Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
March 15, 2019

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No.: 18-17155-MKN
	)	Chapter 11
DANIEL H. ROSENBLUM,	)	
	)	Date: January 30, 2019
Debtor.	)	Time: 9:30 a.m.
	)	

ORDER ON SECURED CREDITOR SHEILA ROSENBLUM'S MOTION TO DISMISS FOR BAD FAITH OR FOR ABSTENTION, OR IN THE ALTERNATIVE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY OR APPOINT A TRUSTEE[1]

On January 30, 2019, the court heard arguments on the Motion to Dismiss for Bad Faith or for Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee ("Motion"),[2] brought by Sheila Rosenblum ("Sheila").[3] The appearances of counsel

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRE" are to the Federal Rules of Evidence. All references to "LR" are to the Local Rules of Bankruptcy Practice of the United States Bankruptcy Court for the District of Nevada.

[2] The Motion is accompanied by the Declaration of Secured Creditor Sheila Rosenblum, etc. ("Sheila Declaration"), the Declaration of Daniel M. Lipschutz, Esq., etc. ("Lipschutz Declaration"), and the Declaration of Daniel Hemming, Esq, etc. ("Hemming Declaration"). Opposition to the Motion were filed by Daniel Rosenblum ("Debtor Opposition") and by Russell Rosenblum ("Russell Opposition"). The Debtor Opposition is accompanied by a declaration from Daniel Rosenblum ("Daniel Declaration"). A reply in support of the Motion is accompanied by the Declaration of Ogonna Brown, Esq., etc. ("Brown Declaration"), as well as additional declarations from Daniel M. Lipschutz ("Supplemental Lipschutz Declaration") and Daniel Hemming ("Supplemental Hemming Declaration").

[3] The court's use of the parties' first names throughout this order is for ease of reference only. No disrespect is intended.

were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[4]

In 1990, Daniel Rosenblum ("Daniel" or "Debtor") and Sheila married. (Sheila Declaration, ¶ 10; Daniel Declaration at 2:24).

In 1994, Daniel and Sheila divorced. (Sheila Declaration, ¶ 11; Daniel Declaration at 2:24-25).

On November 15, 1996, Daniel and Sheila re-married. (Motion, Ex. 1 at Recital A; Sheila Declaration, ¶ 12; Daniel Declaration at 2:25).

On July 8, 2010, Daniel and Sheila executed a Post-Nuptial Agreement ("2010 Post-Nup Agreement"). (Motion, Ex. "1" at Ex. "1"[5]; Sheila Declaration, ¶ 14; Daniel Declaration at 3:3-4).

On September 27, 2013, Sheila commenced a divorce proceeding ("Divorce Proceeding") against Daniel in the Supreme Court of the State of New York, County of New York ("New York State Court"). (Motion, Ex. "1" at Recital "E"; Sheila Declaration, ¶ 16; Daniel Declaration at 2:25-26).

On December 16, 2013, Daniel and Sheila executed another agreement modifying in part the 2010 Post-Nup Agreement ("2013 Agreement"). (Motion, Ex "1" at Recital "D" and Ex. "2"; Sheila Declaration, ¶ 14; Daniel Declaration at 3:3-5).

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[4] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned Chapter 11 proceeding. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Bank of America, N.A. v. CD-04, Inc. (In re Owner Management Service, LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

[5] Exhibit "1" to the Motion was filed under seal. Attached to sealed Exhibit "1" are additional numbered exhibits, including another Exhibit "1." Debtor filed an objection to the Motion that also includes seven numbered exhibits, but which contains two separate documents marked Exhibit "2" and is missing an Exhibit "3." The court will endeavor to clearly delineate throughout this Order the exhibit number or numbers on which it relied for any particular finding or conclusion.

On February 27, 2014, Daniel executed a promissory note in the principal amount of $2,000,000, payable to his son, Russell Rosenblum ("Russell").[6] On that same date, Daniel also executed a Pledge Agreement giving Russell a security interest in 500,000 shares of stock in ED&F Man Holdings Limited ("EDF"), an English international commodities brokerage firm in which the Debtor was a commercial commodities broker for approximately forty-six years. (Motion at 12:9-12; Debtor Opposition, Ex. "4"; Russell Opposition, Exs. "R1" and "R2").[7]

On October 20, 2015, Daniel executed another promissory note in the principal amount of $500,000, payable to Russell. (Debtor Opposition, Ex. "6"; Russell Opposition, Ex. "R3"). On that same date, Daniel apparently executed another Pledge Security Agreement giving Russell a security interest in an additional 125,000 shares of stock in EDF. (Debtor Opposition, Ex. "5"; Russell Opposition, Ex. "R4").

On January 25, 2016, Sheila instituted proceedings against Daniel in London, England ("London Action") to enforce various judgments she received in the Divorce Proceeding. According to her English counsel, Sheila filed the London Action "because there is no direct reciprocal enforcement treaty between the United States and the United Kingdom, and it was not possible for Ms. Rosenblum to simply register a United States judgment in the United Kingdom ….Instead, in order for Ms. Rosenblum to enforce her judgment, she was required to institute new proceedings before the English court, for recognition and enforcement of the United States judgments she holds against" the Debtor. (Hemming Declaration at ¶¶ 6-8; Supplemental Hemming Declaration at ¶¶ 6-8). Since instituting the London Action, Sheila has obtained judgments in excess of US$65,000,000, as well as a charging order ("Charging Order") encompassing more than ten million shares of Daniel's stock in EDF.[8] (Hemming Declaration, ¶¶ 16, 21-22, 26-27).

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[6] Russell is "[D]ebtor's son from another marriage ...." Sheila Declaration, ¶ 106.

[7] Both the promissory note and the Pledge Agreement are dated February 27, 2014, but the notary stamp to each document indicates that they were signed by Daniel on February 25, 2014.

[8] The remainder of the shares to which Daniel allegedly has ownership are the subject of a priority dispute between Sheila and Russell in the London Action. At the hearing on the instant

On June 22, 2016, Daniel and Sheila entered into a stipulation modifying in part the 2013 Agreement ("2016 Agreement"). (Motion, Ex. "1" at Recital "F" and Ex. "4"; Sheila Declaration, ¶ 18; Daniel Declaration at 3:5-7).

On January 12, 2017, a Judgment of Divorce ("JOD"), signed December 23, 2016, was entered in the Divorce Proceeding. (Motion, Ex "1" at Recital "E" and Ex. "3"; Sheila Declaration, ¶ 19; Daniel Opposition at 12:19-20).

On July 20, 2017, Daniel and Sheila entered into another stipulation modifying in part the 2010 Post-Nup Agreement ("July 2017 Agreement"). (Motion, Ex. "1" at Recital "G" and Ex. "5"; Sheila Declaration, ¶ 18; Daniel Declaration at 3:5-7).

On or about December 11, 2017, Daniel and Sheila apparently entered into a settlement agreement that modified, in part, the 2010 Pre-Nup Agreement, the 2013 Agreement, the 2016 Agreement, and the July 2017 Agreement ("December 2017 Agreement"). (Motion, Ex. "1," ¶ 2; Sheila Declaration, ¶ 20; Daniel Declaration, ¶ 3.[9]

On November 13, 2018, the New York State Court held a hearing in the Divorce Proceeding regarding, inter alia, Sheila's motion to appoint a receiver to sell the EDF shares to satisfy her judgments, as well as Daniel's cross-motion that, in pertinent part, requested a determination that he was entitled to 13.97% of any proceeds from the sale of EDF shares under the December 2017 Agreement.[10] See generally November 13, 2018, New York State Court Hearing Transcript, ECF No. 44-1, Ex. 9. Ultimately, the New York State Court denied Daniel's

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Motion, the court orally granted Sheila's request for relief from stay to proceed with that portion of the London Action, and a written order to that effect was entered the same day. (ECF No. 102). That order specified that relief from stay was not being granted as to "any disposition or sale of the EDF Man stock at issue, absent an order from the Bankruptcy Court or a stipulation approved by the Bankruptcy Court …." Id. at 3:1-4. The instant Order addresses the remaining relief requested in the Motion.

[9] The Daniel Declaration includes several separate paragraphs, each having the number 3. The instant reference is the paragraph appearing on page 3 of this declaration.

[10] Neither Sheila's motion nor Daniel's cross-motion were included in the record on the instant Motion, although the transcript of the hearing before the New York State Court reflects the matters presented.

cross-motion and continued the hearing to the first week of December 2018[11] for the court "to issue a ruling on that portion of the motion dealing with the receiver …." Id. at 43:20-21. However, the record before this court does not contain any order entered by the New York State Court regarding any matter discussed at the November 13, 2018, hearing.

On December 1, 2018, prior to the continued hearing in the Divorce Proceeding, Debtor filed his voluntary Chapter 11 petition with this court and his schedules of assets and liabilities ("Schedules"). (ECF No. 1). On his Schedule "A/B," Debtor attested that he has an ownership interest in shares of stock in EDF Man Group PLC having a value of $60,000,000. On his Schedule "E/F," Debtor listed Sheila as having a disputed, priority, unsecured claim in the amount of $700,000, as well as a disputed, non-priority, unsecured claim in the amount of $30,000,000.

On December 21, 2018, Debtor filed amended Schedules. (ECF No. 47). In his amended Schedule "A/B," Debtor attested that he has an ownership interest in approximately 11,827,919 shares of stock in EDF Man Group PLC having a value of $47,311,676. The total value of the Debtor's scheduled assets was listed at $47,453,665. In his amended Schedule "D," Debtor listed three secured claims in the aggregate amount of $8,048,000, including two claims in the aggregate amount of $4,048,000 in favor of Russell. In his amended Schedule "E/F," Debtor listed Sheila as having a disputed, priority, unsecured claim in the amount of $700,000, as well as a disputed, non-priority, unsecured claim in the amount of $39,411,390.41.[12]

On December 21, 2018, Sheila filed the instant Motion, along with her declaration, as well as the Lipschutz Declaration and Hemming Declaration. (ECF Nos. 42, 43, 44, and 45).[13]

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[11] Based upon its review of the hearing transcript, this court is unclear whether the New York State Court continued the hearing to December 4 or December 5, 2018.

[12] In his unsecured claim Schedule "E/F," Debtor listed only five claims as not being contingent, disputed, and/or unliquidated: three credit cards claims by American Express, a claim by the Daniel Rosenblum Family Foundation Inc., and a claim by the NY State Department of Taxation and Finance.

[13] On that same day, Sheila also filed a motion to seal certain confidential documents, including a copy of the December 2017 Agreement; the motion was granted. (ECF Nos. 40, 58;

On the same date, Sheila filed proof of claim number 3 ("POC #3") in the total amount of $190,787,212.18. That amount consists of a secured amount of $65,038,695.31, a priority unsecured amount of $14,105,241.78, and a non-priority unsecured amount of $111,643,275.09.[14]

On January 16, 2019, the Debtor Opposition was filed, along with the Daniel Declaration and accompanying exhibits. (ECF No. 84).[15]

On January 17, 2019, the Russell Opposition was filed, along with an errata attaching various exhibits. (ECF Nos. 86 and 88).

On January 23, 2019, Sheila filed separate responses to each opposition, along with the Brown Declaration, the Supplemental Lipschutz Declaration, and the Supplemental Hemming Declaration. (ECF Nos. 91, 92, 93, 94, and 95).

On January 30, 2019, a hearing was conducted on the Motion. As previously discussed in note 8, supra, the court granted relief from stay with respect to the dispute between Sheila and Russell in the London Action, and took the remainder of the requested relief under submission.

DISCUSSION

By her Motion, Sheila asks for several different forms of relief, including dismissal of the Chapter 11 proceeding pursuant to Section 1112(b), appointment of a trustee or examiner under Section 1104, abstention or dismissal under Section 305(a), and/or relief from the automatic stay under Section 362 to seek appointment of a receiver in the Divorce Proceeding. In his

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see also ECF Nos. 106 and 108 regarding the court's approval of an additional motion to seal filed by Sheila).

[14] As of the date of the hearing on the instant Motion, creditors have filed eleven other proofs of claim asserting an aggregate amount of $1,781,993.56 in non-priority unsecured claims. These include Russell's proof of claim number 12-1 in the non-priority, unsecured amount of $1,500,000. Russell filed a separate proof of claim number 10-1 in the secured amount of $4,261,512.16, based on loans secured by shares of stock in EDF. The bar date for non-governmental entities to file claims is April 3, 2019, and the bar date for governmental entities is May 30, 2019.

[15] On that same day, Debtor filed a separate motion to seal certain documents, including a copy of the December 2017 Agreement; that motion was granted. (ECF Nos. 85 and 87).

opposition, Daniel addresses each of these requested forms of relief, but only after arguing that the Motion should be denied on procedural grounds. Because the court concludes that none of the relief requested by Sheila is warranted, except for the limited relief from stay already granted with respect to the London Action, it is unnecessary to address the procedural grounds raised by the Debtor.

I. Dismissal under Section 1112(b).

a. General Standard.

Section 1112(b)(1) provides as follows:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). Section 1112(b)(4) provides a non-exclusive list of circumstances constituting "cause." The burden of establishing cause rests with the party seeking relief under Section 1112(b)(1). See Labankoff v. U.S. Trustee (In re Labankoff), 2010 WL 6259969, at *3 (B.A.P. 9th Cir. June 14, 2010); see generally 7 COLLIER ON BANKRUPTCY ¶ 1112.04[4] (Alan N. Resnick and Henry J. Sommer, eds, 16th ed. rev. 2018). Because Section 1112(b)(1) provides the alternatives of conversion or dismissal, the moving party also should demonstrate why the alternative it requests is in the best interests of creditors and the estate. Id. at n.35, citing In re Helmers, 361 B.R. 190, 198 (Bankr. D. Kan. 2007).

The operative command in Section 1112(b)(1) that the court shall convert or dismiss a chapter 11 proceeding is subject to the exception set forth in Section 1112(b)(2). The exception sometimes is referred to as a "defense" to conversion or dismissal because the burden of establishing its requirements requests upon the opponent. Under Section 1112(b)(2), if the moving party establishes the existence of cause under Section 1112(b)(1), then the opponent can prevent conversion or dismissal if four requirements are met: (1) the court identifies unusual circumstances establishing that such relief is not in the best interests of creditors and the estate;

(2) the opponent establishes that there is a reasonable likelihood of confirming a plan in a reasonable amount of time; (3) the opponent establishes that the grounds for relief include an act or omission of the debtor for which there is a reasonable justification; and (4) the opponent establishes that the act or omission can be cured within a reasonable time. See 11 U.S.C. § 1112(b)(2)(A and B). Where cause is based on proof of a "substantial or continuing loss or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" under Section 1112(b)(4)(A), however, the third and fourth requirements under Section 1112(b)(2) arguably can never be met because they apply only to acts or omissions "other than under [Section 1112(b)(4)(A)]." 11 U.S.C. § 1112(b)(2)(B).

Sheila raises several arguments supporting dismissal[16] of this case under Section 1112(b), which the court addresses separately below.

b. Bad Faith Filing.

Permeating the entire Motion is Sheila's argument that Debtor filed this bankruptcy case in a bad faith attempt to avoid his responsibilities under the parties' pre-petition agreements, the substantial judgments and Charging Order she obtained against him in the Divorce Proceeding and the London Action, and the New York State Court's appointment of a receiver (which, Sheila contends, was imminent).

A lack of good faith in filing a bankruptcy petition may constitute "cause" warranting dismissal under Section 1112(b). See Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828-29 (9th Cir. 1994). "Good faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process.... Good faith depends on an amalgam of factors, not a specific fact or facts. Margitan v. Hanna (In re Hanna), 2018 WL 1770960, at *5 (B.A.P. 9th Cir. Apr. 13, 2018) (quotations and citations omitted). In determining whether a case was filed in the absence of good faith, courts may consider factors such as whether:

(1) the debtor has only one asset;

(2) the debtor has an ongoing business to reorganize;

[16] Sheila does not address the alternative remedy of conversion, which the statute requires the court to consider in its analysis to the extent "cause" exists.

> (3) there are any unsecured creditors;
>
> (4) the debtor has any cash flow or sources of income to sustain a plan of reorganization or to make adequate protection payments; and
>
> (5) the case is essentially a two-party dispute capable of prompt adjudication in state court.

See St. Paul Self Storage Ltd. P'ship v. Port Authority of the City of St. Paul (In re St. Paul Self Storage Ltd' P'ship), 185 B.R. 580, 582-83 (B.A.P. 9th Cir. 1995).

The bulk of Sheila's bad faith argument centers around the fifth factor. Sheila provided the court with an extensive recitation of the parties' litigation history after their divorce in 2013. She argues that the Debtor's bankruptcy filing is essentially a two-party dispute that was initiated because the Debtor exhausted his other remedies to change the distribution of assets and his responsibilities upon divorce. Sheila relies on numerous cases where dismissal of a bankruptcy proceeding was predicated upon a finding of the debtor's bad faith. The court has reviewed the cases cited by Sheila and finds them distinguishable.

In In re Gooding, 234 B.R. 157 (Bankr. M.D. Fla. 1999), the bankruptcy court dismissed the case as a two-party dispute finding, in pertinent part, that the debtor's only scheduled claims arose out of litigation from the divorce proceeding. In the instant matter, although Sheila arguably holds the bulk of the secured and unsecured debts based on her POC #3, the claims register and Debtor's Schedules reflect several creditors that appear to be unrelated to Sheila, the Debtor, or the parties' extensive litigation history. Although the court acknowledges Sheila's argument that Debtor allegedly manufactured these debts to legitimize his current bankruptcy filing, the court does not have any evidence before it substantiating this allegation.

In In re Moog, 159 B.R. 357 (Bankr. S.D. Fla. 1993), the court, after a four-day evidentiary hearing that occurred one year from the petition date, dismissed the debtor's bankruptcy filing as a two-party dispute, finding, in pertinent part, that debtor's proposed chapter 11 plan reflected his intention to re-write the parties' divorce agreement, and the bankruptcy was filed to avoid the family court's appointment of a receiver on the debtor's company stock. The court in In re Nichols, 223 B.R. 353 (Bankr. N.D. Okla. 1998) also dismissed the debtor's bankruptcy case as a bad faith two-party dispute between ex-spouses after an evidentiary

hearing, where the bankruptcy court had the ability to observe the debtor's "evasive" testimony that "cast[ed] doubt on his credibility as a sincere chapter 11 debtor. Id. at 356. Similarly, in Efron v. Candelario (In re Efron), 529 B.R. 396 (B.A.P. 1st Cir. 2015), the appellate court affirmed the bankruptcy court's dismissal of the case as a two-party dispute after, in pertinent part, the passage of three years, the appointment of an examiner, debtor's inability to confirm a 100% plan because of incessant motion practice between him and his ex-wife, and debtor's failure to abide by court orders requiring him to pay his monthly domestic support obligations. Finally, in In re Silberkraus, 253 B.R. 890 (Bankr. C.D. Cal. 2000), the bankruptcy court found that debtor's chapter 11 was filed in bad faith when, in pertinent part, debtor's counsel conceded seven months into the case that debtor would not be able to propose a confirmable plan over creditors' objections. In contrast to all of those cases, the instant bankruptcy proceeding has been pending for a little more than two months, the Debtor has not yet filed a plan nor conceded that he will be unable to file a plan,[17] and the court has not had the benefit of an evidentiary hearing to enable it to make findings of fact on Sheila's fact-intensive, bad faith allegations.[18]

In In re Purpura, 170 B.R. 202 (Bankr. E.D. N.Y. 1994), the court found that the debtor's bankruptcy case was filed in bad faith to restructure a divorce court's distribution of marital assets after the ex-husband unsuccessfully exhausted all appeals. In support of this determination, the bankruptcy court cited to portions of debtor's schedules where he claimed an interest in property that the divorce court unequivocally gave to his ex-wife and therefore, did

[17] Debtor's counsel indicated at the hearing that Debtor's intention is to file a plan within the exclusivity period, which expires on April 1, 2019.

[18] Neither party requested an evidentiary hearing. Instead, the court is being asked to parse through an extensive paper record involving several years of pre-petition litigation between the parties in an effort to gauge the Debtor's motivation in filing this bankruptcy case. Sheila's counsel argued at the hearing that Debtor "is trying to rewrite all of the agreements in front of this court who doesn't have the benefit of the history of everything that's gone on." Notwithstanding Sheila's valiant effort to cram this history via motion practice and oral argument, the court continues to not have the benefit of the history of everything that has gone on between the parties, much less the evidentiary record necessary to decipher the motivations attendant to the current bankruptcy filing.

not constitute property of the estate. In the instant case, Sheila argues that analogous circumstances exist here, as Debtor is claiming an interest in stock shares in EDF for which she obtained a Charging Order. Yet, in response to questioning from the court at the hearing, Sheila's counsel appeared to concede that the Charging Order, at best, provided her with the status of a secured creditor and did not confer ownership of the shares upon her. Therefore, unlike Purpura, the stock shares on which the present dispute is largely based apparently do constitute property of the Debtor's bankruptcy estate. The court acknowledges Sheila's additional argument that she is entitled to 100% of the proceeds from the sale of the stock pursuant to the Charging Order and in light of her substantial claims against the Debtor. To the extent this additional argument is based on the New York State Court's comments at the November 13, 2018 hearing, the court notes that the current record in support of the Motion fails to include any order entered by the New York State Court regarding any matter discussed during that hearing. For purposes of this Motion only, the court cannot make the leap to find bad faith on Debtor's part without such an order.[19]

In Van Owen Car Wash, Inc., 82 B.R. 671 (Bankr. C.D. Cal. 1988), the court dismissed a chapter 11 filed by a non-operational business entity with no assets other than a lawsuit, finding that the sole purpose of the bankruptcy filing was to obtain a quicker resolution of the lawsuit in the bankruptcy forum in order to alleviate any tax enforcement actions by the IRS against corporate insiders. In In re Donuts of Seekonk, Inc., 122 B.R. 172 (Bankr. D. R.I. 1990), the court dismissed a chapter 11 filed shortly after a state court order requiring it to vacate the space in which it conducted its business operations. In pertinent part, the bankruptcy court found that the bankruptcy filing was an attempt to re-litigate this issue in the bankruptcy court, and the court could see no feasible plan being proposed. In In re Wally Findlay Galleries (New York), Inc., 36 B.R. 849 (Bankr. S.D. N.Y. 1984), the debtor filed chapter 11 shortly after its lease was terminated, and it lost an eviction action in state court. The bankruptcy court dismissed the case as a bad faith two-party dispute in which the debtor, who could not post a supersedeas bond,

[19] The court is not, however, making any determination regarding Sheila's ability, or lack thereof, to raise arguments in the future based on estoppel or any other similar legal principle.

filed bankruptcy to achieve the same result, i.e., a stay of the eviction order. The court also found that the debtor sought to re-litigate the parties' pre-petition relationship, as it also sought to assume the lease that was terminated pre-petition.

Here, Debtor's only significant asset appears to be his shares of stock in ECF. The shares in EDF against which Sheila has a Charging Order constitute Debtor's primary asset on which reorganization will live or die, as even Debtor implicitly concedes. See Debtor Opposition at 10:21-24 ("The EDF Stock is essential to effectuate Debtor's reorganization plan. Since the Debtor has equity in the Shares, they can be sold, the proceeds escrowed (or interplead with the Court), and creditors can be paid through the bankruptcy proceedings under a confirmed plan of reorganization."). Yet, because there was no pre-bankruptcy order from the New York State Court preventing Debtor's ability to obtain 13.97% of the proceeds from the sale of the EDF stock in the manner provided under the December 2017 Agreement,[20] the court cannot conclude at this early stage of the Chapter 11 case that Debtor will not be able propose a plan of reorganization that is fair and equitable to his creditors.[21]

In Oasis at Wild Horse Ranch, LLC v. Sholes (In re Oasis at Wild Horse Ranch, LLC), 2011 WL 4502102 (B.A.P. 9th Cir. Aug. 26, 2011), the bankruptcy appellate panel, in affirming the bankruptcy court's dismissal of the chapter 11 case as a two-party dispute, found that "it is clear from this record" that the bankruptcy filing was initiated to continue pre-bankruptcy litigation involving ownership of the debtor-limited liability company. Similarly, in Matter of Ofty Corp., 44 B.R. 479, 482 (Bankr. D. Del. 1984), the court dismissed the case as a bad faith filing because it was "clear that the sole purpose of the filing was to circumvent the effect of the District Court order entered to resolve years of dispute which the parties could not resolve

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[20] The court makes no determination of whether Daniel is entitled to receive any funds under the December 2017 Agreement, free and clear of Sheila's Charging Order or claims. See December 2017 Agreement, ¶ 46.

[21] In his supplemental declaration, Sheila's divorce counsel opines that "Debtor will almost certainly not have any ability to liquidate the shares pursuant to the Company's restrictive Articles of Association." (Supplemental Lipschutz Declaration, ¶ 13). Counsel lay opinion or legal argument, however, is not evidence.

among themselves." For the reasons previously stated in this Order, it is less clear, based on the record presented, that this bankruptcy case is simply a two-party dispute. Indeed, Debtor's Schedules and claims register reflect other interested non-insider creditors seeking to be paid. The fact that Sheila's potential claim dwarfs all other claims may draw Debtor closer to the line of a bad faith finding, but it does not persuade the court that the Debtor has crossed that line at this time.[22]

In Marsch v. Marsch (In re Marsch), 36 F.3d 825 (9th Cir. 1994), the Ninth Circuit agreed with the bankruptcy court's dismissal of the case as a bad faith filing because, in pertinent part, the record reflected that the debtor had the financial means to pay the judgment that precipitated the bankruptcy filing. In the instant case, the parties' disagreement as to the correct amount of Sheila's claim precludes the court from making a similar finding as to Daniel. Specifically, although Daniel contends that he is solvent, he makes this contention based on his scheduling of Sheila's claim in the disputed amount of $39,411.390.41. Sheila, on the other hand, attests in POC #3 that she is owed more than $190 million, which renders Daniel insolvent if the court accepts his valuation of his assets at $47,453,665. Sheila, though, appears to doubt the veracity of Daniel's valuation of his assets, contending that he listed a net worth in excess of $500,000,000 in 2013. These unresolved disputes prevent the court from making any finding at the present time, as in Marsch, that the Debtor has the ability to pay Sheila's substantial claims.[23]

Finally, in St. Paul Self Storage Ltd. P'ship v. Port Authority of the City of St. Paul (In re St. Paul Self Storage Ltd. P'ship), 185 B.R. 580 (B.A.P. 9th Cir. 1995), the bankruptcy court's dismissal of the case as a two-party dispute was affirmed where, in pertinent part, the debtor's most significant asset was a lawsuit that was scheduled to go to trial shortly after the petition date. On those facts, the appellate court affirmed the bankruptcy court's finding that the

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[22] That does not mean that the court does not have its doubts as to Daniel's motivation or that the court will not be receptive to a similar request after the Debtor has had a sufficient opportunity to quell these concerns by his post-petition actions. It only means that the court does not believe that Sheila has satisfied her burden under Section 1112 at the present time.

[23] According to the Debtor, he apparently was solvent at the time Sheila obtained the Charging Order against his EDF shares.

bankruptcy petition was filed to litigate the matter in a different forum that the debtor perceived to be more friendly. Although the instant case arguably has similarities to St.Paul in that the Debtor's main asset are the EDF shares to which Sheila claims a 100% beneficial interest, the court nevertheless, for the reasons previously stated, concludes that Sheila has not satisfied her burden to show that "cause" exists to dismiss this case as a bad faith filing under Section 1112.

c. Continuing Loss or Diminution of Debtor's Estate and the Absence of a Reasonable Likelihood of Reorganization.

Sheila argues that "cause" exists to dismiss this case under Section 1112(b)(4)(A), which requires a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation …." The basis for this argument centers around Debtor's alleged refusal to execute certain documents allowing Sheila to sell EDF stock shares awarded to her from their divorce. Sheila correctly argues that property awarded to her under the divorce does not constitute property of the estate. See In re Purpura, 170 B.R. at 208 ("It is widely recognized that property awarded to a non-debtor spouse pursuant to a divorce decree finalized prior to the debtor spouse's bankruptcy is not part of the debtor's estate.") (citing cases). Therefore, if Sheila owns any EDF stock shares that do not constitute property of the estate, then there can be no diminution of this bankruptcy estate that does not include the stock shares belonging to Sheila. To the extent Sheila's argument is intended to extend to the other EDF stock shares over which she only holds a security interest, Sheila's argument is appropriately viewed as limited to the delay attendant to her being paid, and not to any diminution in value for which admissible evidence is lacking.[24] For these reasons, the court finds and concludes that Sheila has not satisfied her burden to show that "cause" exists to dismiss this case under Section 1112(b)(4)(A).

d. Gross Mismanagement of Debtor's Estate.

[24] For reasons previously indicated, arguments raised by Sheila's counsel regarding Debtor's alleged difficulty in selling the shares are not evidence. See discussion at note 20, supra.

Sheila argues that "cause" exists under Section 1112(b)(4)(B), which requires a "gross mismanagement of the estate …." Yet, Sheila's arguments relating to Debtor's pre-petition actions, including his accumulation of $2.247 million in credit card debt, withdrawal of funds from his retirement accounts, exorbitant spending habits on companionship and living accommodations, and his alleged encumbrance of stock shares in violation of state court orders, do not fall within the ambit of Section 1112(b)(4)(B) because this bankruptcy estate did not exist during the pre-petition period. Additionally, any issues regarding Debtor's post-petition living accommodations or cash collateral budget do not constitute gross mismanagement at this juncture because, in pertinent part, Russell is paying for the Debtor's living quarters, and Sheila's counsel did not press any objection to Debtor's cash collateral budget as long as Daniel's expenses will not be paid from her collateral, including the EDF stock shares. Furthermore, Debtor's alleged failure to schedule ongoing payments of alimony, maintenance, or support in his Schedule "J" and Debtor's alleged misrepresentation of arrears on the same do not constitute gross mismanagement at this stage because, to the extent Daniel's disclosures are incorrect, FRBP 1007 provides him with the opportunity to amend his Schedules. Finally, Debtor's attempts to reorganize tax debt and his son's payment of his attorneys' fees do not constitute gross mismanagement of the estate. Indeed, reorganizing to pay tax debts and assistance from family members[25] are both common in bankruptcy proceedings. For these reasons, the court finds and concludes that Sheila has not satisfied her burden to show that "cause" exists to dismiss this case under Section 1112(b)(4)(B).

e. Delinquent Post-Petition Domestic Support Obligations.

Sheila argues that "cause" exists under Section 1112(b)(4)(P), which requires a "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." Specifically, Sheila argues that pursuant to the JOD, "Debtor is

[25] The court notes that it has not approved any post-petition financing arrangement between the Debtor and his son. If Russell asserts an administrative claim in the future, including for the payment of his father's alleged $8,000 a month living quarters at the Waldorf Astoria, the court will consider whether the post-petition extensions of credit between a father and son was induced by the payment priority scheme provided under bankruptcy law.

obligated to pay domestic support obligations on the first of every month." (Motion at 33:1-2; Sheila Declaration, ¶ 152). Neither the Motion nor the Sheila Declaration direct the court to a specific provision of the JOD requiring these monthly payments. Based on the court's independent review of the JOD, Daniel is required to pay child support in the manner required under Article VII of the 2010 Post-Nup Agreement, which states, in pertinent part:

> 1. In the event of an Operative Event as defined in this Agreement, and continuing on the **first day of each month** thereafter until the first to occur of the following: (a) the death of DANIEL, or (b) the death of SHEILA, DANIEL shall pay the following Basic Child Support directly to the WIFE by personal check drawn on a New York Bank, or direct deposit to an account designated by SHEILA, the sum of [redacted] **per year** in total for two children until [child one] is emancipated as defined in Article VIII, at which time Child Support payments shall be reduced to [redacted] **per year** until [child two's] emancipation, when Child Support shall cease.

(emphasis added).[26] As the bolded language reflects, Paragraph 1 of Article VII is ambiguous, at best, regarding whether Daniel's child support payments are owed on a monthly or annual basis. For example, the paragraph could be read to require the accumulation of Daniel's child support obligations on a monthly basis until his or Sheila's death, but require Daniel to only pay the aggregate of all such months on an annual basis.[27] Additionally, to the extent an annual payment is required, the deadline for Daniel to make this payment is unclear to this court based on its independent review of the pertinent agreements.

The JOD also required Daniel to pay spousal maintenance to Sheila in the manner provided under paragraph 11 of the 2013 Agreement, which requires Daniel to pay an annual amount to Sheila that "**can** be made in monthly installments …." (Motion, Ex. "1" at Ex. "2"). Unlike the child support provision in the 2010 Agreement, this provision unambiguously permits

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[26] The court redacted certain terms from the above-quoted language because the 2010 Agreement was filed under seal.

[27] Additionally, the evidence does not reflect whether the couple's children are currently emancipated as provided for under Article VIII, which would terminate Daniel's obligation to make further child support payments.

Daniel to make monthly payments but does not require him to do so. Similarly to the child support provision in the 2010 Agreement, however, the deadline for Daniel to make this annual payment is unclear.[28] For these reasons, the court finds and concludes that Sheila has failed to satisfy her burden to show "cause" exists to dismiss this case under Section 1112(b)(4)(P).

II. Appointment of a Trustee or Examiner under Section 1104.

Sheila alternatively requests that the court appoint a trustee or examiner under Section 1104, which states as follows:

> (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee-
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

Sheila has the burden to show that one or both of these independent bases supports the appointment of a Chapter 11 trustee. See 7 COLLIER ON BANKRUPTCY, supra, ¶ 1104.02[4][b].[29] The court concludes that Sheila has failed to sustain her burden to show "cause" under Section 1104(a)(1) for the reasons previously discussed under Section 1112. Additionally, the court concludes that Sheila has failed to sustain her burden under Section 1104(a)(2) as her arguments

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[28] Paragraph 11 of the 2013 Agreement states that Daniel's annual payment obligations "[c]ommenc[e] January 1, 2014" but it does not state that Daniel's deadline to make his annual payments is January 1 of every year thereafter or otherwise specify a deadline this court can decipher that would enable it to find a violation under Section 1112(b)(4)(P).

[29] The treatise discusses the divergent case law as to whether that burden is satisfied under a preponderance of the evidence or a clear and convincing evidence standard. For purposes of this Order only, the court assumes that the preponderance standard applies.

are more geared to the best interests of only one creditor, i.e., herself. There is nothing unusual or crass about a creditor's self-interest, but the court cannot find that appointment of a trustee is in the best interest of any creditor other than Sheila. Indeed, Sheila has not, either in her Motion or during oral argument, suggested any scenario where the appointment of a Chapter 11 trustee would benefit any other creditor. Moreover, no other creditor or party in interest, including the Office of the United States Trustee, has appeared in support of her request to appoint a Chapter 11 trustee.

Continued prosecution of a Chapter 11 proceeding is not, of course, a popularity contest. Debtor's unpopularity with his former spouse is neither surprising nor unusual. An individual Chapter 11 debtor faces significant hurdles to confirming a plan of reorganization,[30] as well as significant hurdles in obtaining a discharge.[31] Even more daunting is the prospect that the individual debtor's most significant creditor may have a claim that will not be discharged in bankruptcy at all.[32] At this early stage, Sheila has not demonstrated that Debtor has no prospect of confirming a Chapter 11 plan or has engaged in misconduct sufficient to warrant intervention

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[30] If there is a dissenting class of creditors holding non-priority unsecured claims, a Chapter 11 debtor must overcome the "absolute priority rule" objection under Section 1129(b)(2)(B)(ii) for a proposed plan to be confirmed. Moreover, an individual Chapter 11 debtor also must devote his "projected disposable income" for at least five years if the holder of an allowed unsecured claim objects to plan confirmation under Section 1129(a)(15). Because of the intersection of these two requirements for individual Chapter 11 debtors, the Ninth Circuit has characterized these confirmation elements as imposing a "double whammy" on individuals with high earning capacity. See Zachary v. California Bank & Trust (In re Zachary), 811 F.3d 1191, 1199 (9th Cir. 2016).

[31] Unlike a non-individual Chapter 11 debtor, and more like a Chapter 13 debtor, an individual Chapter 11 debtor does not obtain a discharge unless he or she completes all payments required by the confirmed plan of reorganization. 11 U.S.C. § 1141(d)(5)(A).

[32] A "domestic support obligation" is a debt, including interest, that is owed to a former spouse or the debtor's child, that is in the nature of alimony, maintenance, or support, that is established by reason of applicable provisions of a separation agreement, divorce decree, property settlement, or an order of a court of record. 11 U.S.C. § 101(14A). Under Section 523(a), a Chapter 11 discharge does not include a debt for a domestic support obligation, see 11 U.S.C. § 523(a)(5), and does not include a debt to a former spouse or child not of a kind described in Section 523(a)(5) that is incurred in connection with a separation agreement, divorce decree or other order of a court of record. See 11 U.S.C. § 523(a)(15).

by a trustee. Because the Debtor's exclusive period to file a proposed Chapter 11 plan of reorganization under Section 1121(b) has not elapsed, the court concludes that Sheila has not demonstrated sufficient grounds to appoint a trustee.

III. Abstention under Section 305.

As her second alternative to appointment of a trustee, Sheila asks the court to "abstain from Debtor's bankruptcy case [under Section 305] and dismiss the case." Motion at 37:23-24. Section 305 states, in pertinent part:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension ….

In deciding whether abstention is in the interests of creditors and the debtor, the court engages in a totality of the circumstances analysis that encompasses the following non-exclusive list of factors:

> (1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

Marciano v. Fahs (In re Marciano), 459 B.R. 27, 47-49 (B.A.P. 9th Cir. 2011) aff'd 708 F.3d 1123 (9th Cir. 2013). "In its construction, § 305(a) is similar to other Bankruptcy Code sections [such as Section 1112(b)] that allow the bankruptcy court to determine whether it is appropriate to continue a bankruptcy case or to dismiss it." In re Marciano, 459 B.R. at 48. For the reasons previously stated under both Sections 1112(b) and 1104(a), the court finds and concludes that neither abstention nor suspension of this bankruptcy case is in the interests of creditors and the Debtor.

IV. Relief from the Automatic Stay under Section 362.[33]

Finally, as a third alternative, Sheila requests relief from the automatic stay to allow her to prosecute, in pertinent part, her receivership motion in the New York State Court. Sheila argues that the automatic stay should be lifted under Sections 362(d)(1 and 2) on the same grounds that the court has considered, and rejected, under Sections 1112(b), 1104(a), and 305(a). The court denies stay relief for the reasons previously stated and because Sheila's request for stay relief indirectly seeks the appointment of a receiver, which is prohibited under Section 105(b).

IT IS THEREFORE ORDERED that Secured Creditor Sheila Rosenblum's Motion to Dismiss for Bad Faith or For Abstention, or in the Alternative, Motion for Relief from the Automatic Stay or Appoint a Trustee, Docket No. 42, be, and the same hereby is, **DENIED**.

Copies sent via CM/ECF ELECTRONIC FILING

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[33] In connection with Sheila's request for relief from the automatic stay, Debtor argues that Sheila's counsel failed to satisfy LR 4001(a)(2) by not communicating in good faith to resolve the request prior to filing the Motion. (Debtor Opposition at 12:3-5). In reply, Sheila's counsel attested that such communications occurred. See Brown Declaration, ¶¶ 5, 6, 7, and 8. Debtor did not pursue the matter at the hearing. Debtor also argues that the Motion fails to include a relief from stay information sheet as required under LR 4001(a)(1). (Debtor Opposition at 12:5-6). The information sheet is designed to provide parties in interest as well as the court a summary of the factual and legal basis for relief from stay, most commonly when real property is the subject of the motion. Having fully responded to the Motion by filing an opposition, Debtor did not suggest at the hearing that he was prejudiced by the absence of the information sheet. Under these circumstances, neither objection based on an alleged non-compliance with LR 4001(a) has merit, and both are overruled.