

AUG 03 2016

NOT FOR PUBLICATION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

In re:	)	BAP No. CC-15-1422-DKuF
	)	
PROMETHEUS HEALTH IMAGING, INC.,	)	Bk. No. 14-10250-SC
	)	
Debtor.	)	
_____	)	
	)	
PROMETHEUS HEALTH IMAGING, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>AMENDED MEMORANDUM<sup>1</sup></b>
	)	
UNITED STATES TRUSTEE,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on July 28, 2016  
at Pasadena, California

Originally Filed - August 2, 2016

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Matthew D. Rifat argued for appellant.

Before: DUNN, KURTZ, and FARIS, 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 8024-1.

1 For the second time, Appellant Prometheus Health Imaging,  
2 Inc. ("Prometheus") appeals from a bankruptcy court order  
3 dismissing its chapter 11<sup>2</sup> bankruptcy petition for bad faith. In  
4 the first appeal, the Panel vacated and remanded to the  
5 bankruptcy court because the record lacked evidentiary support  
6 for the factual findings on which the bankruptcy court's bad  
7 faith determination was based. (See Prometheus Health Imaging,  
8 Inc. v. U.S. Trustee (In re Prometheus Health Imaging, Inc.),  
9 BAP No. CC-14-1576-FKiKu, 2015 WL 6719804 (9th Cir. BAP  
10 November 2, 2015) ("Prometheus I"). On remand, the bankruptcy  
11 court conducted further proceedings, made detailed findings, and  
12 again dismissed based on a determination that the bankruptcy  
13 petition had been filed in bad faith.<sup>3</sup>

14 We AFFIRM.

#### 15 I. BACKGROUND

16 In 2002, Prometheus ordered from General Electric Medical  
17 Systems Europe ("GEM") an imaging machine for delivery in Saudi  
18 Arabia. A dispute arose regarding whether GEM fulfilled the  
19 contract with an adequate machine. Ultimately, GEM obtained a  
20 judgment in the principal amount of \$951,000 against Prometheus  
21 in the federal district court in Ohio. Thereafter, in 2010,  
22 Prometheus commenced litigation against GEM in Paris, France,  
23 where the court ("Paris Trial Court") ruled against Prometheus.

---

24  
25 <sup>2</sup> Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037.

<sup>3</sup> On remand the case was reassigned to Judge Clarkson.

1 In 2012, Prometheus filed an appeal from the Paris Trial Court  
2 decision. Prometheus contends that the French Appellate Court is  
3 not bound by the rulings of the Paris Trial Court. However,  
4 Prometheus had no assets from which to post the bond required to  
5 proceed in the French Appellate Court, so Prometheus filed its  
6 chapter 11 petition on January 14, 2014. At that time,  
7 Prometheus was not operating a business.

8 On September 19, 2014, the bankruptcy court entered an order  
9 to show cause ("Show Cause Order"), which required Prometheus'  
10 counsel to appear and which gave notice that the bankruptcy court  
11 would be determining whether Prometheus' bankruptcy case "should  
12 be dismissed as a bad faith filing . . . ." In response,  
13 Prometheus' counsel filed a declaration that stated, inter alia:

14 8. The Debtor's bankruptcy case should not be  
15 dismissed as a bad faith filing. As I previously  
16 advised the Court, this case is the most unusual  
17 chapter 11 case I have ever handled. The Debtor ceased  
18 business operations in 2004, and the Debtor's primary  
19 asset is the Appeal of litigation pending in Paris. As  
20 previously disclosed to the court, Frederic Jeannin,  
21 counsel for the Debtor for the Paris Appeal, advised me  
22 that the Debtor had to file bankruptcy in order to  
23 proceed with the Appeal. As I advised the Court at one  
24 of the initial status conferences, this was not a bad  
25 faith filing, a la Marsch v. Marsch (In re Marsch),  
26 36 F.3d 825 (9th Cir. 1994), where the Ninth Circuit  
27 affirmed the ruling of the bankruptcy court that it was  
28 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.

24 Prometheus' sole officer and director, Wendee Luke, also provided  
25 a declaration, which provided in relevant part:

26 6. The Debtor needed to file a chapter 11 case to  
27 proceed with the litigation in Paris against GEM. I  
28 believed it was appropriate for the Debtor to file its  
chapter 11 case in Orange County because (I) the  
Debtor's principal place of business is in Orange

1 County; (ii) the Debtor's sole officer and director  
2 lives in Orange County; and (iii) the Debtor's agent  
for service of process lives in Orange County.

3 After the show cause hearing was held, the bankruptcy court  
4 entered its dismissal order and Prometheus filed its first  
5 appeal, Prometheus I. The Prometheus I Panel vacated the  
6 dismissal order and remanded to the bankruptcy court to, inter  
7 alia, make appropriate findings of fact.

8 On remand, the bankruptcy court promptly entered an order  
9 ("Order on Remand") requiring Prometheus to bring its Monthly  
10 Rule 2015 Reports current, to pay all outstanding United States  
11 Trustee fees, to seek employment of its bankruptcy counsel, and  
12 to provide a status report ("Status Report") regarding all  
13 activities Prometheus had engaged in during the pendency of the  
14 Prometheus I appeal. The Order on Remand also mandated the  
15 appearance both of Prometheus' counsel and of Ms. Luke, as  
16 Prometheus' representative, at the hearing ("Hearing on Remand")  
17 scheduled for November 17, 2015.

18 At the Hearing on Remand, the bankruptcy court noted that  
19 Prometheus appeared to have substantially complied with the Order  
20 on Remand. The bankruptcy court engaged in an extended colloquy  
21 with Prometheus' counsel at the Hearing on Remand. Among the  
22 primary issues explored were the following:

23 - Although Prometheus, through counsel and Ms. Luke, had  
24 repeatedly represented to the bankruptcy court that the  
25 bankruptcy case had been filed because it was the only way the  
26 litigation in the French Appellate Court could proceed in the  
27 absence of a bond, in fact a certificate of insolvency from a  
28 certified public accountant would have served the same purpose.

1 - Despite the fact that the bankruptcy case had been used as the  
2 substitute for a bond for the French Appellate Court proceedings,  
3 after the first dismissal order was entered Prometheus neither  
4 obtained a stay pending appeal of the dismissal order nor  
5 informed the French Appellate Court that its substitute for the  
6 bond no longer was in existence. As a consequence, the French  
7 Appellate Court held the trial de novo in May 2015, and  
8 Prometheus was awaiting news of the disposition of that  
9 litigation.

10 - Prometheus had not been an operating business since 2004. It  
11 had no funds with which to make the payments to the U.S. Trustee  
12 under the Remand Order. Ms. Luke provided the funds to make the  
13 payments on behalf of Prometheus.

14 At the conclusion of the Hearing on Remand, the bankruptcy  
15 court made the following ruling on the record:

16 Okay. I'm dismissing this case. This case is  
17 dismissed. It is a bad faith filing. The reason it's  
18 a bad faith filing is because, one, the original  
19 description by your French counsel was that the only  
20 reason this case should go forward is that they needed  
21 to avoid an appeal bond, but now we know that that's  
22 not the only reason. They could have simply filed a  
23 certificate of insolvency, and I have to tell you that  
24 a company that hasn't generated money in 10 years and  
25 doesn't have any assets except for . . . \$125 doesn't  
26 need to be in Chapter 11.

27 Now -- and that certificate would have been efficient.  
28 The other thing is this. The bad faith that's been  
demonstrated by having this case dismissed on  
November 26, 2014, not . . . obtaining a stay pending  
appeal, and then going to French court and not getting  
a certificate of insolvency and not revealing prior to  
that hearing -- and I -- and I'm only assuming that  
that didn't happen because I have to assume and I'm  
going to assume that they would have required you to  
get an appeal bond because you no longer had the  
benefit of the bankruptcy.

So there's bad faith toward the French court. As an

1 honor to courts both in America and to other courts in  
2 democratic societies and a nation such as France, which  
3 has been the friend of America prior to the Revolution,  
4 I'm going to honor the -- the point that they should  
5 have been informed that prior to the trial de novo, the  
6 bankruptcy was not in place, a stay was not in place,  
7 and that no certificate of insolvency was in place.

8 I think that is very much bad faith and an abuse of the  
9 bankruptcy system, and now we have a Debtor that has no  
10 assets, lots of liabilities, has lost I believe in Ohio  
11 on this matter with GE, has lost a court fight in  
12 France and now has asked for a trial de novo in France  
13 and has had the hearing, and there's nobody attacking  
14 you, by the way. There's no one out there seeking  
15 writs of execution or writs of possession against  
16 Prometheus Health Imaging, and I know this because I've  
17 reviewed the statement of financial affairs, and I look  
18 at the statement of financial affairs where it states  
19 that there are no pending actions that are occurring  
20 with respect to collection of debt.

21 So with all of that -- and I guess I could go on, but I  
22 guess the final nail in the coffin is the Debtor  
23 doesn't even have enough money to pay for the U.S.  
24 Trustee quarterly fees. I'm dismissing the case.

25 So I would like you to -- no, I'll do it. The chambers  
26 will provide an order dismissing this case as a bad  
27 faith for the reasons -- based upon the reasons that  
28 are stated on the record, and you can take that back up  
to the Bankruptcy Appellate Panel.

18 Hr'g Tr. (Nov. 17, 2015) 25:11-27:11.

19 After the Hearing on Remand, the bankruptcy court entered  
20 its "Order Dismissing Chapter 11 Case on Remand From Ninth  
21 Circuit B.A.P." ("Second Dismissal Order"). The Second Dismissal  
22 Order contained the bankruptcy court's written findings of fact  
23 and conclusions of law. The written findings provide a  
24 significant additional basis upon which the bankruptcy court  
25 ordered dismissal of Prometheus' case:

26 When asked by the Court what the estate's stake or  
27 interest in the French appeal consisted of, Mr. Broidy  
28 advised that the Debtor may have counterclaims against  
GEM. If the Debtor prevailed in its appeal, assumed  
Mr. Broidy, funds may come into the estate sufficient

1 to pay Debtor's creditors. However, in light of the  
2 prior Chapter 7, it is unclear whether the Debtor's  
3 alleged claims against GEM are even property of this  
4 Chapter 11 estate. The Debtor had filed Chapter 7 on  
5 November 4, 2004 (2:04-bk-33283-VZ), but did not  
6 disclose the presence of claims against GEM. The  
7 Debtor's principal states that the Debtor's claim  
8 against GEM arose in 2002, when GEM delivered a "slower  
9 machine that was not suitable for the Debtor's  
10 needs. . . ." Declaration of Wendee Luke [Dk. 40 at  
11 ¶ 3]. If the Debtor's claims against GEM arose at any  
12 time prior to November 4, 2004, the date of the  
13 Chapter 7 filing, those unadministered claims would remain  
14 unadministered property of the Chapter 7 estate. See  
15 11 U.S.C. § 541 (property of the estate); 11 U.S.C.  
16 § 544(d) (property not abandoned or administered  
17 remains property of the estate); Lopez v. Specialty  
18 Rests. Corp. (In re Lopez), 283 B.R. 22, 28 (9th Cir.  
19 BAP 2002) (An unadministered claim "that is neither  
20 abandoned nor administered remains property of the  
21 estate even after the case is closed."). To the extent  
22 Debtor's claims against GEM are unadministered assets  
23 of the former Chapter 7 estate, the Debtor lacks  
24 standing to prosecute them. 11 U.S.C. § 323 (trustee  
25 is the representative of the estate with capacity to  
26 sue and be sued); In re Edwards, 2011 WL 4485560, at \*3  
27 n.2 (9th Cir. BAP Aug. 26, 2011) (unpublished)  
28 (citations omitted).

16 Second Dismissal Order at 5:16-6:8.

17 The bankruptcy court made the following written conclusions  
18 to support entry of the Second Dismissal Order dismissing the  
19 bankruptcy case for cause pursuant to § 1112(b):

20 In light of these findings, the Court concludes that  
21 this Chapter 11 case was filed in bad faith. The  
22 Debtor is not an operating business, and is not  
23 generating any income, but it is continuing to accrue  
24 expenses. The only purported assets of the estate are  
25 claims which appear to have arisen prior to the  
26 Debtor's previous Chapter 7 case and may not even be  
27 property of this bankruptcy estate. The Debtor has  
28 shown no evidence of abandonment of the claims by the  
Chapter 7 trustee to this estate. The Debtor has not  
provided any evidence of a reasonable likelihood of  
reorganization. The Debtor admits that the purpose of  
the bankruptcy was to avoid paying an appeal bond.  
Indeed, Mr. Broidy admits that the Debtor had other  
avenues available to it to prosecute the French appeal,  
including the filing of a certificate of insolvency.  
Instead of doing so, the Debtor invoked the time and

1 resources of the bankruptcy court system for the  
2 purpose of obtaining the automatic stay to allow it to  
3 prosecute the French appeal. Neither the Debtor's  
4 bankruptcy counsel nor the Debtor's attorney in the  
5 French court system were employed by the estate. The  
6 Debtor's counsel only filed an application for  
7 employment upon this Court's order requiring him to do  
8 so. No such application has been filed for the French  
9 attorney. Finally, the Debtor was unable to explain  
10 satisfactorily whether it gave any notice directly to  
11 the French court or GEM about the dismissal of this  
12 case in November of 2014, which may involve a fraud on  
13 the French court.

8 Second Dismissal Order at 7:23-8:15.

9 The Second Dismissal Order was entered December 2, 2015.  
10 Prometheus once again filed a timely notice of appeal.

## 11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C.  
13 §§ 1334 and 157(1). We have jurisdiction under 28 U.S.C. § 158.

## 14 **III. ISSUE**

15 Whether the bankruptcy court abused its discretion when it  
16 dismissed Prometheus' chapter 11 petition.

## 17 **IV. STANDARDS OF REVIEW**

18 "We review de novo whether the cause for dismissal of a  
19 Chapter 11 case under [§ 1112(b)] is within the  
20 contemplation of that section of the [Bankruptcy] Code. We  
21 review for abuse of discretion the bankruptcy court's decision to  
22 dismiss a case as a 'bad faith' filing." Marsch v. Marsch  
23 (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (citing Stolrow  
24 v. Stolrow's, Inc. (In re Stolrow's, Inc.), 84 B.R. 167, 170 (9th  
25 Cir. BAP 1988)).

26 We apply a two-part test to determine whether the bankruptcy  
27 court abused its discretion. United States v. Hinkson, 585 F.3d  
28 1247, 1261-62 (9th Cir. 2009) (en banc). First, we consider



1 de novo whether the bankruptcy court applied the correct legal  
2 standard. Id. Then, we review the bankruptcy court's factual  
3 findings for clear error. Id. at 1262 & n.20; see Eisen v. Curry  
4 (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (the bankruptcy  
5 court's finding of "bad faith" is reviewed for clear error). A  
6 bankruptcy court abuses its discretion if it applied the wrong  
7 legal standard or its findings were illogical, implausible or  
8 without support in inferences that may be drawn from facts in the  
9 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,  
10 832 (9th Cir. 2011).

11 "We may affirm 'on any ground supported by the record,  
12 regardless of whether the [bankruptcy] court relied upon,  
13 rejected, or even considered that ground.'" Fresno Motors, LLC  
14 v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014);  
15 see also ASARCO, LLC v. Union Pac. R.R. Co., 765 F.3d 999, 1004  
16 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir.  
17 2008).

## 18 V. DISCUSSION

19 The Prometheus I Panel determined that the bankruptcy court  
20 could dismiss a chapter 11 case for bad faith under § 1112(b).  
21 Thus, the only issue to be decided on this appeal is whether the  
22 bankruptcy court abused its discretion when it entered the Second  
23 Dismissal Order dismissing Prometheus' case on the basis that the  
24 petition had been filed in bad faith.

25 It is undisputed on the record before us that (1) the reason  
26 Prometheus filed its chapter 11 case was to obtain a bankruptcy  
27 stay as a substitute to posting a bond in the litigation in the  
28 French Appellate Court; (2) Prometheus' claim ("Litigation

1 Claim") against GEM arose in 2002; (3) Prometheus did not  
2 disclose the Litigation Claim as an asset in the chapter 7 case  
3 it filed in 2004. The bankruptcy court correctly determined  
4 that, as a matter of law, the Litigation Claim remained an  
5 unadministered asset of Prometheus' chapter 7 case when it was  
6 closed. Prometheus has no standing to prosecute the Litigation  
7 Claim, and certainly no basis for filing a chapter 11 case  
8 ostensibly for the purpose of liquidating that claim and  
9 administering it for the benefit of creditors.

10 Remarkably, in its brief on appeal, Prometheus ignores  
11 completely the bankruptcy court's findings of fact and  
12 conclusions of law relating to whether Prometheus has any  
13 interest in the Litigation Claim which could be protected in a  
14 chapter 11 case. Prometheus makes no assertion that the  
15 bankruptcy court's fact findings in this context were clearly  
16 erroneous. Prometheus makes no assertion that the bankruptcy  
17 court erred as a matter of law when it concluded that Prometheus  
18 had no cognizable interest in the Litigation Claim to protect in  
19 the chapter 11 case. As a consequence, Prometheus has waived  
20 these issues on appeal. See Branam v. Crowder (In re Branam),  
21 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th  
22 Cir. 1999) (an issue not adequately addressed by appellant in its  
23 opening brief is deemed abandoned).

24 In our reading of the Second Dismissal Order, the  
25 nondisclosure of the existence of the Litigation Claim in the  
26 prior chapter 7 case constitutes the bankruptcy court's primary  
27 basis for finding the petition was filed in bad faith.

28 While this is sufficient in and of itself to support the

1 dismissal of Prometheus' case, we share the bankruptcy court's  
2 concerns that neither Prometheus' bankruptcy counsel (until  
3 responding to the Order on Remand) nor its counsel in the French  
4 Appellate Court (ever) sought or obtained bankruptcy court  
5 approval for representation of Prometheus during the pendency of  
6 the chapter 11 case.

7 Further, that Ms. Luke, who has no disclosed monetary  
8 relationship with Prometheus,<sup>4</sup> provided the funds necessary for  
9 Prometheus to meet its obligation to pay quarterly U.S. Trustee  
10 fees, is also troubling. It is unlikely that Ms. Luke "gave" the  
11 money to Prometheus. To the contrary, in her declaration filed  
12 with the Status Report Ms. Luke states:

13 Since January 14, 2014, the Debtor has received a total  
14 of \$775, all as set forth in the Debtor's Monthly  
15 Operating Reports. The source of those funds is money  
16 that I caused to be advanced to the Debtor. In  
17 addition, I advanced \$1,625 for payment of the fees due  
and owing to the Office of the United States Trustee  
for the third quarter of 2014 through and including the  
third quarter of 2015.

18 To "advance" is "to supply or furnish **in expectation of**  
19 **repayment.**" Merriam-Webster Collegiate Dictionary 18 (11th ed.  
20 2005) (emphasis added). Because these funds were advanced to  
21 Prometheus other than in the ordinary course of its business,  
22

---

23 <sup>4</sup> The monthly operating reports do not reflect that  
24 Prometheus pays Ms. Luke for the services she renders on its  
25 behalf, and the amended disclosure statement explicitly stated  
26 that "Wendee Luke shall manage the Debtor post-confirmation for  
no compensation." Clearly, adequate disclosure of Prometheus'  
relationship with its insider, Ms. Luke, has not been made.

27 In addition, Prometheus' two shareholders are located  
28 outside of the United States; neither has participated actively  
in the bankruptcy case.

1 bankruptcy court approval was necessary. See § 364(b). There is  
2 nothing in the record to suggest that Prometheus ever sought  
3 approval from the bankruptcy court to borrow money from Ms. Luke  
4 for the purpose of paying the U.S. Trustee quarterly fees.

5 Finally, it is undisputed in the record that Prometheus  
6 actively continued the litigation against GEM in the French  
7 Appellate Court notwithstanding that (1) no bankruptcy stay was  
8 in effect and (2) it neither posted a bond nor provided a  
9 certificate of insolvency. Taken together with Prometheus'  
10 failure to disclose the Litigation Claim in its chapter 7 case  
11 and its demonstrated disregard for compliance with the Bankruptcy  
12 Code in the chapter 11 case, it is clear that Prometheus is  
13 playing fast and loose with the courts.

#### 14 **VI. CONCLUSION**

15 The record establishes that Prometheus filed its chapter 11  
16 petition in bad faith.

17 This appeal is frivolous. See DeWitt v. W. Pac. R.R. Co.,  
18 719 F.2d 1448, 1451 (9th Cir. 1983) (an appeal is frivolous if  
19 the result is obvious and the arguments of error are wholly  
20 without merit). Had there been an appellee participating in this  
21 appeal we would not have hesitated to determine the appeal  
22 frivolous and to award costs and fees as authorized by Rule  
23 8020(a).

24 We AFFIRM the bankruptcy court's Second Dismissal Order.  
25  
26  
27  
28