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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-14-1593-FBD
)
 PAUL A. MORABITO,) Bk. No. 13-51237-GWZ
)
 Debtor.)
)
 _____)
)
 PAUL A. MORABITO,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 JH, INC.; JERRY HERBST;)
 BERRY-HINCKLEY INDUSTRIES,)
)
 Appellees.)
)
 _____)

Submitted Without Oral Argument on May 19, 2016

Filed - June 6, 2016

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearances: _____
 Cecilia Lee and Elizabeth High of Lee & High, Ltd.
 on brief for Appellant Paul A. Morabito; Gerald M.
 Gordon, Brian R. Irvine, Gabrielle A. Hamm, and
 Mark M. Weisenmiller of Gordon Silver on brief for
 Appellees JH, Inc., Jerry Herbst, and Berry-
 Hinckley Industries.

* 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 Before: FARIS, BARASH,** and DUNN, Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellees JH, Inc., Jerry Herbst, and Berry-Hinckley
4 Industries filed an involuntary chapter 7¹ petition against
5 Appellant Paul A. Morabito in the United States Bankruptcy Court
6 for the District of Nevada. Mr. Morabito appeals the bankruptcy
7 court's decisions to (1) decline to dismiss the involuntary
8 petition and instead suspend the case; (2) lift the suspension of
9 the involuntary petition; and (3) grant summary judgment in favor
10 of Appellees and enter an order for relief. We AFFIRM.

11 **FACTUAL BACKGROUND**

12 **A. The underlying dispute**

13 This case arises from a business dispute between Appellees
14 and Mr. Morabito and his associated entities. In 2007, JH, Inc.
15 agreed to purchase the stock of Berry-Hinckley Industries from
16 P.A. Morabito & Co. Ltd. Mr. Herbst guaranteed JH, Inc.'s
17 obligations, and Mr. Morabito was the guarantor for P.A. Morabito
18 & Co.

19 Thereafter, a dispute arose between the parties, and the
20 Morabito parties filed suit against the Herbst parties in Nevada
21 state court. The Herbst parties filed numerous counterclaims
22 against the Morabito parties.

24 ** Hon. Martin R. Barash, United States Bankruptcy Judge for
25 the Central District of California, sitting by designation.

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure, Rules 1-86.

1 After a bench trial in 2010, the state court found that the
2 Morabito parties breached the stock sale agreement and engaged in
3 fraud in the inducement and misrepresentation regarding the
4 transaction. It awarded the Herbst parties \$149,444,777.80 in
5 compensatory and punitive damages. The Morabito parties filed an
6 appeal with the Nevada Supreme Court, and the Herbst parties
7 filed counter-appeals.

8 While the case was on appeal, the parties executed a
9 settlement agreement in November 2011. The parties agreed to
10 dismiss the state court action with prejudice, and the Herbst
11 parties agreed to accept (1) \$13,000,000 in cash; (2) assumption
12 by the Morabito parties of obligations of a commercial lease and
13 a \$4,500,000 note; (3) indemnification in related litigation; and
14 (4) proceeds from the sale of Mr. Morabito's residence.

15 Additionally, the Morabito parties agreed to execute a
16 Confession of Judgment in the amount of \$85,000,000 and
17 Stipulation to Confession of Judgment. Therein, Mr. Morabito
18 admitted that he had acted in bad faith and committed fraud,
19 including fraudulently inducing JH, Inc. to purchase Berry-
20 Hinckley Industries. If the Morabito parties breached the
21 settlement agreement, the Herbst parties could file the
22 Confession of Judgment in state court.

23 The Morabito parties defaulted under the settlement
24 agreement by failing to make timely payments. The parties then
25 entered into a forbearance agreement in which the Morabito
26 parties admitted that they defaulted on various provisions of the
27 settlement agreement and agreed to make payments to the Herbst
28 parties totaling \$875,000. However, the Morabito parties

1 defaulted on the forbearance agreement. The Herbst parties
2 filed the Confession of Judgment in the state court.

3 **B. The involuntary petition and motion to dismiss**

4 Appellees filed an involuntary chapter 7 petition against
5 Mr. Morabito. Relying on the Confession of Judgment and the
6 Stipulation to Confession of Judgment, Appellees asserted that
7 they held claims against Mr. Morabito totaling \$77,000,000.

8 In response, Mr. Morabito filed a Motion to Dismiss
9 Involuntary Chapter 7 Petition ("Motion to Dismiss"). He
10 essentially argued that: (1) the case did not satisfy § 303(b);
11 (2) the petition was filed in bad faith; and (3) the court should
12 abstain under § 305(a). He stated that he had "no significant
13 debts on the Petition Date other than credit card debt and the
14 obligation to [Appellees,]" but admitted that he had more than
15 twelve creditors. He represented that "[w]ith the exception of
16 the obligations to [Appellees] . . . the obligations to all of
17 Morabito's creditors were paid as they came due." He provided a
18 list of creditors pursuant to Rule 1003(b) that allegedly listed
19 all of his creditors and corresponding debt, including a
20 promissory note for \$600,000 held by Edward Bayuk.

21 **C. Suspension of the involuntary petition**

22 After a hearing, the court denied the Motion to Dismiss, but
23 suspended the case pursuant to § 305(a)(1). The court said that
24 it "stated its findings of fact and conclusions of law on the
25 record in open court"² and held that the allegations in the

26
27 ² Although the Order Denying Motion to Dismiss Involuntary
28 Chapter 7 Petition and Suspending Proceedings Pursuant to

(continued...)

1 involuntary complaint were sufficient to overcome the Motion to
2 Dismiss. Among other things, it found sufficient the allegation
3 that Mr. Morabito was generally not paying his debts as they
4 became due. Nevertheless, the court held that there was no
5 evidence that there were other significant creditors, so the case
6 was a two-party collection action; the court was not the proper
7 forum for the collection action; and "the best interests of the
8 creditors and the debtor would be better served by suspension of
9 this case, and the Court will at this time abstain from hearing
10 this case pursuant to 11 U.S.C. § 305(a)(1)." The court
11 suspended the bankruptcy proceedings and lifted the automatic
12 stay.

13 **D. Discovery disputes and additional lawsuits**

14 Appellees sought to depose Mr. Morabito in the original
15 state court action. The state court repeatedly required
16 Mr. Morabito to appear for his deposition. Mr. Morabito refused
17 to submit to a deposition because of "inconvenience."

18 Mr. Morabito filed a petition for writ of prohibition in the
19 Nevada Supreme Court, but the supreme court rejected the
20 petition. Nevertheless, Mr. Morabito still refused to appear for
21 his deposition until the state court threatened to sanction him.

22 Also during this period, a number of other lawsuits with
23 creditors holding potential claims against Mr. Morabito came to
24 light: (1) a state court case entitled Desi Moreno, et al. v.

25
26 ²(...continued)
27 11 U.S.C. § 305(a)(1) ("Suspension Order") is in the record,
28 neither party has provided the Panel with a copy of the hearing
transcript. Moreover, the transcript does not appear on the
bankruptcy court's docket.

1 Berry-Hinckley Industries, et al., in which Mr. Morabito was a
2 defendant; (2) a federal action in the United States District
3 Court for the Northern District of California brought by Electric
4 Properties East, LLC against Mr. Morabito under the Racketeer
5 Influenced and Corrupt Organizations Act and state law; (3) one
6 or more arbitration proceedings in California; and (4) a Nevada
7 state court action initiated by The Hartford Fire Insurance
8 Company, which was seeking indemnification and payment on
9 guarantees from Mr. Morabito and others.

10 **E. Lifting of the suspension**

11 In February 2014, the Moreno parties, Appellees, and
12 Mr. Morabito filed a stipulation in bankruptcy court, whereby the
13 parties stipulated "that the lift of the automatic stay set forth
14 in the Court's Suspension Order applies to the [Moreno] State
15 Court case, and allows the State Court case to proceed in its
16 normal course" The court approved the stipulation.

17 In March 2014, the Moreno parties and Mr. Morabito entered
18 into a settlement agreement. Appellees' counsel then sent a
19 letter to Mr. Morabito and the Moreno parties, warning that the
20 settlement would violate the automatic stay. Nevertheless, the
21 parties to the Moreno litigation stipulated to dismiss the case
22 pursuant to the confidential settlement agreement.

23 Eight days later, Mr. Morabito filed a Motion for
24 Clarification of Order ("Clarification Motion"), seeking to
25 clarify that the automatic stay did not bar the Moreno
26 settlement. In response, Appellees filed a combined status
27 report and opposition to the Clarification Motion. Appellees
28 apprised the bankruptcy court of the various undisclosed lawsuits

1 against Mr. Morabito and his alleged hindering and delay of
2 discovery and collection efforts. Appellees argued that
3 Mr. Morabito misled the court by swearing under oath that
4 Appellees were his only significant creditors. They alleged that
5 Mr. Morabito had demonstrated bad faith and fraudulent conduct by
6 resisting discovery. Appellees also contended that they require
7 the protections of the bankruptcy court.

8 Mr. Morabito then filed an Amended Rule 1003(b) List of
9 Creditors that disclosed two additional creditors. He
10 concurrently filed a declaration in which he admitted that he was
11 a defendant in three lawsuits that he had "inadvertently omitted"
12 from his original Rule 1003(b) list.

13 On June 26, 2014, the court held a hearing on the
14 Clarification Motion and a status conference. It concluded that
15 the Moreno settlement agreement did not violate the automatic
16 stay.

17 The bankruptcy court further concluded, however, that the
18 Suspension Order "was not premised upon an adequate factual
19 foundation." The court noted Mr. Morabito's failure to disclose
20 all of the lawsuits and stated that the court had a "difficult
21 time accepting" the argument that the omission was a mere
22 oversight. The bankruptcy court further noted that the state
23 court found Mr. Morabito in contempt for refusing to appear at
24 his deposition and obstructing Appellees' attempts to exercise
25 their rights under state law. On July 10, 2014, the court
26 entered its written order lifting the suspension ("Status
27 Conference Order").

28

1 **F. The motion for summary judgment**

2 Appellees moved for summary judgment, arguing that
3 Mr. Morabito was generally not paying his debts as they became
4 due. They noted that Mr. Morabito was not paying Appellees under
5 the Confessed Judgment, which amounted to over 98% of his debts;
6 that Mr. Morabito systematically divested himself of estate
7 assets through preferential and fraudulent transfers; and that
8 Mr. Morabito has "played fast and loose with his obligation to
9 fully disclose his assets, creditors, and the claims asserted
10 against him."

11 Appellees also cited portions of Mr. Morabito's deposition
12 testimony concerning the \$600,000 note held by Mr. Bayuk.
13 Mr. Bayuk, who is Mr. Morabito's former companion, has continued
14 to pay Mr. Morabito's debts for "living expenses" totaling
15 \$50,000 to \$75,000 per month. The expenses include \$11,000 per
16 month in rent, \$2,700 per month for lease of a Bentley, and seven
17 credit card balances that include Mr. Morabito's legal expenses.

18 Mr. Morabito argued that he was generally paying his debts
19 when due, the involuntary petition implicated only a two-party
20 dispute, and dismissal or abstention was in the best interest of
21 the creditors and the debtor.³ He attached the declarations of
22 various creditors who stated that Mr. Morabito was current with
23 payments and that they did not desire to participate in
24 bankruptcy proceedings. Mr. Bayuk, the holder of the \$600,000
25 note, submitted a declaration in which he stated that, although
26

27 ³ Prior to filing his opposition, Mr. Morabito also filed a
28 second amended Rule 1003(b) list.

1 he was a creditor prior to September 1, 2014, he has since made a
2 gift to Mr. Morabito in the amount of the promissory note and
3 destroyed the note. He further stated that he intended to
4 continue gifting Mr. Morabito money in the future.

5 After a hearing,⁴ the court granted Appellees' Motion for
6 Summary Judgment and entered its Order Granting Summary Judgment
7 and Judgment ("Summary Judgment Order") and Amended Findings of
8 Fact and Conclusions of Law in Support of Order Granting Summary
9 Judgment and Judgment ("FOF/COL"). The court found that:

10 f. There is no genuine dispute that Morabito was
11 not paying at least 98% of his debt[s] on the Petition
Date.

12 g. The Involuntary Proceeding is not a one-
13 creditor dispute.

14 h. Special circumstances exist that would permit
15 the Court to enter an order for relief even if the
Involuntary Proceeding is a one-creditor dispute.

16 i. Even if the Involuntary Proceeding was a
17 one-creditor dispute, it is because Morabito and Bayuk
sought to isolate the Petitioning Creditors by paying
all of Morabito's other debts.

18 j. The materiality of the debt owned to the
19 Petitioning Creditors swamped Morabito's other debt.

20 k. The conduct of Morabito before the State
Court and the bankruptcy court was gamesmanship.

21 l. [Bayuk's declaration] demonstrates that, on
22 the Petition Date, Morabito was not paying his debts
himself, but that Bayuk was paying Morabito's debts.

23

24 o. The Bayuk Declaration establishes that Bayuk
25 expected, as of the Petition Date, to be repaid by
Morabito the amounts due under the Bayuk Note

26
27 ⁴ The transcript of the hearing on the Motion for Summary
28 Judgment is not included in the record on appeal. Moreover, the
transcript is not included on the bankruptcy court's docket.

1 "[W]e review de novo a bankruptcy court's decision to grant
2 summary judgment." In re Marciano, 459 B.R. at 35. "De novo
3 review requires that we consider a matter anew, as if no decision
4 had been made previously." Francis v. Wallace (In re Francis),
5 505 B.R. 914, 917 (9th Cir. BAP 2014) (citations omitted).

6 DISCUSSION

7 **A. Mr. Morabito fails to provide the Panel with a sufficient 8 record to review the bankruptcy court's decision to suspend the proceedings.**

9 Mr. Morabito argues that the court erred in suspending the
10 involuntary proceedings and that it should have dismissed the
11 petition outright. Because Mr. Morabito fails to provide us with
12 a complete record, we cannot review the court's ruling, and we
13 affirm the bankruptcy court's Suspension Order.

14 To dismiss or suspend a case under § 305(a)(1), the court
15 needs to determine that "the interests of creditors and the
16 debtor would be better served by such dismissal or suspension[.]"
17 See Eastman v. Eastman (In re Eastman), 188 B.R. 621, 624 (9th
18 Cir. BAP 1995) ("abstention in a properly filed bankruptcy case
19 is an extraordinary remedy, and . . . dismissal is appropriate
20 under § 305(a)(1) only in the situation where the court finds
21 that both 'creditors and the debtor' would be 'better served' by
22 a dismissal"). The BAP has adopted the multi-factor test set
23 forth in In re Monitor Single Lift I, Ltd., 381 B.R. 455, 464-65
24 (Bankr. S.D.N.Y. 2008), to determine the best interests of the
25 creditors and the debtor:

- 26 (1) the economy and efficiency of administration;
- 27 (2) whether another forum is available to protect the
interests of both parties or there is already a pending
proceeding in state court;
- 28 (3) whether federal proceedings are necessary to reach a just and equitable

1 solution; (4) whether there is an alternative means of
2 achieving an equitable distribution of assets;
3 (5) whether the debtor and the creditors are able to
4 work out a less expensive out-of-court arrangement
5 which better serves all interests in the case;
6 (6) whether a non-federal insolvency has proceeded so
7 far in those proceedings that it would be costly and
8 time consuming to start afresh with the federal
9 bankruptcy process; and (7) the purpose for which
10 bankruptcy jurisdiction has been sought.

11 In re Marciano, 459 B.R. at 46-47. The analysis is "based on the
12 totality of the circumstances." Id. at 48. The bankruptcy court
13 "must make specific and substantiated findings that the interests
14 of the creditors and the debtor will be better served by
15 dismissal or suspension." Id. at 46 (quoting Wechsler v. Macke
16 Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370 B.R. 236,
17 247 (9th Cir. BAP 2007)).

18 In determining whether dismissal or suspension is
19 appropriate, the bankruptcy court must adhere to a two-step
20 analysis. We analogized the analysis under § 305(a) to § 1112(b)
21 and stated:

22 We believe **this two-step process also is**
23 **appropriate in the context of deciding a § 305(a)**
24 **motion with respect to a pending Involuntary Petition.**
25 **The bankruptcy court first must make findings that**
26 **continuing the adjudication of the Involuntary Petition**
27 **is or is not appropriate.** While no specific statutory
28 cause is stated to guide a bankruptcy court, the
development of the case law has provided guidance as to
the factors to consider. Those were the factors
identified in the Monitor Single Lift case
Only if the bankruptcy court had determined that
adjudication of the Involuntary Petition should not go
forward at the time of its decision would it need to
consider whether it should dismiss the Involuntary
Petition outright or simply "stay" the adjudication of
the Involuntary Petition, for instance, until the state
court appeals had concluded.

29 Id. at 48 (emphases added).

30 In the present case, the bankruptcy court held a hearing on

1 the Motion to Dismiss on October 22, 2013 and denied the Motion
2 to Dismiss, but suspended the involuntary proceedings pursuant to
3 § 305(a)(1). The Suspension Order does not indicate that the
4 bankruptcy court engaged in the analysis required by Marciano.
5 But the written order also says that the court "stated its
6 findings of fact and conclusions of law on the record in open
7 court" We cannot review the oral ruling because
8 Mr. Morabito has not provided a transcript.

9 Without the benefit of the hearing transcript, we are unable
10 to discern (1) whether the bankruptcy court identified the proper
11 legal standard and (2) whether the bankruptcy court's application
12 of the legal standard was illogical, implausible, or "without
13 support in inferences that may be drawn from the facts in the
14 record." Hinkson, 585 F.3d at 1261-62.

15 It is Mr. Morabito's duty to provide the Panel with a
16 complete record on appeal. See Welther v. Donell (In re Oakmore
17 Ranch Mgmt.), 337 B.R. 222, 226 (9th Cir. BAP 2006) (the
18 appellant "bears the burden of presenting a complete record")
19 (citing Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir.
20 BAP 1995)). "The settled rule on transcripts in particular is
21 that failure to provide a sufficient transcript may, but need
22 not, result in dismissal or summary affirmance and that the
23 appellate court has discretion to disregard the defect and decide
24 the appeal on the merits." Kyle v. Dye (In re Kyle), 317 B.R.
25 390, 393 (9th Cir. BAP 2004), aff'd, 170 F. App'x 457 (9th Cir.
26 2006) (citations omitted). But see Ehrenberg v. Cal. State.
27 Univ. (In re Beachport Entm't), 396 F.3d 1083, 1087 (9th Cir.
28 2005) ("Although summary dismissal is within the BAP's

1 discretion, it 'should first consider whether informed review is
2 possible in light of what record has been provided.'").

3 Mr. Morabito's failure to present us with a complete record
4 prevents us from conducting an "informed review" to determine
5 whether the court abused its discretion. Therefore, we affirm
6 the Suspension Order.

7 **B. The bankruptcy court did not err in lifting the suspension.**

8 Mr. Morabito argues that the court erred in lifting the
9 suspension. We disagree.

10 The bankruptcy court was free to reconsider the Suspension
11 Order, especially given the newly-discovered facts raised by
12 Appellees. The Ninth Circuit has stated that "bankruptcy courts,
13 as courts of equity, have the power to reconsider, modify or
14 vacate their previous orders so long as no intervening rights
15 have become vested in reliance on the orders." Meyer v. Lenox
16 (In re Lenox), 902 F.2d 737, 739-40 (9th Cir. 1990) (citations
17 omitted). In other words, a bankruptcy court has "power to
18 reconsider any of its previous orders when equity so requires."
19 Id. at 740 (citations omitted).

20 The court previously found that Appellees established
21 sufficient grounds for filing the involuntary petition; however,
22 it invoked § 305(a)(1) to suspend the proceedings, because
23 (1) there was no other significant creditor and the case was
24 essentially a two-party collection action, and (2) Appellees
25 cannot use the bankruptcy court and Bankruptcy Code merely to
26 collect on a judgment. At the status conference and hearing on
27 the Clarification Motion, the bankruptcy court focused on
28 Mr. Morabito's failure to disclose multiple ongoing litigation

1 and his disregard of the state court's orders. It stated that
2 its initial ruling "was not premised upon an adequate factual
3 foundation" and that it would correct its mistake by lifting the
4 suspension.

5 We find no error in the court's determination that
6 Mr. Morabito misled the court into believing that he had no other
7 significant creditors. We also find no error in the court's
8 determination that Mr. Morabito has willfully disobeyed the state
9 court's orders. The court did not abuse its discretion when it
10 determined that Mr. Morabito's misrepresentations and defiance of
11 the state court warranted resumption of the bankruptcy
12 proceedings.

13 In sum, the court decided that the factual basis for its
14 suspension of the case was false. Given that the court had
15 discretion to impose the suspension in the first place, it was
16 not an error for the court to lift the suspension.

17 **C. The bankruptcy court did not err in granting summary**
18 **judgment and issuing the Order for Relief.**

19 Mr. Morabito contends that the court erred in granting
20 summary judgment in favor of Appellees. He argues that the court
21 erred by concluding that (1) he was generally not paying his
22 debts as they came due and (2) his debt to Bayuk was due and
23 owing. We disagree.

24 In order to prevail on summary judgment, the petitioning
25 creditors "must establish that (1) three or more creditors
26 (2) hold claims against the alleged debtor that are not
27 contingent as to liability and (3) are not the subject of a bona
28 fide dispute as to liability or amount (4) in the aggregate

1 amount of at least [\$15,325], and (5) that the alleged debtor is
2 generally not paying such debtor's debts as such debts become
3 due." In re Marciano, 446 B.R. 407, 420 (Bankr. C.D. Cal. 2010),
4 aff'd, 459 B.R. 27 (9th Cir. BAP 2011), aff'd, 708 F.3d 1123 (9th
5 Cir. 2013) (citing 11 U.S.C. § 303(b), (h)).

6 Appellees hold undisputed, non-contingent claims against
7 Mr. Morabito that exceed the threshold amount, as memorialized in
8 the Confession of Judgment. The only dispute is whether Mr.
9 Morabito is generally not paying his debts as they become due.

10 **1. Summary judgment standard**

11 Under Civil Rule 56, made applicable through Rule 7056, "the
12 court shall grant summary judgment if the movant shows that there
13 is no genuine dispute as to any material fact and the movant is
14 entitled to judgment as a matter of law." The party moving for
15 summary judgment must identify "those portions of 'the pleadings,
16 depositions, answers to interrogatories, and admissions on file,
17 together with the affidavits, if any,' which it believes
18 demonstrate the absence of a genuine issue of material fact."
19 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the
20 moving party meets its burden, the non-moving party must "set out
21 specific facts showing a genuine issue for trial." Civil
22 Rule 56(e)(2).

23 In reviewing an order granting summary judgment, the Panel
24 "must view the evidence in the light most favorable to the
25 non-moving party and 'determine whether there are any genuine
26 issues of material fact and whether the bankruptcy court
27 correctly applied the substantive law.'" Caneva v. Sun
28 Communities Operating Ltd. P'ship (In re Caneva), 550 F.3d 755,

1 760 (9th Cir. 2008) (citation omitted). A genuine issue of
2 material fact exists when the evidence is such that a reasonable
3 jury could return a verdict for the non-moving party. Id. at 761
4 (citation omitted). Findings of fact made in summary judgment
5 proceedings are not subject to the "clearly erroneous" standard
6 of review, because the trial court has not weighed the evidence
7 in the conventional sense. In re Marciano, 459 B.R. at 35
8 (citations omitted).

9 The bankruptcy court found that there was no genuine dispute
10 of material fact. We agree that summary judgment was warranted
11 on this record. There was no conflict in the evidence about what
12 had happened in the real world, and the only dispute concerned
13 the application of the legal standard to the facts. Summary
14 judgment was a proper way to resolve this purely legal dispute.

15 **2. Whether Mr. Morabito was generally not paying his debts**
16 **as they became due**

17 The crux of the Motion for Summary Judgment was whether
18 Mr. Morabito was "generally not paying his debts as such debts
19 become due." § 303(h)(1).

20 The Ninth Circuit has "adopted a 'totality of the
21 circumstances' test for determining whether a debtor is generally
22 not paying its debts under 11 U.S.C. § 303(h)." Liberty Tool &
23 Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys.,
24 Inc.), 277 F.3d 1057, 1072 (9th Cir. 2002) (quoting Hayes v.
25 Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.),
26 779 F.2d 471, 475 (9th Cir. 1985)). "A finding that a debtor is
27 generally not paying its debts 'requires a more general showing
28 of the debtor's financial condition and debt structure than

1 merely establishing the existence of a few unpaid debts.'" Id.
2 (quoting In re Dill, 731 F.2d 629, 632 (9th Cir. 1984)).

3 The "totality of the circumstances test" is not a rigid,
4 mathematic analysis: "The authority of the court is triggered and
5 guided by the totality of the circumstances existing when the
6 petition is filed. Congress intended to provide a flexibility
7 which is not reducible to a simplistic formula." In re Bishop,
8 Baldwin, Rewald, Dillingham & Wong, Inc., 779 F.2d at 475. "[I]t
9 is not possible to lay down guidelines that fit all cases
10 It is intended that the court consider both the number and amount
11 [of debts] in determining whether the inability or failure is
12 general." 2 Collier on Bankruptcy ¶ 303.31 (16th ed.) (quoting
13 Report of the Commission on the Bankruptcy Laws of the United
14 States, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. II, 75 n.5
15 (1973)).

16 The Ninth Circuit has cited with approval an Eleventh
17 Circuit decision holding that, "[i]n determining whether a debtor
18 is generally paying its debts as they become due, courts 'compare
19 the number of debts unpaid each month to those paid, the amount
20 of the delinquency, the materiality of the non-payment, and the
21 nature of the [d]ebtor's conduct of its financial affairs.'" In re Vortex Fishing Sys., Inc., 277 F.3d at 1072 (quoting Gen.
22 Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485,
23 1504 n.41 (11th Cir. 1997)).⁵

24
25
26 ⁵ Courts around the country have considered: the number of
27 debts; the amount of the delinquency; the materiality of the
28 nonpayment; the nature and conduct of the debtor's business; the
debtor's ability to satisfy only small periodic payments, not
(continued...)

1 In the present case, the bankruptcy court found that there
2 was no dispute of material fact that Mr. Morabito was generally
3 not paying his debts as they became due. It so held because he
4 was not paying at least 98% of his debts; the size of the debt
5 owed to Appellees swamped his other debt; and he and Mr. Bayuk
6 were paying off all other debts to isolate Appellees. It
7 concluded that "[t]he amount of delinquency, the materiality of
8 debt and nonpayment, the nature of the conduct of Morabito's
9 affairs, and the inconsistent positions taken by Morabito and
10 Bayuk before the Court by declarations, pleadings and Morabito's
11 testimony in deposition demonstrate that, under a totality of
12 circumstances, Morabito was not generally paying his debts as
13 they became due on the Petition Date." The bankruptcy court did
14 not err.

15 **a. Amount of delinquency**

16 While it may be true that Mr. Morabito was current on all
17 other debt payments thanks to Mr. Bayuk's largess, it is
18 undisputed that he was not making payments on Appellees' claim.
19 It is also not disputed that his debt to Appellees constituted at

20 _____
21 ⁵(...continued)
22 long-term obligations; the debtor's making regular payments only
23 on small, recurring obligations, not on larger debts; the rapid
24 decline in the value of the debtor's assets resulting from asset
25 sales rather than profit-generating activities; the amount of the
26 debtor's debts compared to the debtor's yearly income; payments
27 made by third parties or a waiver of claims by a third party; the
28 debtor's liquidation of assets; the fact that debtor's defaults
are only on extraordinary debts; and the fact that the due and
unpaid debts are made up entirely of the claims of the
petitioning creditors while other non-petitioning creditors are
all paid. 2 Collier on Bankruptcy ¶ 303.31[2] (citations
omitted).

1 least 98% of his outstanding debt. We find no error in the
2 court's consideration of the unpaid debt as a percentage of
3 Mr. Morabito's overall debt. See Focus Media, Inc. v. Nat'l
4 Broadcasting Co., Inc. (In re Focus Media, Inc.), 378 F.3d 916,
5 929 (9th Cir. 2004) (agreeing that, under the totality of the
6 circumstances, "[h]aving 80% of your debts over 90 days old is
7 not paying debts as they come due").

8 **b. Number of unpaid debts**

9 We also find no error with the bankruptcy court's holding
10 that, in this situation, the fact that Appellees' claim
11 represents a single debt does not mean Mr. Morabito was
12 "generally paying" his debts. Mr. Morabito and Mr. Bayuk were
13 selectively making payments to other creditors while defaulting
14 only on the debt to Appellees. In other words, it is by
15 Mr. Morabito's own design that he was not paying only one debt,
16 and he was "isolating" Appellees so that it appeared as though he
17 was paying the majority of his debts. We agree that "there is
18 'substantial authority for the proposition that even though an
19 alleged debtor may owe only one debt, or very few debts, an order
20 for relief may be granted where such debt or debts are
21 sufficiently substantial to establish the generality of the
22 alleged debtor's default.' For example, courts have entered an
23 order for relief 'where the creditors were few in number but a
24 large amount was owed to them.'" In re Marciano, 446 B.R. at 421
25 (quoting Crown Heights Jewish Cmty. Council, Inc. v. Fischer
26 (In re Fischer), 202 B.R. 341, 350, 351 (Bankr. E.D.N.Y. 1996)).

27 Mr. Morabito argues extensively that the involuntary
28 petition was deficient because Mr. Bayuk was not a creditor to

1 whom a debt was due and owing at the time Appellees filed the
2 involuntary petition.⁶ He contends that Mr. Bayuk had never made
3 a demand on the note, and there was no timeline for him to repay
4 Mr. Bayuk; thus, the involuntary petition was a two-party
5 collection action.

6 Whether Mr. Bayuk was a creditor of Mr. Morabito is not
7 dispositive. As discussed above, the comparative number of paid
8 and unpaid creditors may be relevant to the "totality of the
9 circumstances" test to determine whether a debtor is "generally
10 not paying" his debts under § 303(h)(1). Even if Mr. Bayuk were
11 not a creditor, the bankruptcy court did not err in considering
12 the "totality of the circumstances" and granting summary
13 judgment.

14 **c. Efforts to thwart collection attempts**

15 The bankruptcy court properly considered, in its evaluation
16 of the totality of the circumstances, the exceptional
17 circumstances of this case. Those "exceptional" circumstances
18 include: "(1) an exceptional case of a debtor with a sole
19 creditor who would otherwise be without an adequate remedy under
20 State or Federal law (other than bankruptcy law) if denied an
21 order for relief or (2) a showing of special circumstances
22 amounting to fraud, trick, artifice or scam." In re 7H Land &
23 Cattle Co., 6 B.R. 29, 34 (Bankr. D. Nev. 1980); see In re Cent.
24 Hobron Assocs., 41 B.R. 444, 449 (D. Haw. 1984) ("An exception to
25

26 ⁶ Mr. Morabito also argues that Mr. Bayuk later tore up the
27 note and forgave the \$600,000 debt. However, it is undisputed
28 that this event occurred post-petition and the note was valid as
of the petition date.

1 the rule that one unpaid debt will not merit relief is that a
2 single creditor may get relief if it can show that it has a
3 special need for bankruptcy court relief and that state-law
4 remedies would not be adequate, or that the debtor has engaged in
5 trick, sham, artifice or fraud.”); see also 2 Collier on
6 Bankruptcy ¶ 303.31[5] (“Examples of ‘exceptional’ circumstances
7 include when the sole creditor has no other available remedy
8 under federal or state law, recovery of a preference that is
9 unavoidable under state law, the transfer of assets to insiders
10 and third parties or ‘there are [other] circumstances amounting
11 to fraud, trick, artifice, or scam on the part of the debtor.’ A
12 further example of an exceptional circumstance is when the debtor
13 has paid all of its small creditors, leaving only one large
14 creditor.” (citations omitted)).

15 In the present case, Appellees have provided evidence of
16 fraud, artifice, or a scam. The record supports the bankruptcy
17 court’s findings that Mr. Morabito schemed to isolate Appellees
18 by paying all debts but those owed to Appellees, in an attempt to
19 thwart Appellees’ efforts to bring Mr. Morabito into bankruptcy.
20 Further, the record also shows a pattern of wilful disregard of
21 state court discovery orders and false representations to the
22 bankruptcy court. Mr. Morabito’s conduct amounts to
23 gamesmanship, fraud, and artifice that constitute exceptional
24 circumstances.

25 **d. The debtor’s ability to pay**

26 Mr. Morabito’s ability or plan to pay creditors is also
27 important. See In re Focus Media, 378 F.3d at 929 (order for
28 relief was appropriate where the debtor was “a company that had

1 substantial amounts of unpaid bills and no plans or ability to
2 pay them"). He has admitted that he has no means or plan to
3 satisfy his debt to Appellees, and indeed has no way to pay any
4 of his debts other than through Mr. Bayuk's generosity.

5 **e. The debtor's conduct of his financial affairs**

6 Lastly, the court did not err in faulting Mr. Morabito for
7 his conduct of his financial matters. "The court may examine the
8 Debtor's overall contemporaneous handling of its affairs in
9 evaluating whether to order relief. If the Debtor is conducting
10 his financial affairs in a manner inconsistent with good faith
11 and outside the ordinary course of business, it may affect the
12 court's determination." In re Bishop, Baldwin, Rewald,
13 Dillingham & Wong, Inc., 779 F.2d at 475 (quoting In re Reed,
14 11 B.R. 755, 760 (Bankr. S.D.W.Va. 1981)). There is no dispute
15 that Mr. Morabito only defaulted on payments to Appellees. As a
16 result, he was able to claim that the involuntary proceeding is
17 merely a one-creditor dispute outside of the Bankruptcy Code.
18 Mr. Morabito's purposeful isolation of Appellees evidences a lack
19 of good faith that supports summary judgment.

20 Accordingly, considering the totality of the circumstances,
21 the court did not err in determining that Mr. Morabito was
22 generally not paying his debts and granting summary judgment and
23 relief against Mr. Morabito.

24 **CONCLUSION**

25 For the foregoing reasons, we AFFIRM.
26
27
28