 provides that defenses and objections to an involuntary petition shall be
12 presented in the manner prescribed by Civil Rule 12. Subparts (b), (c), (e) and (f) of Civil Rule
13 12 set forth the types of matters that may be presented by motion. Because EBH has not filed an
14 answer to the Petition, the Dismissal Motion does not seek a judgment on the pleadings
15 encompassed by Civil Rule 12(c). EBH also does not seek a more definite statement under Civil
16 Rule 12(e), nor does it seek to strike any allegations of the Petition under Civil Rule 12(f).
17 Because none of the other subparts apply, the Dismissal Motion presumably seeks relief under
18 Civil Rule 12(b). But EBH does not identify which of the seven defenses enumerated under
19 Civil Rule 12(b) supports the relief it requests.⁶²

20 EBH concedes that this court has subject matter jurisdiction over this proceeding, see
21 Dismissal Motion at 4:27-28, and that venue is proper. Id. at 4:28 to 5:1. Dismissal under Civil

22
23 ⁶⁰ GLAS apparently claims its costs and expenses separately as administrative agent
under the PIK Loan. See GLAS Opposition at 10:2-5.

24
25 ⁶¹ GLAS now represents that of the fifty-five participants in the PIK Loan, twenty-eight
of them are not involved in the State Court Litigation. See GLAS Opposition at 4 n.4. The
26 identities of those other twenty-eight PIK Lenders, however, do not appear in the record, and
obviously none of them are the Petitioning Creditors specified in the Petition.

27
28 ⁶² EBH merely states that the subject motion is “brought pursuant to Bankruptcy Rules
1011 and 7012.” Dismissal Motion at 1:12. FRBP 7012(b) incorporates by reference Civil Rule
12(b) through 12(i).

1 Rule 12(b)(1) and Civil Rule 12(b)(3), therefore, would not be available. As there is no dispute
2 the EBH is incorporated in Nevada, dismissal under Civil Rule 12(b)(2) for lack of personal
3 jurisdiction is not available. As there is no dispute that an involuntary summons was properly
4 issued by the bankruptcy court (ECF Nos. 55, 56) and was properly served on EBH (ECF No.
5 58), relief under Civil Rule 12(b)(4) and Civil Rule 12(b)(5) also is not available. As joint
6 bankruptcy petitions can be filed only by individuals who are spouses, see 11 U.S.C. § 302(a),
7 dismissal of the involuntary Petition for failure to join a party under Civil Rule 19 also is not
8 available under Civil Rule 12(b)(7). Compare Hujazi v. Recoverex Corp. (In re Hujazi), 2017
9 WL 3007084, at *10 & n. 9 (B.A.P. 9th Cir. July 14, 2017).

10 By process of elimination, EBH's present request must be based on Civil Rule 12(b)(6),
11 i.e., failure to state a claim for which relief may be granted.⁶³ Relief under Civil Rule 12(b)(6),
12 however, is subject to the requirements of Civil Rule 12(c). The latter rule specifies that when
13 matters outside of the pleadings are considered by the court, a motion under Civil Rule 12(b)(6)
14 must be treated as a motion for summary judgment governed by Civil Rule 56. See, e.g., In re
15 Rothery, 143 F.3d at 548-49 (Civil Rule 12(b)(6) motion to dismiss involuntary Chapter 7
16 petition). Under that rule, summary judgment may be granted only "if the movant shows that
17 there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
18 matter of law." FED.R.CIV.P. 56(a) (emphasis added).⁶⁴

19 _____
20 ⁶³ Civil Rule 12(b)(6) addresses the sufficiency of pleadings in a civil action. Under Civil
21 Rule 7(a), there are only seven pleadings allowed, with no mention of a petition. Under FRBP
22 1018, however, references in the Civil Rules to a complaint are to be read as a reference to an
23 involuntary bankruptcy petition. In an involuntary proceeding, a motion under Civil Rule
24 12(b)(6), therefore, asks whether the involuntary petition states a claim for which relief may be
25 granted. At the hearing, counsel for EBH represented that the Dismissal Motion is not brought
26 under Civil Rule 12(b)(6). Instead, counsel asserted that the Petitioning Creditors had failed to
27 make a threshold, prima facie showing of noncontingent claims that are not subject to bona fide
28 dispute under Section 303(b), apparently irrespective of whether there is proof at trial under
Section 303(h)(1) that EBH generally is not paying its debts as they become due. That
characterization of the argument, however, simply supports the court's focus on whether the
Petitioning Creditors have stated a claim for which relief may be granted under Section 303.

⁶⁴ As discussed below, the key statutory language applicable to involuntary bankruptcy
cases refers to the absence of a "bona fide" dispute concerning the liability or the amount of the

1 As previously mentioned, the Dismissal Motion is accompanied by thirty-two separate
 2 exhibits for which EBH requests that judicial notice be taken under FRE 201. Those exhibits
 3 consist of various pleadings, motions, responses, exhibits, orders, disclosures, and other
 4 documents filed in the GoldenTree Action and in the EBH Action. The opposition to the
 5 Dismissal Motion filed by the PIK Lender Group is accompanied by three separate documents
 6 consisting not only of exhibits filed in the State Court proceedings (RJN-PIK Ex. "A"),⁶⁵ but also
 7 copies of transcripts from certain hearings in those actions (RJN-PIK Ex. "B") as well as an
 8 entirely unrelated involuntary Chapter 11 proceeding brought in this judicial district (RJN-PIK
 9 Ex. "C").⁶⁶ Added to this mix of materials outside of the Petition are two additional exhibits

11 petitioning creditor's claim. The summary judgment standard refers to "genuine" disputes of
 12 material fact that will preclude entry of judgment as a matter of law. It is not clear whether a
 13 "bona fide" dispute is the same as a "genuine" dispute. It seems clear, however, that when there
 14 is no genuine factual dispute between a petitioning creditor and an alleged debtor, there can still
 15 be a bona fide dispute over liability for the debt or the amount of the debt. Issues of statutory,
 16 common law, or contract interpretation fall into the latter category. If a petitioning creditor
 17 seeks summary judgment on its involuntary petition, but fails to demonstrate the absence of a
 18 genuine dispute of material fact that would require a judgment as a matter of law, is there
 19 necessarily a bona fide dispute as to liability or amount that disqualifies the petitioner's claim?
 20 If a petitioning creditor seeks summary judgment on its involuntary petition, but its claim
 21 depends on an unsettled question of state law, is there necessarily a bona fide dispute as to
 22 liability or amount that disqualifies the petitioner's claim? And what happens on summary
 23 judgment when parties to a contested involuntary petition give less than complete consent to the
 24 bankruptcy court's entry of a final judgment on all matters, including the underlying claims?
 25 See discussion at note 77, infra. Is there a bona fide dispute as to liability or amount until such
 26 time as a final judgment is entered by an Article III court? See generally 2 COLLIER ON
 27 BANKRUPTCY, supra, ¶ 303.11[3].

22 ⁶⁵ Those exhibits include seven separate declarations filed on behalf of the GoldenTree
 23 Plaintiffs in the State Court Litigation, to which are attached a variety of transactional documents
 24 and correspondence.

24 ⁶⁶ That case involved an involuntary petition commenced against South Edge, LLC, Case
 25 No. 10-32968-BAM. The February 3, 2011, hearing transcript from the South Edge proceeding
 26 ("South Edge Transcript") encompasses the bankruptcy court's oral ruling after trial granting the
 27 involuntary petition. The court directed the entry of an order for relief and the appointment of a
 28 Chapter 11 trustee. Based on stipulated facts, the court concluded that there were sufficient
 claims not subject to bona fide dispute, see South Edge Transcript at 46:12-20, and that
 abstention was not in the best interests of either creditors generally or the petitioning creditors.
Id. at 52:4-18. The remnants of the South Edge case have been reassigned to the above-signed.

1 accompanying EBH's reply, for which judicial notice also is requested. Those additional
2 exhibits consist of copies of the two anti-SLAPP motions that were filed in the GoldenTree
3 Action and the EBH Action. It is against this impressive backdrop of thirty-seven documents
4 outside of the Petition⁶⁷ that the court is requested to resolve the Dismissal Motion brought under
5 Civil Rule 12(b)(6).⁶⁸

6 Unfortunately, the arguments between the instant parties are ill-suited to resolution by a
7 pleading motion. Either side may be completely wrong on the ultimate merits of the Petition, but
8 both sides are, of course, certain. Neither side can establish the merits of their respective
9 positions, however, without resorting to materials outside of the Petition. This is hardly
10 surprising when parties to the same agreement have created a record of litigation in one court
11 before commencing proceedings in another court. That litigation in state or federal court
12 precedes the filing of an involuntary petition is not unusual. Even a creditor who prevails by
13 default in a state court action can rely on the default judgment as establishing an eligible debt for
14 purposes of its involuntary petition. See, e.g., In re Zapas, 530 B.R. at 571-72 (state court
15 default judgment remained in effect after involuntary Chapter 7 debtor's requests for relief from
16 the judgment were denied on appeal). What is unusual in the present case is that six of the
17 Petitioning Creditors who sued EBH on the PIK Loan prior to joining in the involuntary petition
18 never obtained a judgment of any kind in their favor, and are the only parties who have appeals

19
20 ⁶⁷ As previously indicated at note 5, supra, separate "statements" in support of the
21 Petition were filed by GLAS and the ad hoc PIK Lender Group. Like the various exhibits for
22 which judicial notice is requested, these statements also are outside of the Petition and not
23 incorporated by reference. Attachment "A" to the Petition describes the nature of each
24 Petitioning Creditor's claim as "Loan Facility Obligations" without alleging that the obligations
25 are due or that they are not being paid. Absent reference to the separate statements, the Petition
26 arguably contains only a bare recital of the language of Section 303(h)(1), which would not be
27 sufficient to state a claim for relief. Compare Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
28 555 (2007) (satisfaction of Civil Rule 12(b)(6) requires more than mere "labels and conclusions"
and a "formulaic recitation of the elements of a cause of action.").

⁶⁸ Because FRBP 1011(b) requires an alleged debtor to present defenses to an involuntary
petition "in the manner prescribed by Civil Rule 12," and Civil Rule 12(b) requires its
enumerated defenses to be presented by motion before an answer is filed, the limitations in
Official Form 205 commonly result in a motion to dismiss an involuntary petition under Civil
Rule 12(b)(6) being converted to a summary judgment motion governed by Civil Rule 56.

1 of the State Court's rulings now pending before the Nevada Supreme Court.⁶⁹

2 In this situation, Civil Rule 12(c) requires that the summary judgment standard under
3 Civil Rule 56(a) be applied. As a separate Summary Judgment Motion previously was filed by
4 GLAS, see discussion at note 8, supra, it comes as no surprise that a determination of the
5 existence of a bona fide dispute should be made, if at all,⁷⁰ in connection with the GLAS
6

7
8 ⁶⁹ The PIK Loan had a maturity date of March 31, 2017. The GoldenTree Plaintiffs
9 commenced the State Court Litigation on August 26, 2016, i.e., seven months before maturity.
10 The commencement before the maturity date was predicated on an allegation that EBH was
11 insolvent under Section 4.01(g) of the PIK Loan Annex, and the loan had accelerated without
12 notice under Section 4.02 of the Annex. Apparently, after the GoldenTree Action was filed, the
13 GoldenTree Plaintiffs made a written request to Credit Suisse to commence an action to enforce
14 the loan as the predecessor administrative agent, but Credit Suisse did not do so. Because EBH
15 disputes that it was or is insolvent, it maintains that acceleration had not occurred and that
16 wrongful commencement of the GoldenTree Action resulted in a cancellation of its obligation
17 under the PIK Loan Agreement. Those factual and legal contentions were alleged before the
18 State Court in the EBH Counterclaim and in the EBH Complaint. Those contentions apparently
19 were raised before the State Court in connection with motions to dismiss and special motions to
20 dismiss, but remain unresolved. Not satisfied with those rulings, the GoldenTree Parties have
21 pursued interlocutory appeals that are now pending before the Nevada Supreme Court.

22 For whatever reason, the State Court Litigation was commenced before the PIK Loan
23 matured by its own terms. Substantial litigation activity occurred before the current bankruptcy
24 Petition was filed. As a result, the bankruptcy court does not have a blank slate on which to
25 evaluate the parties' arguments on the underlying merits. As much as any party to this
26 involuntary proceeding may want this bankruptcy court to determine the merits of EBH's
27 theories under New York law, those factual and legal issues are now before the State Court.
28 Moreover, there are no final orders or judgments by the State Court, by default, by summary
judgment, or otherwise, nor any appellate rulings from the Nevada Supreme Court, on which this
bankruptcy court can or should rely.

⁷⁰ The concept of limiting petitioning creditors to those holding claims that are "not
subject to a bona fide dispute" was added to Section 303 in 1984. See In re Johnston Hawks,
Ltd., 49 B.R. 823, 830 (Bankr.D. Haw. 1985). Prior to that, an eligible petitioning creditor was
required to have a "provable claim." Id. at 829. In 2005, Congress added the words "as to
liability or amount" to the requirements for the eligible claims of involuntary petitioners under
Sections 303(b)(1) and 303(h)(1). There are only two other places in the Bankruptcy Code
where the term "bona fide dispute" is used. The term appears in Section 363(f)(4) as a basis for
permitting property of a bankruptcy estate to be sold free and clear of an interest asserted by a
non-debtor party. It also appears in the definition of "insolvent" under Section 101(32)(C)(i)
with respect to a municipality. The 2005 amendments added the words "as to liability or
amount" to the requirements for the eligible claims of involuntary petitioners, but made no
changes to the only other instances in which the term bona fide dispute is used in the Code.

1 motion.⁷¹ Whether the PIK Lenders would, or could, eventually join in the Summary Judgment
 2 Motion is not before this court. EBH's request for dismissal of the Petition under Civil Rule
 3 12(b)(6), therefore, will be denied without prejudice.⁷²

4 **B. Abstention by a Stay Pending Conclusion of the State Court**
 5 **Litigation.**

6 EBH's request for abstention under Section 305 is a different matter.⁷³ Under that
 7 provision, the bankruptcy court may dismiss a case or suspend all proceedings in a case, at any
 8 time, "if the interests of creditors and the debtor would be better served by such dismissal or
 9 suspension." 11 U.S.C. § 305(a)(1) (emphasis added). Unlike the dismissal or conversion of a
 10 voluntary Chapter 11 proceeding, or the appointment of a Chapter 11 trustee or examiner, the
 11 statutory focus is not on the "best interests of creditors and the estate," but on the interests of
 12 both the creditors and the debtor. Compare 11 U.S.C. § 1112(b)(1) ("on request of a party in

13
 14 ⁷¹ Any summary judgment motion also should address whether the number of eligible
 15 claimants required by Section 303(b)(1) or Section 303(b)(2), see discussion at 18-20, supra,
 16 have joined in the involuntary Petition. Additionally, EBH's challenge to GLAS's qualification
 as a petitioning creditor, see note 46, supra, should be addressed, if at all, by summary judgment.

17 ⁷² Apparently, none of the parties to the GoldenTree Action nor the EBH Action filed
 18 motions for summary judgment in those proceedings. An order from the State Court granting
 19 such a motion in either action would suggest the absence of a genuine dispute of material fact
 20 warranting entry of at least partial judgment as a matter of law. But no such motions, much less
 orders from the State Court, are part of the record. Likewise, there are no final judgments on the
 merits in favor of any party to the State Court Litigation.

21 ⁷³ The ubiquitous "totality of the circumstances" approach, see, e.g., discussion at 21,
 22 supra, is commonly applied in determining whether a court should exercise its discretion to
 23 abstain under Section 305(a)(1). For discretionary abstention, the factors typically considered
 24 are: (1) economy and efficiency of case administration, (2) the availability of another forum to
 25 protect the interests of the parties or the pendency of another proceeding in state court, (3) the
 26 necessity for a federal proceeding to achieve a just and equitable solution, (4) the availability of
 27 alternative means to equitably distribute assets, (5) whether the debtor and creditors are able to
 28 achieve a less expensive arrangement out of court, (6) whether continuation of existing non-
 federal insolvency proceedings would be less costly and time-consuming, and (7) the purpose for
 seeking bankruptcy jurisdiction. See Dismissal Motion at 35:18 to 36:4, citing Marciano v.
Chapnick (In re Marciano), 459 B.R. 27, 46 (B.A.P. 9th Cir. 2011). These factors are non-
 exclusive and no one factor is more important than another. See In re Marciano, 459 B.R. at 48
 ("We disagree that any of the § 305(a) factors can be 'primary' where the determination of relief
 under § 305(a) is based on the totality of the circumstances.").

1 interest . . . the court shall convert a case . . . or dismiss a case, whichever is in the best interests
2 of creditors and the estate, unless the court determines that the appointment under section
3 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.”); 11 U.S.C.
4 § 1104(a)(2) (“if such appointment [of a trustee or an examiner] is in the interests of creditors,
5 any equity security holders, and other interests of the estate . . .”). See Eastman v. Eastman (In
6 re Eastman), 188 B.R. 621, 624-25 (B.A.P. 9th Cir. 1995)(“The test is whether both the debtor
7 and the creditors would be ‘better served’ by a dismissal . . .”). See also In re R & S St. Rose,
8 LLC, Case No. 10-18827-MKN, Memorandum Decision on Motion to Dismiss, Docket No. 36,
9 at 10 (Bankr. D. Nev. October 29, 2010). Moreover, because abstention under Section 305 may
10 be sought in both voluntary and involuntary proceedings, the court is required to take into
11 account the interests of all creditors,⁷⁴ not just the creditors that filed or joined in the involuntary
12 petition.⁷⁵ EBH argues that the GoldenTree Action and the EBH Action will fully resolve the
13 liabilities between the parties under the PIK Loan, including any avoidance claims. See
14 Dismissal Motion at 36:11-18 & nn.33 & 34.⁷⁶ There is no dispute that those liabilities are

16 ⁷⁴ As discussed at note 10, supra, LEG is not a creditor of EBH but favors this
17 involuntary proceeding due to LEG’s relationship to Eco-Bat. EBH’s motion to strike the LEG
18 Statement, see note 11, supra, is the subject of a separate ruling in connection with the Summary
19 Judgment Motion.

20 ⁷⁵ It must be remembered that the claims of petitioning creditors cannot be subject to
21 bona fide dispute. If the alleged debtor is adjudicated as bankrupt, then entry of an order for
22 relief shifts the focus for the disposition of all creditor claims to the bankruptcy court. That
23 result may be desirable to the Petitioning Creditors but equally undesirable to creditors who
24 prefer a different venue to have their claims adjudicated. In this instance, the GoldenTree
25 Plaintiffs chose to initiate litigation against EBH in State Court while other participants in the
26 PIK Loan did not. When EBH responded by commencing its own action and asserting
27 counterclaims and third party claims, the GoldenTree Parties chose to initiate anti-SLAPP
28 proceedings. Having failed in their anti-SLAPP motions, the same GoldenTree Parties seek
29 review by the Nevada Supreme Court. Now some of the same GoldenTree Plaintiffs seek entry
30 of a bankruptcy order for relief on an involuntary basis that might wrest control from EBH’s
31 management of the defense of the GoldenTree Action as well as the prosecution of the EBH
32 Action. Under these circumstances, the court must carefully consider the interests of the
33 Petitioning Creditors, the non-petitioning creditors, and the alleged debtor.

⁷⁶ Whether a final judgment between the GoldenTree Parties and EBH would have issue
res judicata effect as to other participants in the PIK Loan also is not before this court. For

1 governed entirely by state law rather than bankruptcy law. No one disputes that all of the factual
 2 and legal issues raised in connection with the PIK Loan can be resolved in the State Court.
 3 Consent to the entry of a final judgment is not an issue in the State Court.⁷⁷

4 In this instance, the named parties to this involuntary proceeding have stipulated to allow
 5 the State Court Litigation, including the appeals before the Nevada Supreme Court, to proceed
 6 during the involuntary “gap period.” The abstention requested by EBH essentially would extend
 7 the gap period through the conclusion of the State Court Litigation. There is no doubt that
 8 conclusion of that litigation will result in a final determination of the enforceability of the PIK
 9 Loan Agreement out of which most if not all of the claims in this bankruptcy proceeding, if any,

10
 11 _____
 12 purposes of claim preclusion in this circuit, however, the requirement of privity as to non-parties
 13 has been found in a variety of situations, including “(1) where a non-party has succeeded to a
 14 party’s interest in property; (2) where a non-party controlled the original suit; (3) where the non-
 15 party’s interests were adequately represented by a party in the original suit; (4) where there is a
 16 “substantial identity” between the party and the non-party; (5) where the non-party had a
 17 significant interest and participated in the prior action; (6) where the interests of the non-party
 18 and the party are so closely aligned as to be virtually representative; and (7) where there is an
 19 express or implied legal relationship by which parties to the first suit are accountable to non-
 20 parties who file a subsequent suit with identical issues.” F.T.C. v. Garvey, 383 F.3d 891, 897 n.5
 21 (9th Cir. 2004).

22 ⁷⁷ GLAS states that it “[C]onsents to the entry of final orders or judgment by this Court
 23 with respect to the Motion to Dismiss, the Motion for Summary Judgment, the filing of the
 24 involuntary petition, and any order for relief entered pursuant to section 303(h) of the
 25 Bankruptcy Code, to the extent it is determined that this Court, absent the consent of the parties,
 26 cannot enter final orders or judgment consistent with Article III of the Constitution with respect
 27 to such matters. GLAS otherwise reserves its right to withhold consent to this Court’s entry of
 28 final orders of judgment in all other matters.” GLAS Statement at 3:20-26 (emphasis added).
 The PIK Lender Group states that it “[D]oes consent to entry of final orders of judgment by the
 Court if it is determined that the bankruptcy judge, absent consent of the parties, cannot enter
 final orders or judgment consistent with Article III of the United States Constitution.” PIK
 Lenders Statement at 2:15-17. EBH states that it “[C]onsents to this Court’s jurisdiction for
 entry of final orders and/or judgments with respect to this Motion and the filing of the
Involuntary Petition. EB Holdings respectfully reserves its right to withhold consent to the
 Court’s entry of final orders and/or judgments in all other matters.” Dismissal Motion at 5:2-5
 (emphasis added). The consent of the PIK Lenders appears to be unrestricted, while the consent
 of GLAS and EBH is limited. It remains unclear whether the parties consent to the bankruptcy
 court entering a final order as to any aspects of the merits of the underlying claims amongst the
 parties.

1 would arise.⁷⁸ There also is no doubt that inconsistent outcomes could result if the State Court
2 litigation on the enforceability of the PIK Loan Agreement proceeds to judgment while this
3 bankruptcy court makes the determinations required under Sections 303(b) and 303(h)(1) to
4 involuntarily place EBH into bankruptcy.

5 The present status of the State Court Litigation tempers these considerations. The State
6 Court orders denying the two anti-SLAPP dismissal motions are currently on appeal before the
7 Nevada Supreme Court as required by NRS 41.679(4). If the Nevada Supreme Court concludes
8 that the EBH Action should have been dismissed, along with the counterclaim and third party
9 claims that EBH presented in the GoldenTree Action, then there likely would be no bona fide
10 dispute as to liability or amount of the PIK Lender claims. Presumably these related appeals
11 have been consolidated and briefing will be completed before the end of this year. Exactly when
12 the Nevada Supreme Court will schedule oral argument, if at all, is unknown. At the hearing on
13 the Dismissal Motion, none of the parties indicated whether they will seek to have the Nevada
14 Supreme Court hear and decide the anti-SLAPP appeals before the scheduled trial of the
15 coordinated actions.

16 The parties do not dispute that the State Court scheduled a jury trial on a five week
17 “stack” to commence on April 16, 2018. (RJN-EBH Ex. 24). Not surprisingly, counsel for the
18 respective parties differ on whether that jury trial actually will be ready to proceed on that date.
19 EBH represented that significant discovery has been completed as evidenced by the over two
20 million pages of documents already produced, see Dismissal Motion at 2:7-8, but apparently
21 concedes that EBH has produced a much smaller portion of those documents. See EBH Reply at
22 2:19-21 & n.9. Apparently, optimistic that the Nevada Supreme Court will rule in its favor on
23 anti-SLAPP motions, EBH argues that the State Court Litigation will move forward on an
24 expedited schedule. See Dismissal Motion at 37:1-9; EBH Reply at 11:13-15. GLAS perhaps is
25 optimistic that the dismissal rulings will be overturned, but separately maintains that the State
26

27 ⁷⁸ As previously discussed at 13, supra, the Third Amended Complaint includes an
28 allegation that a maturity default has occurred in connection with the breach of contract cause of
action alleged by the GoldenTree Plaintiffs.

1 Court Litigation is immaterial to GLAS's effort to seek involuntary relief against EBH. See
2 GLAS Opposition at 9:3 to 10:16. The PIK Lenders infer that the coordinated actions will not be
3 ready for trial on the scheduled date.⁷⁹ Regardless of when the State Court Litigation is
4 completed, however, further proceedings in the involuntary case at this time risk inconsistent
5 outcomes on the merits of the claims arising from the PIK Loan Agreement.

6 Debts that may be addressed through a voluntary bankruptcy are not required to be
7 reduced to judgment, liquidated, noncontingent, matured, or undisputed. See 11 U.S.C. §§
8 101(12) and 101(5)(A). See discussion at note 57, supra. A debtor can voluntarily seek relief
9 from such debts by subjecting its real and personal property interests to the jurisdiction of the
10 bankruptcy court. In such cases, the debtor does so consensually and also agrees to have its
11 activities scrutinized by its creditors, any appointed trustee, and the court.

12 This is not the situation at all when parties attempt to take actual or constructive
13 possession of a debtor's property without its consent through an involuntary proceeding. Filing
14 an involuntary petition against a debtor triggers the automatic stay that protects property of the
15 bankruptcy estate, but the debtor, of course, is free to operate and use its property as if no
16 involuntary proceeding had been commenced. See 11 U.S.C. § 303(f). If the involuntary debtor
17 does not respond to the petition, an order for relief will be entered, thereby preventing the debtor
18 from operating its business or using its property without supervision of the bankruptcy court or
19 any appointed trustee. In a Chapter 7 context, entry of an order for relief results in the
20 immediate appointment of a Chapter 7 bankruptcy trustee to take over control of the debtor's
21 assets, including any business operations, any claims being prosecuted by the debtor, and any
22 rights that may be asserted by the debtor. In a Chapter 11 context, entry of an order for relief
23 does not automatically result in a trustee being appointed, but typically is followed by the

24
25 ⁷⁹ As previously discussed at note 13, the PIK Lenders filed a Clarification Notice
26 attempting to update the court on the status of the State Court Litigation. Also as previously
27 discussed, this court entered an order striking that Notice without prejudice to the parties
28 requesting permission to file additional declarations attesting to the current status of the State
Court Litigation. None of the parties have done so. As it now stands, the trial scheduling order
entered by the State Court indicates that a jury trial in the coordinated actions will commence as
early as April 16, 2018.

1 petitioning creditors' immediate request for appointment of a Chapter 11 trustee under Section
2 1104(a).⁸⁰ A Chapter 11 trustee can exercise the same control over the debtor's assets that can
3 be asserted by a Chapter 7 trustee.⁸¹

4 Where there is ongoing litigation, an involuntary bankruptcy offers obvious strategic
5 advantages to a creditor. Not only can a bankruptcy trustee seek to avoid transfers made and
6 obligations incurred by a debtor, she can also settle existing litigation and sell a debtor's claims
7 and causes of action. See, e.g., In re Hyloft, 451 B.R. 104 (Bankr. D. Nev. 2011). Moreover, a
8 bankruptcy trustee might attempt to exercise any available statutory or contractual rights that the
9 debtor possesses as an equity security holder in other, non-debtor entities. See generally
10 Theodore Hartl, Trustee's Corporate Governance Rights and Obligations, at 2-3, ABA Business
11 Law Section Spring Meeting, April 6-8, 2017.

12 Congress insisted, however, that a debtor who does not consent to bankruptcy court
13 supervision cannot be deprived of its property unless "[T]he debtor is generally not paying such
14 debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute
15 as to liability or amount." 11 U.S.C. § 303(h)(1). Bankruptcy law takes a cautionary approach
16 when it permits the interests of creditors to be altered or abridged without their consent. See,
17 e.g., 11 U.S.C. § 363(c)(2) (use of cash collateral); 11 U.S.C. § 1129(b) (Chapter 11 cramdown of
18 dissenting holders of impaired claims and interests). No less is required when an alleged debtor
19

20
21 ⁸⁰ The PIK Lenders allege that the principal of EBH has engaged in a variety of self-
22 dealing, see PIK Lender Statement at 6:1 to 12:5, and will be enlightened by the fiduciary duties
23 of a Chapter 11 debtor in possession "or be replaced." Id. at 12:6-17. Because EBH is
24 admittedly a holding company with no employees or business operations, see note 44, supra, it
25 begs the question of why any creditor would want to put EBH into Chapter 11 for any purpose
26 other than divest current management of control over the State Court Litigation or of the equity
27 interests in Eco-Bat.

28 ⁸¹ A Chapter 11 trustee, like a Chapter 7 trustee, can also exercise the powers to avoid
fraudulent transfers under both bankruptcy law, see 11 U.S.C. § 548, and under applicable state
law. See 11 U.S.C. § 544(b). In this instance, the GoldenTree Plaintiffs already seek to avoid
various alleged fraudulent transfers under Nevada law. See discussion at 9 & notes 25 and 26,
supra. In this respect, bankruptcy does not offer a unique remedy to address the alleged
wrongdoing by the principals and affiliates of EBH.

1 is placed into bankruptcy without its consent.⁸²

2 In this case, the court concludes that a stay of this involuntary proceeding is appropriate.
 3 A stay of the proceeding is not a determination that a bona fide dispute as to liability or amount
 4 actually exists. Nor is it a determination that the Petition was filed in bad faith. Rather, it is a
 5 recognition that the GoldenTree Action and EBH Action are the appropriate and existing
 6 proceedings to resolve issues under nonbankruptcy law in a court that has undisputed authority
 7 to enter a final judgment. Entry of an order staying this involuntary bankruptcy proceeding
 8 pursuant to Section 305 therefore is warranted.

9 CONCLUSION

10 In light of the foregoing, the court will deny without prejudice the request for dismissal
 11 of this involuntary proceeding, and will stay the matter pending the outcome of the State Court
 12 Litigation until further order of this court. A separate order has been entered concurrently
 13 herewith.

14
 15 Copies sent to all parties via CM/ECF ELECTRONIC FILING

16 Copies sent via BNC to:

17 PAUL M. BASTA, ESQ.
 18 KIRKLAND & ELLIS LLP
 19 601 LEXINGTON AVE
 20 NEW YORK, NY 10022

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23 ⁸² A bankruptcy court's assertion of jurisdiction over parties without their consent is
 24 perhaps at its farthest limit when it enters an order substantively consolidating a non-debtor
 25 entity with an existing debtor. See, e.g., Clark's Crystal Springs Ranch, LLC v. Gugino (In re
 26 Clark), 692 Fed.Appx. 946 (9th Cir. July 12, 2017)(Chapter 7 individual debtor's estate
 27 substantively consolidated with separate limited liability company and separate family trust).
 28 Substantive consolidation of existing bankruptcy estates can be contentious, but is comparatively
 straightforward. See, e.g., In re R&S St. Rose Lenders, LLC, 553 B.R. 814 (Bankr. D. Nev.
 2016)(denial of substantive consolidation of separate voluntary Chapter 11 proceedings).
 Substantive consolidation of a debtor that has not subjected itself to bankruptcy jurisdiction,
 however, arguably is the equivalent of an involuntary proceeding without the protections of
 Section 303(b) and Section 303(h).

1 ANDREW GOLDMAN, ESQ.
CHARLES C. PLATT, ESQ.
2 WILMER CUTLER PICKERING HALE AND DORR LLP
7 WORLD TRADE CENTER
3 250 GREENWICH ST.
NEW YORK, NY 10007

4 BENJAMIN W. LOVELAND, ESQ.
5 WILMER CUTLER PICKERING HALE AND DORR LLP
60 STATE STREET
6 BOSTON, MASSACHUSETTS 02109

7 WILLIAM A. GUERRIERI, ESQ.
DAVID J. ZOTT, ESQ.
8 300 NORTH LASALLE
CHICAGO, IL 60654

9 JANET CHUBB, ESQ.
10 WILLIAM BREWER, ESQ.
KAEMPFER CROWELL
11 50 WEST LIBERTY STREET, SUITE 700
RENO, NV 89501

12

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