

JUN 15 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No. SC-06-1453-PaMkB
	)	
ECV DEVELOPMENT, LLC,	)	Bk. No. 06-02001
	)	
Debtor.	)	
_____	)	
ECV DEVELOPMENT, LLC,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM<sup>1</sup></b>
	)	
EMERALD BAY FINANCIAL, INC.;	)	
C.N.A. FORECLOSURE SERVICES,	)	
INC.; UNIFIED MORTGAGE	)	
SERVICES, INC.; BETTY WALLACE,	)	
	)	
Appellees.	)	
_____	)	

Argued and Submitted on May 17, 2007  
at Pasadena, California

Filed - June 15, 2007

Appeal from the United States Bankruptcy Court  
for the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: PAPPAS, MARKELL<sup>2</sup> and BRANDT, Bankruptcy Judges.

<sup>1</sup> 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 8013-1.

<sup>2</sup> The Honorable Bruce A. Markell, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

1 This is an appeal from an order dismissing the chapter 11<sup>3</sup>  
2 bankruptcy case filed by debtor ECV Development, LLC ("ECV"), as a  
3 bad faith filing. We AFFIRM.

4  
5 **FACTS**

6 In December 2000, Frank Avila ("Avila") purchased a house on  
7 4.73 acres in El Centro, California (the "Property"). He  
8 thereafter subdivided the Property into 24 lots, one with the  
9 house and 23 vacant.

10 Avila formed Olive XXIII, LLC ("Olive") on May 14, 2002, and  
11 conveyed the Property to Olive. On August 27, 2002, Appellee  
12 Emerald Bay, Inc. ("Emerald Bay") made 23 loans of \$32,000 each to  
13 Olive, allegedly<sup>4</sup> secured by Deeds of Trust on each of the vacant  
14 lots; a loan of \$134,000, secured by a Deed of Trust on the  
15 improved lot with building; and a loan of \$54,000.

16 At some point, Emerald Bay<sup>5</sup> assigned its interests under the  
17 notes and trust deed to private investors and to Emvest Mortgage  
18

19 \_\_\_\_\_  
20 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

23 <sup>4</sup> We say "allegedly" because a considerable dispute arose  
24 concerning which parcels secured which loans. For our purposes,  
25 it is uncontroverted that Avila originally owned the Property,  
26 that he formed Olive and conveyed the Property to Olive, and that  
27 Emerald Bay (itself or through one of its controlled companies),  
28 made the loans described above to Olive.

29 <sup>5</sup> Besides Emerald Bay, the other Appellees in this appeal  
30 are Unified Mortgage Services, Inc. ("Unified") and CNA  
31 Foreclosure Services, Inc. ("CNA"). Unified is an affiliate of  
32 Emerald Bay and provides mortgage servicing for Emerald Bay. CNA  
33 is an affiliate of Emerald Bay and provides foreclosure services  
34 for Emerald Bay. Appellee Betty Wallace is identified as a Trust  
35 Deed Holder, but has not taken an active role in this appeal.

1 Fund, Inc. ("Emvest").<sup>6</sup> Then, at some later time, Emerald Bay  
2 alleges that it bought back "some of those notes and now holds an  
3 'interest in the subject property.'"<sup>7</sup>

4 Olive failed to make the required payments on the \$54,000  
5 note, and then later failed to make payments on all of the \$32,000  
6 notes and the \$134,000 note. The record does not disclose the  
7 date(s) of the defaults.

8 Emvest scheduled a foreclosure sale on the Property on  
9 October 8, 2003. Olive filed a chapter 11 bankruptcy on October  
10 7, 2003 (the "Olive I" bankruptcy), one day prior to the  
11 foreclosure sale. In its schedule D, Olive listed a secured claim  
12 by Emvest of \$881,000, based on "8/2/02 8/27/02 Deed of Trust Lots  
13 1-24."

14 On June 9, 2004, the bankruptcy court, acting sua sponte,  
15 issued an order to show cause requiring Olive to explain why the  
16 chapter 11 case should not be dismissed. The court supported its  
17 order with a six-page "Recitation of Deficiencies in Support of  
18 Order to Show Cause Why This Chapter 11 Case Should not be  
19 Dismissed or Converted to Chapter 7." In the Recitation, the  
20 bankruptcy court noted that the case was "replete with examples of  
21 applications and motions without required information or notice,  
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23 <sup>6</sup> Emvest is a mortgage broker at times affiliated with  
24 Emerald Bay. A permanent receiver to oversee Emvest was appointed  
25 by U.S. District Court for the Southern District of California in  
an action entitled SEC v. Emvest Mortgage Fund, LLC, et al. The  
date of the receiver's appointment is not clear in the record.

26 <sup>7</sup> Emerald Bay would later, in its motion to dismiss the  
27 bankruptcy case now on appeal, assert that it initiated the  
foreclosure attempt on October 8, 2003. We are unable to  
28 determine from the record whether Emvest initiated the foreclosure  
on its own behalf or on behalf of Emerald Bay.

1 delays and amendments to correct earlier errors;" that Olive was  
2 making adequate protection payments, but had no funds and had not  
3 requested authorization to incur debt; that Olive did not serve  
4 all creditors with notice of the bankruptcy proceedings, including  
5 two creditors owed over \$280,000 who were not on the service list  
6 or Olive's schedules; and that Olive had proposed a financing plan  
7 that, in the court's words, was "essentially a plan of  
8 reorganization . . . without the benefit of a disclosure  
9 statement."

10 At the June 24, 2004 show cause hearing, it was revealed that  
11 the previous three months of adequate protection payments the  
12 bankruptcy court had earlier ordered be paid to secured creditors  
13 by Olive had been financed by the AtVantage Group, Inc.  
14 ("AtVantage"). The bankruptcy court questioned James Deffner,  
15 AtVantage's attorney, and concluded that these payments were a  
16 gift, having not been approved by the court or the U.S. Trustee.  
17 At the end of the hearing, the court, in strong language, decided  
18 to dismiss the case.

19 Before you can implement the powers and the  
20 benefits under the bankruptcy code, there's  
21 one solid foundation that must be laid and  
22 that is procedural due process, which means  
23 that you can't change people's interests  
24 without giving them adequate notice so that  
25 they can be heard and that their positions can  
26 be before the court and evaluated and  
27 adjudicated. What's happened in this case is  
28 over a period of time the court has come to  
the conclusion that it does not have  
confidence in the representations that have  
been made to the court in this regard. The  
court is unsure of what is being asserted  
before the court is even correct or in some  
cases improved and that caused me - and I've  
been on the bench here 28 and a half years.  
I've sat on hundreds of chapter 11s, possibly  
even thousands at this point - and in all

1           those cases I have never issued an order such  
2           as the order I issued on June the 9th and  
3           that's exactly what my problems are in this  
4           particular case.

5 Tr. Hr'g 33:13 - 34:4 (June 24, 2004). The bankruptcy court's  
6 order dismissing Olive I was entered on June 24, 2004.

7           On June 29, 2004, Olive sought an injunction in state  
8 superior court to prevent Emerald Bay from foreclosing the  
9 Property scheduled for August 10, 2004. On August 4, 2004, the  
10 superior court denied the motion because Olive's claims were not  
11 strong enough to justify imposition of an equitable remedy.

12           On August 9, 2004, Daniel Holbrook ("Holbrook"), the  
13 principal of AtVantage, paid \$165,951.33 to Emerald Bay allegedly  
14 to satisfy the \$54,000 loan. On August 9, 2004, based on this  
15 payment, the prior adequate protection payments made by AtVantage  
16 in the Olive I bankruptcy, and upon the promises of Holbrook,  
17 Olive, acting through Avila, executed a quitclaim deed to the  
18 Property in favor of AtVantage.<sup>8</sup>

19           On December 3, 2004, Holbrook and other employees of  
20 AtVantage drafted articles for a limited liability company, ECV.  
21 The articles provided that ECV would have three managers, Craig  
22 Boucher, Lansing Eberling and Ron Ramos. There was one member of  
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24           <sup>8</sup> Although Avila would later assert that he never agreed to  
25 convey title to AtVantage in signing the quitclaim deed, a state  
26 court in the subsequent Imperial County Action, *infra*, in which  
27 both AtVantage and Olive were parties, determined that the chain  
28 of title to the Property was "undisputed" and that the quitclaim  
deed transferred title from Olive to AtVantage (and, according to  
the state court, it was also undisputed that the subsequent grant  
deed from AtVantage to ECV transferred title of the Property to  
ECV.).

1 the company, AtVantage, which was wholly owned by Holbrook.<sup>9</sup>

2 On March 23, 2005, AtVantage transferred title to the  
3 Property to ECV by grant deed. ECV executed a promissory note in  
4 favor of AtVantage for \$406,619, which note was secured by a deed  
5 of trust against the Property recorded on May 27, 2005.

6 On March 29, 2005, ECV filed a suit against Emerald Bay and  
7 Olive in superior court (the "Imperial County Action") alleging  
8 that the underlying notes and deeds of trust were invalid. A  
9 contested hearing was held on June 2, 2005, at which ECV was  
10 granted a preliminary injunction preventing foreclosure. However,  
11 the state court noted that it had serious doubts whether ECV would  
12 eventually prevail in the action.

13 Emerald Bay and other defendants moved for summary judgment  
14 in the Imperial County Action. On May 26, 2006, the state court  
15 granted the motion. A judgment was entered in state court on June  
16 6, 2006, dismissing all counts of ECV's complaint.

17 On June 26, 2006, Olive filed another chapter 11 bankruptcy  
18 petition ("Olive II"), and listed the Property as an asset of the  
19 Olive II bankruptcy estate.

20 On July 25, 2006, the state court denied ECV's motion for  
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22 <sup>9</sup> There is some confusion in the record whether AtVantage  
23 was one company or two: AtVantage and Custom Advantage Home  
24 Builders ("Custom Advantage"). Custom Advantage is a  
25 construction company at least partly owned by Holbrook. We do not  
26 know from the record the extent of ownership or control Holbrook  
27 exercised over Custom Advantage. However, Custom Advantage,  
28 according to the Holbrook Declaration, only owned 10 percent of  
ECV while the remaining 90 percent was owned by AtVantage which  
was in turn 100 percent owned by Holbrook. We note that the  
Holbrook Declaration was ruled inadmissible in its entirety by the  
bankruptcy court. However, this particular fact was within the  
direct knowledge of Holbrook and no party has questioned  
Holbrook's control of ECV.

1 reconsideration in the Imperial County Action. On July 28, 2006,  
2 ECV filed a "bare bones" chapter 11 bankruptcy petition ("ECV I").  
3 The ECV I schedules listed the Property as an asset of the ECV I  
4 bankruptcy estate.

5 On July 31, 2006, ECV appealed the summary judgment and  
6 denial of reconsideration in the Imperial County Action.<sup>10</sup>

7 On August 22, 2006, the § 341(a) hearing in ECV I occurred.  
8 Boucher, one of the managers of ECV, testified that:

- 9 • ECV had no employees, income or expenses;
- 10 • ECV's real property taxes, if paid, were paid by AtVantage, a  
11 wholly owned Holbrook entity;
- 12 • AtVantage paid the compensation of managers of ECV, the fees  
13 of ECV's law firm and the \$100,000 cash bond for the Imperial  
14 County Action;
- 15 • there were no current commitments to finance home  
16 construction on the Property, and no current offers to  
17 purchase the Property;
- 18 • a bank account had been opened for ECV on August 22, 2006,  
19 with funds provided by AtVantage and Custom Advantage.
- 20 • Holbrook wholly owned AtVantage, and was part-owner of Custom  
21 Advantage.

22 On September 8, 2006, the bankruptcy court dismissed Olive II  
23 as a bad faith filing and imposed a 180-day bar. On the same day,  
24 Judge Hargrove, who also presided in Olive II, conducted a status  
25 conference in ECV I at which he directed Holbrook to submit a  
26 statement detailing the relationship between AtVantage and ECV.

27 On September 25, 2006, Emerald Bay, CNA and Unified moved to  
28 dismiss or convert ECV I as a bad faith filing (the "Dismissal

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27 <sup>10</sup> The judgment in the Imperial County Action was appealed to  
28 the California Court of Appeals. The court of appeals has not yet  
reached a decision.

1 Motion") On October 12, 2006, Betty Wallace, a trust deed holder,  
2 filed a joinder in the motion to dismiss.

3 On October 6, 2006, Holbrook filed a declaration regarding  
4 the relationship between ECV and AtVantage, as well as other facts  
5 related to the ECV bankruptcy (the "Holbrook Declaration").

6 A hearing was held on November 9, 2006, regarding the motion  
7 to dismiss or convert at which counsel for ECV and the movants  
8 appeared. Early in the hearing, the bankruptcy court disposed of  
9 the Holbrook Declaration:

10 MR. SUNNEN [counsel for Emerald Bay]: Mr.  
11 Holbrook did file something in connection with  
12 the status conference on October the 13th. We  
13 filed a lengthy objection to hearsay, lack of  
14 foundation and testimony from an improper  
15 party. I'm going to object to anything that  
16 was put in that declaration.

17 As the court recalls -

18 THE COURT: Yeah, I would sustain. I've looked  
19 at that. I've sustained those  
20 objections. . . . There's absolutely no  
21 foundation. The declaration is substantially  
22 all hearsay.

23 Tr. Hr'g 13:21 - 14:5 (November 9, 2006).

24 After considering arguments of counsel and the record, the  
25 bankruptcy court then dismissed ECV I as a bad faith filing. It  
26 explained:

27 On this record, I've gone through these  
28 pleadings, and this record supports a  
dismissal of this case today. In this court's  
view, this is a classic bad faith filing.

I have reiterated early on in today's  
proceeding the chronology involving this  
property; and to summarize, again, the Arnold  
case, the ninth circuit case, is the authority  
for this court to proceed, and it basically  
incorporates the 1986 Fifth Circuit[']s In re  
Little Creek Development case dealing with a  
dismissal for cause under section 1112(b).



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I'll recite those again for the record.

The debtor had one asset such as a tract of undeveloped or developed real estate. That fits right in here.

The secured creditors' liens encumber this tract. They do.

There is generally no employees except for the principals.

Little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments. That factor holds true here. Nothing has been shown to this court to the contrary.

There are typically few, if any, unsecured creditors whose claims are relatively small. That's the case here.

The property has usually been posted for foreclosure because of arrearages on the debt. The property's been in foreclosure for years.

Number 6, the debtor and one creditor may have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which cannot be afforded. It's just right out of the book in Little Creek, exactly what's happened here in this case.

Seven, there are sometimes allegations of wrongdoing by the debtor or its principals. Unclear on that.

New debtor syndrome may have occurred in which a one-asset entity has been created or revitalized on the eve of the foreclosure to isolate the insolvent property and its creditors. There's some of that here.

Tr. Hr'g 34:8 - 35:16.

The bankruptcy court entered its order dismissing the case as a bad faith filing on November 28, 2006, memorializing the findings it recited on the record at the hearing on November 9, 2006.

Based on the arguments of counsel, the Court grants the motion to dismiss finding that the existence of good faith depends on an amalgam

1 of factors and not upon a specific fact. In  
2 re Arnold, 806 F.2d 937 (9th Cir. 1986). The  
3 Arnold court cited Matter of Little Creek Dev.  
4 Co., 779 F.2d 1068, 1072-73 (5th Cir. 1986)  
5 which set for a nonexclusive list of factors  
6 for the court to consider. The court finds  
7 that this Debtor has many of the factors set  
8 forth in Little Creek that warrant dismissal  
9 of this case.

- 6 \* sole asset is undeveloped real property
- 7 \* secured creditor's liens encumber the
- 8 property
- 9 \* no cash flow
- 10 \* no unsecured creditors
- 11 \* property posted for foreclosure/debtor
- 12 unsuccessful in defending actions against
- 13 foreclosure in state court
- 14 \* no employees.

11 ECV filed a timely appeal of the dismissal order on December  
12 7, 2006.<sup>11</sup>

#### 14 JURISDICTION

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
16 § 1334 and 157(b) (2) (A). We have jurisdiction pursuant to 28  
17 U.S.C. § 158.

#### 18 ISSUES

19 Whether Appellees had standing to move to dismiss the  
20 bankruptcy case.

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23 <sup>11</sup> Following the filing of the appeal, on January 8, 2007,  
24 ECV filed a motion for stay pending appeal before the bankruptcy  
25 court. On the same day, ECV filed another, second petition for  
26 relief under chapter 11, Case no. 07-00052-JH-11 ("ECV II"). On  
27 January 18, 2007, the bankruptcy court denied the motion for stay  
28 pending appeal. On March 7, 2007, ECV filed a motion for stay  
pending appeal with the Panel. On March 19, our motions panel  
denied any relief because ECV "had not established sufficient  
grounds for a stay pending appeal. See Wymer v. Wymer (In re  
Wymer), 5 B.R. 802, 806 (9th Cir. BAP 1980)." ECV v. Emerald Bay,  
BAP no. SC-06-1453 (March 19, 2007).



1 during the pendency of this appeal, ECV filed a second chapter 11  
2 case.

3  
4 A. Appellees Emerald Bay, CNA and Unified had standing  
5 in the bankruptcy case to move for dismissal.

6 ECV argues that Appellees Emerald Bay, CNA and Unified did  
7 not have standing in the bankruptcy court to move for dismissal of  
8 ECV I. According to ECV, Emerald Bay originated the loans on the  
9 Property, but subsequently assigned all beneficial interest away  
10 to other investors; ECV argues CNA and Unified are merely  
11 servicing agents for the alleged debts.

12 Appellees do not address the standing issue in their Opening  
13 Brief. However, a review of the record indicates that this issue  
14 was fully briefed at the bankruptcy court, and discussed at the  
15 hearing on November 9, 2006.

16 Emerald Bay<sup>12</sup> asserts Appellees have standing based upon their  
17 status as a judgment creditor arising in the Imperial County  
18 Action. Indeed, a judgment was entered in favor of Appellees  
19 Emerald Bay, CNA, and Unified in which Appellees were awarded  
20 costs of suit as against ECV. Appellees submitted a Memorandum of  
21 Costs to the superior court in the amount of \$5,630.95. This  
22 Memorandum of Costs was discussed at the hearing on the motion to  
23 dismiss:

24 MR. HEINEN [Counsel for ECV]: In that Judgment  
25 [in the Imperial County Action], there is a  
26 Judgment for Emerald Bay Financial, Wild Rock,  
Unified Mortgage Services and Lenders'

27 <sup>12</sup> We need not consider whether CNA and Unified have standing  
28 independently of Emerald Bay. The record establishes that they  
are entities controlled by Emerald Bay.

1 Reconveyance. None of those entities are the  
2 holders of any notes in this case. And so my  
point being -

3 THE COURT: But they are creditors.

4 MR. HEINEN: They are not creditors. They  
5 became creditors by virtue of a memorandum of  
costs.

6 THE COURT: They are creditors. They are  
7 creditors.

8 MR. HEINEN: Based on a memorandum of costs.  
9 But they're not secured creditors.

10 THE COURT: That doesn't make any difference.  
11 They're creditors. They can bring a motion to  
-

12 MR. HEINEN: I'm not disagreeing.

13 THE COURT: - dismiss.

14 MR. HEINEN: - I'm not disagreeing.

15 THE COURT: This is not a relief from stay.  
16 They can bring a motion to dismiss. They're  
creditors.

17 Tr. Hr'g 15:20 - 16:13.

18 As can be seen in this colloquy, ECV's counsel admits that  
19 Appellees Emerald Bay, CNA and Unified are creditors of ECV, but  
20 argues that they are not secured creditors. The bankruptcy court  
21 correctly points out that whether Appellees are secured or  
22 unsecured creditors is irrelevant - any creditor may prosecute a  
motion to dismiss.

23 Section 101(10)(A) defines a creditor as an entity that has a  
24 claim against the debtor that arose at the time of or before the  
25 entry of the order for relief. Appellees' claim arose on June 8,  
26 2006, when the state court entered its judgment awarding costs as  
27 against ECV in the Imperial County Action. ECV filed its  
28 voluntary chapter 11 petition on July 28, 2006. Therefore, for

1 purposes of the bankruptcy case, Appellees have a claim against  
2 ECV, and are thus creditors.

3 Section 1109 governs the "right to be heard" in chapter 11  
4 cases, and § 1109(b) provides that a "party in interest . . . may  
5 appear and be heard on any issue in a case under this chapter" and  
6 defines "party in interest" to include "a creditor." Section  
7 1112(b) indicates that dismissal of a chapter 11 case may be  
8 sought via the "request of a party in interest," thereby  
9 conferring express standing on creditors to move for dismissal of  
10 a chapter 11 case. Johnston v. JEM Dev. Co. (In re Johnston), 149  
11 B.R. 158, 161 (9th Cir. BAP 1992) (creditor may move to dismiss  
12 under § 1112(b)).

13 We conclude that the bankruptcy court correctly decided that  
14 Appellees Emerald Bay, CNA and Unified had statutory standing  
15 under § 1112(b) to move to dismiss ECV's chapter 11 case.

16

17 B. This appeal is not moot.

18 Appellees note that during this appeal, ECV filed a second  
19 chapter 11 case on January 8, 2007, which is currently pending  
20 before the bankruptcy court. Appellees therefore suggest that we  
21 cannot grant ECV effective relief in this appeal (i.e., reversal  
22 of the dismissal order in ECV I). If we were to grant such  
23 relief, Appellees argue, inconsistent and inequitable results may  
24 occur in the two bankruptcy cases.

25 Appellees misconstrue the concept of mootness. Mootness does  
26 not rest on the possibility that relief may be undesirable or  
27 arguably inequitable. The critical focus in the mootness inquiry  
28 is whether it is "impossible" to fashion effectual relief. The

1 Ninth Circuit discussed this concept in In re Patullo, 271 F.3d  
2 898, 901 (9th Cir. 2001):

3 [t]he mootness inquiry focuses upon whether we  
4 can still grant relief between the  
5 parties. . . . If an event occurs while a  
6 case is pending on appeal that makes it  
7 impossible for the court to grant any  
8 effectual relief whatever to a prevailing  
9 party, the appeal is moot and must be  
10 dismissed. . . .

11 (Emphasis added.) The Patullo decision is consistent with a long  
12 line of cases in our circuit that restrict appellate mootness<sup>13</sup> to  
13 situations where "events may occur that make it impossible for the  
14 appellate court to fashion effective relief." Focus Media, Inc.  
15 v. Nat'l Broad. Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916,  
16 922 (9th Cir. 2004) (citing Bennett v. Gemmill (In re Combined  
17 Metals Reduction Co.), 557 F.2d 179, 187 (9th Cir. 1977)).

18 It is not impossible for us to fashion relief for ECV.  
19 Appellees, in their Opening Brief at p. 23, concede that  
20 "effective relief could conceivably be fashioned," although they  
21 suggest that it would be inequitable. This Panel, like all  
22 federal courts, is under "the virtually unflagging  
23 obligation . . . to exercise the jurisdiction given them." Colo.  
24 River Conservation Dist. v. United States, 424 U.S. 800, 817-18  
25 (1976). If fashioning effective relief is not "impossible," we  
26 are under an obligation to exercise our statutory jurisdiction.

27 Appellees express concern that, if we reverse, the Property  
28 may constitute property of two different bankruptcy estates, thus

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29 <sup>13</sup> We are dealing here only with mootness that arises as a  
30 result of an intervening act before the appeal ends, and not  
31 mootness that may arise as a matter of law such as a change in  
32 statutory law or binding precedent.

1 violating the "single estate rule."<sup>14</sup> But even if that is true, to  
2 the extent any "rule" has been violated, that violation occurred  
3 in the filing of ECV's second chapter 11 case, and that violation  
4 should logically be addressed in the second, not this, bankruptcy  
5 case.<sup>15</sup>

6 In sum, it is not impossible for us to fashion effective  
7 relief in this appeal and, thus, it is not moot.<sup>16</sup>

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8  
9 <sup>14</sup> "Appellees respectfully request that applicable Ninth  
10 Circuit precedent be followed and this Panel determine that it  
11 cannot fashion relief in Appellant's appeal as the Appeal and  
12 subsequent Chapter 11 filing violate the 'single estate rule.'" Appellees' Opening Brief at 24. As a general principle, the  
13 single estate rule was addressed by the Panel in In re Grimes, 117  
14 B.R. 531 (9th Cir. BAP 1990): "Property cannot be an asset of two  
15 bankruptcy estates simultaneously." Id. at 535 (citing Bateman v.  
16 Grover (In re Berg), 45 B.R. 899, 903 (9th Cir. BAP 1984); see  
17 also In re Saylor, 869 F.2d 1434, 1438 (11th Cir. 1989).

18 <sup>15</sup> The automatic stay arising in ECV's second bankruptcy case  
19 does not apply to this appeal stemming from the first bankruptcy  
20 case. In Parker v. Bain, 68 F.3d 1131, 1135-36 (9th Cir. 1995),  
21 the court held that the automatic stay only applies to appeals  
22 when the action or proceeding was originally brought against the  
23 debtor. And even if the motion to dismiss the first chapter 11  
24 case can be considered to be an action against the debtor, "the  
25 automatic stay does not apply to proceedings initiated against the  
26 debtor in the same bankruptcy court where the debtor's bankruptcy  
27 proceedings are pending." Snavely v. Miller (In re Miller), 397  
28 F.3d 726, 730 (9th Cir. 2005). Both of ECV's bankruptcy cases  
were filed in the same bankruptcy court before the same judge.

21 <sup>16</sup> At oral argument on May 17, 2007, Appellees' counsel  
22 informed us that the Property was sold in a foreclosure sale on  
23 April 2, 2007, to the note holders, but that a trustee's deed had  
24 not yet been executed and recorded. Ordinarily, the sale of the  
25 debtor's principal asset under these circumstances would raise  
26 additional mootness considerations. However, there is at least  
27 one other significant potential asset of this bankruptcy estate, a  
28 \$100,000 security bond on deposit with the clerk of the Imperial  
County Superior Court, which ECV listed in its amended schedule B  
filed on November 8, 2006.

Further, although presumably difficult, it is not impossible  
for ECV to undo the foreclosure sale in an equitable proceeding in  
state court under Cal. Civ. Code § 3412. The validity of the  
notes is the subject of the appeal of the Imperial County Action

(continued...)



1 II.

2 The bankruptcy court did not abuse its discretion in  
3 dismissing ECV's bankruptcy case for bad faith.

4 A chapter 11 case may be dismissed under § 1112(b)(1) "if the  
5 movant establishes cause." Section 1112(b)(4) provides a non-  
6 exclusive listing of events and circumstances constituting cause  
7 for dismissal. However, if the petition was filed in bad faith,  
8 cause for dismissal exists. In re Arnold, 806 F.2d 937 (9th Cir.  
9 1986).<sup>17</sup> The ultimate decision whether to dismiss a chapter 11

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11 <sup>16</sup>(...continued)

12 currently before the California Court of Appeals. Further, it is  
13 questionable whether the note holders qualify as bona fide  
14 purchasers for value of the Property. Melendrez v. D & I  
15 Investment, Inc., 127 Cal. App.4th 1238, 1251 (Cal. Ct. App.  
16 2005)(bona fide purchaser is one "who acquires a property interest  
17 for valuable consideration, in good faith, without actual or  
18 constructive notice of another's asserted rights in the  
19 property."). Thus, the mortgage foreclosure may not have  
20 conclusively passed title to the Property as usually occurs under  
21 California law when a trustee issues a deed to a bona fide  
22 purchaser. Nguyen v. Calhoun, 105 Cal. App.4th 428, 441 (Cal. Ct.  
23 App. 2003).

24 For these reasons, we conclude that the sale of the Property  
25 on April 2, 2007, did not moot this appeal.

26 <sup>17</sup> Section 1112(b) was substantially amended by The  
27 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005  
28 ("BAPCPA"). The revised subsection (b) mandates (rather than  
allows the bankruptcy court to exercise discretion as under pre-  
BAPCPA) that the bankruptcy court convert or dismiss a chapter 11  
case, whichever is in the best interests of creditors and the  
estate, if the movant establishes cause, absent unusual  
circumstances. The bankruptcy court must "specifically identify"  
the circumstances that support the court's finding that conversion  
or dismissal is not in the best interests of the creditors and  
estate. § 1112(b)(1). The new subsection allows an exception  
where the debtor establishes that there is a reasonable likelihood  
that a plan will be confirmed within the time frame of § 1121(e),  
or a reasonable period, and that the grounds for granting such  
relief include an act or omission for which there is a reasonable  
justification or that the act or omission will be cured within a  
reasonable time. § 1112(b)(2). Finally, BAPCPA expands to 16  
from 10 the number of types of conduct or circumstances that the

(continued...)

1 case is submitted to the discretion of the bankruptcy judge. In  
2 re St. Paul Self Storage Ltd. P'ship, 185 B.R. at 582.

3 Arnold adopted as indicia of a bad faith those factors  
4 earlier articulated in In re Little Creek Dev. Co., 779 F.2d 1068,  
5 1072-73 (5th Cir. 1986):

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7 Determining whether the debtor's filing for  
8 relief is in good faith depends largely upon  
9 the bankruptcy court's on-the-spot evaluation  
10 of the debtor's financial condition, motives,  
11 and the local financial realities. Findings of  
12 lack of good faith in proceedings based on  
13 §§ 362(d) or 1112(b) have been predicated on

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17 (...continued)

12 term "cause" includes. § 1112(b)(4).

13 This bankruptcy case was filed after the effective date of  
14 BAPCPA, and thus, the amended version of § 1112(b) applies. The  
15 bankruptcy court determined that cause existed for dismissal.  
16 Moreover, neither of the safe-harbor conditions found in new  
17 § 1112(b)(2)(A) or (B) have been established. ECV has not  
18 persuasively argued in this appeal that there is a reasonable  
19 likelihood that a plan can be confirmed if the dismissal is set  
20 aside. Moreover, we take it as axiomatic that there cannot be a  
21 reasonable justification for a bad faith filing.

22 The parties have not argued, nor do we assume or decide, that  
23 the BAPCPA amendments to § 1112(b) were intended to supplant or  
24 overrule existing case law recognizing a debtor's bad faith in  
25 filing a chapter 11 case as "cause" for dismissal. There is no  
26 helpful appellate case law interpreting the revised subsection.  
27 However, several bankruptcy courts have noted that amended  
28 § 1112(b), which limits the court's discretion to decline to  
dismiss or convert if cause is shown, seemingly lowers the  
barriers to dismissal, and thus it is unlikely that cause found  
under prior case law based on bad faith will not also constitute  
good cause for dismissal under BAPCPA. In re 3 Ram, Inc., 343  
B.R. 113, 118 (Bankr. E.D. Pa. 2006); In re Incredible Auto Sales,  
LLC, 2007 Bankr. LEXIS 1305 \*13 (Bankr. D. Mont. 2007) ("If cause  
for conversion or dismissal exists because the debtor filed its  
chapter 11 case in bad faith, then section 1112(b)(2) would not  
apply because, by determining that the debtor filed the case in  
bad faith, the court would foreclose a reasonable justification  
for the filing. In addition, a bad faith determination would  
likely constitute 'unusual circumstances' demonstrating that  
section 1112(b)(2) should not be applied."); see also In re  
Daniels, 2007 Bankr. LEXIS 299 (Bankr. D. Iowa 2007); In re  
Causey, 2006 Bankr. LEXIS 1137 (Bankr. D.Ga. 2006) (applying an  
expanded list of factors based on Little Creek).

1 certain recurring but non-exclusive patterns,  
2 and they are based on a conglomerate of  
3 factors rather than on any single datum.  
4 Several, but not all, of the following  
5 conditions usually exist. The debtor has one  
6 asset, such as a tract of undeveloped or  
7 developed real property. The secured  
8 creditors' liens encumber this tract. There  
9 are generally no employees except for the  
10 principals, little or no cash flow, and no  
11 available sources of income to sustain a plan  
12 of reorganization or to make adequate  
13 protection payments pursuant to 11 U.S.C.  
14 § 361, 362(d)(1), 363(e), or 364(d)(1).  
15 Typically, there are only a few, if any,  
16 unsecured creditors whose claims are  
17 relatively small. The property has usually  
18 been posted for foreclosure because of  
19 arrearages on the debt and the debtor has been  
20 unsuccessful in defending actions against the  
21 foreclosure in state court. Alternatively, the  
22 debtor and one creditor may have proceeded to  
23 a stand-still in state court litigation, and  
24 the debtor has lost or has been required to  
post a bond which it cannot afford. Bankruptcy  
offers the only possibility of forestalling  
loss of the property. There are sometimes  
allegations of wrongdoing by the debtor or its  
principals. The "new debtor syndrome," in  
which a one-asset entity has been created or  
revitalized on the eve of foreclosure to  
isolate the insolvent property and its  
creditors, exemplifies, although it does not  
uniquely categorize, bad faith cases.<sup>18</sup>

19 Our decisions on bad faith filings have been informed both by  
20 the Little Creek and Arnold rulings, as well as our own emphasis  
21 on examination of the "totality of the circumstances" in  
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25 <sup>18</sup> The Little Creek factors for bad faith have also been  
26 adopted, with occasional variation, by the majority of circuits.  
27 C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship),  
28 113 F.3d 1304, 1311 (2d Cir. 1997); Udall v. FDIC (In re Nursery  
Land Dev.), 91 F.3d 1414, 1416 (10th Cir. 1996); Laguna Assocs.  
Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd.  
P'ship), 30 F.3d 734, 738 (6th Cir. 1994); In re Phoenix  
Piccadilly, 849 F.2d 1393, 1394-95 (11th Cir. 1988).

1 determining good and bad faith issues.<sup>19</sup> For example, in In re  
2 Stolrow's Inc., 84 B.R. 167, 171 (9th Cir. BAP 1988), we applied  
3 the Little Creek factors and determined that most did not apply,  
4 and that the bankruptcy court had other valid reasons for refusing  
5 to dismiss the case. Our decision in St. Paul Self Storage  
6 examined the application of five indicia, and we concluded that  
7 the presence of those indicia indicated that the debtor was  
8 unreasonably deterring or harassing creditors and the court was  
9 justified in dismissing the case. 185 B.R. at 583.

10 In this case, at the conclusion of the November 9, 2006  
11 hearing, the bankruptcy court announced its findings of fact  
12 concerning the Little Creek factors, determining that six of the  
13 eight were present in connection with the filing of ECV's chapter  
14 11 bankruptcy petition. The court found that:

- 15 • ECV has only one major asset - undeveloped real property.  
Tr. Hr'g 34:15-17.
- 16 • The secured creditors' liens encumber the tract. Tr. Hr'g  
17 34: 18-19.
- 18 • ECV has no employees other than principals. Tr. Hr'g 34:20-  
19 21.

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21 <sup>19</sup> Indeed, the Fifth Circuit in Little Creek cited our  
22 earlier decision in In re Thirtieth Place, Inc., 30 B.R. 503 (9th  
23 Cir. BAP 1983). "The abrupt ruling of the bankruptcy court here  
24 contrasts with the approach of the Ninth Circuit Bankruptcy  
25 Appellate Panel in Thirtieth Place, which considers the  
26 determination of this question [whether to dismiss a case for bad  
27 faith] to require an examination of all the particular facts and  
28 circumstances in each case. 30 B.R. at 505. In reversing a  
bankruptcy court determination that had rejected a creditor's  
motion to dismiss the case or lift the stay, the Bankruptcy  
Appellate Panel thoroughly analyzed the debtors condition. . . ."  
The Arnold court also cited to Thirtieth Place and our  
"totality of the circumstances" approach to bad faith filing in  
support of its requirement that the existence of good faith  
depends on an "amalgam" of factors and not upon a specific fact.  
Arnold, 806 F.2d at 939.

- 1 • ECV has no cash flow or income and no resources to sustain a  
2 plan of reorganization. "This is a non-working company."  
Tr. Hr'g 34:22-25.
- 3 • There are few unsecured creditors. Tr. Hr'g 35:1-2.
- 4 • The Property has been in foreclosure for years and ECV was  
5 unsuccessful in defending actions against foreclosure in  
state court. Tr. Hr'g 35:3-10.

6 The bankruptcy court noted that it had considered an amalgam  
7 of factors, and had not relied upon any specific fact. This  
8 approach is consistent with the instructions of the Ninth Circuit  
9 in Arnold. 806 F.2d at 939; see also Marsch v. Marsch (In re  
10 Marsch), 36 F.3d 825, 828 (9th Cir. 1994) ("The existence of good  
11 faith depends on an amalgam of factors and not upon a specific  
12 fact.).

13 An additional factor concerned the bankruptcy court. It  
14 observed that ECV had been less than diligent in presenting a plan  
15 of reorganization to the court and its creditors: "What bothers  
16 me is that this Debtor is sitting back, apparently doing nothing.  
17 I've got to prompt the creditor to get a plan filed. If there's  
18 going to be a plan and there is something legitimate about this  
19 operation, why wasn't a plan filed right away? This is not a  
20 complex case as far as a plan." Tr. Hr'g 23:21-24. The court's  
21 concern is consistent with our rulings on bad faith filing. See  
22 In re Thirtieth Place, Inc., 30 B.R. 503, 505 (9th Cir. BAP  
23 1983) (good faith will not ordinarily be denied where there is an  
24 attempt to affect a speedy efficient reorganization"). See also  
25 In re Marsch, 36 F.3d at 828 ("The test is whether a debtor is  
26 attempting to deter and harass creditors or attempting a speedy,

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1 efficient reorganization on a feasible basis.”).<sup>20</sup>

2 On appeal, ECV does not challenge the individual findings of  
3 the bankruptcy court. Rather, it asserts a two-pronged objection.  
4 First, it suggests that application of the bad faith indicia is  
5 particularly harsh in cases with one asset, and it cites to a  
6 bankruptcy court decision noting that it takes a “Sisyphean  
7 effort” to avoid a finding of bad faith in a single asset case.  
8 In re Victoria Ltd. P’ship, 187 B.R. 54, 58-62 (Bankr. D. Mass  
9 1995).<sup>21</sup>

10 ECV’s second objection to the bankruptcy court’s analysis is  
11 that the court applied the wrong legal standard in deciding  
12 whether the chapter 11 case had been filed in bad faith. Rather  
13 than Arnold and Little Creek, ECV suggests that the correct  
14 standard is the one discussed in Carolin Corp. v. Miller, 886 F.2d  
15 693, (4th Cir. 1989), which held that, in addition to the  
16 subjective factors in Little Creek, a moving party must also prove  
17 objective futility of any possible reorganization. Carolin , 886  
18 F.2d at 702.

19 No other court of appeals has accepted the Carolin rule that,  
20 in addition to other accepted bad faith factors, to obtain  
21 dismissal, a movant must show that no reorganization is possible.  
22 Indeed, the Eighth Circuit has explicitly rejected the Carolin

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25 <sup>20</sup> Although the bankruptcy court did not make a specific  
26 finding regarding feasibility of reorganization, it did determine  
that ECV had “no available sources of income to sustain a plan of  
reorganization.” Tr. Hr’g 34:22-23.

27 <sup>21</sup> We note that, unlike in the Ninth Circuit, the Little  
28 Creek factors have not been expressly adopted in the First  
Circuit.

1 rule. Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore  
2 Resort, Inc.), 235 F.3d 375, 380 (8th Cir. 1989) (“We decline to  
3 adopt the Carolin test and hold a Chapter 11 petition may be  
4 dismissed for bad faith alone where the circumstances warrant.”).  
5 Carolin is not controlling in this circuit; Arnold is. We  
6 therefore also decline to make “objective futility” a requisite  
7 factor in reviewing whether a chapter 11 case has been filed in  
8 bad faith.

9 The bankruptcy court’s findings of fact are not clearly  
10 erroneous and are supported by ample evidence in the record. Its  
11 decision that ECV I was filed in bad faith was based on an amalgam  
12 of nearly all the factors presented in Little Creek, the standard  
13 adopted by our circuit in In re Arnold. We conclude that the  
14 bankruptcy court did not abuse its discretion in dismissing ECV’s  
15 bankruptcy case for bad faith.

16  
17 **CONCLUSION**

18 We AFFIRM the bankruptcy court’s order dismissing the  
19 bankruptcy case as a bad faith filing.  
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