

NOV 02 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-14-1576-FKiKu
)		
6	PROMETHEUS HEALTH IMAGING,)	Bk. No.	8:14-bk-10250-CB
	INC.,)		
7)		
	Debtor.)		
8	_____)		
)		
9	PROMETHEUS HEALTH IMAGING,)		
	INC.,)		
10)		
	Appellant,)		
11)		
	v.)	MEMORANDUM*	
12)		
	UNITED STATES TRUSTEE,)		
13)		
	Appellee.)		
14	_____)		

Argued and Submitted on October 22, 2015
at Los Angeles, California

Filed - November 2, 2015

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Alan F. Broidy argued for appellant Prometheus
Health Imaging, Inc.

Before: FARIS, KIRSCHER, and KURTZ, Bankruptcy Judges.

* 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.

1 Debtor had requested a specific, high quality machine,
2 but GEM sent a different, slower machine that was not
3 suitable for the Debtor's needs in Saudi Arabia.
4 Litigation ensued in the District Court in Ohio, and
5 GEM obtained a judgment against the Debtor for the
6 principal sum of \$951,000. In 2010, the Debtor brought
7 action against GEM in Paris, where the court also ruled
8 against the Debtor. In 2012, the Debtor filed an
9 appeal of the Paris court decision, and that appeal is
10 currently pending. It is my understanding that an
11 appeal in Paris is a new matter and that the court is
12 not bound by the lower court ruling. However, the
13 Debtor has no assets to post a bond, and filing a
14 bankruptcy is the only way that the appeal can proceed.
15 If the Debtor prevails on its appeal and recovers sums
16 from GEM, there will be some recovery for creditors.
17 If the Debtor loses on the appeal, there will be no
18 distribution to any creditors.

19

20 b1. The bankruptcy had to be filed in order to
21 proceed with the Debtor's appeal in Paris.

22 On June 10, 2014, Prometheus filed its chapter 11
23 reorganization plan and disclosure statement. Ms. Luke's
24 declaration attached to the disclosure statement advised the
25 court that the appeal was to be heard on February 5, 2015, with a
26 decision expected within thirty to sixty days thereafter.

27 Prometheus also filed a declaration by Frederic Jeannin, its
28 counsel in the French proceedings. He explained that, under
French law, the appellate court would decide the case de novo.
He also explained that:

GEM sought to stay the Appeal on the ground that the
Debtor had not paid the Judgment, which is a
prerequisite for the Appeal to be heard under French
law. Since the Debtor had no money to pay the
Judgment, the only way to proceed with the Appeal was
for the Debtor to demonstrate that it was prevented to
pay the Judgment and file a chapter 11 petition and
seek to reinstate the appeal.

On September 3, 2014, Appellee United States Trustee for

1 Region 16³ objected to the disclosure statement ("Objection").
2 The U.S. Trustee argued generally that "[t]he disclosure
3 statement filed in this case [Docket No. 45] does not contain
4 sufficient information to allow for the formation of an informed
5 judgment and the Court is urged to deny approval absent amendment
6 or supplement." In response, Prometheus filed its First Amended
7 Disclosure Statement Describing Original Chapter 11 Plan. The
8 hearing to approve the disclosure statement was set for
9 October 22, 2014.

10 On September 19, 2014, the bankruptcy court issued its Order
11 to Show Cause Whether Case is Properly Filed in this Court
12 ("OSC"). The court set a hearing for October 15 and ordered
13 Prometheus's counsel to show cause:

14 (1) why venue is proper in this division, (2) why this
15 case should not be transferred to the United States
16 Bankruptcy Court, Central District, Los Angeles
17 Division, (3) why this case should not be dismissed for
18 failure to comply with Section 2.1(a)(5)(A) of the
19 Central District Court Manual, (4) as to Counsel's
20 potential conflict of interest in representing Debtor
and creditor Munir Uwaydah, (5) why Counsel failed to
disclose debtor's involvement in an ongoing adversary
proceeding, case # 2:12-ap-02042-TD in the Central
District, Los Angeles Division, and (6) why sanctions
should not be imposed and/or this case dismissed for
what appears to be an improper filing.

21 The court additionally stated that it "will determine whether the
22 above entitled bankruptcy case should be dismissed as a bad faith
23 filing"

24 Prometheus's counsel filed a declaration in response to the
25 OSC, addressing each of the court's concerns. Regarding the
26

27 ³ The U.S. Trustee did not file a brief in this appeal or
28 otherwise make an appearance.

1 final issue of an improper filing, counsel stated:

2 8. The Debtor's bankruptcy case should not be
3 dismissed as a bad faith filing. As I previously
4 advised the Court, this case is the most unusual
5 chapter 11 case I have ever handled. The Debtor ceased
6 business operations in 2004, and the Debtor's primary
7 asset is the Appeal of litigation pending in Paris. As
8 previously disclosed to the court, Frederic Jeannin,
9 counsel for the Debtor for the Paris Appeal, advised me
10 that the Debtor had to file bankruptcy in order to
11 proceed with the Appeal. As I advised the Court at one
of the initial status conferences, this was not a bad
faith filing, a la Marsch v. Marsch (In re Marsch),
36 F.3d 825 (9th Cir. 1994), where the Ninth Circuit
affirmed the ruling of the bankruptcy court that it was
bad faith for debtors to file a chapter 11 petition to
obtain a stay of a pending appeal when the debtor had
the necessary funds to bond the appeal. Here, the
Debtor has no funds, and the Appeal cannot proceed
unless the bankruptcy case remains active.

12 Similarly, Ms. Luke, as the sole officer and director of
13 Prometheus, stated:

14 6. The Debtor needed to file a chapter 11 case to
15 proceed with the litigation in Paris against GEM. I
16 believed it was appropriate for the Debtor to file its
17 chapter 11 case in Orange County because (i) the
18 Debtor's principal place of business is in Orange
19 County; (ii) the Debtor's sole officer and director
20 lives in Orange County; and (iii) the Debtor's agent
21 for service of process lives in Orange County.

19 The bankruptcy court held the hearing on its OSC on
20 October 15, 2014. According to the hearing transcript, the
21 hearing lasted roughly four minutes. Excluding the introductions
22 and discussion concerning fees, the entirety of the hearing
23 consisted of a short exchange between the court and Prometheus's
24 counsel, culminating in the court's dismissal of Prometheus's
25 chapter 11 petition:

26 THE COURT: So I saw the information from the
27 person who I guess is the president of Prometheus or
what is her role?

28 MR. BROIDY: She is the sole - she is the

1 president, the sole officer and director of Prometheus.

2 THE COURT: Okay. And it's said that she does - I
3 left the paperwork on my desk, unfortunately, but works
4 out of Orange County. And I did - it's a tax prep
5 bill. It's a strip mall with - she's a tax prep -
6 preparer.

7 MR. BROIDY: That's where she works out of, Your
8 Honor. That's where her building is. But if Your
9 Honor is concerned about the proper jurisdiction here
10 before this court, we will consent that the matter goes
11 - is referred to the district - to the Bankruptcy Court
12 in Los Angeles -

13 THE COURT: Well, I'm -

14 MR. BROIDY: - before Judge Donovan.

15 THE COURT: Prometheus is a Delaware corporation.
16 Is that -

17 MR. BROIDY: Yes, it is, Your Honor.

18 THE COURT: Thank you so much. It's a Delaware
19 corporation and this whole thing just looks so
20 fraudulent to me. I'm sorry. It's an attempt to get
21 an automatic stay so he can relitigate in a French
22 court what you've already lost here and already lost in
23 France. And this strip mall tax preparer person seems
24 to be a front for somebody else.

25 I mean, let's brass tacks here. I'm not buying
26 it, you know. This is not - there is - there's
27 somebody in the background and I know who it is and
28 this woman is not that person, and I'm not happy about
this at all. And from day one I wanted to dismiss this
case and I'm going to dismiss it because this is not
real.

This fellow in the background, who I believe is a
fugitive at this point in time, he's using this woman,
paying her to work out of the strip mall to file this
bankruptcy, to continue to litigate what has been
decided in two different countries already and I'm not
going to let it go on anymore. I'm not. They bought
time. They bought more time than I ever should have
given them, but we're not stupid. [We] know what's
really going on.

MR. BROIDY: I understand, Your Honor. I'll
prepare the order of dismissal.

On or around November 26, 2014, the bankruptcy court entered

1 its Order Dismissing Chapter 11 Case. Prometheus timely filed
2 its notice of appeal on December 10, 2014.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **ISSUE**

8 Whether the bankruptcy court abused its discretion in
9 dismissing Prometheus's chapter 11 bankruptcy petition.

10 **STANDARD OF REVIEW**

11 "We review de novo whether the cause for dismissal of a
12 Chapter 11 case under 11 U.S.C. § 1112(b) is within the
13 contemplation of that section of the Code. We review for abuse
14 of discretion the bankruptcy court's decision to dismiss a case
15 as a 'bad faith' filing." Marsch v. Marsch (In re Marsch),
16 36 F.3d 825, 828 (9th Cir. 1994) (citing Stolrow v. Stolrow's,
17 Inc. (In re Stolrow's, Inc.), 84 B.R. 167, 170 (9th Cir. BAP
18 1988)).

19 The Panel must apply a two-part test to determine whether
20 the bankruptcy court abused its discretion. United States v.
21 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

22 First, we consider de novo whether the bankruptcy court applied
23 the correct legal standard. Id. Then, we review the bankruptcy
24 court's factual findings for clear error. Id. at 1262 & n.20;
25 see Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir.

26 1994) (the bankruptcy court's finding of "bad faith" is reviewed
27 for clear error). A bankruptcy court abuses its discretion if it
28 applied the wrong legal standard or its findings were illogical,

1 implausible, or without support in the record. See
2 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
3 Cir. 2011).

4 DISCUSSION

5 **A. The bankruptcy court may dismiss a chapter 11 case for bad** 6 **faith under § 1112(b).**

7 Section 1112(b)(1) provides that “the court shall convert a
8 case under this chapter to a case under chapter 7 or dismiss a
9 case under this chapter, whichever is in the best interests of
10 creditors and the estate, for cause” § 1112(b)(1).

11 Although the statute does not define “for cause,” it identifies a
12 nonexclusive list of factors that may constitute “cause.” See
13 § 1112(b)(4). “The bankruptcy court has broad discretion in
14 determining what constitutes ‘cause’ under section 1112(b).”
15 Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 614 (9th
16 Cir. BAP 2014) (citing Chu v. Syntron Bioresearch, Inc.
17 (In re Chu), 253 B.R. 92, 95 (S.D. Cal. 2000)).

18 “Although section 1112(b) does not explicitly require that
19 cases be filed in ‘good faith,’ courts have overwhelmingly held
20 that a lack of good faith in filing a Chapter 11 petition
21 establishes cause for dismissal.” In re Marsch, 36 F.3d at 828
22 (citations omitted).

23 In its oral ruling, the bankruptcy court did not explicitly
24 state that “bad faith” was the basis of the dismissal. However,
25 in the OSC which precipitated the hearing, the court said that it
26 would consider whether the “bankruptcy case should be dismissed
27 as a bad faith filing” Further, the court commented at
28 the hearing that “this whole thing just looks so fraudulent to

1 me." We conclude that bad faith was the "cause" that the court
2 thought justified dismissal under § 1112(b).

3 "The existence of good faith depends on an amalgam of
4 factors and not upon a specific fact." Id. (quoting Idaho Dep't
5 of Lands v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir.
6 1986)). "The test is whether a debtor is attempting to
7 unreasonably deter and harass creditors or attempting to effect a
8 speedy, efficient reorganization on a feasible basis." Id.
9 (citing In re Arnold, 806 F.2d at 939); see In re Mense, 509 B.R.
10 269, 276 (Bankr. C.D. Cal. 2014) (requiring good faith "deter[s]
11 filings that seek to achieve objectives outside the legitimate
12 scope of the bankruptcy laws"). "The bankruptcy court should
13 examine the debtor's financial status, motives, and the local
14 economic environment Good faith is lacking only when the
15 debtor's actions are a clear abuse of the bankruptcy process."
16 In re Chameleon Sys., Inc., 306 B.R. 666, 670 (Bankr. N.D. Cal.
17 2004) (quoting In re Arnold, 806 F.2d at 939).

18 The court may consider a number of factors when determining
19 bad faith: (1) whether the debtor misrepresented facts in his
20 petition or plan, unfairly manipulated the Bankruptcy Code, or
21 otherwise filed his petition or plan in an inequitable manner;
22 (2) the debtor's history of filings and dismissals; (3) whether
23 the debtor only intended to defeat state court litigation; and
24 (4) the presence of egregious behavior. See Drummond v. Welsh
25 (In re Welsh), 711 F.3d 1120, 1129 n.45 (9th Cir. 2013) (citing
26 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir.

1 1999)).⁴ “The bankruptcy court is not required to find that each
2 factor is satisfied or even to weigh each factor equally.” Khan
3 v. Curry (In re Khan), 523 B.R. 175, 185 (9th Cir. BAP 2014)
4 (citing Meyer v. Lepe (In re Lepe), 470 B.R. 851, 863 (9th Cir.
5 BAP 2012)). Rather, “[t]he . . . factors are simply tools that
6 the bankruptcy court employs in considering the totality of the
7 circumstances.” Id.; see In re Mitchell, 357 B.R. at 154 (“no
8 single criterion should be considered dispositive, but rather the
9 entirety of the situation must be evaluated”).

10 Moreover, if the court finds cause for dismissal or
11 conversion, it must “(1) decide whether dismissal, conversion, or
12 the appointment of a trustee or examiner is in the best interests
13 of creditors and the estate; and (2) identify whether there are
14 unusual circumstances that establish that dismissal or conversion
15 is not in the best interests of creditors and the estate.”
16 In re Sullivan, 522 B.R. at 612 (citing § 1112(b)(1), (b)(2)).

17 **B. The bankruptcy court abused its discretion by failing to**
18 **articulate a finding of bad faith or any other reason for**
19 **dismissal that is supported by the record.**

20 The bankruptcy court dismissed Prometheus’s chapter 11
21 petition at the hearing on its OSC. Prometheus argues that the
22 court’s reasons stated at the hearing are not supported by the
23 evidence in the record. We agree.

24 “Whether the good faith requirement has been satisfied is a

25 ⁴ Both Welsh and Leavitt concerned chapter 13 cases.
26 However, the totality-of-the-circumstances test is applicable to
27 both chapter 13 and chapter 11 cases alike. See In re Mitchell,
28 357 B.R. 142, 154 (Bankr. C.D. Cal. 2006) (noting that “[c]ourts
applying the Chapter 11 and Chapter 13 bad faith tests generally
consider a variety of non-exclusive factors” and listing five
factors similar to those considered in Welsh and Leavitt).

1 'fact intensive inquiry' that involves examining 'the totality of
2 facts and circumstances' and determining whether the petition is
3 consistent with the purposes of the Bankruptcy Act or is
4 'patently abusive.'" 1500 Mineral Spring Assocs., LP v.
5 Gencarelli, 353 B.R. 771, 781 (D.R.I. 2006) (quoting NMSBPCSLDHB,
6 L.P. v. Integrated Telecom Express, Inc. (In re Integrated
7 Telecom Express, Inc.), 384 F.3d 108, 118 (3d Cir. 2004)). "The
8 question of good faith is factual and will often require the
9 introduction of evidence." In re Stolrow's, Inc., 84 B.R. at 170
10 (citing In re Universal Clearing House Co., 60 B.R. 985, 994 (D.
11 Utah 1986)). A bankruptcy court's findings of fact "must be
12 sufficient to enable a reviewing court to determine the factual
13 basis for the court's ruling." Veal v. Am. Home Mortg.
14 Servicing, Inc. (In re Veal), 450 B.R. 897, 919 (9th Cir. BAP
15 2011) (citing Vance v. Am. Haw. Cruises, Inc., 789 F.2d 790, 792
16 (9th Cir. 1986)).

17 The bankruptcy court's OSC raised six issues, the last of
18 which was whether the case should be "dismissed as a bad faith
19 filing." At the hearing, the court barely mentioned the first
20 five issues⁵ and instead focused solely on the question whether
21 the case was a bad faith improper filing. The court mentioned
22 only two circumstances as a basis for a bad faith determination.

23 First, the court stated that a "strip mall tax preparer
24 person" was purportedly running the debtor, but was really just a
25 "front" for "somebody in the background" who was "a fugitive at
26

27
28 ⁵ The court confirmed that the debtor is a Delaware
corporation, presumably in connection with the venue issue.

1 this point in time” The court said that “I know who [the
2 fugitive] is” but did not identify the person.

3 Second, the court observed that Prometheus had filed the
4 bankruptcy case in order to buy time to continue litigating a
5 case that it had already lost twice in the courts of two nations.

6 We recognize that, “[e]ven when a bankruptcy court does not
7 make formal findings, . . . the BAP may conduct appellate review
8 ‘if a complete understanding of the issues may be obtained from
9 the record as a whole or if there can be no genuine dispute about
10 omitted findings.’” In re Veal, 450 B.R. at 919-20 (quoting
11 Gardenhire v. Internal Revenue Serv. (In re Gardenhire), 220 B.R.
12 376, 380 (9th Cir. BAP 1998), rev’d on other grounds, 209 F.3d
13 1145 (9th Cir. 2000)). “After such a review, however, when the
14 record does not contain a clear basis for the court’s ruling, we
15 must vacate the court’s order and remand for further
16 proceedings.” Id. at 920 (citing Alpha Distr. Co. of Cal., Inc.
17 v. Jack Daniel Distillery, 454 F.2d 442, 452-53 (9th Cir. 1972);
18 Canadian Comm’l Bank v. Hotel Hollywood (In re Hotel Hollywood),
19 95 B.R. 130, 132-34 (9th Cir. BAP 1988)).

20 We have carefully scrutinized the excerpts of record
21 provided by Prometheus. We have also exercised our discretion to
22 review the entire docket in the bankruptcy court. See Woods &
23 Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2
24 (9th Cir. BAP 2008). We are unable to find any evidentiary
25 support for the bankruptcy court’s statements about the person
26 who was actually controlling the debtor and that the real control
27 person was a fugitive.

28 We note that the court conducted several status conferences.

1 It is possible that the bankruptcy court relied on information
2 revealed in those conferences (although Prometheus's counsel
3 represented at oral argument that the bankruptcy court's concerns
4 regarding the two grounds for dismissal were never discussed at
5 the status conferences). But the bankruptcy court did not say
6 that it was doing that, and we have no minutes, transcript, or
7 other record of what transpired during those conferences. We
8 cannot speculate that evidence not in the trial or appellate
9 record might support the court's ruling.

10 We also think that the record does not support the court's
11 finding that the debtor was merely attempting to buy time in
12 which to continue meritless litigation. The bankruptcy court
13 correctly found that the debtor was defeated in U.S. and French
14 courts. It is also correct that abuse of the automatic stay or
15 use of other litigation tactics unrelated to reorganization can
16 constitute bad faith warranting dismissal. If "a debtor seeks to
17 use a chapter 11 filing to 'unreasonably deter and harass
18 creditors,' such a filing lacks good faith." In re Sullivan,
19 522 B.R. at 615 (quoting In re Marsch, 36 F.3d at 828).

20 Furthermore, the Ninth Circuit has stated that courts may dismiss
21 "cases filed for a variety of tactical reasons unrelated to
22 reorganization." In re Marsch, 36 F.3d at 828.

23 "Cause" for dismissal may exist if the debtor seeks an
24 automatic stay to defeat state court litigation. Cf. id. ("One
25 limitation some courts have implied under section 1112(b)
26 involves Chapter 11 cases filed to stay a state court judgment
27 against the debtor pending appeal. In those cases, courts have
28 expressed concern that the petition is merely a 'litigating

1 tactic' designed to 'act as a substitute for a supersedeas bond'
2 required under state law to stay the judgment." (citation
3 omitted); In re Mitchell, 357 B.R. at 154 (courts should
4 consider "whether the debtor intended to invoke the automatic
5 stay for improper purposes, such as for the sole objective of
6 defeating state court litigation" (citation omitted)).

7 But the bankruptcy court did not indicate that it considered
8 the unusual circumstances of this case.

9 In the first place, the debtor offered evidence that it was
10 entitled under French law to de novo review of the French trial
11 court's judgment. Therefore, Prometheus's initial defeat in
12 France is less significant than it appears.

13 Further, Prometheus provided unrebutted evidence that, in
14 order to prosecute the appeal and obtain de novo review of the
15 French trial court's judgment, it had to either pay the judgment
16 in full (which it could not afford to do) or demonstrate that it
17 could not pay the judgment by filing a bankruptcy case. In other
18 words, Prometheus was not invoking the automatic stay "for the
19 **sole** objective of **defeating** [non-bankruptcy] litigation,"
20 In re Mitchell, 357 B.R. at 154 (emphases added), or to stall the
21 legitimate collection activities of creditors. Rather,
22 Prometheus filed a bankruptcy petition because, if it did not do
23 so, it would have irrevocably lost a potentially valuable asset -
24 the claims against GEM - to the detriment of all creditors (other
25 than GEM). In light of this unrefuted evidence, the bankruptcy
26 court committed clear error when it found that Prometheus filed
27 the bankruptcy petition as a delaying tactic.

28 Finally, we note that the court's oral ruling does not

1 indicate that the court engaged in the broad examination of the
2 circumstances that the good faith standard requires. See
3 In re Welsh, 711 F.3d at 1129 n.45. We do not mean to suggest
4 that the good faith inquiry is a "check the boxes" exercise. We
5 do think, however, that the bankruptcy court abused its
6 discretion when it dismissed a bankruptcy case based on only two
7 findings, particularly where the evidence in the record does not
8 support either finding.

9 **CONCLUSION**

10 For the reasons set forth above, we VACATE the bankruptcy
11 court's order dismissing Prometheus's bankruptcy petition and
12 REMAND to the bankruptcy court to (1) consider whether the
13 evidence supports a finding of bad faith or other "cause,"
14 (2) consider whether conversion, dismissal, or the appointment of
15 a trustee is in the best interests of creditors and the estate,
16 and (3) make appropriate findings of fact.