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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANYAH VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

SIG ROGICH, A/K/A SIGMUND ROGICH, INDIVIDUALLY, AND AS TRUSTEE OF THE ROGICH FAMILY IRREVOCABLE TRUST; ELDORADO HILLS, LLC, A NEVADA LIMITED LIABILITY COMPANY; TELD, LLC, A NEVADA LIMITED LIABILITY COMPANY; PETER ELIADES, INDIVIDUALLY AND AS TRUSTEE OF THE ELIADES SURVIVOR TRUST OF 10/30/08; AND IMITATIONS, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Supreme Court No. 79917

District Court No. A686303

RESPONDENTS' JOINT MOTION FOR EXTENSION OF ANSWERING BRIEF DEADLINE (FIRST REQUEST)

Respondents.

SIG ROGICH, A/K/A SIGMUND ROGICH, INDIVIDUALLY AND AS TRUSTEE OF THE ROGICH FAMILY IRREVOCABLE TRUST,

Cross-Appellant,

vs.

NANYAH VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Cross-Respondent,

and

ELDORADO HILLS, LLC, A NEVADA LIMITED LIABILITY COMPANY; TELD, LLC, A NEVADA LIMITED LIABILITY COMPANY; PETER ELIADES, INDIVIDUALLY AND AS TRUSTEE OF THE ELIADES SURVIVOR TRUST OF 10/30/08; AND IMITATIONS, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondents.

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Eldorado Hills, LLC, Teld, LLC, Peter Eliades, Individually and as Trustee of the Eliades Survivor Trust of 10/30/08 (collectively, the "Eliades Respondents"), Sig Rogich, Individually and as Trustee of the Rogich Family Irrevocable Trust, and Imitations, LLC (the "Rogich Respondents"), by and

through their respective counsel of record, hereby move this Court for a 90 day extension to file their respective Answering Briefs in the above-entitled appeal.[1]

DATED this 10th day of August, 2021.

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By: /s/ Dennis L. Kennedy
DENNIS L. KENNEDY
JOSEPH A. LIEBMAN

Attorneys for Eliades Respondents

HUTCHISON AND STEFFEN

By: /s/ Brenoch Wirthlin
BRENOCH WIRTHLIN

Attorneys for Rogich Respondents

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nanay Vegas, Inc. ("Nanyah") previously sought and received two separate 90 day extensions to file its Opening Brief. As a matter of professional courtesy, Respondents agreed to Nanyah's requests for these

[1] The Eliades Respondents and the Rogich Respondents are jointly referred to as the "Respondents."

extensions, recognizing both the large scope of the issues Nanyah chose to include in its appeal (necessitating Nanyah's filing of an oversized brief), as well as the numerous practical and logistical hurdles caused by the COVID-19 Pandemic. Accordingly, when Respondents sought the same professional courtesy from Nanyah due to the Rogich Respondents' conflicting trial schedule and the Eliades Respondents' desire to remain on the same briefing schedule with the Rogich Respondents, they fully expected that they would receive the same courtesy. Unfortunately they did not, thereby necessitating the filing of this Motion.

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II. RELEVANT HISTORY

1. Nanyah filed a Notice of Appeal on October 24, 2019, which included 14 separate appellate issues.

2. On October 14, 2020, following various Orders to Show Cause relating to the ripeness of various appellate issues, this Court issued an Order establishing a briefing schedule.

3. Specifically, Nanyah had 60 days to file its Opening Brief. The Rogich Respondents then had 30 days to file a combined Answering Brief and Opening Brief on cross-appeal, and the Eliades Respondents had 30 days to

file an Answering Brief. Nanyah then had 30 days to file its combined Reply and Answering Brief on cross-appeal, along with the Eliades Defendants filing their Answering Brief on cross-appeal. Finally, the Rogich Respondents had 14 days to file its Reply Brief on Cross-Appeal.

4. On November 18, 2020, Nanyah filed an Unopposed Motion for Extension to File Opening Brief and Appendix, after the Respondents agreed not to oppose any such extension. Nanyah requested a 90 day extension.

5. On November 30, 2020, this Court granted Nanyah's request for an extension, setting the deadline for Nanyah's Opening Brief for March 11, 2021. The rest of the briefing schedule remained the same as in this Court's October 14, 2020 Order.

6. On February 25, 2021, Nanyah filed another Unopposed Motion for Extension to File Opening Brief and Appendix, after the Respondents again agreed not to oppose any such extension. Nanyah requested another 90 day extension.

7. On March 5, 2021, this Court granted Nanyah's request for another 90 day extension, setting the deadline for Nanyah's Opening Brief for June 9, 2021. The rest of the briefing schedule remained the same as in this

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Court's October 14, 2020 Order.

8. On March 29, 2021, Nanyah filed a Notice of Bankruptcy with this Court.

9. Nanyah's Chapter 11 bankruptcy was filed because Nanyah had failed to post a superseadeas bond in order to stay execution during the pendency of this appeal, and as a result, Respondents had begun to execute on Nanyah's "things in action," as permitted by *Reynolds v.Tufenkjian*, 136 Nev. Adv. Rep. 19, 461 P.3d 147 (2020).[2]

10. As a result of Nanyah's decision to file for Chapter 11 bankruptcy and to file a Notice of Bankruptcy in this action, on April 7, 2021, this Court filed an Order to Show Cause asking Nanyah to show whether the automatic stay applied to its pending appeals (which included two consolidated appeals encompassing an award of attorney's fees to the Respondents). The Court also suspended the briefing schedule.

11. On June 18, 2021, following briefing in response to the Order to Show Cause, this Court dismissed the two consolidated appeals (81038 and 81238) due to Nanyah's bankruptcy filing, and entered a new briefing

[2] *See* Briefing Relating to Mot. to Dismiss Bankruptcy Petition, attached as Exhibit 1.

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schedule which provided Nanyah with another 21 days to file its Opening Brief and Appendix. Accordingly, between the two 90 days extensions, as well as the additional time resulting from its Notice of Bankruptcy, Nanyah had approximately seven months to prepare and file its Opening Brief.[3]

12. In its June 18, 2021 Order, this Court stated as follows: "As Nanyah Vegas, LLC has already been granted two 90-day extensions of time to file the opening brief and appendix, further extension requests will not be viewed favorably and will not be granted absent demonstration of extraordinary circumstances and extreme need."

13. Because Nanyah included 14 separate issues in its Notice of Appeal, on July 9, 2021, Nanyah filed a Motion for Leave to File an Oversized Brief, seeking permission to file an 18,082 word Opening Brief.

14. On July 13, 2021, the Eliades Respondents moved to dismiss Nanyah's Chapter 11 bankruptcy, arguing that it was filed in bad faith because it was being used as a substitute for a supersedeas bond for this appeal. *See Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994).[4]

[3] This does not even include the one year between the time the Notice of Appeal was filed and the first briefing schedule was ordered by the Court.

[4] Exhibit 1.

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15. On July 27, 2021, the Court granted Nanyah's Motion to File an Oversized Brief. The rest of the briefing schedule remained the same as the Court's October 14, 2020 Order. Accordingly, Respondents' respective Answering Briefs are currently due on August 26, 2021.

16. On August 4, 2020, the Rogich Respondents' counsel e-mailed Nanyah's counsel and informed him of a multi-week jury trial that is currently upcoming in which the Rogich Respondents' counsel will be filing pre-trial disclosures, objections and additional trial related preparation and documentation the same week the Answering Brief is due. Further, the weeks-long jury trial is set to begin mid-September and therefore a two week or even 30 day extension will not allow sufficient time to prepare for and conduct trial, and to prepare the Answering Brief. Accordingly, the Rogich Respondents' counsel requests a 90 day extension (the same time frame Nanyah repeatedly had requested).

17. Because the Eliades Respondents are tasked with responding not only to Nanyah's Opening Brief, but also to the Rogich Respondents' Opening Brief on cross-appeal, the Eliades Respondents' counsel requested the same extension to ensure that all parties remain on the same briefing schedule.

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18. On August 5, 2021, Nanyah's counsel rejected the Respondents' extension request. Nanyah's counsel claimed he was not willing to grant an extension because: (1) the Eliades Respondents had moved to dismiss Nanyah's bankruptcy; (2) Respondents had begun to execute on their attorney's fees judgments against Nanyah; and (3) the language in this Court's June 18, 2021 Order stating that because of ***Nanyah's two 90 day extensions***, further extension requests would not be permitted except in extraordinary circumstances. The Eliades Respondents' counsel tried to further discuss these issues with Nanyah's counsel, but Nanyah's counsel failed to respond.[5]

III. ARGUMENT

Good cause exists for a 90 day extension for Respondents to file their respective Opening Briefs (and the Rogich Respondents' Opening Brief on cross-appeal). As recognized in Nanyah's Notice of Appeal (14 separate issues) and its Motion for Leave to File an Oversized Brief (18,082 words), the scope of this appeal is much larger than usual. For the sake of equity and fairness, Respondents should be granted at least half the amount of time that Nanyah had to prepare its extensive Opening Brief.

[5] E-mail string between parties, attached as Exhibit 2.

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Further, the Rogich Respondents have a significant conflict with the current deadline. Their counsel is about a begin a multi-week trial. Further, considering the overlapping issues and briefing that will arise in this appeal, including the Eliades Respondents' need to respond to the Rogich Respondents' cross-appeal, the standard briefing schedule set forth by this Court should remain in place.

Finally, Nanyah's bases for declining to agree to an extension are without merit. Respondents should not be penalized for filing a Motion to Dismiss Nanyah's bankruptcy, or attempting to execute on their valid judgments, as they are well within their rights to do both, and have an obligation to their clients to do so. While Nanyah may not like having its assets at risk, that is the result of its failure to file a supersedeas bond. Finally, Nanyah's reference to this Court's June 18, 2021 Order is ludicrous. This Court was clearly limiting its commentary to Nanyah, and would not use ***Nanyah's*** two prior 90 day extensions as a basis to increase the burden for ***Respondents*** to seek ***their first and only*** extension.

Accordingly, Respondents request that their current deadline of August 26, 2021 be extended to November 24, 2021.

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DATED this 10th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 10th day of August, 2021, service of the foregoing **RESPONDENTS' JOINT MOTION FOR EXTENSION OF ANSWERING BRIEF DEADLINE (FIRST REQUEST)** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

EXHIBIT 1

EXHIBIT 1

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Attorneys for Creditors
PETER ELIADES; PETER ELIADES, as Trustee of THE ELIADES SURVIVOR TRUST OF 10/30/08; ELDORADO HILLS, LLC; and TELD, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:	Case No. BK-N-21-50226-BTB
NANYAH VEGAS, LLC,	Chapter 11
Debtor.	Hearing Date: August 11, 2021 Hearing Time: 2:00 p.m. Hearing Place: 300 Booth Street Reno, NV 89509

MOTION TO DISMISS BANKRUPTCY PETITION FOR BAD FAITH; OR IN THE ALTERNATIVE, TO TERMINATE THE AUTOMATIC STAY TO ENFORCE STATE COURT'S JUDGMENT

Creditors Eldorado Hills, LLC ("Eldorado"); Peter Eliades; Peter Eliades, as Trustee of the Eliades Survivor Trust of 10/30/08 ("Eliades Trust"); and Teld, LLC ("Teld"), by and through their counsel, hereby move to dismiss this case, under 11 U.S.C. § 1112(b), for cause. Nanyah did not file this case in good faith. Nanyah filed it as a litigation tactic to avoid its judgment creditors—who make up nearly all the creditors in this case—from executing on their judgments, while simultaneously avoiding bond requirements while appealing said judgments. This warrants dismissal for cause under 11 U.S.C. § 1112(b).

Alternatively, this court should grant relief from the automatic stay, for cause, under 11 U.S.C. § 362(d)(1). By allowing the judgment creditors to execute on their judgments, any ulterior motive in filing this case by Nanyah would be rendered useless.

Thus, as explained more fully below, this Court should dismiss this case or, in the alternative, grant relief from the stay.

DATED this 13th day of July, 2021.

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Attorneys for Creditors
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The bankruptcy process exists to give debtors a fresh start.[1] But for Nanyah, it's an effort to hang on to the past—a last-ditch effort to continue pursuing litigation arising from events that happened nearly 15 years ago, and which it has unsuccessfully litigated for 8 years. ***A prime example of a Chapter 11 case filed in bad faith is one "filed to stay a state court judgment against the debtor pending appeal."***[2] And that is what Nanyah did here.

To be sure, Nanyah is a shell entity with no employees, no income, no assets (besides it meritless claims), and no ongoing business. It funded the litigation for eight years—and still is funding it—through "loans" from its sole principal. And its only creditors are judgment creditors and

[1] *See, e.g., In re Dumont*, 581 F.3d 1104, 1111 (9th Cir. 2009); *In re Majewski*, 310 F.3d 653, 658 (9th Cir. 2002).

[2] *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994).

Nanyah's principal. So for Nanyah, there is no use in a "fresh start"; Nanyah—in its own words—is a holding company (although it is currently holding nothing).

Nanyah only filed its Petition once the judgment creditors started executing on Nanyah's choses in action—as Nevada law expressly allows—in a clear effort to stall execution while it continued pursuing its claims on appeal. But there is another way Nanyah could have accomplished the same goal without filing bankruptcy: by posting a supersedeas bond. Across the board, bankruptcy courts have held that using the bankruptcy process and its automatic stay as an alternative to the requirement for posting a bond is bad faith. This Court should accordingly dismiss the case or, in the alternative, grant Eldorado and the Eliades Parties relief from the automatic stay.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Parties.

In 2007, Carlos Huerta sought out investors for Eldorado Hills, a company formed in 2005 for the purpose of owning and developing land near Boulder City, Nevada.[3] Eldorado was originally comprised of Go Global (100% owned by Huerta) and the Rogich Trust.[4] After a series of transactions, Go Global (i.e., Huerta) no longer owned an Eldorado membership interest, Teld owned 60% of Eldorado, and the Rogich Trust owned 40% of Eldorado.[5]

Nanyah—the debtor here—was formed in 2007 as a holding company, and claims it should have had some sort of an investment in Eldorado. (Ex. 1, Transcript of 341 Meeting, Vol. I, at 12:5-6; 14:9-12.) Nanyah never acquired a membership interest in Eldorado and ultimately sued various parties, including Eldorado and the Eliades Parties.

[3] Ex. 3, Ord. (1) Grant Defs. Peter Eliades, Ind. And as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC's Mot. for Summary J.; and (2) Den. Nanyah Vegas LLC's Countermot. for Summary J., *Huerta v. Rogich*, Case No. A-13-686303, at ¶¶ 1-2 (Eighth Jud. Dist. Ct. Nev. Oct. 5, 2018).

[4] *Id.* at ¶ 1.

[5] *Id.* at ¶ 2.

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B. Nanyah Spends Eight Years (And Counting) Litigating in State Court.

1. Nanyah Files Suit in 2013 Related to a 2007 Transaction.

On July 31, 2013, Nanyah filed suit against the Rogich Trust and Eldorado, alleging that it invested $1,500,000 in Eldorado, which it intended to be a capital investment in exchange for a membership interest, that it did not receive.[6] The single claim against Eldorado was for unjust enrichment based on the alleged investment. The Court initially dismissed Nanyah's claims, finding that they were barred by the statute of limitations.[7] Nanyah appealed, and the Supreme Court reversed the district court and remanded for further proceedings. *Nanyah Vegas, Ltd. v. Rogich*, No. 66823, 132 Nev. 1011, at *2-*3 (Nev. Feb. 12, 2016).

2. Nanyah Files a Second Lawsuit in 2016 for the Same 2007 Transaction.

Upon remand, Nanyah filed a second action adding additional parties and claims.[8] All of these claims in both lawsuits eventually were dismissed. First, on May 22, 2018, the Court dismissed certain claims regarding the transfer itself as barred by NRS 112.230(1) because the claims were filed more than four years after the membership interest transfer.[9] Then, on October 5, 2018, the Court entered summary judgment against Nanyah and in favor of the Eliades Defendants, dismissing each and every one of Nanyah's remaining claims against Eliades, the Eliades Trust, and Teld, concluding that there was no contractual basis for Nanyah to sue them.[10] The final blow was when the district court dismissed the remaining unjust enrichment claim against Eldorado Hills because Nanyah failed to bring the case to trial within three years after the remittitur from the

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[6] *See generally* Ex. 4, Compl., *Huerta v. Rogich*, Case No. A-13-686303-C (Eighth Jud. Dist. Ct. Nev. July 31, 2013).

[7] Ex. 5, Ord. Granting Partial Summary Judgment, *Huerta v. Rogich*, Case No. A-13-686303-C (Eighth Jud. Dist. Ct. Nev. Oct. 1, 2014).

[8] The two actions were ultimately consolidated. Ex. 6, Notc. of Consolidation, *Huerta v. Rogich*, Case No. A-13-686303 (Eighth Jud. Dist. Ct. Nev. Apr. 5, 2017).

[9] Ex. 7, Ord. Partially Granting Summary Judgment, *Huerta v. Rogich*, Case No. A-13-686303, at 2 (Eighth Jud. Dist. Ct. Nev. May 22, 2018).

[10] Ex. 3, Ord. (1) Grant Defs. Peter Eliades, Ind. And as Trustee of the Eliades Survivor Trust of 10/30/08, and Teld, LLC's Mot. for Summary J.; and (2) Den. Nanyah Vegas LLC's Countermot. for Summary J., *Huerta v. Rogich*, Case No. A-13-686303, at 2 (Eighth Jud. Dist. Ct. Nev. Oct. 5, 2018). The "Eliades Defendants" include Teld, Peter Eliades, and the Eliades Survivor Trust of 10/30/08.

Supreme Court.[11]

As expected after seven years of litigation, Eldorado and the Eliades Parties incurred substantial attorney's fees and because they were prevailing parties, the district court granted some of the incurred fees, and all of the costs. The court then issued a subsequent judgment in that amount, which Eldorado and the Eliades Parties recorded on July 30, 2020. (Ex. 9, Recorded Judgment.)

C. Nanyah Appeals, but Does Not Post a Bond.

Nanyah appealed each grant of summary judgment, the award of attorney's fees, and the ultimate judgment.[12] ***Nanyah did not post a bond.*** To date, Nanyah still has not posted a bond. When asked why during the 341 Meeting of Creditors in this matter, Nanyah did not have an answer. (Ex. 1, at 23:8-11.) So in other words, it was not that Nanyah could not afford to do so. In fact, Nanyah has had no problem continuing to pay attorney's fees through its principal, Yoav Harlap. (Ex. 1, at 16:20-23; Ex. 2, Transcript of 341 Meeting, Vol. II, at 9:11-13.)

D. Eldorado and the Eliades Parties Begin to Execute on Nanyah's Choses in Action.

When Nanyah did not pay the judgment or post a bond, Eldorado and the Eliades Parties began to execute on the judgment. (Ex. 10, Notc. of Sherriff's Sale.) Knowing that Nanyah has no assets beyond its claims, Eldorado and the Eliades Parties began to execute on Nanyah's choses in action.[13] They served Nanyah with the Writ of Execution and Notice of Execution on February 12, 2021. (Ex. 11, Receipt of Copy.) The Sheriff's Sale for Nanyah's choses in action was set for April 28, 2021. (Ex. 10.) Less than one month before the Sheriff's Sale was Set to take place, and only after receiving the Writ of Execution and Notice of Execution, Nanyah filed its Voluntary Petition. (ECF No. 1, Vol. Pet. For Non-Individuals Filing for Bk.)

[11] Ex. 8, Notc. of Entry of Decision and Ord., *Huerta v. Rogich*, Case No. A-13-686303 (Eighth Jud. Dist. Ct. Nev. Oct. 1, 2019).

[12] Nanyah additionally appealed several other non-dispositive orders. (Ex. 12, Case Appeal Statements.)

[13] Under Nevada law, executing on the choses in action of a party who does not post a bond is permissible. *Reynolds v. Tufenkjian*, 461 P.3d 147, 154 (Nev. 2020).

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E. <u>This Bankruptcy</u>

1. Nanyah Files for Chapter 11 with No Income, No Ongoing Business, No Assets Aside from the Claims, and No Creditors Besides its Principal and Judgment Creditors.

After unsuccessfully pursuing litigation for seven years, determining to continue to pursue it at the appellate level, refusing to post a bond for the attorney's fees judgment, and seeing Eldorado and the Eliades Parties begin to execute on its claims, Nanyah filed for bankruptcy protection under Chapter 11. (*Id.*) Nanyah filed with its appellate claims as its sole assets: no income, no real property, no investments, no cash, nothing. (*Id.*) Further, Nanyah's only creditors are the judgment creditors and its principal, who claimed the money he paid towards litigating his claims as loans to Nanyah.[14] (*See id.*; *see also* Ex. 1, at 16:20-22.)

2. The 341 Meeting of Creditors.

At the 341 Meeting of Creditors, Nanyah confirmed what is evident from the Petition itself. Nanyah did not file its bankruptcy to reorganize, but to allow itself to continue litigating its appellate claims without the adverse parties executing on their respective judgments.

The "sole assets" listed by Nanyah? The claims it has been unsuccessfully litigating for eight years.[15]

The debts listed by Nanyah? Judgments and Nanyah's attorney's fees.[16]

The business Nanyah conducts or intends to conduct in the future? None.[17]

The income Nanyah receives? None.[18]

Employees it has? None.[19]

Nanyah has admitted that the only business it intends to pursue is its appellate claims. (*Id.*

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[14] In fact, his attorney in the litigation is not a creditor to the bankruptcy. (Ex. 1, at 16:24-17:1.)

[15] (*Id.*, at 16:14-19.)

[16] (*See* Ex. 1, Transcript of 341 Meeting, Vol. I, at 16:20-22.)

[17] (*Id.*, at 14:6-14; *see also* Ex. 2, Transcript of 341 Meeting, Vol II, at 8:20-24.)

[18] (*Id.*, at 14:15-17.)

[19] (*Id.*, at 12:14-15.)

at 14:18-16:15.) Those claims are the ***sole reason*** Nanyah filed bankruptcy. Specifically, for Nanyah, the bankruptcy "was the only way to…be able to recoup…any amounts that can be retrieved from the litigation or any other process." (Ex. 2, at 9:18-25; *see also* Ex. 1, at 14:18-23 (stating that reorganization would allow Nanyah to pursue "enforcement of its investment").) But Nanyah could have ensured its ability to continue pursuing litigation another way: by posting a bond. As explained more fully below, that Nanyah filed the bankruptcy to stay the state court judgment instead of filing a bond requires dismissal of the Petition because it is not a proper use of the bankruptcy process. Accordingly, this Court should dismiss the Petition or, in the alternative, grant relief from the automatic stay to allow Eldorado and the Eliades Parties to continue executing on Nanyah's choses in action.

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3. Meet and Confer Efforts

On June 25, 2021, counsel for Eldorado and the Eliades Parties sent a letter to counsel for Nanyah requesting that it dismiss the bankruptcy case or, alternatively, post a supersedeas bond in relation to its state court litigation. (Ex. 13, Letter fr. Stephanie J. Glantz; *see also* ECF No. 29, Decl. of Stephanie J. Glantz, at ¶ 3.) If Nanyah was not willing to do so, Eldorado and the Eliades Parties requested that Nanyah meet and confer regarding the issue. (Ex. 13.) The parties held a meet and confer conference on July 7, 2021. (ECF No. 29, at ¶¶ 5; *see also* Ex. 14, Email Chain.) Ultimately, Nanyah would not agree to dismiss this action or post a supersedeas bond. (ECF No. 29, at ¶ 6.) Eldorado and the Eliades Parties now seek relief from this Court.

III. LEGAL ARGUMENT

A. Filing a Petition to Avoid Posting a Bond in State Court Litigation Constitutes Cause for Dismissal.

Section 1112(b) of the Bankruptcy Code requires that, absent "unusual circumstances" or, in the case of certain narrowly defined exceptions (none of which is applicable in this case), a court "shall" dismiss a chapter 11 case if the movant establishes cause. 11 U.S.C. § 1112(b).[20] "[S]ection

[20] If more appropriate, 11 U.S.C. § 1112(b) also allows the district court to convert a case under this chapter to a case

1112(b) was designed to provide the court with a powerful tool to weed out inappropriate Chapter 11 cases at the earliest possible stage." 7 Collier on Bankruptcy ¶ 1112.04[2] at 1112-23 (15th Ed. Rev. 2008).

The lack of good faith in filing a Chapter 11 petition constitutes cause for dismissal. *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994) (affirming bankruptcy court's dismissal of chapter 11 case for bad faith based on finding that debtor filed a chapter 11 petition solely to delay collection of a restitution judgment). "The decision whether to dismiss a Chapter 11 case as a bad faith filing is subject to the discretion of the bankruptcy court." *In re Erkins*, 253 B.R. 470, 474 (Bankr. D. Idaho 2000). It "depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities." *In re Mense*, 509 B.R. 269, 277 (Bankr. C.D. Cal. 2014) (quoting *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (Matter of Little Creek Dev. Co.)*, 779 F.2d 1068, 1071-72 (5th Cir. 1986)). Further, the determination "depends on an amalgam of factors and not upon a specific fact." *Marsch*, 36 F.3d at 828 (citing *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986)).

Malice is not a requirement in a challenge for bad faith. *In re Southern Cal. Sound Sys., Inc.*, 69 B.R. 893, 901 n.2 (Bankr. S.D. Cal. 1987) (dismissing debtor's chapter 11 case as an abuse of the bankruptcy process); *see also Marsch*, 36 F.3d at 828 ("While the case law refers to these dismissals as dismissals for 'bad faith' filing, it is probably more accurate in light of the precise language of section 1112(b) to call them dismissals 'for cause.'"). Instead, the movant is merely required to show that the case was filed "for a purpose other than that sanctioned by the Bankruptcy Code." *Id.* "In finding a lack of good faith, courts have emphasized an intent to abuse the judicial process and the purposes of the reorganization provisions…[p]articularly when there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the

under chapter 7. Although it is unclear from the record, it is certainly conceivable that Nanyah filed this case under Chapter 11 in order to avoid the appointment of a bankruptcy trustee.

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legitimate efforts of secured creditors to enforce their rights."[21] *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 674 (11th Cir. 1984). Ultimately, "[t]he test is whether the debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis." *Marsch*, 36 F.3d at 828.

A prime example of a Chapter 11 case filed in bad faith is one "filed to stay a state court judgment against the debtor pending appeal." *Marsch*, 36 F.3d at 828. *Cf. NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 128 (3d Cir. 2004) ("Indeed, if there is a 'classic' bad faith petition, it may be one in which the petitioner's only goal is to use the automatic stay to avoid posting an appeal bond in another court.") In those cases, the petition is described as "a 'litigating tactic' designed to 'act as a substitute for a supersedeas bond' required under state law to stay the judgment." *Id.* Indeed, the majority of bankruptcy courts across the country hold the same. *See, e.g., In re Liptak*, 304 B.R. 820, 843 (Bankr. N.D. Ill. 2004); Erkins, 253 B.R. at 477; *In re Boynton*, 184 B.R. 580, 584 (Bankr. S.D. Cal. 1995); *In re Byrd*, 172 B.R. 970, 974 (Bankr. D. Wash. 1994); *Mueller v. Sparklet Devices, Inc. (In re Sparklet Devices, Inc.)*, 154 B.R. 544, 549 (Bankr. E.D. Mo. 1993); *In re Harvey*, 101 B.R. 250, 252 (Bankr. D. Nev. 1989); *In re Karum Group, Inc.*, 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986); *In re Smith*, 58 B.R. 448, 451 (Bankr. W.D. Ky. 1986); *In re Wally Findlay Galleries (New York), Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984).

When a debtor "files chapter 11 to dodge the requirement for an appeal bond," a court should look to the following factors to determine whether the chapter 11 filing was in good faith:

1. Whether the debtor is a "viable business" that would suffer any disruption if enforcement of the judgment was not stayed, for example, to its employees and creditors;

2. Whether the debtor had financial problems on the petition date, ***other than the adverse judgment***;

3. Whether the debtor has any, or few, unsecured creditors besides the holder of the adverse

[21] "[I]nability to effectuate substantial consummation of a confirmed plan" is an independent basis, aside from bad faith, for dismissing a case. 11 USC § 1112(b)(4)(M).

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judgment;

4. Whether the debtor has sufficient assets to post a bond;

5. Whether the debtor acted in good faith to exhaust all efforts to obtain a bond to stay the judgment pending appeal;

6. Whether the debtor is able to pursue an effective reorganization "within a reasonable period of time," or whether the debtor must wait until the conclusion of the litigation; and

7. Whether assets of the estate are being diminished by the combined ongoing expenses of the debtor, the chapter 11 proceedings, and prosecution of the appeal.

In re Mense, 509 B.R. 269, 279-81 (Bankr. C.D. Cal. 2014). Here, ***every single factor weighs in favor of dismissing this case***.

1. Nanyah is Not a Viable Business and Has No Interests the Bankruptcy Protects Other Than Delay.

When a debtor is not "involved in a business venture," the state court judgment does not "pose any danger of disrupting business interests." *Marsch*, 36 F.3d at 829.

Nanyah has admitted—flat out—that it "does not have day-to-day business." (Ex. 2, at 8:20-22. It "is simply holding company" and "it has no day-to-day business other than that." (Ex. 1, at 14:9-12.) As expected then, it has no employees. (*Id.* at 12:14-15.) The only interest Nanyah has in a bankruptcy proceeding is discharging the judgment-debts it owes; the same judgments it is currently challenging in the Nevada Supreme Court. (*Compare* ECF No. 1 *with* Ex. 12, Case Appeal Statements.) Accordingly, this factor weighs in favor of dismissal.

2. Nanyah Has No Financial Problems Unrelated to the State Court Litigation.

Each of the debts listed on Nanyah's Petition is related to the state court litigation. *Infra*, Section III(A)(3). This indicates Nanyah filed this case solely to enable it to continue litigating in state court without having to post a supersedeas bond. *See Karum*, 66 B.R. at 438. Thus, this factor weighs in favor of dismissal.

3. Nanyah's Creditors are Judgment Creditors.

Each judgment creditor is listed as a creditor to Nanyah's bankruptcy. (*Compare* ECF No. 1

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with Ex. 12.) Aside from the judgment creditors, Nanyah listed its sole principal as a creditor. (ECF No. 1.) The nature of that claim is "loans to debtor," which Nanyah has admitted were loans to fund attorney's fees for the state court litigation. (Ex. 1, at 16:20-22.) Accordingly, because nearly all of Nanyah's creditors are judgment creditors, this factor weighs in favor of dismissal.

4. Nanyah Can Afford to Post a Bond.

Although the ability to post a bond is listed as a factor to consider, it has been described as "unimportant to the decision" to dismiss a bankruptcy petition for cause. *In re Karum Grp., Inc.*, 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986); *see also In re Wally Findlay Galleries, Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984) (concluding that the debtor does not have "sufficient assets to post a bond in order to stay these judgments pending appeal," but nevertheless concluding that debtor "filed its petition herein to avoid the consequences of adverse state court decisions while it continues litigating" and noting that a bankruptcy court "should not, and will not, act as a substitute for a supersedeas bond of state court proceedings").

Further, bankruptcy courts have held that the filing of a Chapter 11 petition to avoid posting an appeal bond even though the debtor can satisfy the judgment with non-business assets is a filing in bad faith. *In re Marsch*, 36 F.3d 825, 828-29; *see also In re Holm*, 75 B.R. 86, 87 (Bankr. N.D. Cal. 1987) ("[I]f the debtor has the ability to satisfy the judgment from non-business assets, then it is bad faith to attempt to use the bankruptcy laws to appeal without posting a bond. Stated another way, a Chapter 11 proceeding should be dismissed only if the debtor has the clear ability to survive without bankruptcy court protection.").

Nanyah had the ability to obtain a bond, it just chose not to. Nanyah's principal, Harlap, is funding its litigation. (*See* Ex. 1, at 16:20-22.) Further, Nanyah intends to continue paying its attorney's fees—even while the bankruptcy is pending—through additional loans from Harlap. (*Id.* at 18:23-19:4.) When asked why Nanyah did not post a bond in the State Court litigation, Nanyah did not have an answer. (*Id.* at 23:8-11.) That is because Harlap could loan money to Nanyah to post a bond, just as he continues to loan money to Nanyah for attorney's fees to pursue litigation.

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Harlap is not low on cash—he is one of the wealthiest men in the world. He is the Vice-Chairman and one of two members of Colmobil, Israel's largest car importer. *Colmobil, Ltd.*, BLOOMBERG, https://www.bloomberg.com/profile/company/0609882D:IT (last accessed July 1, 2021); *see also Meet the Israeli Who Added $1 Billion to His Bank Account Overnight*, Hagai Amit and Shuki Sadeh, Haaretz (Mar. 27, 2017), available at https://www.haaretz.com/israel-news/business/meet-the-israeli-who-added-1b-to-his-bank-account-overnight-1.5453795?mid142=open. The reason he did not loan the money to Nanyah to obtain a bond, despite having the ability to do so, is clear: if Nanyah does not prevail on appeal, and has posted a bond, then Eldorado and the Eliades Parties will be able to recover at least a portion of the judgment through the bond. By abusing the bankruptcy process to avoid posting a bond, Nanyah—a shell and essentially judgment-proof entity—has nothing to lose if—or rather when—it loses on appeal.

In sum, Nanyah has the ability to post a bond to preserve the status quo while litigating its claims; it chose to abuse the bankruptcy process instead. (Ex. 2, at 9:18-25 (stating that the bankruptcy "was the only way to…be able to recoup…any amounts that can be retrieved from the litigation or any other process"); *see also* Ex. 1, at 14:18-23 (stating that reorganization would allow Nanyah to pursue "enforcement of its investment").) Accordingly, this factor weighs in favor of dismissal.

5. Nanyah Never Attempted to Post a Bond or Obtain Other Relief to Stay Execution of the Judgment Before Filing its Petition.

The "failure to apply to the state district court and supreme court for relief by posting a bond commensurate with [an litigant's] financial ability" will preclude a finding that a bankruptcy petition is filed in good faith. *Harvey*, 101 B.R. at 252. Specifically, a debtor may apply for a stay of a state court judgment to the state court trial judge pursuant to NRCP 62 or, if the state court trial judge denies a conditional stay, the debtor "may still make application, pursuant to N.R.A.P. 8(a), to the supreme court, or a justice thereof, for a stay of the judgment or for approval of a supersedeas bond." *Id.* Without doing so, the bankruptcy court "does not, and cannot, know whether or not the [debtor]

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face[s] financial ruin" upon execution of a judgment. *Id.*

Nanyah pursued none of these options. Instead, it went straight to this Court to "protect and preserve the assets" of Nanyah. (Ex. 1, at 12:12-13.) Indeed, it is clear why Nanyah does not want to even attempt to post a bond. If it does, and loses on appeal, Eldorado and the Eliades Defendants will be able to collect at least a portion of the judgment through the bond. If it does not post a bond, and loses on appeal, Nanyah can use the bankruptcy process to be discharged of its obligations under the law, as it has already attempted to do so here, or can simply dismiss the bankruptcy considering Nanyah is a shell, judgment-proof entity. There is simply no benefit to Nanyah posting a bond if it can use the bankruptcy court to obtain the same status quo a bond provides. But fear of losing an appeal is no justification for abusing the bankruptcy process to obtain a stay rather than post a supersedeas bond. Accordingly, that Nanyah did not even attempt to obtain a bond supports dismissal.

6. Nanyah Cannot Pursue an Effective Reorganization.

Nanyah's Petition makes clear that it will not be able to pursue an effective reorganization. If a "debtor is unable to propose a meaningful plan of reorganization until its [appeal]…is resolved" then "it is evident that the debtor seeks to use th[e] [bankruptcy] court not to reorganize," and instead "to relitigate." *Wallay*, 36 B.R. at 851. "This is an impermissible use of Chapter 11 of the Bankruptcy Code." *Id.*

As discussed herein, Nanyah's bankruptcy was filed for the purpose of delay; Nanyah supposedly believes it will prevail on appeal at the Nevada Supreme Court and can propose a plan based on "whatever money comes in from the lawsuit." (Ex. 1, at 20:13-16.) Nanyah's financial future being dependent on the state court litigation highlights the infeasibility of any successful reorganization here because there are two potential outcomes, each resulting in the inability to pursue a reorganization.

One: Nanyah does not prevail on appeal. In that scenario, it is left with the judgment-creditors listed in its Petition, no assets whatsoever—since by that point it will have exhausted any

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form of relief—and further will have incurred even more debt in the form of attorney's fees. There would be no funds to pay its creditors. (Ex. 1, at 18:14-18; 22:6-7.) In this scenario, Nanyah cannot confirm a plan of reorganization because a court may not confirm a plan if it is "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor…unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11).

Two: Nanyah *does* prevail on appeal. In that scenario, Nanyah then has to return to the district court and continue prosecuting its claims. While it assumingly would no longer have judgment-creditors (for the time being) it still would have no income. (ECF No. 1.) However, by not filing this Action and obtaining an automatic stay, Nanyah would have inevitably lost its ability to pursue those claims when Eldorado and the Eliades Parties executed on its choses in action. In this scenario, it becomes evident that the purpose of filing this action (and eventually proposing a plan) is purely to delay the debts Nanyah owes to its judgment-creditors, by preventing those judgment-creditors from executing on the claims, until it can ultimately—it hopes—get those judgments reversed. A court may not confirm a plan that is not proposed in good faith and proposing one for delay is not a plan made in good faith. 11 USC § 1129(a)(3); *see also Wallay*, 36 B.R. at 851.

Either way, Nanyah has no ability to confirm a plan of reorganization. The more appropriate course of action was for Nanyah to post a bond to continue litigating its appellate claims, without fear of Eldorado and the Eliades Parties executing on their judgments. It chose to abuse the bankruptcy process instead. Accordingly, this factor weighs in favor of dismissal.

7. The Ongoing Bankruptcy Proceeding Only Further Inhibits the Creditors' Ultimate Chances of Any Collection.

With each day that passes, Eldorado and the Eliades Parties get further from the ability to collect. Nanyah's sole assets are its claims. By continuing to litigate those claims, its principal must continue lending money to Nanyah to pay its fees—which both increases the debts of the company—and the value of executing on Nanyah's choses in action decreases. Furthermore, it

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forces Nanyah's creditors to continue paying attorney's fees as well. It is clear from the Petition and 341 Meeting of Creditors that Nanyah will never be able to confirm a plan. Delaying the inevitable only increases Nanyah's debts, increases creditor's attorney's fees, and eliminates any ability for Eldorado and the Eliades Parties to collect on their judgments. Thus, this factor weighs in favor of dismissal.[22]

B. Filing a Petition to Avoid Paying a Bond in State Court Litigation Constitutes Cause for Terminating the Automatic Stay.

Section 362(d)(1) directs the court to grant relief from the automatic stay upon a showing of "cause." 11 U.S.C. § 362(d)(1). "What constitutes 'cause' for granting relief from the automatic stay is decided on a case-by-case basis." *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer)*, 405 B.R. 915, 921 (9th Cir. BAP 2009); *see Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990) ("'Cause' has no clear definition and is determined on a case-by-case basis."). Lack of good faith in filing a petition constitutes 'cause' for relief from the automatic stay. *Mense*, 509 B.R. at 276.

If this Court does not dismiss this case, it should, in the alternative, grant Eldorado and the Eliades Parties relief from the automatic stay. As discussed above, this case was filed to avoid posting a bond in state court litigation. By granting relief from the automatic stay, this Court would render any ulterior motive in filing this case useless, as Eldorado and the Eliades Parties would not be prohibited from executing on Nanyah's choses in action. Accordingly, this case warrants cause for relief from the automatic stay in the event that this Court chooses not to dismiss it outright.

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[22] This "substantial or continuing loss to or diminution of the estate" and "absence of a reasonable likelihood of rehabilitation" serves as an independent basis to dismiss this case for cause. 11 U.S.C. § 1112(b)(4)(A). *See also, e.g., In re Citi-Toledo Partners*, 170 B.R. 602, 606 (Bankr. N.D. Ohio 1994) (diminution of an estate exists where the debtor's business has ceased); *In re Great American Pyramid Joint Venture*, 144 B.R. 780, 791 (Bankr. W.D. Tenn. 1992) (a debtor lacks a reasonable likelihood of rehabilitation where it lacks income or operating funds)*; Stage I Land Co. v. U.S. Dept. of H.U.D.*, 71 B.R. 225, 231 (D. Minn. 1986) (debtor's chapter 11 case should be dismissed at the outset for cause where no reasonable possibility of a reorganization exists).

IV. CONCLUSION

Nanyah's motivation for filing this case is patent when looking at the Petition itself, Nanyah's appeals in state court, as well as Nanyah's testimony from the 341 meeting. Nanyah is a debtor with no income, no ongoing business, no employees, no assets beyond the claims it has attempted to litigate for eight years, and no creditors aside from its judgment creditors. The bankruptcy process offers nothing to Nanyah but delay and a loophole to avoid posting a bond. Accordingly, this Court should dismiss the case or, in the alternative, grant Eldorado and the Eliades Parties relief from the automatic stay.

DATED this 13th day of July, 2021.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 13th day of July, 2021, service of the foregoing was made by mandatory electronic service through the United States Bankruptcy Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

NVB 4001 (Rev. 09/20)

* * § 362 INFORMATION SHEET * *

Nanyah Vegas, LLC	21-50226	ECF No. 28
DEBTOR	BK-	MOTION #:
Peter Eliades, et al.	CHAPTER: 11	
MOVANT		

Certification of Attempt to Resolve the Matter Without Court Action:

Moving counsel hereby certifies that pursuant to the requirements of LR 4001(a)(2), an attempt has been made to resolve the matter without court action, but movant has been unable to do so.

Date: 7/13/2021 *Signature:* /s/ Stephanie J. Glantz

Attorney for Movant

Note for parties not represented by an attorney: Information about motions for relief from the automatic stay is available at the U.S. Bankruptcy Court's website: https://www.nvb.uscourts.gov/filing/filing-pro-se/legal-services/.

PROPERTY INVOLVED IN THIS MOTION: N/A

NOTICE SERVED ON: Debtor(s) [✓]; Debtor's counsel [ ]; Trustee [ ];

DATE OF SERVICE: 7/13/2021

MOVING PARTY'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st
2nd
3rd
4th
Other:
Total Encumbrances:

APPRAISAL of OPINION as to VALUE:
N/A

DEBTOR'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st
2nd
3rd
4th
Other:
Total Encumbrances:

APPRAISAL of OPINION as to VALUE:
N/A

TERMS of MOVANT'S CONTRACT with the DEBTOR(S)::

Amount of Note:
Interest Rate:
Duration:
Payment per Month:
Date of Default:
Amount in Arrears:
Date of Notice of Default:
SPECIAL CIRCUMSTANCES:
N/A

SUBMITTED BY:

DEBTOR'S OFFER of "ADEQUATE PROTECTION"for MOVANT :

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.
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.
.
.
.

SPECIAL CIRCUMSTANCES:
N/A

SUBMITTED BY:

SIGNATURE:

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Attorneys for Debtor/Debtor in Possession

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

NANYAH VEGAS, LLC,

Debtor.

CASE NO.: BK-N-21- 21-50226-BTB
Chapter 11 Subchapter V

OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE, TO TERMINATE THE AUTOMATIC STAY

Hearing Date: August 11, 2021
Hearing Time: 2:00 p.m.

_____/

Debtor and Debtor in Possession, NANYAH VEGAS, LLC ("Nanyah" or "Debtor"), hereby opposes the *Motion To Dismiss Bankruptcy Petition for Bad Faith; or in the Alternative, to Terminate the Automatic Stay to Enforce State Court's Judgment*, filed herein on July 13, 2021, as Docket No. 28 (the "Motion"). Nanyah's opposition is supported by the appendix of exhibits filed herewith and the following points and authorities.

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I. INTRODUCTION.

This case was filed in good faith for several reasons expressly found to be proper in extensive case law. First, Nanyah filed this case, in part, because it does not have sufficient assets to post a bond for a stay of a certain pending appeal. Contrary to the insinuations in the Motion, neither the U.S. Supreme Court, the Ninth Circuit, nor the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") have ever held that filing a bankruptcy case in lieu of posting an appeal bond is ipso facto bad faith. To the contrary, there is ample case law holding a bankruptcy case is filed in good faith if a debtor does not have sufficient liquid assets to post an appeal bond. Nanyah's bankruptcy schedules show Nanyah has insufficient assets to post a bond and there is no evidence to the contrary.

Second, Nanyah filed this case after Movant's began executing on Nanyah's assets, including Nanyah's claims against Movant and others, in an attempt to enforce a judgment currently on appeal before the Supreme Court of Nevada. Nanyah filed this case to preserve its assets and its right to pursue the appeal for the benefit of all legitimate parties in interest. The filing resulted in leveling the playing field for all. Filing a bankruptcy case to preserve assets and to ensure an orderly payment of legitimate claims is a well-recognized good faith reason to file bankruptcy.

Third, Nanyah filed this case to allow it to proceed promptly with its appeal. As detailed below, Nanyah has consistently moved the appeal forward and has already filed its opening appeal brief. Movant's responsive brief is due at the end of August. Nanyah does not seek to delay the appeal or collaterally attack the state court judgments in this Court. These facts all establish Nanyah's good faith in filing this case according to case law.

Fourth, there are significant issues with the judgment on appeal before the Supreme Court of Nevada, which are discussed below. Those issues give Nanyah a strong chance of success on appeal. Filing a bankruptcy case to preserve the right and ability to pursue a meritorious appeal has been recognized as a good faith use of the Bankruptcy Code.

It must also be pointed out that Movants never alleged this case was filed in bad faith back in March, 2021, or during the three and a half months that passed after this case was filed. Instead,

the Motion was not filed until after the Supreme Court of Nevada ordered briefing to continue in the appeal and after Movant's read Nanyah's opening appeal brief. The failure of Movants to allege bad faith at the outset of this case is meaningful. It shows the Movant's did not believe the case was filed in bad faith. The Motion was filed only after it became clear that the appeal before the Supreme Court of Nevada would proceed and presents serious problems for Movant. Movant's delay and the timing of the Motion undermine Movant's bad faith arguments.

Ultimately, this case was filed in good faith for common reasons expressly authorized as proper in case law. Therefore, the Motion should be denied.

II. RELEVANT FACTUAL BACKGROUND.

1. Eldorado Hills, LLC ("Eldorado") was formed in 2005 for the purpose of owning and developing approximately 161 acres of land near Boulder City, Nevada. Eldorado's original members were Go Global, Inc. (100% owned by Carlos Huerta) and The Rogich Family Irrevocable Trust (the "Rogich Trust"). *See Order Granting Defendants Peter Eliades, Individually and as Trustee of The Eliades Survivor Trust of 10/30/08, and Teld, LLC's Motion for Summary Judgment; and (2) Denying Nanyah Vegas, LLC's Countermotion for Summary Judgment* (the "October 5th Summary Judgment Order"), ¶ 1 Debtor's Appendix 1

2. In 2007, Eldorado's manager and representative, Carlos Huerta ("Huerta") contacted Nanyah to invest in Eldorado. In December of 2007, Nanyah sent Eldorado $1,500,000.00, which was deposited into Eldorado's bank account. *Id. at* ¶2.

3. In October of 2008, approximately ten months later, Teld, LLC ("Teld") purchased a l/3 interest in Eldorado for $3,000,000.00. Concurrently, The Flangas Trust ("Flangas") also purchased a l/3 interest in Eldorado for $3,000,000.00, which was subsequently transferred to Teld. *Id. at* ¶3. These transactions were memorialized in various written agreements. Nanyah was not included as a named signatory on the agreements. However, the agreements memorialized the fact the Rogich Trust specifically agreed to assume the obligation to pay Nanyah its percentage interest in Eldorado or to pay Nanyah its $1,500,000 invested into Eldorado. *Id. at* ¶4.

4. Nanyah's interest in Eldorado was acknowledged and recognized in a certain Membership Interest Purchase Agreement between Rogich, the Rogieh Trust, Teld, Go Global and

Huerta, dated October 30th, 2008 (the "October 30th Purchase Agreement"). The October 30th Purchase Agreement states that the Rogich Trust confirms certain amounts were advanced to or on behalf of Eldorado by certain third-parties, including Nanyah. Exhibit D to that Agreement memorializes Nanyah's $1,500,000 investment into Eldorado. *Id.* at ¶ 5(b)(i).

5. Most importantly, the October 30th Purchase Agreement states that the ***Rogich Trust specifically agreed to assume the obligation to pay Nanyah its percentage or debt***. *Id.* at ¶ 7.

6. In August, 2012, a Membership Interest Assignment Agreement dated January 12, 2012, was allegedly entered into between the Rogich Trust and the Eliades Survivor Trust of 10/30/08 (the "Eliades Trust"), pursuant to which the Rogich Trust assigned its membership interest in Eldorado to the Eliades Trust, *subject to* Nanyah's rights and claim. *Id.* at ¶ 5(d). Nanyah was not informed of this purported assignment until December, 2012. Nanyah is aware of no evidence that such an agreement was ever actually executed.

7. On July 31, 2013, after not receiving repayment of its $1,500,000 investment or any distributions from Eldorado, Nanyah commended litigation against the Rogich Trust and Eldorado. *See Movant's Appendix of Exhibits*, Docket No. 35 ("Movants Appendix"), Exhibit 4. On November 4, 2016, in furtherance of its efforts to recover its investment, Nanyah commenced litigation against Teld, the Eliades Trust, the Rogich Trust and Imitations, LLC. The two State Court actions were later consolidated.

8. On October 5, 2018, the State Court entered the October 5th Summary Judgment Order, in which the court found it was undisputed that Nanyah invested $1.5 million into Eldorado. *October 5th Summary Judgment Order*, at ¶ 2. The Court further found the Rogich Trust specifically assumed "the obligation to pay Nanyah" its percentage interest in Eldorado or debt. *Id. at* ¶ 7. However, the Court dismissed all of Nanyah's claims seeking to recover that investment from the Rogich Trust.

9. The State Court also dismissed all claims against the Eliades Trust, essentially holding that the interest in Eldorado acquired from the Rogich Trust was not subject to Nanyah's rights and claim. *Id. at* ¶ 15. In doing so, the State Court ignored the legal consequences of Eliades admission that the Rogich Trust, and any assignees, held their interest "subject to" Nanyah's rights.

Debtor's Appendix 2, ¶40. The State Court specifically held Nanyah was an express intended third party beneficiary holding:

> These transactions were memorialized in various written agreements. Nanyah was not included as a named signatory on the agreements, however, the agreements identified The Rogich Trust specifically agreed to assume the obligation to pay Nanyah its percentage interest in Eldorado or to pay Nanyah its $1,500,000 invested into Eldorado.

October 5th Summary Judgment Order, at ¶ 4.

10. The State Court also entered extensive findings on the interpretation and applicability of the various contract provisions all of which affirmed that the Rogich Trust assumed the obligation to repay Nanyah its investment or transfer it a membership interest. *October 5th Summary Judgment Order*, ¶¶4, 5(a)(i), 5(a)(ii), 5(b)(iv), 7, 21. The district court also held that the Rogich Trust's interest was "subject to" Nanyah's right of ownership. Id., ¶¶(a)(i), (b)(iii), 5(c)(i).

11. Despite the multiple rulings in Nanyah's favor, the State Court denied Nanyah' s motions for summary judgment and dismissed all claims against all defendants, including the Rogich Trust, ensuring no judgment would be entered in Nanyah's favor. *See October 5th Summary Judgment Order.*

12. On November 1, 2020, Nanyah filed a notice of appeal commencing an appeal of various State Court rulings, including the October 5th Summary Judgment Order, before the Supreme Court of Nevada (the "Appeal").

13. On March 9, 2021, Movants filed a notice of Sheriff's Sale pursuant to which Movants sought to execute on Nanyah's claims that were proceeding on appeal before the Supreme Court of Nevada.

14. On March 29, 2021, Nanyah filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

15. As set forth in Nanyah's bankruptcy schedules, has no cash or other liquid assets to post an appeal bond.

16. On April 7, 2021, the Supreme Court of Nevada entered an order to show cause why the Appeal should not be proceed due to the filing of Nanyah's bankruptcy case. After briefing on

the issue, on June 18, 2021, the Supreme Court of Nevada ordered the appeal to continue and set a deadline for Nanyah to file its opening brief. *See* (Debtor's Appendix 3).

17. On July 9, 2021, Nanyah filed its opening appeal brief in the Supreme Court of Nevada. *Id.*

18. On July 13, 2021, nearly three and a half months after this case was filed, nearly a month after the Supreme Court of Nevada ordered briefing on the appeal to continue, and four days after Nanyah filed its opening appeal brief, Movants filed the instant Motion.

19. The deadline to file a proof of claim in this case was July 26, 2021. There were nine (9) timely filed proofs of claim together totaling $3,029,609.98, some of which are duplicative. *See Claims Register*.

20. Movant's deadline to file appellee's answering brief is August 26, 2021.

III. LEGAL ARGUMENT.

A movant bears the burden of establishing by a preponderance of evidence that cause exists to dismiss a bankruptcy case under 11 U.S.C. §1112(b). *In re Sullivan*, 522 B.R. 604, 614 (B.A.P. 9th Cir. 2014). A Chapter 11 case *may* be dismissed for cause under §1112(b) if it is established that the petition was not filed in good faith. Good faith depends upon an "amalgam of factors," not a specific fact or facts. *In re Marshall,* 721 F.3d 1032, 1048 (9th Cir. 2013). The ultimate determination of whether a Chapter 11 case is filed in good faith is "based on the totality of the circumstances." *In re Sylmar Plaza, L.P.,* 314 F.3d 1070, 1074 (9th Cir. 2002). The good faith requirement does not depend on a debtor's subjective intent, but rather encompasses several, distinct equitable limitations that courts have placed on Chapter 11 filings. *Marshall,* 721 F.3d at 1047. "Good faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process." *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986).

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A. A bankruptcy petition may be filed in good faith in lieu of posting an appeal bond.

In *In re Hanna*, 2018 WL 1770960, BAP Case No. EW-17-1238-BJF, at 12-13 (9th Cir. BAP, April 13, 2018) [1], the BAP explained that "***neither the Ninth Circuit Court of Appeals nor this Panel has held that filing a bankruptcy petition in lieu of posting an appeal bond is ipso facto bad faith for purposes of dismissal under §1112(b)***." (Emphasis added). In *Hanna,* a creditor argued the case should be dismissed as a bad faith filing because the debtors admitted at their §341(a) meeting that the creditors' judgment and the debtors' inability to obtain a supersedeas bond was what led them to file bankruptcy. *Hanna,* at 6. The creditor argued it was bad faith for the debtors to use Chapter 11 case as a free stay. *Id.* The creditor pointed to debtors' admission that, had they not filed for bankruptcy, the creditor would have seized their assets to satisfy the judgment. *Id.* at 6-7. The bankruptcy court found the creditor had not established bad faith. *Id.* at 15. The court ruled the case was filed in good faith and denied the creditor's motion to dismiss.

On appeal, the BAP affirmed and explained §362 of the Bankruptcy Code "is intended to provide debtors in bankruptcy with a breathing spell from their creditors' collection actions and it is not unusual to encounter a chapter 11 case 'because of the crushing weight of a judgment." *In re Hanna,* at 14. The BAP agreed the petition was not filed to unreasonably deter and harass creditors; it was filed to ensure creditor collections would proceed in an orderly fashion. *Id.* The moving creditor had been very aggressive in their judgment collection efforts and had a substantial advantage over other creditors with their judgment lien. *Id.* The BAP ruled "[t]he debtors' petition not only appropriately provided them a breathing spell, it laid the ground work for another key goal underlying the bankruptcy process – leveling the playing field for other creditors." *Id.*

The BAP also found it important that the *Hanna* debtors sought relief from stay to proceed with the appeal of the creditor's judgment. *Hanna,* at 15. According to the BAP, this clearly revealed that the debtors were not intending to stall or delay that process by filing their bankruptcy

[1] A copy of the *Hanna* decision is attached hereto as Exhibit 1. All citations to page numbers herein shall refer to the page on the attached decision.

petition. *Id.*

In *In re Marshall,* cited supra, the Ninth Circuit found the case was filed in good faith where it was filed to stay enforcement of a judgment and in lieu of a stay pending appeal. *Marshall,* 721 F.3d at 1048-49. There, the filing of a Chapter 11 petition followed the entry of a judgment against the debtors totaling nearly $500,000,000. The solvent debtors had very little other debt compared to their assets. *Id.* at 1049. The Ninth Circuit affirmed the lower courts' ruling that a bankruptcy case filed in lieu of an appeal bond is filed in good faith where debtors did not have sufficient liquid assets to post an appeal bond. *Id.*

In *In re Slettelland,* 260 B.R. 657 (Bankr. S.D.N.Y. 2001), the court refused to dismiss a Chapter 11 case as a bad faith filing when the debtor filed in large part to avoid posting a supersedeas bond. The *Slettelland* Court explained the mere fact the debtor sought to avoid the payment of the supersedeas bond was not enough to establish bad faith. The court noted the debtor did not have the means to pay the judgment or obtain an appeal bond. Further, while there were few creditors, the court noted that there was no attempt on the part of the debtor to relitigate or forum shop, nor would the bankruptcy court have to decide matters being litigated elsewhere.

In *In re Dilling*, 322 B.R. 353 (Bankr. N.D. Ill. 2005), the bankruptcy court refused to dismiss a bankruptcy even though it was filed in part to allow the debtor to pursue an appeal without a supersedeas bond. That court placed great weight on the fact that the judgment against the debtor was novel. As a result, the court determined that it was not unreasonable to conclude that the debtor's appeal might succeed. *Id*. at 360. The court noted that it was not the type of case where the debtor had enough assets to pay the judgment, but instead preferred bankruptcy to try and collaterally attack the judgment and avoid posting an appeal bond. The debtor was appealing the judgment in state court and was not using the bankruptcy as a litigation tactic to foil state court procedures.

In *In re Zaruba*, 2007 WL 4589746 (Bankr. D. Alaska, Dec. 28, 2007), the court held that the debtors' Chapter 11 filings were not in bad faith because the debtor lacked the ability to post an appeal bond. The court based its decision on the fact debtor could not satisfy the state court judgment and the evidence did not indicate that the debtors filed the bankruptcy petition in an

attempt to delay the appeal or harass creditors. *Id*. at *4.

In *In re Autterson*, 2016 WL 1039592 (Bankr. D.Colo.), the court, while not dealing with the issue of supersedeas bonds, noted that "debtors often file for bankruptcy protection after suffering adverse judgments." The court stated that it would not suggest that such post-judgment bankruptcy filings, by themselves, establish bad faith. *See In re Experient Corp.,* 535 B.R. 386, 410–11 (Bankr.D.Colo.2015) ("[Debtor's management] openly testified that the reason [debtor] filed for bankruptcy relief was [a] state court judgment. However, this alone is not indicative of bad faith."). Quite to the contrary, adverse litigation results may justify bankruptcy as a mechanism to fairly pay creditors and allow reorganization consistent with the Bankruptcy Code.

B. **Nanyah filed this case in good faith consistent with the policies and purposes of the Bankruptcy Code.**

Nanyah filed this case for various reasons, all of which have been recognized by courts as being in good faith.

a. ***Nanyah does not have sufficient assets to post an appeal bond.***

In *Marshall,* the Ninth Circuit held a bankruptcy case may be filed in good faith to stay judgment collection pending an appeal where the debtor did not have the financial ability to pay for an appeal bond. *Marshall*, 721 F.3d at 1048. In *Hanna,* the BAP ruled the same. In fact, many courts have found a bankruptcy case may be filed in good faith when the debtor does not have sufficient liquid assets to post an appeal bond. In this case, Schedules A and B to the Nanyah's bankruptcy petition establish that Nanyah does not have sufficient cash or other liquid assets available to post a bond. There is absolutely no evidence before this Court to the contrary. Nanyah's inability to post a bond establishes sufficient good faith to file a bankruptcy petition.

While Movants argue Nanyah has the financial ability to post a bond, they have failed to offer any evidence to support that claim. Instead, Movant's offer argument that Nanyah's principal can afford to post a bond. That is not relevant. The question is whether the Debtor, Nanyah, has the ability to post a bond. It is irrefutable that Nanyah does not have sufficient liquid assets to post a bond.

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Movants frivolously argue Nanyah has sufficient assets to post a bond because they know this issue is fatal to their Motion. The case Movants primarily rely upon, *In re Marsch,* 36 F.3d 825, 828, 831 (9th Cir. 1994), held that a petition was correctly dismissed for bad faith where it debtor could afford to post an appeal bond or satisfy the judgment with cash on hand, but filed the case solely to avoid posting a bond. *Marsch* is entirely distinguishable from this case. Nanyah cannot afford to pay the judgment or for a bond. This distinction is determinative on the issue and establishes this case was filed in good faith.

b. ***Nanyah seeks to proceed with the pending Appeal as quickly as possible.***

As noted above, the BAP has ruled that a debtor's intent and actions to proceed with an appeal of the creditor's judgment helps establish good faith. *Hanna*, at 15. Here, Nanyah has continued to move forward with the Appeal after this case was filed. Upon an order to show cause entered by the Supreme Court of Nevada, Nanyah argued that the Appeal should proceed. The Supreme Court of Nevada agreed and Nanyah has already filed its opening brief in the Appeal. There is no evidence or argument that Nanyah seeks to delay the Appeal. To the contrary, Nanyah's actions show Nanyah seeks to move the Appeal forward.

In addition, Nanyah has made no attempt to collaterally attack the state court's rulings in this Court or to otherwise bring those issues before this Court. This case was not filed to forum shop. Nanyah is committed to pursuing its claims in the Supreme Court of Nevada and State District Court. This all further establishes Nanyah's good faith in filing this case.

c. ***Nanyah sought the protections of the Bankruptcy Code to preserve its assets and level the playing field for all interested parties.***

"It is well recognized that the automatic stay under § 362, activated upon filing a bankruptcy petition, is intended to provide debtors in bankruptcy with a breathing spell from their creditors' collection actions. *Sullivan,* 522 B.R at 614-615. It is not unusual to encounter a Chapter 11 case filed "because of the crushing weight of a judgment." *Id.* at 615. Filing a bankruptcy case to preserve assets is a common and good faith use of the Bankruptcy Code. *See Hanna*, at 15.

Prior to this case being filed, Movant's began executing on Nanyah's assets. Nanyah was forced to file this case because it was at risk of losing everything, including its claims against the

Rogich Trust, Eliades and others. The Movant's execution efforts also put Nanyah's other creditors at risk of an unfair outcome based solely on how quickly Movant's moved to execute. Nanyah needed the protection of this Court to: (1) preserve its assets for the benefit of any and all legitimate creditors; and (2) to ensure any payments to creditors would occur in an orderly fashion. These are both well-recognized as good faith reasons to file a bankruptcy case.

d. There are significant defects in the October 5th Summary Judgment Order, which provide Nanyah a likelihood of success on appeal.

As explained above, there are certain findings and inconsistencies in the October 5th Summary Judgment Order that make it ripe to be overturned on appeal. On the one hand, the State Court found it was undisputed that Nanyah invested $1.5 million into Eldorado and that the Rogich Trust specifically assumed the obligation to pay Nanyah its percentage interest in Eldorado or debt. *Id. at* ¶¶ 2 & 7. On the other hand, the State Court dismissed all of Nanyah's claims seeking to recover that investment from the Rogich Trust. Similarly, Eliades admitted that the Rogich Trust, and any assignees, held their interest "subject to" Nanyah's rights. Debtor's Appendix 2, ¶40. However, the State Court dismissed all claims against Eliades in its capacity as successor in interest to the Rogich Trust. As the State Court's findings and conclusions are inconsistent with its ultimate rulings, there is a significant likelihood that the judgment will be overturned on appeal. This is further evidence this case was not filed to unreasonably deter or harass creditors. It was filed to preserve Nanyah's right to pursue a legitimate good faith appeal.

C. Movant's delay in seeking dismissal should be taken into account.

This case was filed on March 29, 2021. None of the facts Movant relies upon to allege bad faith have changed since that date. Neither the Movant, nor any other interested party, including the United States Trustee, alleged this case was filed in bad faith at the time it was filed or in over three months thereafter. This is because the Movant knew the case was not filed in bad faith. The Motion was only filed after the Supreme Court of Nevada ordered the appeal to proceed and after Nanyah filed (and Movant's read) Nanyah's opening appeal brief. It is apparent the Motion was filed in an attempt to avoid having to participate in the pending appeal. Movants most certainly know the State Court committed reversible errors in its rulings. The only way for

Movant's to avoid an inevitable loss on appeal is to have this bankruptcy case dismissed and to execute on Nanyah's claims against them. Execution is being used as a litigation tactic to prevent Nanyah for pursuing its appeal. Those facts should be taken into account as part of the "totality of circumstances" and cut against any argument that this case was filed in bad faith.

D. Cause does not exists to lift the automatic stay.

Movants have failed to establish sufficient cause to vacate the automatic stay for all of the reasons set forth above.

IV. CONCLUSION

This case was filed in good faith and this Court should deny the Motion in its entirety.

DATED this 28th day of July, 2021.

DARBY LAW PRACTICE, LTD.

/s/ Kevin A. Darby

KEVIN A. DARBY, ESQ.
Attorneys for NANYAH VEGAS, LLC

EXHIBIT 1

EXHIBIT 1

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No. EW-17-1238-BJF
MARK KEVIN HANNA and JENNIFER MCWILLIAMS-HANNA,	)	Bk. No. 16-03437-FPC
Debtors.	)	
ALLAN MARGITAN,	)	
Appellant,	)	
v.	)	**M E M O R A N D U M**[1]
MARK KEVIN HANNA; JENNIFER MCWILLIAMS-HANNA,	)	
Appellees.	)	

Submitted Without Argument on March 22, 2018,

Filed - April 13, 2018

Appeal from the United States Bankruptcy Court
for the Eastern District of Washington

Honorable Frederick P. Corbit, Chief Bankruptcy Judge, Presiding

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Appearances: Appellant Allan Margitan, pro se on brief; Ian Ledlin of Phillabaum Ledlin Matthews & Sheldon, PLLC on brief for Appellees Mark Hanna and Jennifer McWilliams-Hanna.

Before: BRAND, JURY[2] and FARIS, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

[2] Hon. Meredith A. Jury, Bankruptcy Judge for the Central District of California, sitting by designation.

Appellant Allan Margitan appeals an order (1) denying his motion to dismiss the debtors' chapter 11[3] case and (2) confirming the debtors' chapter 11 plan of reorganization. We AFFIRM.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prepetition events

1. The parcels and the Hannas' sewage system

The Margitans and the debtors, Mark Hanna and Jennifer McWilliams-Hanna, have been neighbors since 2002 and have been litigating various land disputes between them for the past several years. The Hannas own what is known as Parcel 2 of a 3-parcel Short Plat; the Margitans own Parcels 1 and 3 and live on Parcel 1. The Margitans have a 40-foot ingress, egress and utility easement over the Hannas' Parcel 2, which the Margitans use to access Parcel 3 — a lakeside property that contains a high-end vacation home the Margitans purchased in 2010 and remodeled for use as a rental property. In 2002, after the county approved the parties' predecessor's application for the Short Plat, a waterline for supplying potable water to the parcels was installed somewhere in the 40-foot easement.

In 2003, the Hannas obtained a permit from the Spokane Regional Health District ("SRHD") for the construction of an on-site sewage system for Parcel 2. SRHD was informed, incorrectly, that the easement was only 20 feet wide. Mr. Hanna knew prior to the system's installation that the easement was 40 feet wide, but never gave his contractor that information. Unfortunately,

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[3] Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

because of that error, the Hannas' septic tank and drain field was placed within the 40-foot easement in violation of Washington law.

2. The prepetition litigation between the parties

Although it is not entirely clear how all of the litigation proceeded between the parties, it appears that it started in 2012, when the Hannas filed a quiet title action against the Margitans in state court to resolve easement issues for the three parcels. The Margitans filed a counterclaim for intentional interference with their easement and requested that the Hannas remove their sewage system from it.

The Margitans also filed a separate administrative action with SRHD over the drain field. The Margitans' primary argument was that, because of the close proximity of the Hannas' drain field to the Margitans' waterline, the Margitans were unable to obtain a Certificate of Occupancy ("CO") for the rental home on Parcel 3 and could not rent the home as a result. The Margitans never presented any evidence establishing that fact.

SRHD ruled against the Margitans, finding that: (1) the existence of the Hannas' drain field in the easement created no imminent public health risk; (2) they had failed to establish that the Hannas' drain field was illegally within 10 feet of their potable waterline; (3) even if the waterline was within 10 feet, the public health risk was minimal; and (4) it was proper for SRHD and the Hannas to agree that relocation of the offending drain field could be delayed for a reasonable period of time. The state court dismissed the Margitans' appeal of SRHD's ruling for lack of standing, and the state appellate court affirmed.

However, the Margitans were more successful in their

litigation against the Hannas. On August 10, 2016, the jury returned a verdict in favor of the Margitans for $422,934.00 for damages resulting from the Hannas' intentional interference with the Margitans' easement, including lost rents and emotional distress. The state court entered a judgment on the verdict and ordered the Hannas to remove the existing drain field encroaching on the easement.

The state court later reduced the jury verdict and entered an amended judgment in favor of the Margitans and against the Hannas for $297,834.00, plus 5% interest ("Judgment"). The Hannas were still required to remove the encroaching drain field. The Hannas appealed the Judgment; the Margitans cross-appealed.

B. Postpetition events

1. The bankruptcy filing

The Hannas filed a chapter 11 bankruptcy case on November 2, 2016. Two weeks after filing their bankruptcy case, the Hannas moved for stay relief to proceed with their appeal of the Judgment. The Hannas maintained that they had obtained design plans for the new drain field in accordance with the Judgment. They also requested a comfort order stating that the automatic stay did not prohibit SRHD from enforcing its regulatory powers to continue the drain field project, which would include collecting fees. The bankruptcy court granted the Hannas relief from stay to proceed with the appeal and provided the comfort order for SRHD to continue its involvement with the new drain field.

2. The Margitans' motion for relief from stay

A few weeks later, the Margitans moved for relief from stay to allow the state court to enforce its order requiring the Hannas

to remove their encroaching drain field from the Margitans' easement. The Margitans maintained that the Hannas were intentionally delaying the removal of their drain field and that the encroaching drain field prevented them from obtaining a CO for the rental home on Parcel 3.

The Hannas asserted that they were complying with the Judgment by installing a new tank and drain field rather than removing the existing system. The Hannas further asserted that the Margitans' refusal to turn on the water for Parcel 3 is what prevented them from getting the CO, not the Hannas' encroaching drain field.

The bankruptcy court held an evidentiary hearing on the Margitans' stay relief motion, where the primary dispute was whether the Hannas were complying with the Judgment by only installing a new tank and drain field and not removing the old, encroaching system. On an interim basis, the court ordered the Hannas to continue with installing the new drain field.

Ultimately, after another hearing where the bankruptcy court considered testimony and additional evidence from the parties, the court denied the motion, finding that: (1) the old, encroaching drain field had been decommissioned; (2) the new drain field had been installed and did not encroach on the easement; (3) the Margitans had not established that they could not get the CO under those circumstances; and (4) the regulatory agencies had stated that there may not be a problem with the water supply for Parcel 3, and that there was no requirement to remove the old drain field based on public health principles.

The bankruptcy court entered an order denying the Margitans'

stay relief motion on June 7, 2017. The Margitans did not appeal that order.

3. The Hannas' chapter 11 plan and disclosure statement and the Margitans' motion to dismiss

Meanwhile, the Hannas filed their chapter 11 plan and disclosure statement (the "Plan"). The Hannas proposed to pay the Margitans' claim, to the extent it was allowed, in full within 60 months of the entry of a non-appealable judgment. Between the effective date and the date a non-appealable judgment was entered, the Hannas would make payments to a secured account which would be payable to the Margitans within 30 days of entry of the judgment. If the account funds were insufficient to satisfy the judgment, the Hannas would list their residence for sale within 45 days and sell other property if needed. The Hannas would pay a 6% interest rate on the Margitans' allowed claim, which was greater than the 5% rate on the Judgment. The Hannas maintained that creditors would receive more on their claims with the Plan than they would in a chapter 7 liquidation.

In response, the Margitans moved to dismiss or convert the Hannas' bankruptcy case ("Motion to Dismiss"). In short, the Margitans argued that the case should be dismissed as a bad faith filing: the Hannas were solvent at the time of the filing; they had few unsecured creditors; and Mr. Hanna admitted at the § 341(a) meeting of creditors that the Judgment and the Hannas' inability to obtain a supersedeas bond was what led them to file for bankruptcy. The Margitans argued that the Hannas had the ability to obtain the bond based on their net worth of $379,611.77. Lastly, the Margitans argued that the Hannas were

using the chapter 11 case as a free stay and as a litigation tactic to delay paying the Judgment, as evidenced by Mr. Hanna's admission that, had they not filed for bankruptcy, the Margitans would have seized their assets to satisfy the Judgment.

In opposition to the Motion to Dismiss, the Hannas explained that the Margitans had refused their offer of real property as a substitute for a supersedeas bond. Mr. Hanna admitted that he did not attempt to purchase a bond before filing the chapter 11 case, because, based on his research, they did not have the required $300,000 in cash available to pay for one. Mr. Hanna stated that the Hannas filed the bankruptcy case because the Margitans would have begun executing on their assets, draining their bank accounts and leaving them unable to pay for the new drain field. If the Judgment had not been stayed, all creditors could have been put at risk for payment of their claims. In short, the bankruptcy filing enabled them to repay their debts in an orderly manner.

The Hannas further argued that their bankruptcy filing was not made to unreasonably delay resolution of the Margitans' claim, as evidenced by their early motion for relief from stay to proceed with the appeal of the Judgment. Moreover, the Hannas believed that the Judgment would be reversed because the Margitans provided no evidence that the separation between the Hannas' old drain field and the Margitans' waterline was less than the required 10 feet, they never proved they actually had bad water, and they never proved that there was any interference with the use of their easement.

In objecting to the Plan, the Margitans argued that it was not proposed in good faith. First, the Hannas did not need debt

reorganization and the Plan made no attempt to do that. Second, the Hannas were not adjusting their high standard of living, while the Plan adversely affected only one creditor — the Margitans. Lastly, the Margitans argued that the Hannas' lack of good faith was shown by their admission that if they prevailed in the appeal they would dismiss their chapter 11 case and use the funds in the Margitan account to pay all remaining creditors.

The Margitans also argued that the Plan was unconfirmable because it violated the absolute priority rule; if the Hannas had to sell their residence to pay creditors in full, they were paying themselves $125,000 of homestead exemption proceeds before paying the Margitans. Furthermore, the Plan was not fair and equitable because the Margitans would not be paid until they won all of the appeals of the Judgment, and they had to wait at least 60 months from the effective date plus 45 days before the Hannas were even required to list their residential and non-residential real property for sale to fund payment of the allowed claim in the event funds in the secured account were insufficient to fully pay it. Finally, the Margitans argued that it was unfair that the Hannas were using the chapter 11 case in lieu of bond while they pursued appeals of the Judgment.

In response, the Hannas maintained that the Plan did not violate the absolute priority rule because it did not provide that they would pay themselves their $125,000 homestead exemption before paying all allowed claims in full. Further, the Hannas asserted that the Plan was fair and equitable; the Margitans would fare no better in a chapter 7 scenario: the trustee could not pay any dividends to them until the state court litigation was

concluded; the trustee could not distribute the Hannas' exempt property which was available under the Plan; and the interest rate would be approximately 1.25% instead of 6%. In any event, the Hannas supplemented the Plan with the following: (1) they would deposit 401k funds (about $72,000) into the DIP Agent General Account that they could not access without a court order to fund the Plan; and (2) they would pay to have electrical conduit installed in the easement for a security cable the Margitans wished to install, if the cost was increased solely because of the proximity of their former drain field to the easement.

Not surprisingly, the Margitans voted to reject the Plan. They were the only objecting creditors.

4. The court's ruling on Plan confirmation and the Motion to Dismiss

Mr. Hanna was the only witness to testify at the combined hearing on confirmation of the Plan and the Margitans' Motion to Dismiss. He testified extensively as to the feasibility of their proposed Plan and how they intended to fund it. Mr. Hanna also testified that, if they were to lose the appeal of the Judgment in the state intermediate appellate court, they did not intend to appeal to the state supreme court.

After hearing Mr. Hanna's testimony and the parties' closing arguments, the bankruptcy court announced its oral ruling confirming the Hannas' chapter 11 Plan, finding that it was proposed in good faith and complied with § 1129(a) and (b). The court denied the Motion to Dismiss, finding that the Hannas had filed their chapter 11 case in good faith and that it was not filed to unreasonably deter and harass creditors.

Mr. Margitan timely appealed the bankruptcy court's order.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

1. Did the bankruptcy court abuse its discretion in denying the Motion to Dismiss?

2. Did the bankruptcy court abuse its discretion in confirming the Plan?

IV. STANDARDS OF REVIEW

We review the bankruptcy court's ruling on a motion to dismiss for bad faith under an abuse of discretion standard. Marshall v. Marshall (In re Marshall), 721 F.3d 1032, 1045 (9th Cir. 2013); Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.), 84 B.R. 167, 170 (9th Cir. BAP 1988). We also review the bankruptcy court's decision to confirm a debtor's chapter 11 plan for an abuse of discretion. In re Marshall, 721 F.3d at 1045 (citing Computer Task Grp., Inc. v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003)). In both cases, the question of "good faith" is factual, and we review a good faith finding for clear error. Id.; In re Stolrow's, Inc., 84 B.R. at 170. The issue of "fair and equitable" treatment under a plan of reorganization is a question of fact we review for clear error. Pac. First Bank v. Boulders on the River, Inc. (In re Boulders on the River, Inc.), 164 B.R. 99, 103 (9th Cir. BAP 1994).

The bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are clearly erroneous. TrafficSchool.com,

Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

We may affirm on any basis supported by the record. Heers v. Parsons (In re Heers), 529 B.R. 734, 740 (9th Cir. BAP 2015).

V. DISCUSSION

Mr. Margitan essentially disputes only the bankruptcy court's findings of fact, in particular, the court's findings as to the Hannas' "good faith." The court applied the same "good faith" standard to the questions of whether the Hannas' chapter 11 petition was filed in good faith and whether their Plan was proposed in good faith. However, the good faith standards required to file a chapter 11 petition are different from those for proposing a plan of reorganization. In re Boulders on the River, Inc., 164 B.R. at 103 (citing In re Stolrow's, Inc., 84 B.R. at 171); accord In re Madison Hotel Assocs., 749 F.2d 410, 424-26 (7th Cir. 1984). In any case, we conclude that such error was harmless; the court made sufficient findings to satisfy both good faith tests, and the record provides further support for them.

A. The bankruptcy court did not abuse its discretion in denying the Motion to Dismiss.

A chapter 11 petition may be dismissed for cause under § 1112(b)[4] if it appears that the petition was not filed in good

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[4] Section 1112(b) provides, in relevant part:

> 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

(continued...)

faith. Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (per curiam). A chapter 11 petition is not filed in good faith if it represents an attempt "to unreasonably deter and harass creditors" and to "achieve objectives outside the legitimate scope of the bankruptcy laws." In re Marshall, 721 F.3d at 1047; In re Marsch, 36 F.3d at 828. "Good faith is lacking only when the debtor's actions are a clear abuse of the bankruptcy process." Idaho Dep't of Lands v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir. 1986); Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 617 (9th Cir. BAP 2014). Good faith depends on an "amalgam of factors," not a specific fact or facts. In re Marshall, 721 F.3d at 1048; In re Marsch, 36 F.3d at 828; In re Arnold, 806 F.2d at 939.

Mr. Margitan argues that filing a chapter 11 petition as a substitute for a supersedeas bond is in itself a basis for a finding of bad faith. The Hannas' ability (or inability) to obtain a supersedeas bond was a hotly contested issue. The bankruptcy court found that the Hannas' failure to obtain the bond was only one factor of the "amalgam of factors" the court can consider in determining whether a case has been filed in good faith. We agree. While Mr. Margitan cites several bankruptcy court cases within this circuit supporting his argument, neither the Ninth Circuit Court of Appeals nor this Panel has held that

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[4](...continued)
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).

filing a bankruptcy petition in lieu of posting an appeal bond is ipso facto bad faith for purposes of dismissal under § 1112(b).

Mr. Margitan relies on Marsch. But, in Marsch, the Ninth Circuit did not specifically address the propriety of a bankruptcy petition being filed as a substitute for a supersedeas bond, noting that, given the bankruptcy court's supported finding of bad faith, it did not need to decide the issue of "whether bankruptcy laws can be used to skirt state court procedural rules in this manner." 36 F.3d at 829. Rather, the Marsch court simply upheld the court's bad faith finding as cause for dismissal, where the debtor clearly had the financial means to pay the creditor's judgment and the chapter 11 petition was filed solely to delay collection of the judgment and to avoid posting an appeal bond. Id. at 828-29.

Here, the bankruptcy court found that even if the Hannas had obtained a supersedeas bond, the Margitans would not have been able to collect on the Judgment until the appeal was finally resolved. Thus, the Hannas' bankruptcy filing was not an attempt to unreasonably deter and harass creditors; instead, they were attempting to effect a speedy, efficient reorganization on a feasible basis. Even if the Hannas could have afforded a supersedeas bond, which is not entirely clear on this record and was the Margitans' burden to prove, the inclusion of the Judgment in their Plan suggests that they filed their bankruptcy petition for the proper purpose of reorganization, not as a mere ploy to avoid posting a bond. See In re Marshall, 721 F.3d at 1048 (inclusion of creditor's judgment in debtors' plan suggested a good faith filing and not a ploy to avoid posting an appeal bond,

which they may or may not have been able to afford).

Next, Mr. Margitan argues that the Hannas' bankruptcy case was filed for the improper purpose of obtaining a stay of the state court litigation. The automatic stay under § 362 "is intended to provide debtors in bankruptcy with a breathing spell from their creditors' collection actions. And it is not unusual to encounter a chapter 11 case 'because of the crushing weight of a judgment.'" In re Sullivan, 522 B.R. at 614-15 (quoting In re Marshall, 298 B.R. 670, 683 (Bankr. C.D. Cal. 2003)). Again, the bankruptcy court found that the Hannas' petition was not filed to unreasonably deter and harass creditors; it was filed so that their creditors could be paid in an orderly fashion and without sacrificing equity. The goal of orderly payment of creditors is one of the legitimate reasons to file bankruptcy. Id. at 616.

The Margitans were very aggressive in their Judgment collection efforts and had a substantial advantage over other creditors with their judgment lien, which was obtained within the preference period and which the Hannas were seeking to avoid. The Hannas' petition not only appropriately provided them a breathing spell, it laid the ground work for another key goal underlying the bankruptcy process — leveling the playing field for other creditors. Id. at 615-16. Mr. Hanna testified that the Hannas were concerned about the Margitans executing on their liquid assets, leaving them unable to pay for their new drain field. Preventing the Margitans from seizing all liquid assets ahead of other creditors and bringing preferential transfers back into the estate for the benefit of all creditors are consistent with the primary goals of the bankruptcy process. Id. at 617.

Mr. Margitans' argument is further undermined by the fact that, just two weeks after they filed their chapter 11 case, the Hannas sought relief from stay to proceed with the appeal of the Judgment. Clearly, they were not intending to stall or delay that process by filing their bankruptcy petition. In addition, we do not overlook the fact that the United States Trustee did not support dismissal of the Hannas' case.

Finally, "'perhaps the most compelling grounds for denying a motion to dismiss grounded on bad faith is the determination that a reorganization plan qualifies for confirmation.'" In re Marshall, 721 F.3d at 1049 (citation omitted). The bankruptcy court properly considered the viability of the Hannas' Plan as weighing heavily against dismissal. See id.

Accordingly, the bankruptcy court did not clearly err in finding that the Hannas filed their chapter 11 petition in good faith, and it did not abuse its discretion in denying the Motion to Dismiss.[5]

B. The bankruptcy court did not abuse its discretion in confirming the Plan.

The bankruptcy court found that the Plan complied with the § 1129(a) factors, including the § 1129(a)(3) "good faith" test. The good faith that is necessary to confirm a plan of

[5] Mr. Margitan argues that allowing the Hannas to file their chapter 11 petition as a substitute for a supersedeas bond is a violation of the Full Faith and Credit doctrine. The Full Faith and Credit doctrine, 28 U.S.C. § 1738, has no relevance to the question of whether filing a chapter 11 petition in lieu of an appeal bond can constitute a bad faith filing providing cause for dismissal under § 1112(b). Clearly, the Margitans are unhappy about the Hannas' bankruptcy filing, but that has nothing to do with whether the bankruptcy court gave preclusive effect to the Judgment. Thus, this argument lacks merit.

reorganization requires the plan to achieve a result consistent with the objectives and purposes of the Code. In re Marshall, 721 F.3d at 1046; In re Boulders on the River, Inc., 164 B.R. at 103. Mr. Margitan's arguments here are a bit muddled, but he appears to argue that the Plan (1) served no reorganizational purpose, only to delay payment of the Judgment, so it was filed in bad faith; (2) violated the absolute priority rule and was therefore not fair and equitable; (3) failed to meet the best interest of creditors test; and (4) was not feasible.

As to his first argument, the bankruptcy court found that the Plan enabled the Hannas to repay all of their creditors in an orderly manner. The court found that the Plan was not filed merely to avoid the need for a supersedeas bond; it was filed so creditors could be paid in full, in an orderly fashion, and without sacrificing equity. Based on the record and the authority discussed above, we see no clear error in the court's finding that the Plan was proposed in good faith. Simply because the Margitans may not be paid as quickly as they would like does not mean that the Hannas' Plan was not proposed in good faith.

As for Mr. Margitan's second argument, an individual chapter 11 debtor may cram down a plan if it complies with the absolute priority rule in § 1129(b)(2)(B)(ii). Zachary v. Cal. Bank & Tr., 811 F.3d 1191, 1194 (9th Cir. 2016). Thus, the bankruptcy court may find that a debtor's plan is "fair and equitable" to an objecting creditor only if the plan complies with the absolute priority rule. The Margitans had argued in their objection to confirmation that the Plan violated the absolute priority rule because it allowed the Hannas to receive homestead

exemption proceeds before paying creditors in full. To the contrary, the Plan did not so provide and the bankruptcy court found as much.[6] The court further found that the Plan did not discriminate unfairly and was fair and equitable with respect to each class of claims or interests that were impaired under the Plan.

Mr. Margitan also argues that the Plan violated the absolute priority rule because a "junior class" received a distribution of $47,351.93 on the effective date, while the Margitans received nothing. Not only did the Margitans not raise this issue before the bankruptcy court in objecting to the Plan, Mr. Margitan fails to identify the junior creditor who allegedly received these funds. Perhaps he is referring to the Hannas' state court attorney. However, the attorney was paid directly by the Hannas' homeowners insurance company, not with estate funds. Therefore, we find no clear error with the bankruptcy court's finding that the Plan was fair and equitable.

For his third argument, Mr. Margitan argues that he would have received more in a chapter 7 liquidation; thus, the Plan did not meet the "best interest of creditors" test under § 1129(a)(7). Mr. Margitan fails to say what amount he would have received in a chapter 7 case. In any event, the bankruptcy court disagreed, finding that in a chapter 7 scenario the trustee could not distribute the Hannas' exempt property, which was available to pay creditors in the Plan, and the Margitans were receiving 6% interest under the Plan, which they would not have received in a

[6] We express no opinion on whether retention of exempt property or its proceeds could violate the absolute priority rule.

chapter 7 liquidation. We see no clear error in the bankruptcy court's finding that the Plan complied with § 1129(a)(7).

Finally, as to the Plan's feasibility, the Margitans did not raise this issue before the bankruptcy court. The court found that the Plan was feasible, in that confirmation of the Plan was not likely to be followed by the liquidation or the need for further financial reorganization by the Hannas.

To demonstrate that a plan is feasible, a debtor need only show a "reasonable probability" of success. In re Brotby, 303 B.R. at 191 (citing Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1364 (9th Cir. 1986)). The record establishes that the Plan met the necessary feasibility requirement under § 1129(a)(11). For example, the Hannas' net worth from the filing date of November 2, 2016 through June 30, 2017, had increased by almost $35,000. During that same time period, receipts totaled $137,260.80 and disbursements totaled $101,027.82, for a net cash flow of $36,232.98. In the event of a shortfall in cash to pay creditors in full plus interest, the Hannas will liquidate property, including exempt property. We perceive no clear error in the bankruptcy court's finding as to feasibility.

Accordingly, the bankruptcy court did not clearly err in finding that the Hannas proposed their chapter 11 Plan in good faith, and it did not abuse its discretion in confirming the Plan.[7]

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[7] Mr. Margitan argues that the bankruptcy court exceeded its jurisdiction when it allowed the Hannas to keep their drain field (continued...)

VI. CONCLUSION

For the above reasons, we AFFIRM.

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[7](...continued)
within the easement in violation of the Judgment, and that the bankruptcy court improperly ruled on "non-core" matters. The bankruptcy court addressed these issues in the Margitans' stay relief motion, not the Motion to Dismiss or Plan confirmation. The bankruptcy court entered a final order denying the stay relief motion on June 7, 2017. The Margitans did not appeal the order. Therefore, we have no jurisdiction over these issues and are unable to address them.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:	Case No. BK-N-21-50226-BTB
NANYAH VEGAS, LLC,	Chapter 11
Debtor.	**REPLY IN SUPPORT OF MOTION TO DISMISS BANKRUPTCY PETITION FOR BAD FAITH; OR IN THE ALTERNATIVE, TO TERMINATE THE AUTOMATIC STAY TO ENFORCE THE STATE COURT'S JUDGMENT**

I. INTRODUCTION

Nearly each and every point that Eldorado and the Eliades Parties[1] make in their Motion, Nanyah does not dispute. Nanyah is not shy about the fact that it filed this case to avoid posting a bond—it flat out admits it. Nanyah also does not dispute that there is no ongoing business to protect, that it is a judgment-proof shell entity, that its creditors are judgment creditors (and litigation loans from its principal), and that there is no feasible route to or rationale for reorganization. Instead,

[1] Eldorado Hills, LLC ("Eldorado"); Peter Eliades; Peter Eliades, as Trustee of the Eliades Survivor Trust of 10/30/08 ("Eliades Trust"); and Teld, LLC ("Teld"). Eliades, the Elides Trust, and Teld are collectively referred to as the "Eliades Parties."

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Nanyah simply asserts that it cannot afford to post a bond and contends the inquiry ends there. Not true.

Whether or not Nanyah can afford to post a bond is "unimportant to the decision" of whether or not a petition was filed in good faith.[2] Instead—and Nanyah contradicts itself by admitting—the determination is dependent on several factors. But each and every one of these facts put Nanyah's motives in filing this case on full display.

Indeed, instead of discussing *Nanyah's* circumstances, Nanyah's Opposition is principally an act of misdirection. In one instance, Nanyah asserts that because the Motion was filed after briefing on the appeal resumed, simultaneously ignoring that a meet and confer letter was sent well before Nanyah filed its opening brief, that Eldorado and the Eliades Parties' arguments are somehow not valid. While irrelevant to whether *Nanyah* filed this case in good faith, Nanyah ignores that the 341 Meeting of Creditors, the testimony from which forms much of the basis of the Motion, was reset because Nanyah did not have a principal initially present. Indeed, the questions asked by counsel for Eldorado and the Eliades Parties during both 341 meetings show that they have always known what Nanyah's motives in filing this case are—they were just getting them on the record. Furthermore, briefing in the State Court Appeal was stayed due to *Nanyah's* actions. Ultimately, Nanyah's arguments are a tacit admission that Nanyah has nothing further to add to the discussion; it simply cannot rebut the arguments made by Eldorado and the Eliades Parties. This Court should accordingly grant the Motion.

II. LEGAL ARGUMENT

A. Nanyah's Arguments Reaffirm the Basis for the Motion.

Nanyah admits in its Motion—more than once—that it filed this case to avoid posting a bond, but still reap the benefit of avoiding execution. (*See, e.g.*, ECF No. 38, at 2:3-4, 10:27-11:1.) There is accordingly no question—and Nanyah does not dispute—that the *Mense* factors apply for

[2] *In re Karum Grp., Inc.*, 66 B.R. 436, 438 (Bankr. W.D. Wash. 1986); *see also In re Wally Findlay Galleries, Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984).

determining whether this case should be dismissed for cause. *In re Mense*, 509 B.R. 269, 279-81 (Bankr. C.D. Cal. 2014).

Of those factors, Nanyah did not dispute any of the arguments made by Eldorado and the Eliades Parties, except for one. Nanyah simply asserts that it is permissible to file a bankruptcy case solely to avoid posting a bond because it does not have sufficient assets to post the bond. In other words, Nanyah does not dispute that:

- It is not a viable business and has no employees or day-to-day business.
- It has no financial problems other than judgment creditors, as it is a judgment-proof shell entity.
- It never attempted to obtain a bond in some fashion before filing its Petition.
- It cannot pursue an effective reorganization.
- The assets of the estate will continue to be diminished by the ongoing expenses of the chapter 11 proceedings and prosecution of the appeal.

Nevertheless, Nanyah asserts that not having sufficient assets to post a bond is "determinative on the issue" of whether this case should be dismissed for cause, despite also acknowledging that the determination "depends on an 'amalgam of factors'" and is "based on the totality of the circumstances." (*Id.* at 6:16-19; 10:6.) The reason for this stark contradiction is clear: Nanyah's *has no other argument* when looking to the various factors typically considered when analyzing whether a bankruptcy case was filed in good faith.

The ability to post a bond has been described as "unimportant to the decision" to dismiss a bankruptcy petition for cause. *Karum*, 66 B.R. at 438; *see also Wally*, 36 B.R. at 851. That is particularly the case here, where **every single other factor** weighs against Nanyah. For example, if Nanyah could not afford to post a bond, but also had ongoing business and employees to take care of, the Petition *may* be justified. Or if Nanyah legitimately had a need (and ability) to reorganize, but could not afford to post the bond in its entirety, the Petition *may* be justified. Or if Nanyah had several other creditors unrelated to the judgment for which the playing field needed to be "leveled,"

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by utilizing the bankruptcy process as was the case in *Hanna*, the case Nanyah principally relies on, the Petition *may* have been justified. ECF No. 38 at 7 (citing *In re Hanna*, Nos. EW-17-1238-BJF, 16-03437-FPC, 2018 Bankr. LEXIS 1146, at *10 (B.A.P. 9th Cir. Apr. 13, 2018). But none of these hypotheticals are true here. There is a reason why courts look at various factors; they are *each* indicative of the reasons for filing a bankruptcy petition.

Even looking to the one specific factor that Nanyah disputes, it still does not weigh in Nanyah's favor. Nanyah does not deny that *it did not even attempt* to seek the assets for a bond elsewhere before filing this case. That is because by posting a bond, Eldorado and the Eliades Parties would be paid at least a portion of the judgment when they prevail on the appeal—something that will not happen through the bankruptcy process given that Nanyah has no assets to facilitate a reorganization. By not posting a bond, and obtaining a stay via the bankruptcy, Nanyah has nothing to lose. If it does not prevail on appeal, it can then use the bankruptcy process to discharge the debt or abandon the bankruptcy altogether as a judgment-proof shell entity.

Further, Nanyah does not deny that its principal could post a bond for Nanyah—it simply argues that is not relevant, despite the fact that LLCs—particularly shell entities—are usually capitalized through the contributions of its members. Simultaneously, Nanyah states that it "seeks to proceed with the pending Appeal as quickly as possible," without answering how it has the assets to continue pursuing the Appeal when it supposedly does not have sufficient assets to post a bond.[3] Indeed, it is *Nanyah* who is pursuing those claims, not Nanyah's principal. Yet, Nanyah somehow has the money to pursue that litigation, but not post a bond. The bankruptcy code does not exist to allow principals to spend money on the business expenses it so choses, but claim it does not have sufficient assets to follow the rules. This conduct shows Nanyah's ultimate reason for filing its Petition, and accordingly that the case should be dismissed.

[3] Notably, Nanyah's Opposition has a material misstatement. All while arguing that Nanyah is speedily pursuing its Appeal, it represents to this Court that it filed its Notice of Appeal on November 1, 2020. ECF No. 39, at 5:17-19. The truth is that Nanyah filed its Notice of Appeal on October 24, 2019, over one year earlier. ECF No. 31, at Ex. 12. Accordingly, Nanyah's appeal process has already encompassed almost two years, which can hardly be described as an attempt "to proceed with the pending Appeal as quickly as possible."

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B. Nanyah's Attempt at Redirection Is Indicative of the Merit in Nanyah's Position.

The rest of Nanyah's arguments are an exercise in redirection. Nanyah spends nearly half of its legal argument summarizing why the circumstances of *other* entities in *other* cases did not warrant dismissal, without discussing *Nanyah's* circumstances in *this* case. (ECF No. 38, at 7-9.) While each and every case cited by Nanyah is easily distinguishable,[4] what ultimately matters is *Nanyah's* circumstances and *Nanyah's* motives for filing *Nanyah's* Petition. *See Mense*, 509 B.R. at 279-81 (describing the various facts a court should look to, which are specific to each debtor, to determine whether a bankruptcy petition should be dismissed for cause).

Then, Nanyah sets forth a self-serving, one-sided version of the underlying litigation and contends that it has a likelihood of success on appeal, as if its likelihood of success has any bearing over Nanyah's motives for filing the Petition. (*See id.* at 11:6-19.) Whether or not a party has a likelihood of success on appeal has no bearing on whether a chapter 11 filing was in good faith when filed "to dodge the requirement for an appeal bond." *See Mense*, 509 B.R. at 279-81. Regardless, Nanyah's chance of success on appeal is slim to none; Nanyah has litigated these claims over the course of ***eight years*** without any success.[5]

Finally, Nanyah asserts—with not a single source of legal authority—that the "delay" in filing the motion "should be taken into account." (*Id.* at 11:20.) Not only is there no support for this argument, *see Mense*, 509 B.R. at 279-81, but any "delay" is a direct result of Nanyah's own actions. Primarily, Nanyah wholly ignores the multitude of citations within the Motion to Nanyah's testimony during its ***two*** separate 341 meetings. The reason for the two separate 341 meetings was because Nanyah failed to make its sole principal—Yoav Harlap—available during the first session,

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[4] *See, e.g., Marshall v. Marshall (In re Marshall)*, 721 F.3d 1032, 1049 (9th Cir. 2013) (debtor had assets sufficient to propose—and did propose—a plan that included payment of the judgment); *In re Sletteland*, 260 B.R. 657, 666 (Bankr. S.D.N.Y. 2001) (debtor engaged in ongoing business and had multiple non-judgment creditors); *In re Zaruba*, Nos. 07-00100-DMD, 07-00101-DMD, 07-00103-DMD, 2007 Bankr. LEXIS 5083, at *10 (Bankr. D. Alaska Dec. 28, 2007) (debtor had ongoing business and there was no evidence that rehabilitation was unlikely).

[5] In fact, Nanyah omits many aspects of the underlying litigation for which it has no argument for reversal. For example, the fact that its claims against Eldorado were dismissed for failure to comply with the three year rule under Nevada Rule of Civil Procedure 41(e).

requiring a second to take place.[6] ECF No. 30, Ex. 1, at 8:20-10:9. Indeed, the reason Eldorado and the Eliades Parties waited until after the 341 meeting concluded to file the Motion is evident both from the Motion itself, which cites to Nanyah's testimony numerous times, and from the questions asked by counsel for Eldorado and the Eliades Parties during the 341 meetings. (*See generally* ECF No. 28; ECF No. 30, at Exs. 1-2.) Further, counsel for Eldorado and the Eliades Parties sent Nanyah's counsel a meet and confer letter raising the issues in the Motion well before Nanyah filed its opening brief within the State Court Appeal. ECF No. 31, at Ex. 2.

In addition, the delay in the Appeal was a result of Nanyah filing a Notice of Bankruptcy within the appeal (despite Nanyah's position that the automatic stay does not apply to the appeal), prompting an order to show cause and stay of briefing. Ord. to Show Cause, *Nanyah Vegas v. Rogich, et al.*, Case No. 79917 (Apr. 7, 2021). Even before that, and before Eldorado and the Eliades Parties initiated execution on Nanyah's claims, Nanyah obtained numerous extensions to file its opening brief. *See* Ord. Granting Mot., *Nanyah Vegas v. Rogich, et al.*, Case No. 79917 (Nov. 30, 2020); Ord. to Show Cause, *Nanyah Vegas v. Rogich, et al.*, Case No. 79917 (March 5, 2021). But ultimately, none of this matters. There is no deadline on when a Motion to Dismiss for cause must be filed. *See* 11 U.S.C. § 1112(b). Nanyah simply has no legitimate argument in response to the Motion and, as a result, must try to shift focus.

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[6] Furthermore, as a practical matter, Eldorado and the Eliades Parties then had to have the 341 meeting transcribed for purposes of the Motion, the transcripts of which were filed with the Motion. *See* ECF No. 30, at Exs. 1-2.

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III. CONCLUSION

Nanyah admits it filed the Petition to avoid posting a bond. It further does not dispute that six of seven factors weigh against it and misses the boat on the seventh. Nanyah's intentions are clear. It filed the Petition in bad faith. This Court should accordingly grant the Motion and dismiss this case for cause.

DATED this 4th day of August, 2021.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 4th day of August, 2021, service of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS BANKRUPTCY PETITION FOR BAD FAITH; OR IN THE ALTERNATIVE, TO TERMINATE THE AUTOMATIC STAY TO ENFORCE THE STATE COURT'S JUDGMENT** was made by mandatory electronic service through the United States Bankruptcy Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

KEVIN A. DARBY TRICIA M. DARBY **DARBY LAW PRACTICE, LTD.** 4777 Caughlin Parkway Reno, Nevada 89519	Email: kevin@darbylawpractice.com tricia@darbylawpractice.com *Attorneys for Debtor and Debtor in Possession* NANYAH VEGAS, LLC
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/s/ Sharon L. Murnane
Employee of BAILEY❖KENNEDY

EXHIBIT 2

EXHIBIT 2

Joseph Liebman

From: Joseph Liebman
Sent: Thursday, August 5, 2021 10:25 AM
To: Mark Simons; Brenoch R. Wirthlin; Kevin A. Darby, Esq.; Tricia M. Darby, Esq.; Andrew Heymann; Jodi Alhasan
Cc: Jon Linder; Danielle Kelley; Sharon Murnane
Subject: RE: Appeal briefs
Attachments: 21.06.18 Order Dismiss Appeal Nos. 81038, 81238; Set Briefing Schedule 79917.pdf

Mark:

Just to clarify, is this the language you are referring to when you state that you don't believe the Supreme Court will grant any extensions to my clients and Brenoch's clients absent extraordinary circumstances?

"***As Nanyah Vegas, LLC has already been granted two 90-day extensions of time to file the opening brief and appendix***, further extension requests will not be viewed favorably and will not be granted absent demonstration of extraordinary circumstances and extreme need." (see page 5 attached order).

From: Mark Simons <msimons@shjnevada.com>
Sent: Thursday, August 5, 2021 10:15 AM
To: Joseph Liebman <JLiebman@baileykennedy.com>; Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Mark Simons <msimons@shjnevada.com>; Kevin A. Darby, Esq. <kevin@darbylawpractice.com>; Tricia M. Darby, Esq. <tricia@darbylawpractice.com>; Andrew Heymann <aheymann@solblum.com>; Jodi Alhasan <jalhasan@shjnevada.com>
Cc: Jon Linder <jlinder@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Sharon Murnane <SMurnane@baileykennedy.com>
Subject: RE: Appeal briefs

All
Given the efforts to set aside Nanyah's BK proceedings, and the efforts to undermine the appeal by your actions to enforce the judgments, I decline your requests. Further, as a read the Nevada Supreme Court's prior order, no additional extensions will be granted absent extraordinary circumstances.
However, if all parties want to withdraw any opposition to Nanyah's ongoing BK proceedings and suspend any efforts to enforce the judgments pending the outcome of the appeal, please advise as we may be able to reach accommodation. However, please be advised that I think any action in the appeal needs to include approval and participation of Nanyah's bankruptcy counsel.
Mark

From: Joseph Liebman <JLiebman@baileykennedy.com>
Sent: Thursday, August 5, 2021 9:25 AM
To: Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Mark Simons <msimons@shjnevada.com>
Cc: Jon Linder <jlinder@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Sharon Murnane <SMurnane@baileykennedy.com>
Subject: RE: Appeal briefs

I would request the same extension, in order to keep us all on the same briefing schedule. Thanks Mark.

From: Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>
Sent: Wednesday, August 4, 2021 5:25 PM
To: Mark Simons <msimons@shjnevada.com>
Cc: Joseph Liebman <JLiebman@baileykennedy.com>; Jon Linder <jlinder@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>
Subject: Appeal briefs

Mark, with the Supreme Court's most recent order it puts the brief due in the middle of a multi-week trial I have coming up that will make the current date unworkable. I would propose a single 90 day extension for the responsive opening briefs to allow for adequate time after trial to complete the opening briefs. Would your client be amenable? If so we can prepare the joint motion or stipulation as necessary.

Brenoch R. Wirthlin
Partner

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