IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

In re: Eidos, LLC, Debtor-in-Possession.	Case No. 16-10385-BFK Chapter 11
In re: Eidos Partners, LLC, Debtor-in-Possession.	Case No. 16-10386-BFK Chapter 11
In re: Eidos Display, LLC, Debtor-in-Possession.	Case No. 16-10388-BFK Chapter 11
In re: Eidos III, LLC, Debtor-in-Possession.	Case No. 16-10389-BFK Chapter 11
In re: Eidos Advanced Display, LLC, Debtor-in-Possession.	Case No. 16-10390-BFK Chapter 11
In re: Eidos IV, LLC, Debtor-in-Possession.	Case No. 16-10391-BFK Chapter 11
In re: Kamdes IP Holding, LLC, Debtor-in-Possession.	Case No. 16-10392-BFK Chapter 11

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS CHAPTER 11 CASES UNDER 11 U.S.C. §§ 305(a)(1) AND 1112(b) OR, ALTERNATIVELY, FOR RELIEF FROM THE AUTOMATIC STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

Stairway Capital Management II L.P. ("Stairway") possesses a first-priority lien on all of the assets of the above-captioned Debtors (collectively, the "Debtors" or "Eidos") and, as of January 31, 2016, is owed approximately $50 million.[1] After several years of litigation dating back to March 2012 and spreading across several state and federal courts, the parties landed in binding arbitration (the "Arbitration") before the American Arbitration Association ("AAA").

[redacted] These cases are merely the latest episode in the Debtors' efforts to frustrate and delay Stairway's exercise of its legitimate contractual and state law rights and remedies against the Debtors. These Chapter 11 Cases were filed in bad faith and should be dismissed immediately.

These Chapter 11 Cases also serve no legitimate purpose. The only claims the Debtors face are those within the Arbitration. In short, this is merely a three-party dispute between: (i) the Debtors/Dentons and Stairway pursuant to the Loan Documents; and (ii) among the

[1] Eidos LLC is not a "Borrower" under the operative Loan Documents.

Debtors, Stairway and the Debtors' insurer, Ironshore Specialty Insurance Company ("Ironshore"), regarding an insurance policy (obtained for Stairway's benefit). The claims between these parties have been (since 2012), and continue to be, litigated extensively [redacted]

Moreover, [redacted] the Debtors are legally solvent. The Debtors also have no business operations other than engaging in litigation regarding the enforcement of a single patent. The Debtors have few, if any, employees and few, if any, creditors (other than Stairway). Certainly, the claims of the same handful of unsecured creditors listed on each of their petitions (aggregating approximately $165,000) pales in comparison to the Debtors' stated assets of between $100 million to $500 million. Those claims, according to the Debtors, can be satisfied without the need for bankruptcy relief.

Indeed, the Debtors themselves concede that the filing of the Chapter 11 Cases was motivated solely by the three-party dispute noted above. In their only motion filed to date in these Chapter 11 Cases, the Debtors reveal the sole reason for the filings: "to stay the Arbitration proceeding" – and, thereby, [redacted] Accordingly, these Chapter 11 Cases should be dismissed, having been brought in bad faith, and without a legitimate need for bankruptcy protection. Dismissal will best serve the parties and permit the adjudication of all issues to proceed to conclusion in September 2016, after years of litigation. Alternatively, Stairway requests that the Court suspend the Chapter 11 Cases pending resolution of the Arbitration and the Enforcement Action (as defined below) (each of which is scheduled for final adjudication in 2016) and grant

Stairway relief from the automatic stay to litigate to conclusion all of the claims in the Arbitration.

BACKGROUND

The statement of facts pertinent to this Motion are set forth in detail in the accompanying Declaration of John Rijo in Support of Motion to Dismiss Chapter 11 Cases Under 11 U.S.C. §§ 305(a)(1) and 1112(b) or, Alternatively, for Relief from the Automatic Stay (the "Rijo Decl."). For the sake of brevity, those facts will not be repeated at length below, but are incorporated herein by reference. Capitalized terms not otherwise defined herein shall be given the meanings ascribed to them in the Rijo Decl.

ARGUMENT

I.
THIS COURT SHOULD DISMISS OR, IN THE ALTERNATIVE, SUSPEND THESE CHAPTER 11 CASES PURSUANT TO 11 U.S.C. § 305(a)(1)

A. Legal Standard

Section 305(a)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time . . . if (1) the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1).

The purpose of section 305(a) is outlined in the legislative history, which provides that:

> A principle of the common law requires a court with jurisdiction over a particular matter to take jurisdiction. This section recognizes that there are cases in which it would be appropriate for the Court to decline jurisdiction. . . . Thus, the Court is permitted, if the interests of creditors and the debtor would be better served by dismissal of the case or suspension of all proceedings in the case, to so order.

In re Colonial Mem'l Gardens, Inc., 1982 WL 628958, *1 (Bankr. E.D. Va. Feb. 2, 1982) (quoting H.R.Rep. No. 595, 95th Cong., 1st Sess. 325 (1977); S.Rep. No. 989, 95th Cong., 2nd Sess. 35 (1978)).

Section 305(a) confers significant discretion upon the Court to dismiss or suspend a bankruptcy case, and the facts of each case should determine whether dismissal or suspension is appropriate. *See In re Grigoli*, 151 B.R. 314, 319 (Bankr. E.D.N.Y. 1993); *In re Fax Station, Inc.*, 118 B.R. 176, 177 (Bankr. D.R.I. 1999). The factors courts frequently consider in determining if dismissal is warranted include: (1) economy and efficiency of administration; (2) whether another forum is available to protect the interest of both parties; (3) whether there is already a pending proceeding in a state court; (4) whether federal proceedings are necessary to reach a just and equitable solution; (5) whether there is an alternative means of achieving the equitable distribution; (6) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (7) whether a non-federal insolvency has proceeded so far that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (8) the purpose for which jurisdiction has been sought. *See In re Mazzocone*, 200 B.R. 568, 575 (E.D. Pa. 1996) (collective cases); *see also Fax Station*, 118 B.R. at 177; *In re Audio Visual*, 211 B.R. 154, 161 (Bankr. S.D.N.Y. 1997); *In re Trina*, 128 B.R. 858, 867 (Bankr. E.D.N.Y. 1991). As explained directly below, these factors (to the extent applicable here) weigh heavily in favor of abstention and the dismissal or suspension of the Chapter 11 Cases.

B. Dismissal or, in the Alternative, Suspension of these Chapter 11 Cases is Appropriate Pending the Resolution of the Arbitration and the Enforcement Action.

Courts have applied section 305(a) after concluding that there is pending litigation in a non-bankruptcy forum that can adjudicate the respective interests of all parties fairly and

economically. *See, e.g., Colonial Mem'l Gardens*, 1982 WL 628958, *2 ("By dismissing this petition the matter may be promptly and fairly resolved by the state court system."); *In re 801 South Wells Street Ltd. P'ship*, 192 B.R. 718, 724 (Bankr. N.D. Ill. 1996) ("A suitable alternative forum will be deemed to exist if in that forum 'there are pending arrangements that will equitably satisfy the creditors and not be unduly burdensome or prejudicial to the debtor,' so that continuation of the bankruptcy proceeding will be 'duplicitous and uneconomical."') (quoting *In re RAI Marketing Servs., Inc.*, 20 B.R. 943, 946 (Bankr. D. Kan. 1982)); *In re Duratech Indus.*, 241 B.R. 283, 284-85 (E.D.N.Y. 1999) (bankruptcy court *sua sponte* abstained from administering Duratech's Chapter 11 case pending the resolution of civil litigation involving allegations of theft and misappropriation of trade secrets).

In these cases, the Arbitration can – and will – adjudicate the respective interests of all parties fairly and economically. [redacted] The Debtors are legally solvent and have no need for Chapter 11, [redacted]

1. Judicial Economy Supports Dismissal

Given the Debtors' solvency, and that there is no "business" that needs rehabilitation or reorganization, there is no legitimate purpose served by these Chapter 11 Cases, and no just reason to delay the adjudication of all claims, [redacted] Litigation among the parties has been ongoing since 2012 and is nearing conclusion. *See* Rijo Decl., § II. [redacted] The United States District Court for the Southern District of

New York, affirmed by the Second Circuit Court of Appeals, has already determined that the parties' dispute, including the claims by and against Ironshore, must be arbitrated. *See* Sirota Decl., Exs. N & S; *see also* Rijo Dec., ¶¶ 56-65. Thus, this Court could not (or at least should not) even entertain the disputes among the parties. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (generally, a bankruptcy court has no discretion to deny arbitration of a non-core claim); *In re Pisgah Contractors, Inc.*, 215 B.R. 679, 683 (W.D.N.C. 1995) (same).

To be sure, there is a strong policy favoring arbitration despite the bankruptcy proceedings of one party. *See Moses v. CashCall, Inc.*, 781 F.3d 63, 71 (4th Cir. 2015) (when a contract between two parties contains an arbitration provision, federal courts generally favor enforcement of a demand for arbitration pursuant to the terms of the contract); *Pisgah*, 215 B.R. at 683 (citing *In re Stewart Foods, Inc.*, 64 F.3d 141, 145 (4th Cir. 1995) (citing *Hays, supra*); *In re A.H. Robins Co., Inc.*, 42 F.3d 870 (4th Cir. 1994) (implementing an arbitration in the bankruptcy proceedings through district court); *Delta Financial Corp. v. Paul D. Comanduras & Assoc.*, 973 F.2d 301, 306 n. 7 (4th Cir. 1992) (noting in connection with a bankruptcy proceeding, "[n]othing we have said should indicate any suggestion on our part that the matter of the dissolution of the partnership is not a proper subject for arbitration")). *See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[The FAA] establishes 'a liberal federal policy favoring arbitration agreements'").

Even if this Court determined it could adjudicate all claims (which, respectfully, it cannot), it would be a waste of the Court's resources to allow the Chapter 11 Cases to proceed when they have no purpose. Exercising the Court's discretion to abstain where such litigation

exists in another forum, and arguably the only forum that could handle all claims, serves the interests of judicial economy and efficiency.

2. Another Forum is Available to Protect the Interests of All Parties

As described above and in the Rijo Decl., the Chapter 11 Cases are admittedly driven by the Debtors and Dentons' desire to evade the jurisdiction of the AAA. The disputes among the parties, however, are being extensively litigated and are scheduled to conclude at a hearing set for September 2016. Rijo Decl., ¶ 73. Indeed, the AAA is the *only* forum where the claims among all of the parties can proceed. No one, not even the Debtors, is suggesting that the Arbitration will not protect the interests of all parties, including the Debtors. *Id.* at ¶ 70; *see also* Sirota Decl., Exs. E & F.

Moreover, although the Debtors allegedly have a handful of other (unsecured) creditors, *see* Sirota Decl., Ex. X, there is no suggestion that the claims of those creditors will remain unsatisfied without a bankruptcy proceeding. Indeed, once the Debtors conclude the Enforcement Action, something that will happen regardless of the pendency of the bankruptcy cases, creditors will be paid. The Debtors concede as much in the Chapter 11 Cases, stating that: "Based upon recently-filed export [sic] reports, the Debtors expect the Enforcement Action in Texas to yield funds far exceeding the claims of all creditors in these Cases, including the secured claim of Stairway." *See* Joint Administration Motion, ¶ 7. Thus, another forum exists to protect the interests of all parties without resort to this Court.

3. The Purpose for Which Jurisdiction Has Been Sought

As highlighted throughout, there is no legitimate purpose for which the jurisdiction of this Court has been sought. Indeed, the Debtors' stated purpose – to stay the Arbitration – is not legitimate. *See, e.g., In re Ebell Media, Inc.*, 462 Fed.Appx. 674 (9th Cir. 2011) (debtor's

bankruptcy petition was filed in bad faith where case involved solely two-party dispute, and had no estate to be administered, and only possible effect of bankruptcy filing was to stop arbitration). [redacted] That the proceedings have no rehabilitative or reorganizational purpose only reinforces that the Court should decline jurisdiction and dismiss, or at least suspend, the Chapter 11 Cases. In fact, the Debtors have filed nothing in these Chapter 11 Cases other than the Petitions and a motion for joint administration. Notably, the Debtors have not filed any other "first-day" motions, requests to operate, or other requests for substantive relief typically filed in the early days of a Chapter 11 case by a debtor with a legitimate rehabilitative or reorganizational purpose.

4. The Remaining Factors

The remaining factors are largely duplicative or irrelevant to the facts and circumstances of the Chapter 11 Cases. As discussed, significant litigation (*i.e.*, the Arbitration) is pending and nearing conclusion (as is the Enforcement Action, which, according to Eidos, will result in the full payment to all creditors). *See* Rijo Decl., § II. Thus, bankruptcy court involvement is not necessary to reach a just and equitable solution because the rights and interests of the parties can and are being determined in the Arbitration. Because there are alternative means to reach an equitable distribution, the Chapter 11 Cases are without legitimate purpose. Finally, the factor of a pending non-federal insolvency is not relevant to the facts and circumstances here.

Accordingly, for all of these reasons, the Court should dismiss, or suspend, the Chapter 11 Cases pursuant to 11 U.S.C. § 305(a).

II.
THE COURT SHOULD DISMISS THE CHAPTER 11 CASES AS HAVING BEEN FILED IN BAD FAITH

Section 1112(b)(1) of the Bankruptcy Code provides an additional basis for the dismissal of these ill-conceived Chapter 11 Cases. That section provides as follows:

> Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1) (emphasis added).[2]

Subsection (b)(4) of section 1112 lists several non-exhaustive factors constituting "cause" to dismiss a Chapter 11 case. However, the term "includes" is not limiting and, thus, the Court may consider other factors. *In re WSG Dulles, L.P.*, 2013 WL 64759, *6 (Bankr. E.D. Va. Jan. 4, 2013) (citing 11 U.S.C. § 102(3)). As this Court recently noted, "[t]he court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." *Id.* (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 699 (4th Cir. 1989), in turn, quoting H.R.Rep. No. 595, 95th Cong., 2d Sess. 406, reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6362).

Although not specifically enumerated in section 1112(b), multiple courts, including the Fourth Circuit, have recognized that a debtor's bad faith in filing a Chapter 11 case is sufficient "cause" for dismissing a case pursuant to section 1112(b). *See In re Kestell*, 99 F.3d 146, 148

[2] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 changed the statutory language with respect to conversion and dismissal from permissive to mandatory. *See* H.R. Rep. 109-31(I), 2005 U.S.C.C.A.N. 88, 94 (stating the amendments "mandate that the 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").

(4th Cir. 1996); *Carolin Corp.*, 886 F.2d at 700; *see also In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986) ("Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings."). In other words, good faith is a requirement for the filing of a Chapter 11 petition, which has as its ultimate objective a debtor's successful rehabilitation, and as such, a Chapter 11 petition may be dismissed "for cause" pursuant to section 1112(b) if it has been filed in bad faith. *See Monsour Med. Ctr., Inc. v. Stein*, 154 B.R. 201, 206 (Bankr. W.D. Pa. 1993).

Filing a bankruptcy petition as a tactic to litigate non-bankruptcy issues or to resolve a dispute indicates bad faith. *See In re Paolini*, 312 B.R. 295, 307 (Bankr. E.D. Va. 2004) ("Courts have especially eschewed the use of a bankruptcy proceeding for resolution of a two-party dispute where the intent of the bankruptcy is perceived to be a relitigation of the prior action."); *see also In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999) ("[A] Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. § 1112(b) unless it is filed in good faith"); *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004) (dismissing Chapter 11 case where debtor was financially healthy at time of filing, had no intention of reorganizing or liquidating as a going concern, and admitted filing was solely to take advantage of Bankruptcy Code's provision capping landlord's rejection claim); *Furness v. Lilienfeld*, 35 B.R. 1006 (D. Md. 1983) (debtor's case dismissed where court determined filing was effected as litigation tactic).

Once a party establishes a *prima facie* showing that the debtor's bankruptcy case lacked good faith, the debtor bears the burden of rebutting it. *See Paolini*, 312 B.R. at 305.

In *Carolin Corp.*, the Fourth Circuit concluded "that a bankruptcy court may dismiss such a petition for want of good faith in its filing, but only with great caution and upon supportable findings both of the objective futility of any possible reorganization and the subjective bad faith of the petitioner in invoking this form of bankruptcy protection." *Carolin Corp.*, 886 F.2d at 694; *see also Rollex Corp. v. Assoc. Materials, Inc. (In re Superior Siding & Window, Inc.)*, 14 F.3d 240, 242 (4th Cir. 1994). "[T]hough separate inquiries into each are required, proof inevitably will overlap. Evidence of subjective bad faith in filing may tend to prove objective futility, and *vice versa*." *Carolin Corp.*, 886 F.2d at 701.

Because both subjective bad faith and objective futility exist here, these Chapter 11 Cases should be dismissed.

A. Subjective Bad Faith

The inquiry on subjective bad faith "is designed to insure that the petitioner actually intends to use the provisions of Chapter 11 . . . to reorganize or rehabilitate an existing enterprise, or to preserve going concern values of a viable or existing business." *WSG Dulles*, 2013 WL 64759, *6 (quoting *Carolin Corp.*, 886 F.2d at 702). Its aim is to "determine whether the petitioner's real motivation is 'to abuse the reorganization process' and 'to cause hardship or to delay creditors by resort to the Chapter 11 device merely for the purpose of invoking the automatic stay, without an intent or ability to reorganize his financial activities.'" *Id.* (quoting *Carolin Corp.*, 886 F.2d, at 702, in turn, quoting *In re Thirtieth Place, Inc.*, 30 B.R. 503, 505 (B.A.P. 9th Cir. 1983)).

Here, there is no question that these Chapter 11 Cases were filed in bad faith. [redacted]

[redacted]

[redacted]

Through the filing of an electronic notice in the ALPS Patent Litigation, Stairway learned of what appeared to be a settlement between Debtors and the AU Parties – one of the defendants in the ALPS Patent Litigation. Rijo Decl., ¶ 80; Sirota Decl., Ex. L. [redacted]

[redacted]

Moreover, a simple review of the few filings herein confirms there is no intent to seriously reorganize the Debtors. Indeed, the only "first-day" motion filed in these Chapter 11 Cases is a motion to authorize their joint administration. The Debtors have not filed a single substantive request for relief in the early days of these Chapter 11 Cases – and for good reason. These Cases instead were filed as a litigation tactic against Stairway [redacted]

Recently, under circumstances similar to these cases, this Court, applying the test in *Carolin Corp.*, ruled that the debtors' commencement of Chapter 11 proceedings after having diverted a secured creditor's collateral to an insider, was the "very definition of bad faith" necessitating the dismissal of the Chapter 11 cases there. *WSG Dulles*, 2013 WL 64759, at *7,

13. In *WSG Dulles*, the Debtors stopped paying their secured debt and rather than escrow the funds, or set them aside in some way, the Debtors made a decision to up-stream them to an insider management company. The secured lenders inarguably had a lien on those funds. As a result, this Court held that the withholding of a secured lender's collateral in a substantial amount (in that case, over $700,000), and the payment of those funds to an insider management company for other than ordinary and necessary operating expenses such as management fees, is the very definition of bad faith in the context of a commercial real estate loan workout. *Id.* at *7.

The facts here compel the same conclusion. [redacted]

[redacted]

[3] As the Fourth Circuit has held:

> It is well settled that the statutory definition of insider is not exhaustive; "[r]ather, an insider may be any person or entity whose relationship with the debtor is sufficiently close so as to subject the relationship to careful scrutiny." *Hunter v. Babcock (In re Babcock Dairy Co.),* 70 B.R. 662, 666 (Bankr.N.D.Ohio 1986). In order to satisfy this standard, the alleged insider "must exercise sufficient authority over the debtor so as to unqualifiably dictate corporate policy and the disposition of corporate assets." *Id.*

Butler v. David Shaw, Inc., 72 F.3d 437, 443 (4th Cir. 1996). An attorney can be an insider if as a matter of fact, he exercises such control or influence over the debtor as to render their transactions not arms-length. *See In re Ackels*, 2010 WL 7785859, at *1 (Bankr. D. Alaska Jan. 19, 2010), citing *Kepler v. Schmalbach (In re Lemanski),* 56 B.R. 981, 983 (Bankr. W.D. Wis. 1986); *see also In re Dunes Hotel Assocs.*, 194 B.R. 994 (Bankr. D.S.C. 1995) (firm that participated in both the filing and conduct of the bankruptcy case, and recognizing the importance, willingly allowed itself to be used as the means of providing the critical vote was an insider). [redacted]

[redacted]

B. Objective Futility

The objective futility inquiry is "designed to insure that there is embodied in the petition 'some relation to the statutory objective of resuscitating a financially troubled [debtor].'" *WSG Dulles*, 2013 WL 64759, *7 (quoting *Carolin Corp.*, 886 F.2d at 701, in turn, quoting *In re Coastal Cable TV, Inc.*, 709 F.2d 762, 765 (1st Cir. 1983). While objective futility has typically been satisfied upon a showing that the debtor has no legitimate chance at reorganization, it may also be satisfied where the purported reorganization is unnecessary. *See First Union Nat'l Bank v. Oestreich (In re Oestreich)*, 1995 Bankr. LEXIS 1979 (Bankr E.D. Va. Aug. 24, 1995).

[redacted]

("Objective futility is established where the purposes of the Bankruptcy Code will not be served, either because reorganization is not possible or because reorganization is not necessary.").

Here, because the Debtors have no need for reorganization, there is objective futility. First, the Debtors have no real business operations; besides enforcing one patent through litigation in the Enforcement Programs financed by Stairway, Stairway is not aware of any other business activity or other assets owned by the Debtors. Rijo Decl., ¶ 6. The lack of any other legitimate business activity is evidenced by the Debtors' filing of these Chapter 11 Cases without even requesting a "first-day" hearing or any substantive "first-day" relief, which would be typical in cases of this size when a business is being operated. In addition, Stairway understands that the Debtors are controlled only by one individual (Vince M. Sedmak), with few – if any – other employees involved in their current operations. Rijo Decl., ¶ 6. The Debtors appear to have few creditors (other than their own professionals and those already a party to the Arbitration).[4] [redacted] The Debtors here are using bankruptcy as a sword, not as a shield as the Bankruptcy Code was intended. *See Dunes Hotel Assoc. v. Hyatt Corp.*, 245 B.R. 492, 507 (D.S.C. 2000) ("The bankruptcy laws are intended as a shield, not as a sword.").

The Debtors are not being pressured by any creditor who is not also a party to the Arbitration. In fact, the Debtors acknowledge that they are legally solvent. These undisputed

[4] The Debtors will be required to file schedules and statements of financial affairs prior to the hearing on this motion detailing all of their assets and liabilities.

facts, together with the lack of any rehabilitative purpose, establish that no relief is needed from this Court.

In *Dunes Hotel*, the district court affirmed the dismissal of a case of a solvent debtor where the purpose of the case was to provide a windfall for the debtor and its equity holder at the expense of one creditor. 245 B.R. at 507. There, the district court ruled as follows:

> Dunes as a solvent debtor-in-possession should not be permitted to remain in bankruptcy for the sole purpose of being able to use the strong-arm clause of the Bankruptcy Code to strike down a bilateral contract to the detriment of its only remaining non-insider creditor. To allow Dunes to do so would set the stage for a post-deal negotiation of a lease that was entered into between two sophisticated entities in 1973.

Id. citing *Barclays-Am./Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broad., Inc.)*, 871 F.2d 1023, 1028 (11th Cir. 1989) ("The Bankruptcy Code is not intended to insulate financially secure sellers or buyers from the bargains they strike."); *Huang v. Pierce (In re Chi-Feng Huang)*, 23 B.R. 798, 803 (9th Cir. BAP 1982) ("[I]t is not true that solvent debtors may petition for bankruptcy and then obtain a windfall by rejecting their executory contracts. . . ."); *In re Albrechts Ohio Inns, Inc.*, 152 B.R. 496, 501 (Bankr. S.D. Ohio 1993) ("It perverts the wholesome economic objective of Chapter 11 [as] an instrument for the rehabilitation of troubled businesses [to] nakedly . . . allow the remaking of a bilateral contract by one of the parties thereto."); *In re Anderson Oaks (Phase I) Ltd. P'ship*, 77 B.R. 108, 111 (Bankr. W.D. Tex. 1987) ("Two-party disputes such as this simply have no place in bankruptcy. Allowing the dispute to be resolved in bankruptcy confers unwarranted leverage in favor of the Debtors, without the attendant equities that normally justify that leverage."); *Furness*, 35 B.R. at 1009 ("Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to

reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability.").

Here, even if the Debtors' admitted solvency and lack of any reorganizational need did not, by themselves, establish objective futility, Stairway submits the Debtors are unable to confirm a plan, which provides yet another basis for a finding of objective futility. There is no conceivable plan that the Debtors could confirm over Stairway's objection – indeed, Stairway would oppose *any* plan that failed to pay Stairway in full on the effective date of the Plan. Moreover, any plan that the Debtors proposed would inevitably be premised on the recovery of funds in litigation, which has been ongoing for several years and could potentially go on for years to come (as appeals are exhausted). Litigation of that nature is a purely speculative event, making it unlikely any plan of reorganization could meet standards of feasibility. *See In re Am. Capital Equip., LLC*, 688 F.3d 145, 156 (3d Cir. 2012) ("A plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely.") (citations omitted); *see also Ames v. Sundance State Bank*, 973 F.2d 849, 851 (10th Cir. 1992) (holding that speculative nature of proceeds from debtors' potential litigation did not meet feasibility requirement for Chapter 11 plan); *In re Orienta Coop. Ass'n*, 256 B.R. 508, 511–12 (Bankr. W.D. Okla. 2000) (converting Chapter 11 to Chapter 7 after finding that debtor's plan, which relied on recovery of substantial amounts from lawsuit, were "speculative and contingent"); *Ewald v. National City Mortgage Co. (In re Ewald)*, 298 B.R. 76, 82 (Bankr. E.D. Va. 2002) (denying confirmation of Chapter 13 plan where debtor could not prove there is a reasonable likelihood that the amended plan will succeed as it is totally dependent on a favorable lawsuit). In sum, the Debtors' inability to confirm a plan over the Stairway's objection is additional evidence that these Chapter 11 Cases are objectively futile.

III.
ALTERNATIVELY, THE COURT SHOULD GRANT STAIRWAY RELIEF FROM THE AUTOMATIC STAY TO CONTINUE THE ARBITRATION

If the Court does not dismiss the Chapter 11 Cases altogether under §§ 305(a)(1) and/or 1112(b), the Court should grant Stairway relief from the automatic stay pursuant to section 362(d)(1) of the Bankruptcy Code. Pursuant to section 362(a) of the Bankruptcy Code, all actions against a debtor are automatically stayed upon the filing of a petition in bankruptcy. 11 U.S.C. § 362(a)(1). However, a court may lift the stay and allow an action to proceed against a debtor upon a showing of "cause." 11 U.S.C. § 362(d). Specifically, section 362(d) of the Bankruptcy Code provides:

> On the request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as terminating, annulling, modifying, or conditioning such stay -- (1) for cause….

11 U.S.C. § 362(d). "Cause" is not defined in the Bankruptcy Code and the determination as to whether "cause" exists rests within the discretion of the bankruptcy court. *See Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir. 1992).

The Fourth Circuit requires consideration of the following factors when determining whether "cause" exists to lift the stay to allow pre-petition litigation to proceed in another forum: (1) whether the issues in the pending litigation involves only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court. *Id.* (citations omitted). When considering these factors, the court

"must balance the potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person seeking relief from the automatic stay if the relief is denied." *Id.*

In addition, when deciding whether to lift the stay, courts also consider whether the debtor sought the protection of the automatic stay in "good faith." *Carolin Corp.*, 886 F.2d at 699 (equating the "cause" standard under section 1112(b) to the "cause" requirement under section 362(d)(1) of the Bankruptcy Code). In fact, some courts hold that a finding that the bankruptcy proceeding was commenced in bad faith, alone, is sufficient "cause" to lift the stay. *See In re Laguna Assocs., L.P.*, 30 F.3d 734, 738 (6th Cir. 1994); *In re Long Bay Dunes Homeowners Assocs., Inc.*, 246 B.R. 801, 806 (Bankr. D.S.C. 1999). These courts see no difference between the "cause" requirements for dismissal under section 1112(b) and the "cause" requirements for relief from the automatic stay. *In re Laguna Assocs., L.P.*, 30 F.3d at 737-38.

The interplay between a "bad faith filing" and a "for cause" dismissal or relief from the automatic stay is particularly important where, as is the case here, the Debtors have invoked the equitable jurisdiction of this Court as a litigation tactic. [redacted]

[redacted]

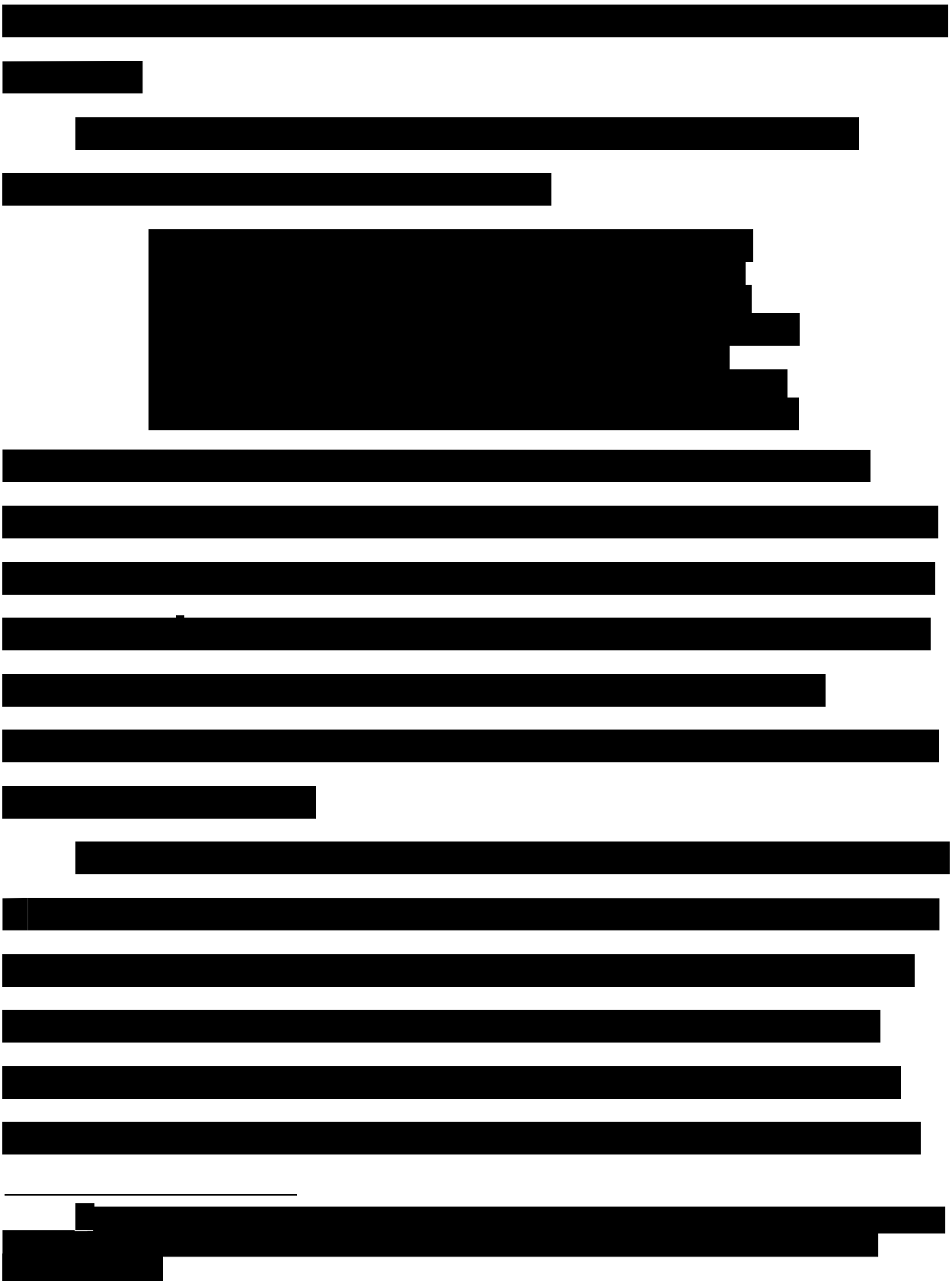
Here, "cause" exists to lift the stay to allow the Arbitration to continue. [redacted] Allowing the Arbitration to go forward before the AAA serves the interests of judicial economy. *See In re Burger Boys, Inc.*, 183 B.R. 682, 688 (S.D.N.Y. 1994) (finding that the resolution of the issues in state court best served the interests of judicial economy); *In re AMF Bowling, Inc.*, 2003 WL 22002560, at *2 (Bankr. E.D. Va. June 4, 2003) (granting relief from the automatic stay where the judicial economy of allowing

litigation to continue in state court outweighed any prejudice to the debtor); *Ewald*, 298 B.R. at 81 (granting relief from the stay because that state court was more familiar with the facts and claims asserted as the case had been pending there for almost three years and relief would not interfere with the debtor's bankruptcy case).

Moreover, lifting the stay to allow the Arbitration to proceed to final hearing will not interfere with the administration of the Debtors' bankruptcy estates. The claims of Stairway, Ironshore, Dentons, and the Debtors must be resolved. Considering the magnitude of Stairway's claims and that Debtors have little, if any, ongoing business operations, an expedient resolution of these claims now will guide the Court on how best to proceed.

On the other hand, the prejudice to Stairway if the Arbitration does not proceed to final hearing will be considerable. Stairway has spent substantial time and resources preparing to litigate its dispute with the Debtors in the Arbitration. Discovery has been extensive and is nearing conclusion. Rijo Decl., ¶¶ 72-73. Preventing the pursuit of the claims in the Arbitration, after several years of litigation, would prove to be an injustice, especially since the Debtors were fully engaged in that process until filing these Chapter 11 Cases in the face of the Injunction Order.

Finally, and regardless of whether the Court grants the relief sought in this Motion with respect to the Debtors, this Court should, respectfully,



[redacted]

Finally, Stairway respectfully submits that, should these Chapter 11 Cases not be dismissed or should this Court elect not to abstain, then this Court should issue an order

[redacted] *See James River Ins. Co. v. Kemper Cas. Inc. Co.*, 585 F.3d 382, 385

(7th Cir. 2009) (stating that the declaratory judgment defendant was the real plaintiff and therefore the burden of proof generally placed upon a plaintiff would be placed upon the declaratory judgment defendant and further stating that the "'defendant' has made himself a [declaratory judgment] 'plaintiff' by filing a declaratory-judgment action rather than waiting to be sued."); *J.B. Hunt Transport, Inc. v. Innis*, 985 F.2d 553 (4th Cir. 1993) ("Declaratory relief should not be used to deprive the real plaintiff of the choice of forum or to determine merely the 'validity of a defense' which would be asserted and could be determined in another action.") (citations omitted).

Consequently, the Debtors' (and Stairway's) claims against Ironshore in the Arbitration can only benefit the Debtors' estate and should not be stayed.[6] *Cf. White v. City of Santee (In re White)*, 186 B.R. 700, 704 (B.A.P. 9th Cir. 1995) ("The trustee or debtor in possession is not prevented by the automatic stay from prosecuting or appearing in an action which the debtor has initiated and that is pending at time of bankruptcy."); *In re Intercorp Intern., Ltd.*, 309 B.R. 686, 695 (Bankr. S.D.N.Y. 2004) (holding that "the automatic stay did not apply" where "[t]he debtor was the plaintiff"); *Mitchell v. Fukuoka Daiei Hawks Baseball Club (In re Mitchell)*, 206 B.R. 204, 212 (Bankr. C.D. Cal. 1997) (recognizing that the automatic stay does not apply when the debtor is the plaintiff because it "only stays lawsuits against the debtor and the debtor's bankruptcy estate") (emphasis added); *Wills Motors, Inc. v. Volvo N. Am. Corp.*, 131 B.R. 263, 266 (S.D.N.Y. 1991) (finding that the automatic stay did not apply to an action brought pre-petition "by the debtor as a plaintiff against the defendant" because the stay "enjoins the

[6] Payment of the insurance proceeds to Stairway will reduce the outstanding debt to the benefit of the Debtors.

commencement or continuation of all litigation against a debtor based on prepetition claims") (emphasis added).

CONCLUSION

With no legitimate reorganization purpose available (or even possible), the interests of creditors and the Debtors would be better served by dismissal of the Chapter 11 Cases so that the parties can conclude the Arbitration; a forum that can adequately address and dispose of the claims of all parties to the Chapter 11 Cases – including counterclaims and cross-claims asserted by the Debtors. As such, Stairway submits dismissal of the Chapter 11 Cases is warranted by section 305(a) of the Bankruptcy Code.

Even if the Court determined otherwise, section 1112 of the Bankruptcy Code provides an additional basis for the dismissal of the Chapter 11 Cases. In that regard, case law requires any analysis of the totality of the circumstances to determine whether these impractical and unnecessary Chapter 11 Cases should be dismissed. In assessing the totality of the circumstances here, this Court should, respectfully, conclude that the real motivation of the Debtors here is "to abuse the reorganization process" and "to cause hardship or delay creditors by resort to the Chapter 11 devices merely for the purpose of invoking the automatic stay, without an intent or ability to reorganize his financial activities." *Carolin Corp.*, 886 F.2d at 702. Furthermore, nothing in the Debtors' petitions suggests there is "some relation to the statutory objective of resuscitating a financially troubled [debtor]." *Id.* at 701. As such, grounds exist to conclude that the Debtors' petitions were not filed in good faith and should be dismissed.

Accordingly, for the reasons set forth herein, Stairway respectfully requests that the Court enter an Order dismissing the Chapter 11 Cases or, alternatively suspending the Chapter 11 Cases pending resolution of the Arbitration and the Enforcement Action (as defined herein)

(each of which is set to proceed later this year) and granting Stairway relief from the automatic stay to litigate to conclusion the claims in the Arbitration.

Dated: February 9, 2016

COLE SCHOTZ P.C.

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