IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: Iowa Gaming Company, LLC, Debtor,	Chapter 11 Case No. 14-13904 (Joint Administration Requested)
In re: Belle of Sioux City, L.P. Debtor,	Chapter 11 Case No. 14-13907 (Joint Administration Requested)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF IRGC, MRHD, AND SCE'S JOINT MOTION TO DISMISS CHAPTER 11 PETITIONS

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I. INTRODUCTION

When the parties appeared before this Court on May 16 for a hearing on the first-day motions, Debtors' counsel made the following representation to this Court about the judicial review status of Belle's renewal license for the Argosy Casino:

> And ***the only viable method*** that we have to buy the time that we need to litigate in Iowa, whether the license to operate the Argosy Casino has been--should be renewed or not is through the filing of this bankruptcy. This bankruptcy will, we believe, buy us that time ***to litigate an issue which has not yet been subject to judicial review***, it's only been at a regulator level to this point." Transcript of Motion Hearing at 10:20-11:2 (May 16, 2014) (emphases added).[1]

Simply put, Belle's counsel misled this Court. In all of the Debtors' first-day papers, including their lengthy preliminary injunction motion, as well as their first-day remarks, the Debtors failed to mention that only three months ago, Iowa state court Judge Eliza J. Ovrom issued a 24-page ruling regarding the status of Belle's license to operate the Argosy Casino.[2] Judge Ovrom explicitly found that, with respect to Belle's 2012-2013 renewal application, "Belle's operator license has expired."[3] Judge Ovrom went on to hold that Belle did not have a likelihood of prevailing on the merits of its procedural and substantive challenges to the IRGC's decision to not renew Belle's license for 2012-2013 term. Belle now challenges the IRGC's April 17, 2014 decision to deny Belle's claim that it should have a license for the 2013-2014 term. Belle seeks to relitigate issues that have already been ruled on for purposes of preliminary relief by Judge Ovrom, the most important of which is the status of Belle and MRHD's licenses during the

[1] Transcript of Motion Hearing, Nos. 14-13904, 14-13907 at 10:20-11:2 (May 16, 2014), Appendix in Support of Joint Opposition to Motion for Stay, Application of Bankruptcy Code Section 108(A), and Preliminary Injunction, and Motion to Dismiss (hereafter "Appendix"), Ex. 32.

[2] Ruling Following Limited Remand at 22, *Belle of Sioux City, L.P. v. IRGC*, No. CV9254 (Iowa Dist.Ct. Feb. 14, 2014, Appendix Ex. 1.

[3] *Id.* at 22; s*ee also id*. at 20 ("The commission did not renew the riverboat's license."); *id.* at 19 (the IRGC reasonably interpreted the statutes in determining that there was not "licensed excursion gambling boat"); *id.* at 21 (the IRGC correctly interpreted Iowa law as requiring a QSO and an operator to have an operating agreement).

2012-2013 time frame.[4] And Judge Ovrom's opinion was not issued in isolation, but is just one part of more than two years of IRGC and Iowa state court contested case proceedings with respect to Belle's expired license. These proceedings are pending and active, and are available today for whatever relief the Debtors believe they are entitled to seek. The Debtors' bankruptcy petitions—a blatant attempt to obtain a lengthy stay from a different judge to avoid the inevitable—are the worst example of forum shopping and should not be tolerated.

"Chapter 11 petitions must be filed in good faith or they are subject to dismissal." *In re SGL Carbon Corp.*, 200 F.3d 154, 161 n.9 (3d Cir. 1999). These bankruptcy cases should be dismissed for the following reasons:

First, the petitions were admittedly filed for an improper purpose, i.e., to relitigate previously decided issues: "the goal of the [Chapter 11] filing is to keep the Belle operational while it relitigates the non-renewal decision."[5] Debtors attempt to evade Judge Ovrom's ruling through the automatic stay and by way of a preliminary injunction in bankruptcy court, rather than face the preclusive effects of Judge Ovrom's ruling were they to return to her courtroom for preliminary relief and a judgment on the merits.[6] Given that the Iowa courts have spoken on the license issues, the Debtors' improper purpose alone warrants dismissal for cause. *See In re Collins*, 250 B.R. 645, 649 (Bankr. N.D. Ill. 2000) (imposing sanctions on debtor and his attorneys because bankruptcy was filed in bad faith as evidenced by debtor's filing after he lost hope of winning case in state court); *In re Schlangen*, 91 B.R. 834, 837-38 (Bankr. N.D. Ill.

[4] Findings of Fact, Conclusions of Law, Decision and Order, *In the matter of Belle of Sioux City, L.P.*, No. 13IRGC020 (IRGC April 17, 2014), Appendix Ex. 2.

[5] May 14, 2014 Penn National Gaming, Inc. statement re Belle of Sioux City, L.P., Appendix Ex. 33; *see also* Transcript of Motion Hearing, Nos. 14-13904, 14-13907 at 10:20-11:2 (May 16, 2014), Appendix Ex. 32.

[6] Even though the Debtors claim that they filed these proceedings only to obtain a stay rather than relitigating issues in this Court concerning Belle's gaming license, in order to obtain any such stay, this Court would have to make findings of fact and conclusions of law that, in essence, would result in relitigating issues already decided by Iowa's state courts.

1988) (dismissing debtors' petitions where it was clear they were filed solely for the purpose of avoiding adverse rulings issued by a state court). Even if this Court wanted to entertain the Debtors' improper requests for a stay, it could not because the expired status of Belle's license cannot be challenged, given that such challenges are precluded under the doctrines of law of the case and collateral estoppel. Further, Belle cannot ask this Court to review and reject Judge Ovrom's decision. As this Court previously held in another matter, pursuant to the *Rooker-Feldman* doctrine, "federal courts lack jurisdiction over suits that are essentially appeals from state-court judgments." *See In re Lehigh Valley Prop., Inc.*, 482 B.R. 127, 131 (Bankr. E.D. Pa. 2012) (internal quotation marks omitted).

Second, there are pending and available proceedings in Iowa to address the underlying issue in this bankruptcy case, and those proceedings have been pending for over two years. Debtors have filed four petitions for judicial review in Iowa state court, all of which directly relate to the status of Debtors' Iowa operator license. The first of these four petitions has been pending for nearly two years. Debtors never moved the Iowa state court for any preliminary stays of the IRGC's non-renewal decisions or closure order pending judicial review. In fact, the only relief they have sought to date based on these four petitions is to stay the issuance of a license to SCE. Debtors know how to seek stays in Iowa, but have never asked for a stay of the IRGC's revocation decisions.[7]

Debtors falsely claim to urgently require the protection of this Court. The Debtors could have simply filed their fifth petition for judicial review in Iowa state court and asked for a stay of the denial of their license (if they truly thought it had not already expired). The fact that they

[7] *See* Belle Petition, Temporary Injunction Requested, *Belle of Sioux City, L.P., v. Mo. River Historical Dev., Inc.*, No. CL 126161 (Iowa Dist. Ct. Sept. 21, 2012.), Appendix Ex. 34. Not only did Belle seek a stay of SCE's license which was ruled on by Judge Ovrom, it also requested that an Iowa Court enjoin MRHD from participating in bidding process.

engineered an entire bankruptcy case to seek a stay from this Court, rather than seeking further review and relief from the pending Iowa state court proceedings, proves that the Debtors have no intention of seeking judicial review in Iowa "promptly" or "diligently"[8] but are dragging things out through forum shopping. This Court should not tolerate such conduct. Independently, this Court should abstain from considering the Iowa state license issues, and given that this is the sole acknowledged reason for the bankruptcy petitions, the Court should also dismiss the petitions based on the abstention doctrine.

Third, the Debtors' case is essentially a two-party dispute that is nothing more than a continuation of Debtors' litigation against the IRGC in state court, and is able to be resolved in state court. *See In re Schlangen*, 91 B.R. at 837-38 (dismissing case because, in part, the bankruptcy filing was meant to further a two-party dispute).

Fourth, the Debtors have no reorganization prospects. As demonstrated in the Debtors' first-day papers, the Debtors are balance sheet solvent, paying debts as they become due, do not contemplate any financial or operational restructurings or the use of any of the "tools" available to them in Chapter 11 (other than the automatic stay), and thus did not file this case for any of the typical reasons debtors seek Chapter 11 relief. In the unlikely event that the Debtors successfully revive their license, there will be no need for a Chapter 11 plan. Alternatively, if the Debtors are unsuccessful in reviving their license, then the Debtors can simply wind up their business in the ordinary course without the need for Chapter 11.

[8] During the First Day hearings, the Debtors mentioned they were planning to "diligently" pursue their state court remedies, but the Court expressed concerned about whether they were merely parsing words and whether they planned to "promptly" pursue such remedies. Transcript of Motion Hearing, Nos. 14-13904, 14-13907 at 44:9-45:21 (May 16, 2014), Appendix Ex. 32.

Fifth, this Court should also dismiss Debtors' case because they are seeking to use the bankruptcy process to allow them to operate an unlawful gaming establishment in contravention of Iowa state laws, which is a violation of 28 U.S.C. § 959(b).

II. STATEMENT OF THE FACTS AND RELEVANT BACKGROUND

A. To Lawfully Conduct Gaming In Iowa, A License Applicant Must Either Partner With A Non-Profit Or Be A Non-Profit Itself.

In Iowa, gaming is a highly-regulated industry overseen by the IRGC. The Iowa legislature granted the IRGC "full jurisdiction" and supervision of "all gambling operations," including the power to "determine the eligibility of applicants for a license and to select among competing applicants for a license the applicant which best serves the interests of the citizens of Iowa." Iowa Code § 99F.4. The IRGC also has the authority to adopt rules to implement Iowa's statutory gaming requirements. *Id*. The Iowa Supreme Court and Court of Appeals repeatedly have recognized the IRGC's power to interpret various provisions of Iowa Code Chapter 99F.[9]

In its consolidated memorandum, Belle glosses over the legal framework for gaming in Iowa to portray the role of a QSO such as MRHD to be nothing more than a conduit to impose a three percent tax. However, under Iowa law only a QSO, defined as a non-profit organization, may hold a license to "conduct" gambling games. Iowa Code §§ 99F.5(1), 99F.1. This statute restricting holders of a license to "conduct" to non-profit QSOs is meaningful because it guarantees that a for-profit can never hold a license to "conduct" and therefore can never lawfully operate a gambling facility without partnering with a QSO.[10] This language embodies

[9] *See, e.g., Nat'l Cattle Cong., Inc. v. Iowa Racing and Gaming Comm'n*, 752 N.W.2d 453 (Iowa Ct. App. 2008) (holding the IRGC is vested with discretion to interpret Iowa Code section 99F.4A(2); *Alfredo v. Iowa Racing and Gaming Comm'n*, 555 N.W.2d 827 (Iowa 1996) (recognizing the powers and obligations of the IRGC pursuant to Iowa Code sections 99F.4 and 99F.7, and holding that the IRGC has authority to conduct proceedings regarding an applicant's licensure and a duty to closely monitor ownership interests in gaming operations).

[10] *See* § 99F.3 (gambling is only legal when "conducted" at authorized locations by a licensee "as provided in this chapter").

the intent of the voters of Woodbury County who, on September 26, 1989, approved by referendum legislation that permitted the IRGC "to license qualified sponsoring organizations to conduct gambling games."[11] MRHD, therefore, held the one thing Belle could never obtain on its own, the very privilege to conduct gambling games in Iowa.

If the QSO decides to engage an operator, the operator must be licensed to "operate" the casino. *See*, § 99F.5(1). As Judge Ovrom confirmed in her February 14 ruling, a casino operator must partner with a licensed QSO and there must be an operating agreement between that QSO and the operator.[12] In 2004, the Iowa legislature amended section 99F.5 to require that new operating agreements between an operator and a QSO contain a three-percent minimum contribution from the operator. Iowa Code § 99F.5(1).

Pursuant to its legislative mandate, the IRGC has implemented rules for the issuance and renewal of gaming licenses in accordance with the governing statutes, including section 99F.5's requirement that an operator has an operating agreement with a licensed QSO. The IRGC issues standard one-year licenses, and licenseholders must seek renewal on an annual basis. *See* 491 Admin. Code § 1.5(3).[13] After 99F.5 was enacted, the IRGC revised its license applications to require applicants to provide information "describ[ing] the arrangement with the qualified sponsoring organization" and "[i]nclude as an exhibit, any required agreements or assignments."[14]

The Iowa Administrative Procedure Act authorizes any person or party aggrieved or adversely affected by agency action to seek judicial review of such agency action in the Iowa

[11] http://www.iowa.gov/irgc/CommChronology.htm (Chronology of the Iowa Racing and Gaming Commission), Appendix Ex. 5.
[12] Ruling Following Remand at 16-17, 21, Appendix Ex. 1.
[13] *See also* IRGC Brief on Remand, at 4, Appendix Ex. 3.
[14] *See, e.g.*, Application to Establish a Gambling Structure, at 25, Appendix Ex. 4; *see also* Iowa Code § 99F.5(1) (granting the IRGC broad discretion to prescribe the information applicants must submit with their applications for a gambling license).

District Court. Iowa Code § 17A.19. Belle can, as a matter of right, obtain judicial review of the IRGC's decision to deny renewal of Belle's license to operate the Argosy Casino. The Iowa District Court may reverse or grant other appropriate relief from any agency action that prejudices the substantial rights of any person that was unconstitutional, taken in violation of any applicable provision of law, or was otherwise unreasonable, arbitrary, or capricious. Iowa Code § 17A.19(10). A party who is adversely affected by a ruling of the district court is entitled to appellate review from the Iowa Supreme Court. Iowa Code § 17A.20.

Pursuant to Iowa Code § 17A.19(5)(a), the mere filing of a petition for judicial review does not stay the execution of any agency action. An agency or the District Court may issue a stay pending the disposition of the judicial review proceedings. Iowa Code § 17A.19(5); *see also* 491 Iowa Admin. Code § 4.45 (delineating procedure for requesting stay of agency action or other temporary remedy from the IRGC). Thus, Belle can seek a stay from the IRGC and the Iowa District Court of the IRGC's closure order. As demonstrated in its pending judicial review cases, Belle knows how to avail itself of this procedure.

B. The IRGC Refused To Renew Belle's License For The 2012-2013 Licensing Term Because Belle Failed To Partner With A Non-Profit.

Gaming at the site now occupied by the Argosy Casino commenced in 1993, when the IRGC issued MRHD a license to conduct gaming and a former operator, Sioux City Riverboat Corporation ("SCRC"), an operating license for the facility then known as "Sioux City Sue" in

Sioux City.[15] MRHD and SCRC were parties to a Management and Operation Agreement entered on May 27, 1992.[16]

In 1994, Belle assumed all of SCRC's rights and obligations under the 1992 Operating Agreement.[17] Contrary to Belle's false claims before this Court and Judge Ovrom, Belle has recognized previously that it needed an operating agreement per 99F.5 for the right to conduct gambling games, including when it first assumed these rights and obligations[18] and in Belle's most recent renewal application.[19] Debtors' parent company has also admitted in at least seven public filings that the Argosy Casino's gaming activities were only permitted due to MRHD's status as a QSO and MRHD as the holder of a license to "conduct" gambling.[20] The Debtors' briefings to this court now try to falsely relegate MRHD's role as nothing more than a "pass-through" organization.

On November 18, 1994, IRGC granted licenses to MRHD to conduct gaming and Belle to be an operator at the Argosy Casino. On December 1, 1994, Belle began operations at the Argosy Casino.[21] Licensing terms are from April through March 31 of the following year. The last renewal approved by the IRGC without conditions or restrictions was Belle's application to

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[15] *See* Chronology of Iowa Racing and Gaming Commission, *available at* http://www.iowa.gov/irgc/CommChronology.htm (last visited May 26, 2014) ("July 2, 1992, a three year license was granted to the Missouri River Historical Development, Inc./Sioux City Riverboat Corp., who began operation as the Sioux City Sue in Sioux City on January 29, 1993."), Appendix Ex. 5.

[16] 1992 Operating Agreement, Appendix Ex. 6.

[17] Belle Petition, Case No. CL 126161, ¶ 8, Appendix Ex. 7.

[18] See Management and Operating Agreement (admitted as State's Ex. 2 in March contested case proceeding), Appendix Ex. 6, p. 1 (Recitals A and B); id. at 12 (2004 amendment to Management and Operating Agreement, signed by Belle, containing "whereas" recitals, one of which states "WHEREAS, MRHD has permitted Sioux City to use MRHD's license to conduct gambling games on such excursion gambling boat on the Missouri River in Woodbury County, Iowa").

[19] See Belle 2013-2014 Renewal License Application (admitted as State's Ex. 6 in March contested case proceeding), Appendix Ex. 9, p. 19.

[20] *See* Penn National Gaming Form 10K at exhibit 99.1 from 2007, 2008, 2009, 2010, 2011, 2012 and 2014, Appendix Exs. 25-31.

[21] *See* Chronology of Iowa Racing and Gaming Commission ("November 18, 1994, excursion gambling boat licenses were granted…to the Missouri River Historical Development Inc./Belle of Sioux City, L.P. , began operation as the Belle of Sioux City on December 1, 1994 in Sioux City. The Sioux City Riverboat Corporation ceased operation at that time."), Appendix Ex. 5; *see also* Belle Petition, Case No. CL 126161, ¶ 8, Appendix Ex. 7.

renew its license for the 2011-2012 licensing term.[22] Accordingly, Belle's 2011-2012 license was set to lapse on March 31, 2012.

On December 27, 2011, Belle and MRHD submitted to the IRGC a joint application to renew their licenses for the 2012-2013 licensing term.[23] Belle and MRHD's operating agreement was set to expire on July 6, 2012. At the time Belle and MRHD submitted their application, both parties acknowledged that "renewal or extension of an operating agreement pursuant to Iowa Code Chapter 99F through the applicable time period of the requested license ***is necessary***."[24] At its March 8, 2012 public meeting, the IRGC approved the joint application, but this approval was conditioned on the submission of a new operating agreement by June 7, 2012.[25] IRGC Commissioner Chair Toni Urban explained the conditional approval as follows:

> [Chair Urban] stated that she did not see any way for the Commission to grant a license without a condition due to the fact that the current operating agreement expires in July, necessitating the approval of a new agreement at the June Commission meeting.[26]

Belle's General Manager responded that "Penn/Argosy [understood] that the granting of a one-year license would be conditioned upon the extension of both agreements," one of which was the operating agreement with MRHD.[27] The IRGC informed Belle on March 8, 2012 that if no operating agreement was reached, ***"the Commission would be obligated to look elsewhere."***[28] Thus, Belle was aware as of March 8, 2012 that if it did not submit an operating agreement by June 7, 2012, the IRGC would look for alternative licensees.

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[22] *See* IRGC Brief on Remand, at 5, Appendix Ex. 3.
[23] *See* Argosy Sioux City License Renewal Application, April 1, 2012 to March 31, 2013, Appendix Ex. 8.
[24] *See* Belle's 2013-2014 License Renewal Application (emphasis added), Appendix Ex. 8.
[25] March 8, 2012 IRGC Meeting Minutes, at 17, Appendix Ex. 10.
[26] *Id.* at 15.
[27] *Id.* at 14.
[28] *Id.* at 15 (emphasis added).

At the IRGC's next meeting on April 19, 2012, Belle and MRHD still had not reached an agreement.[29] The IRGC encouraged the parties to come to an agreement.[30] IRGC Commissioner Lamberti noted that the IRGC would "need to rapidly move to other ideas and plans" if an agreement between Belle and MRHD was not reached "fairly quickly."[31] Belle's representatives assured the IRGC that the parties could resolve their issues before the June IRGC meeting.[32]

Belle, however, appeared at the IRGC's June 7, 2012 meeting without an operating agreement.[33] Belle informed the IRGC that MRHD had offered to extend the operating agreement to 2015, but Belle refused to accept MRHD's extension offer unless MRHD dismissed federal litigation pending against its parent company, Penn National Gaming, Inc.[34] Belle had not fulfilled the condition for approval of its license. The IRGC then decided to open up Woodbury County for applications to build and operate a land-based casino.[35]

Under Iowa law, a party may appeal an agency's action by filing a petition for judicial review in Iowa District Court to have the court review the agency's action. *See* Iowa Code § 17A.19. On July 6, 2012, Belle filed its first petition for judicial review, challenging the IRGC's action to accept applications for a land-based casino.[36]

On July 12, 2012, Belle submitted an operating agreement to the IRGC that would extend its operating agreement with MRHD to March 31, 2015.[37] The IRGC had already opened up bidding on a land-based facility, but desired to keep the Argosy Casino open until the land-based

[29] *See* April 19, 2012 IRGC Meeting Minutes, at 3, Appendix Ex. 11.
[30] *Id.* at 6-7.
[31] *Id.* at 7.
[32] *Id.* at 4.
[33] *See* June 7, 2012 IRGC Meeting Minutes, at 4, Appendix Ex. 12.
[34] *Id.* at 3-4.
[35] *Id.* at 7-8.
[36] *See* Petition for Judicial Review, Case No. CV9254 (Iowa Dist. Ct. July 6, 2012), Appendix Ex. 13.
[37] July 12, 2012 IRGC Meeting Minutes, at 2-3, Appendix Ex. 14.

facility was ready to open in order to preserve existing jobs.[38] The IRGC thus asked Belle to agree to an extension of its operating agreement only through March 31, 2013.[39] Belle refused to agree to the March 31, 2013 date, insisting on the March 31, 2015 date.[40] The IRGC approved an extension of the operating agreement only through March 31, 2013, on the condition that the parties reach agreement by August 23, 2012.[41] On August 10, 2012, Belle filed its second petition for judicial review in Iowa District Court, this time challenging the IRGC's decision not to approve an extension of the operating agreement through March 31, 2015.[42]

At the IRGC's next meeting on August 23, 2012, the IRGC denied a request by Belle to reconsider its decision not to approve an extension of the operating agreement into 2015.[43] The IRGC informed Belle that its license would continue by operation of law under Iowa Code Section 17A.18 "until a hearing is set by the Commission to show cause why the license should not be continued."[44] The IRGC informed Belle that its "license continues under operation of law until the Commission takes action to deny that application to renew the license."[45] On September 21, 2012, Belle filed its third petition for judicial review over the actions taken by the IRGC at the August 23, 2012 meeting.[46] Over the course of the next seven months, Belle did nothing to prosecute its three filed petitions for judicial review. Thus, the licensing term for 2012-2013, which ended on March 31, 2013, passed without any judicial hearing on the merits of Belle's petitions.

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[38] *Id.* at 3.
[39] *Id.*
[40] *Id.* at 3-4.
[41] *Id.* at 5.
[42] Petition for Judicial Review, Case No. CV9316, (Iowa Dist. Ct. Aug. 10, 2012), Appendix Ex. 15.
[43] August 23, 2012 IRGC Meeting Minutes at 4, Appendix Ex. 16; Excerpts from Tr. of IRGC Mtg (labeled Aug. 24, 2012), Appendix Ex. 17.
[44] IRGC Tr. at 9, Appendix Ex. 17.
[45] *Id.* at 10.
[46] Petition for Judicial Review, Case No. CV9383, (Iowa Dist. Ct. Sep. 21, 2012), Appendix Ex. 18.

In those seven months, however, Belle did file a lawsuit against MRHD and seek a temporary injunction restraining MRHD from participating in the bidding process opened up by the IRGC.[47] Belle alleged that MRHD breached the parties' operating agreement and that this conduct would result in irreparable harm to Belle and that it was "entitled to a temporary injunction."[48] Judge Hanson, however, disagreed and denied Belle's Motion for a Temporary Injunction in October of 2012.[49] MRHD went on to submit a proposal to the IRGC for a land-based casino. During the next licensing term, which began on April 1, 2013, the IRGC awarded a land-based casino license to SCE and MRHD for development of the Hard Rock Casino in downtown Sioux City.[50] Upset with the outcome, Belle filed its fourth petition for judicial review on May 17, 2013.[51]

In total, Belle filed four petitions for judicial review and a civil action over the course of 10 months but did nothing in the Iowa courts to actively pursue its challenges to the IRGC's actions. Notably, all four petitions against the IRGC, the civil action against MRHD, and the temporary injunction request were filed in Iowa state court. And the four petitions were always filed within 30 days of the IRGC's challenged actions.[52] None were accompanied by any requests for a preliminary injunction or stay in conjunction with the petitions.

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[47] Petition, Temporary Injunction Requested, *Belle of Sioux City, L.P. v. MHRD*, No. CL12616 (Iowa Dist. Ct. Sept. 21, 2012) (requesting declaratory relief, injunctive relief, and damages from an alleged breach of contract claim), Appendix Ex. 7.

[48] Id. at ¶ 34.

[49] Ruling on Motion to Intervene and Motion for Temporary Injunction , *Belle of Sioux City, L.P. v. MHRD*, No. CL12616 (Iowa Dist. Ct. Oct. 29, 2012) Appendix Ex. 45.

[50] IRGC Meeting Minutes, at 19 (April 18, 2013), Appendix Ex. 23.

[51] Petition for Judicial Review, *Belle of Sioux City, L.P. v. IRGC*, CV45760 (Iowa Dist. Ct. May 17, 2013), Appendix Ex. 35.

[52] Case No. CV9254, seeking review of IRGC action taken at June 7, 2012 meeting, was filed on July 6, 2012, Appendix Exs. 12-13 Case No. CV9316, seeking review of IRGC action taken at July 12, 2012 meeting, was filed on August 10, 2012, Appendix Exs. 15-16. Case No. CV9383, seeking review of IRGC action taken at August 23, 2012 meeting, was filed on September 21, 2012, Appendix Exs. 16, 18. Case No. CV45760, seeking review of IRGC action taken at April 18, 2013 meeting, was filed on May 17, 2013, Appendix Exs. 23, 35.

C. Three Months Ago, An Iowa State Court Judge Approved Of The IRGC's Statutory Interpretations and Found That "Belle's Operator License Has Expired."

The Debtors did not do anything to pursue their challenges to the IRGC's decisions or pursue their judicial review petitions for nearly 14 months. Instead, the Debtors waited until September 2013, approximately five months after the IRGC licensed a new land-based casino in Woodbury County, when Belle moved before an Iowa State Court judge for an order staying the IRGC's actions in furtherance of its development of the Hard Rock Casino and licensing of MRHD and SCE.[53] Iowa District Court Judge Hanson initially granted Belle's motion. SCE was not named as a party and, therefore, sought a writ from the Iowa Supreme Court on the basis that Belle had sought relief impacting SCE's license without joining SCE in the proceedings.[54] The Iowa Supreme Court remanded the case back to the Iowa district court, ordering it to determine whether SCE was in fact an indispensable party that should have been joined in the proceedings and if so, to reconsider the stay order.[55] By this time, the four judicial review cases had been transferred to Iowa District Court Judge Eliza Ovrom.

On remand, Belle asserted three arguments in support of its challenges against the IRGC's actions:

1. 99F.7(2)(c) Violation: Belle claimed that under Iowa law, the IRGC was prohibited from licensing a new land-based casino in Woodbury County on April 18, 2013 because at the time, Belle still held a valid license under section 17A.18(2) of the Iowa Administrative Procedure Act.[56]

[53] Belle's Br. In Support of Mot. to Stay, *Belle of Sioux City, L.P. v. IRGC,* No. CV9254 et al. (Iowa Dist. Ct. Sept. 16, 2013), Appendix Ex. 34.
[54] SCE's Petition for Writ, *SCE Partners, L.L.C.., vs. The Dist.Ct. for Polk Cnty.*, No. 13-1972 (Iowa Sup. Ct. Dec. 19, 2013), Appendix Ex. 39.
[55] Order Remanding to District Court, *Belle of Sioux City, L.P. v. IRGC,* No. 13-1972 (Iowa Sup. Ct. Jan. 8, 2014), Appendix Ex. 36.
[56] Ruling Following Limited Remand at 18-19, *Belle of Sioux City, L.P. v. IRGC*, No. CV9254 (Iowa Dist.Ct. Feb. 14, 2014), Appendix Ex. 1.

2. Substantive Error on 2012-2013 Renewal Decision: With respect to its 2012-2013 renewal application, Belle contended that the IRGC had erred in concluding that Belle was required to have an operating agreement with a QSO.[57]

3. Procedural Error on 2012-2013 Renewal Decision: Belle claimed that the IRGC denied it due process because the IRGC had effectively revoked Belle's license without providing Belle notice or an opportunity to be heard by issuing the license to MRHD and SCE, and announcing that the riverboat will close when the new casino opens.[58]

Judge Ovrom considered voluminous briefings from Belle, the IRGC, MRHD and SCE. Judge Ovrom then issued a 24-page ruling explaining in great detail why Belle's challenges to the IRGC's decisions were not likely to succeed.[59] As part of her ruling, Judge Ovrom considered—and ultimately rejected—Belle's argument that it held a valid gaming license as of April 18, 2013, the date that the IRGC awarded a license to the new casino. In reaching her decision, Judge Ovrom rejected all three of Belle's arguments. First, in order to determine if there had been a violation of Chapter 99F.7(2)(c), Judge Ovrom examined whether Belle's gaming license for the 2011-2012 term was still in existence under section 17A.18 as of April 18, 2013.[60] Judge Ovrom determined that it was reasonable for the IRGC to consider MRHD's license to "conduct" as having expired as of March 31, 2013 because MRHD and Belle failed to finalize an operating agreement. Judge Ovrom noted that although the IRGC had allowed the Argosy Casino to remain open by operation of law under Section 17A.18 in order to save Belle's employees from abruptly losing their jobs, the IRGC properly viewed the license as expired.

[57] *Id.* at 21.
[58] *Id*. at 21-22.
[59] *See id.* at 16-22.
[60] *Id.* at 21-22. Section 17A.18 is not part of Iowa's substantive gaming laws found in Chapter 99F of the Iowa Code. Rather, it is found in Chapter 17A, Iowa's Administrative Procedure Act.

Thus, the IRGC did not violate Chapter 99F.7(2)(c) by awarding SCE a new license because there was no other licensed gaming facility in Woodbury County as of April 18, 2013.[61]

Judge Ovrom next analyzed whether the IRGC had wrongfully refused to renew Belle's gaming license for the 2012-2013 licensing term under Chapter 99F. Belle argued that Iowa law did not require Belle to have an operating agreement with a QSO. To quote Judge Ovrom's exact words, "The court disagrees."[62] Judge Ovrom interpreted section 99F.5 as requiring "that a Qualified Sponsoring Organization and an operator will have an operating agreement."[63] Observing that QSOs and operators apply for joint licenses under Iowa's statutory scheme, Judge Ovrom further reasoned that it would be hard to imagine how the two sets of groups could apply for a joint gambling license "without an operating agreement which spells out the terms of their business arrangement."[64] Thus, Judge Ovrom concluded that "the IRGC is correct interpreting the law to require an operating agreement between a QSO and an operator."[65] As a result, Belle was "unlikely to succeed on the merits of this argument."[66] Judge Ovrom also rejected Belle's claims that the IRGC denied it due process. Judge Ovrom concluded that the IRGC's decision to deny Belle's renewal application for the 2012-2013 licensing term was free of procedural deficiencies:

> Belle received notice of the IRGC's requirements and planned actions at public meetings, and was allowed to appear and present information before the commission at its monthly public meetings. In addition, Belle has a contested case proceeding pending before the commission in connection with the nonrenewal of its license. Belle has received notice of the commission's actions, and has had

[61] *Id*. at 19.
[62] *Id*. at 21.
[63] *Id.*
[64] *Id.*
[65] *Id*.
[66] *Id*.

> a number of opportunities to be heard before the commission. It is unlikely to succeed on the merits of its due process claim.[67]

In sum, Judge Ovrom rejected every argument made by Belle in support of its contentions that it continued to hold a valid Iowa gaming license. The wording in Judge Ovrom's decision leaves no room for misinterpretation: "Belle's operator license has expired."[68] Notably, Belle did not seek reconsideration of Judge Ovrom's ruling, nor did Belle seek to appeal Judge Ovrom's ruling. Thus, Her Honor's determinations became the law of the case, subject to reconsideration only under extraordinary circumstances.

D. The IRGC Refused To Renew Belle's 2013-2014 Licensing Application for the Same Reasons Previously Deemed To Be Reasonable By Judge Ovrom.

On December 31, 2012, Belle filed a renewal application with the IRGC for the period from April 1, 2013 through March 31, 2014.[69] Again, Belle attempted to revive its operator license without a QSO. The IRGC took action on the application in its August 2013 meeting, denying the application "based upon the fact that Belle is statutorily ineligible to hold a license in the absence of an operator's agreement with a qualified sponsoring organization."[70] Belle was provided notice of the decision on August 27, 2013. Belle requested a contested case hearing to once again challenge the IRGC's decision. A hearing was scheduled on March 5, 2014.[71] At the hearing, Belle repeated the same arguments rejected by Judge Ovrom in connection with the prior year's renewal application—once again, Belle argued that its license continued under section 17A.18(2).[72] The IRGC, consistent with Judge Ovrom's February 14 Order, ruled that MRHD had not filed an application for renewal of its license to "conduct" gaming at the Argosy

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[67] *Id*. at 22.
[68] *Id.*
[69] Findings of Fact, Conclusions of Law, Decision and Order, *In the matter of Belle of Sioux City, L.P.*, No. 13IRGC020 (IRGC April 17, 2014), Appendix Ex. 2.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 8.

Casino for the 2013-2014 licensing term and therefore, its license to "conduct" expired on March 31, 2013. In addition, the IRGC noted that no QSO joined Belle's application for renewal for that term.[73] Thus, the IRGC determined that "Belle is statutorily ineligible to hold a license to conduct gambling games and cannot be granted a license to operate the excursion boat in the absence of an operating agreement with a QSO licensed to conduct games at this location. Therefore, the Belle's 2013-2014 renewal application must be denied."[74]

Debtors assert that Belle's "license to operate the Argosy Casino will not expire until at least July 1, 2014."[75] Judge Ovrom has already found that Belle's operator license has expired. And the IRGC's order states in no uncertain terms, "Therefore, the Belle's 2013-2014 renewal application must be denied." The reference to July 1, 2014 as the date that Belle must cease its operations in no way suggests that the IRGC intended to extend the time in which Belle is permitted to file for judicial review or continue to hold a license.

Moreover, Belle acknowledges that its right to seek judicial review of the IRGC's denial decision is governed by section 17A.19(3).[76] "Accordingly, [ ] the last day for Belle to seek judicial review of the IRGC's decision is June 11, 2014."[77]

E. Debtors File Chapter 11 Petitions That, On Their Face, Fail To Demonstrate A Need For Reorganization Or Liquidation.

On May 14, 2014, Debtors filed their Chapter 11 petitions. Throughout their filings, Debtors admit that their reorganization plan is entirely predicated upon their ability to prevail on their appeals of the IRGC's decisions in Iowa state court. [78] If, however, their appeals are

[73] *Id.* at 10-11.
[74] *Id.*
[75] Belle Br. at 14.
[76] Belle Br. at 13-14.
[77] Belle Br. at 14.
[78] Belle Br. at 29-30.

unsuccessful, Debtors admit that they will not be reorganizing and instead they will have to wind down their business and liquidate the estate.

Debtors are solvent as a going concern.[79] In addition, their liabilities are miniscule in comparison to their assets.[80] Debtors also admit that the Argosy Casino generated a quarterly EBITDA of $2.5 million during the first quarter of 2014, and that Debtors do not have any secured or unsecured debt. Debtors' only undisputed obligations are owed on account of ordinary course operating expenses, and Debtors make no mention of any of those obligations being past due.[81] For a company that generates millions of dollars in revenue and profits, their top 20 creditor list filed with their petitions reveals only two creditors owed more than $20,000 and half of their top 20 creditors are owed approximately $5,000 or less. Debtors' filings lack any indication that there will be any restructuring efforts in the case as there is no mention of any need to negotiate with their creditors, de-leverage their capital structure, or utilize the tools of Chapter 11 of the Bankruptcy Code to make adjustments to their business operations or financial obligations.

In conjunction with their bankruptcy petitions, Debtors seek several forms of relief, all of which have the common goal of prolonging the effect of any IRGC decision by allowing Debtors to continue their operations by some extended amount of time in the future. For example, Debtors seek an order from this Court to stay the non-renewal of Belle's license and the forced closure of the Argosy Casino based on the automatic stay.[82] Similarly, Debtors seek, in the alternative, a preliminary injunction that will prevent the IRGC from terminating Belle's

[79] Huygens Decl. at 5-6 ("The Debtors believe they are solvent on a going concern basis. However, the Debtors . . . face the real threat of the closure of the Argosy Casino, and the resulting loss of valuable jobs, economic relationships, and going concern value.").
[80] *See* Voluntary Petition, at 1 (estimating Debtors' assets to be $50 million to $100 million and its liabilities to be $1,000,001 to $10 million).
[81] Huygens Decl. ¶¶ 15, 25, 58.
[82] Belle Br. at 4.

operating license or otherwise closing Debtor's business, even though the license already has expired years ago. Debtors also ask that the Court determine that its deadline to seek judicial review under 17A.18, and thus its time to operate, is extended for two years under Bankruptcy Code section 108(a).

While Debtors' challenges to the IRGC's actions have been pending before the Iowa state court and the IRGC, the Argosy Casino has continued to generate revenue for Debtors. Debtors report that for the fiscal year ending December 31, 2013, the Argosy Casino generated $12.1 million in profits.[83] Just last quarter alone, the Argosy Casino generated $2.5 million in profits.

III. DEBTORS FILED THEIR PETITIONS IN BAD FAITH.

Section 1112(b) of the Bankruptcy Code authorizes the court to dismiss a Chapter 11 case for cause. While bad faith is not an enumerated factor under § 1112(b), it is "well established under the Bankruptcy Code…that a Chapter 11 petition must be filed in good faith, and if not, dismissal of the case is an appropriate remedy." *Pacific Rim Inv. L.L.P. v. Oriam, L.L.C.*, 243 B.R. 768, 771 (D. Colo. 2000) (citing *Udall v. FDIC*, 91 F.3d 1414-16 (10th Cir. 1996) ("[T]he Bankruptcy Court's conclusion that the specific purpose of the filing was to frustrate the FDIC's efforts to foreclose on the property was amply supported by the numerous indicia that constitute classic *badges of a bad faith* bankruptcy filing" (emphasis added))); *In re SGL Carbon Corp.*, 200 F.3d 154, 161 n.9 (3d Cir. 1999) ("Chapter 11 petitions must be filed in good faith or they are subject to dismissal."). Once the question of a debtor's good faith has been placed into issue, the Debtor bears the burden of establishing that the petition was filed in good faith. *Id*. at 162 n.10.

[83] Huygens Decl ¶ 25.

Courts recognize several "badges" of a bad faith bankruptcy filing including: (i) the debtor's filing seeks to avoid other court orders; (ii) debtors' prepetition conduct; (iii) whether the debtor's financial condition is, in essence, the result of a two-party dispute; (iv) debtors are unable to propose meaningful reorganization until pending litigation is resolved; (v) the debtor's lack a reasonable possibility of reorganization; and (iv) debtors do not require the court's assistance to liquidate. *See In re DCNC N. Car. I, LLC*, 407 B.R. 651, 551-62 (Banrk. E.D. Pa. 2009); *In re SB Prop., Inc.*, 185 B.R. 198, 205 (Bankr. E.D. Pa. 1995); *In re Wally Findlay Galleries*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984). As discussed below, each of these badges of bad faith is present in this case. Moreover, this bankruptcy case should be dismissed because its entire purpose is to allow the Debtors to operate illegally and in violation of Iowa state gaming laws, in contravention of 28 USC § 959(b).

A. Debtors Seek A New Forum To Escape Judge Ovrom's Adverse and Fatal Finding That They Do Not Possess A Valid License Under Iowa Law.

This Court should dismiss Debtors bankruptcy petitions, which were filed for the sole purpose of evading Judge Ovrom's order and relitigating the issue of whether it possesses a valid license under Iowa law. Where a debtor files its petition to avoid adverse consequences of state court decisions, its petition should be dismissed. *See In re Wally Findlay Galleries*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984) (dismissing debtor's petition where it found that debtor did not file its petition to reorganize, but rather as a litigating tactic "to avoid the consequences of adverse state court decisions while it continues litigating").

1. The Purpose of these Bankruptcy Cases Is to Relitigate Issues Currently Pending in Iowa State Court.

Here, there is simply no dispute that the Debtors' sole reason for filing for bankruptcy is to open another litigation front in their multi-year administrative proceedings before the IRGC

and judicial proceedings in Iowa state court. The Debtors have sought to stay the "non-renewal" of their license and to stay the impact of the IRGC's closure order. But in doing so, the Debtors seek judicial determinations from this Court regarding the status of their license under Iowa law, including that the Debtors still have an existing license that can be extended in the first place. These are issues that can and should be left with the Iowa courts to adjudicate, and in fact were adjudicated by Judge Ovrom months ago. The Debtors have judicial remedies available to them in Iowa, in the form of appellate remedies and stays pending further judicial review, and have taken advantage of those remedies in the past. There is no reason why they cannot continue to pursue judicial remedies in Iowa. With no other purpose for the bankruptcy filing other than litigating issues pending in Iowa, these bankruptcy petitions should be dismissed.

Courts have recognized that where a debtor "is unable to propose a meaningful plan of reorganization until its litigation . . . is resolved[,] it is evident that the debtor seeks to use [the bankruptcy] court not to reorganize, but to relitigate." *Wally*, 36 B.R. at 851. Such "impermissible use of Chapter 11 of the Bankruptcy Code" warrants dismissal of the Chapter 11 case. *Id.*; *see also In re Newport Assembly Rest., Inc.*, 142 B.R. 22, 23-24 (Bankr. D.R.I. 1992) (finding that the debtor had not established a likelihood of success on the merits and noting, among other things, that the court "would indeed be acting irresponsibly and in direct contravention of federal law if it permitted a Debtor to 'reorganize its affairs' by refusing to comply with statutory liquor license regulations").

2. The Bankruptcy Court Cannot Consider Previously Adjudicated Issues of Iowa Law.

Not only were these bankruptcy cases filed for an improper purpose, this Court cannot reject or ignore Judge Ovrom's determination that Belle's license has expired. Judge Ovrom's order has preclusive effect under the doctrines of "law of the case" and collateral estoppel.

Further, to the extent this Court believes it has any discretion to reject Judge Ovrom's decision, it should exercise that discretion and abstain from deciding this key issue of Iowa law. Given the Court's inability to address these issues of Iowa law, and given that there is no other purpose for these bankruptcy cases, the petitions should be dismissed.

The "law of the case" doctrine limits a party's ability to relitigate an issue once it has been decided in an earlier stage of the same litigation. *Hamilton v. Leavy*, 322 F.3d 776, 787 (3rd Cir. 2003). "Under the law-of-the case doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *ACLU v. Mukasey*, 534 F.3d 181, 187 (3rd Cir. 2008) (citations omitted). "This rule of practice promotes finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Id.* Accordingly, courts only permit exception to this doctrine where extraordinary circumstances warrant reconsideration of an issue decided earlier in the course of litigation. *Pub. Interest Res. Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3rd Cir. 1997) (identifying extraordinary circumstances as (1) the availability of new evidence, (2) the announcement of a supervening new law, and (3) a clearly erroneous decision that would create manifest injustice). Although grants and denials of preliminary injunction are not final judgments on the merits, preliminary injunction findings have preclusive effect "if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again." *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 n.11 (3rd Cir. 1997) (rejecting an argument that findings arising from preliminary injunction proceedings are not entitled to preclusive effect where the findings were "sufficiently firm" such that there was no compelling reason for permitting them to be litigated again).

Judge Ovrom received exhaustive legal briefings from all the parties before this Court. Based on the full record before her, she determined that Belle's license had expired. Belle decided not to appeal Judge Ovrom's ruling. Thus, the "law of the case" doctrine governs and Judge Ovrom's decision prevents Belle from re-arguing that it possesses a valid Iowa license and also prevents Belle from reseeking a stay of the IRGC's actions on that basis. Because Judge Ovrom's ruling is now the "law of the case," the whole purpose for this bankruptcy case—i.e., to utilize the automatic stay to seek judicial review in Iowa—collapses. Simply put, there is no need for a bankruptcy stay to pursue litigation in Iowa to challenge Judge Ovrom's findings and conclusions that are now law of the case. The Debtors made a tactical decision to not appeal Judge Ovrom's rulings in Iowa, and they cannot reverse their decision through an after-the-fact bankruptcy filing.

In fact, the doctrine of collateral estoppel prevents Debtors from doing so. This doctrine prevents Belle from relitigating in other courts the same issues that were raised and resolved in Judge Ovrom's order upholding the IRGC's determination that Belle's license expired because Belle did not have an operating agreement as required by law. *Dici v. Commonwealth. of Pa.*, 91 F.3d 542, 547-48 (3d Cir. 1996) (noting that a federal court "should grant preclusive effect to a state court decision upholding a state administrative agency determination when the state court's decision would be barred by issue preclusion in subsequent actions in that state's own courts"); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981) (noting that collateral estoppel "prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action").

Lastly, Belle has effectively requested that this Court review and reject Judge Ovrom's decision. "Quite simply . . . *Rooker-Feldman* prohibits [this Court] from doing so." *In re Lehigh*

Valley Prop., 482 B.R. at 131. Federal courts lack jurisdiction over suits that are essentially appeals from state-court judgments. *See Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 165 (3d Cir. 2010). Dismissal of Debtors' case here is warranted for the same reasons this Court saw fit to dismiss the debtor's case in *In re Lehigh Valley Prop., Inc*.—Belle, an unsuccessful party in Iowa, cannot now ask this Court to sit in review of Judge Ovrom's factual findings and preliminary conclusions of law.[84] *See In re Lehigh Valley Properties*, 482 B.R. at 131 (refusing to sit in review of a state court judgment).

B. Iowa State Court is the Existing and Proper Forum to Adjudicate These Disputes.

1. Iowa Is Best Equipped to Handle The Dispute.

As discussed above, these bankruptcy filings were for an improper purpose—to re-litigate and avoid the impact of four pending appeals proceedings in Iowa that address all aspects of the Debtors' licensure issues. This Court should not countenance that improper purpose. The fact that the Debtors have made the tactical decision not to vigorously pursue these four petitions for judicial review of the expiration of their license or to seek interim stays pending judicial review—exposes their inequitable conduct and provides an independent reason for the dismissal of these bankruptcy cases.

As discussed above, there have been extensive proceedings regarding Belle's license in front of the IRGC and the Iowa state court since at least 2012. Those proceedings are pending. Belle has made multiple applications in front of the IRGC, the IRGC has conducted multiple contested and evidentiary hearings and Belle has filed multiple petitions for judicial review. Belle has also filed a lawsuit against MHRD and sought stays of IRGC license grants. The Iowa

[84] *See supra* text accompanying footnote 6.

courts have been—and remain—available to hear Belle's expected fifth petition for judicial review.

Belle made the conscious decision to not expeditiously seek and pursue judicial review in Iowa of the IRGC's decisions with respect to the expiration of Belle's license. Nor did Belle ever seek a judicial stay—the same relief they seek from this Court—of the expiration of their license. As Judge Ovrom held, Belle's operator license expired on June 7, 2012, at which time the IRGC "informed Belle that its license had expired, and that it would be allowed to continue to operate under Section 17A.18 only until the new facility opened."[85] Belle has known for two years that the IRGC deemed that Belle's license had expired. Belle's parent company, Penn National Gaming, began reporting impairments in its 10K filing for the quarter ending June 30, 2013 in the amount of $71.8 million to reflect Belle's loss of its license.[86]

In the past two years, Belle has filed four petitions for judicial review but has done very little to reach final resolution on the merits as to any of them. Belle did not seek any judicial stays in Iowa state court based on the expiration of its 2012-2013 license or the denial of its 2013-2014 license application. After filing its first petition in July of 2012, Belle did not ask for discovery until January 17, 2014. Belle allowed the deadline to appeal Judge Ovrom's February 14, 2014 ruling to pass without appeal.

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[85] Ruling Following Limited Remand, at 22, *Belle of Sioux City, L.P. v. IRGC*, No. CV9254 (Iowa Dist.Ct. Feb. 14, 2014, Appendix Ex. 1.

[86] *See, e.g.*, Penn National Gaming 10-K at 50 (Feb. 27, 2014) , Appendix Ex. 31 ("Additionally, as a result of a new gaming license being awarded for the development of a new casino in Sioux City, Iowa to another applicant in April 2013, we recorded a pre-tax impairment charge of $71.8 million ($70.5 million, net of taxes) for Argosy Casino Sioux City for the quarter ended June 30, 2013, as we determined that the fair value of our Sioux City reporting unit was less than its carrying amount based on the Company's analysis of the estimated future expected cash flows the Company anticipates receiving from the operations of this facility."); *see id.* at 56 (reporting that $23.3 million increase in adjusted EBITDAR for Southern Plains segment "was partially offset by reduced earnings at Argosy Casino Sioux City primarily due to a challenging local gaming market and a negative impact related to the potential loss of our gaming license"); *id.* at 43 (reporting same $71.8 million impairment for Argosy Casino).

Belle certainly knows how to bring offensive litigation and seek stays. For instance, it filed a lawsuit against MHRD in September of 2012 in connection with a dispute over the operating agreement with MRHD.[87] Moreover, it sought expedited judicial review and preliminary injunction of the IRGC's decision to grant SCE an operator's license. However, for litigation tactical reasons, for two years Belle chose not to seek expedited, direct judicial review of its own licensure deficiencies with any speed or alacrity, nor did it seek any stays of the expiration of its own license pending final judicial determination.[88]

In fact, not only has Belle failed to vigorously pursue judicial review and seek interim stays, but it has made several attempts to delay the IRGC from issuing a final adverse decision, while simultaneously failing to vigorously pursue its rights through the judicial review process. For example, on September 26, 2013, Belle asked the IRGC to hold a contested case hearing with respect to its 2013-2014 contested case proceeding.[89] The IRGC scheduled a hearing for March of 2014. Before the hearing took place, Belle asked the IRGC to delay its contested case hearing until after certain issues could be litigated in its civil action against MRHD in state court.[90] The ALJ denied Belle's request. Two weeks later, on the same day that Judge Ovrom issued her adverse ruling, Belle again filed a request to stay or continue the March contested case hearing. This request was also denied.[91] Belle's pre-hearing efforts to delay a final resolution from the IRGC continued after the hearing was held. For example, while Belle awaited a

[87] Petition, Temporary Injunction Requested, Belle of Sioux City, L.P. v. MHRD, No. CL12616 (Iowa Dist. Ct. Sept. 21, 2012) (requesting declaratory relief, injunctive relief, and damages from an alleged breach of contract claim), Appendix Ex. 7.
[88] *Belle of Sioux City, L.P. v. MRHD,* Case No. CV9254 (Iowa Dist. Ct. July 6, 2012), Appendix Ex. 13; Case No. CV9316 (Iowa Dist. Ct. Aug. 10, 2012), Appendix Ex. 15; Case No. CV9383 (Iowa Dist. Ct. Sept. 21, 2012), Appendix Ex. 18; Case No. CV45760 (Iowa Dist. Ct. May 17, 2013), Appendix Ex. 35.
[89] Findings of Fact, Conclusions of Law, Decision and Order, *In the matter of Belle of Sioux City, L.P.*, No. 13IRGC020 (IRGC April 17, 2014), Appendix Ex. 2.
[90] Ruling Denying Applicant's Motion for Continuance, *In the Matter of Belle of Sioux City, L.P.*, No. 13IRGC020, at 1 (IRGC Feb. 21, 2014) Appendix Ex. 37.
[91] *Id.* at 1-2.

decision from the IRGC following the contested case proceedings, Belle's counsel represented to the IRGC that it wished to "preserve the Belle's right to" seek stay relief directly "from the IRGC" if the IRGC issued a decision that was adverse to Belle.[92] In his letter, Belle's counsel acknowledged that Iowa's laws allowed it to seek a stay until all judicial appeals were completed, including appeals "to the Iowa Supreme Court." But after the IRGC's April 17, 2014 decision was issued, Belle did not go to the IRGC for a stay. Nor did it go back to Iowa state court where it had been previously denied a stay. Instead, Belle filed Chapter 11 petitions and sought the protection of the automatic stay and other preliminary injunction relief available under the Bankruptcy Code.[93]

Not only has Belle failed to vigorously pursue its rights for years in Iowa, there is no reason why it cannot do so today. As this Court surmised at the first day hearing, there is no reason why the Debtors cannot seek the same stay **today** from the Iowa state court that they have sought from this Court, and there is no reason why the Iowa state courts are ill equipped to entertain that stay request. In fact, Judge Ovrom is best equipped to address any requests for judicial action, as not only has she already ruled on these issues, but she has judicial review proceedings currently pending in front of her. It is clear that the only reason that the Debtors have not sought such a stay, but instead have come to this Court, is because they feel that given Judge Ovrom's prior rulings, they are unlikely to prevail. Thus, the Debtors' are engaging in blatant forum shopping.

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[92] April 3, 2014 Ltr. from Weinhardt to Ohorilko (identifying the Iowa laws permitting Belle to seek a stay from the agency), Appendix Ex. 38.

[93] Another example of Belle's delay tactics are illustrated when Judge Ovrom asked the parties to submit briefing on its desired scheduling preferences with respect to judicial review of the IRGC's decisions, it was the other parties involved —the IRGC, MRHD, and SCE—that asked for a May hearing date on the merits while Belle asked for a hearing months away in October. *See* Scheduling Motions, at Appendix Exs. 40-42. Thus, this Court should discredit Belle's claims that it intends to "diligently" pursue its claims for judicial review in state court. (Consol. Memo at 3.)

2. This Court Should Abstain From Considering Any Issues of Iowa Law.

The circumstances surrounding the filing of the Chapter 11 cases and the nature of the primary dispute in front of the Court—whether Debtors should be able to continue to operate the Argosy Casino in contravention of applicable state law—call out for the Court to permissively abstain pursuant to section 1334(c)(1) of the Judicial Code. Because the affirmative relief sought by Debtors is entirely dependent on the resolution of a dispute regarding Iowa state law and regulations, the Court should abstain from making any determinations regarding Iowa law, especially given the pendency of current proceedings in Iowa. Once the court abstains from this issue, there is no other reason for these bankruptcy cases to remain pending.

Permissive abstention is a matter within the sound discretion of the bankruptcy court, which may abstain from hearing a matter "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1). Bankruptcy courts in this district have consistently employed a twelve-factor test to determine whether permissive abstention pursuant to 28 U.S.C. § 1334(c)(1):

(1) the effect on the efficient administration of the estate;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficulty or unsettled nature of applicable state law;

(4) the presence of a related proceeding commenced in state court or other non-Bankruptcy Court;

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than the form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the Bankruptcy Court;

(9) the burden on the court's docket;

(10) the likelihood that the commencement of the proceeding in Bankruptcy Court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence of non-debtor parties.

In re D'Angelo, 491 B.R. 395, 441-42 (E.D. Pa. 2013). Upon evaluation of the relevant factors in this list, it is clear that permissive abstention is appropriate in this case.

Abstention will positively effect the efficient administration of the estate as it will not waste the limited judicial resources of this Court or burden its docket with matters that are entirely state law issues. There is no hardship to Debtors if this Court declined to grant the relief Debtors are seeking to obtain by the filing the chapter 11 cases—Debtors are capable of challenging in Iowa state court the closure of the Argosy (and seeking a preliminary injunction to the extent necessary). Moreover, the dispute regarding the closure of the Argosy consists solely of state law issues and no bankruptcy issues will be determinative or even factor into the resolution of such dispute. Thus, Iowa state law clearly predominates over bankruptcy issues and it would be easy to sever the state law issues from the core bankruptcy matters, if any, that may need to proceed in this Court. In addition, Iowa state laws regarding the gaming industry are unique to Iowa, and while they are not so complex so as to prevent this Court from resolving the dispute at hand, an Iowa state court clearly would be best equipped to determine the dispute.

Bankruptcy courts are courts of specialized expertise and the Iowa state court would be able to address more efficiently and expeditiously the substance of the unique Iowa gaming laws and the status of Debtors' license and whether the Argosy should be permitted to remain open. The substance of the core proceeding, rather than the form, involves state law as the Chapter 11 cases hinge only on whether Debtors have a license under applicable Iowa law that would permit

the Argosy to remain open. Finally, for the reasons discussed herein, Debtors' machinations demonstrate that the filing of these Chapter 11 cases is an effort to forum shop. Rather than challenge in Iowa state court the non-renewal decision and the requirement that the casino be closed, Debtors are coming to this Court to try and obtain a stay of an action that Debtors know, given the conclusions in Judge Ovrom's prior orders, an Iowa state court would be unlikely to grant.

C. Debtors' Petitions Allege A Two-Party Dispute That Can Be Resolved In The Pending Judicial Review Proceedings.

This case should also be dismissed because the bankruptcy court is not the appropriate venue for Belle to carry out protracted litigation against the IRGC, which is essentially a two party dispute. *See In re Schlangen*, 91 B.R. 834, 837-38 (Bankr. N.D. Ill. 1988) (dismissing case because, in part, the bankruptcy filing was meant to further a two-party dispute). In *Schlangen*, the debtor was litigating against a creditor in state court in connection with multiple foreclosures on her properties. Shortly after the state court entered judgment of foreclosure on four of her properties and the creditor had petitioned the state court for appointment of a receiver, debtor filed her petition in bankruptcy court. The court determined that the debtor was using the bankruptcy case to confer federal jurisdiction on its lawsuit against the creditor and to invoke the automatic stay. Because debtor's "Chapter 11 petition serves as a litigation tactic in essentially a two-party dispute," the court dismissed the debtor's lawsuit. *Id.* at 837-38.

Belle offers no explanation as to why it is not able to seek relief in state court over this two-party dispute. Belle has filed four separate petitions for judicial review against the IRGC in the past two years. Each of these four petitions were filed within thirty days of the agency's challenged action. Nor does Belle offer a reason as to why it cannot seek a stay of the agency's actions in state court as it did before. This is because the only reason Belle is able to offer is one

that has been held as an improper basis for Chapter 11 filings: Although Belle previously filed four petitions for judicial review thirty days following the agency's challenged actions, Belle is now reluctant to enter state court because, in light of Judge Ovrom's Order, it will almost certainly lose. Judge Ovrom presumed that without relief, the IRGC would likely shut Belle's operations down before its petitions for judicial review would reach final resolution. Nonetheless, Judge Ovrom still found that Belle's likelihood of succeeding on the merits was so low that it could not justify a stay even in light of such harm. Although Judge Ovrom's analysis makes it very difficult for Belle to seek a stay in her courtroom or to ultimately win its appeals of the agency's decision on the merits in an Iowa state court, it does not mean that Belle is free to shop its arguments around to another forum. The nature of Belle's claims have not changed—they remain a two-party dispute that is entitled to no more than the traditional remedies available under non-bankruptcy law.

D. The Debtors Have No Reorganization Prospects.

The Debtors have no reorganization prospects, no matter the outcome of the license disputes. For the reasons explained above, Judge Ovrom has already concluded that Debtors do not hold a valid gaming license under Iowa law. Because Debtors are unlikely to be able to produce any evidence that would change Judge Ovrom's prior decisions as to rulings that were largely a matter of statutory interpretation, they likely cannot prevail in their appeals of the IRGC's decisions, regardless of whether a judicial review proceeding is resolved in favor of Belle or not, there will be no reorganization here. Belle reasons that:

> The nature of the plan … will depend upon the outcome of the license dispute. If Belle's license is preserved, the Debtors will be able to propose a plan that provides for the full payment of their creditors. . . . Conversely, if the license ultimately is terminated . . .

> the Debtors will propose a plan that provides for the orderly wind-down of their business and liquidation of their estates.[94]

This artfully states the obvious—*viz*., in the end there will be one of two outcomes. In the highly unlikely event that Belle were successful in its judicial review to obtain a license to operate the Argosy Casino in accordance with Iowa laws, there will be no need for a plan of reorganization as no obligations are being restructured and no discharge of debts will be necessary; in fact, at that point Belle will likely seek to dismiss their bankruptcy cases themselves.

Conversely, in the likely event that Belle will not be able to operate the Argosy Casino in violation of Iowa law, Belle, by its own admission will not be reorganizing, but instead will be winding-down its business and liquidating the estate. Belle's own filings and admissions indicate that the bankruptcy estates are solvent. There is no indication that Belle is imminently threatened by liabilities it cannot pay. *See In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999) (holding that a trial court committed clear error in failing to dismiss a Chapter 11 petition because the debtor was experiencing no present financial difficulty, though the court acknowledged the debtor "may have to file for bankruptcy in the future"); *In re Marsch*, 36 F.3d 825, 829 (9th Cir. 1994) (holding that a Chapter 11 petition was filed in bad faith where the debtor was solvent and could pay its debts); *In re Liberate Tech.*, 314 B.R. 206, 212 (Bankr. N.D. Cal. 2004). Belle acknowledges that it is solvent as a going concern and that its Chapter 11 cases are not about avoiding piecemeal liquidation of its assets.[95] Moreover, Belle's assets far exceed its liabilities. Thus, assuming that the Debtors cannot avoid a shutdown on July 1, there is no indication that the Debtors need to utilize Chapter 11 to shut down their operations and

[94] Belle Br. at 29-30.
[95] *See* Decl. of Paul Huygens, at 5-6 ("The Debtors believe they are solvent on a going concern basis. However, the Debtors . . . face the real threat of the closure of the Argosy Casino, and the resulting loss of valuable jobs, economic relationships, and going concern value.").

wind up their affairs in the ordinary course. Thus, the Debtors merely pay lip service to Chapter 11 when they say that if they do not have a license, they will file a plan of liquidation.

IV. DEBTORS CANNOT USE THIS COURT TO HOLD THEMSELVES EXEMPT FROM, AND OPERATE IN CONTRAVENTION OF, IOWA GAMING LAWS.

As explained above, Iowa law requires gaming operators to be licensed under Chapter 99F. Judge Ovrom has found that Belle has no operator's license and the IRGC has not renewed or otherwise issued Debtors a gaming license. Thus, through its motion for preliminary injunction and application of stays under the Bankruptcy Code, Belle essentially asks this court to sanction its noncompliance with valid Iowa laws. All the while, Debtors do not dispute that they are not currently partnered with a QSO, nor have they submitted an application to renew their license for the 2014-2015 licensing term that started on April 1 of this year. Regardless of Debtors' strong disagreement with the IRGC's rejection of its prior renewal applications, they are unable to argue that they are eligible to hold a gaming license under Iowa Code Chapter 99F, let alone actually licensed to hold one.

Also, as Belle argued before Judge Ovrom, Iowa Code section 99F.7(2)(c) provides that only an entity licensed to conduct gambling at one type of facility (river boat or land-based) in a county may be licensed to operate a different type of casino (land-based or river boat) within the county.[96] Belle specifically argued before Judge Ovrom that section 99F.7 prevented the IRGC from issuing a license to MRHD and SCE to operate a land-based casino in Woodbury County, Iowa, since Belle purportedly had a license to operate a river boat casino. Since MRHD and SCE are licensed to conduct gaming at the land-based Hard Rock Casino, Belle cannot be licensed to operate a river boat casino within Woodbury County.

[96] Ruling Following Remand at 18, Appendix Ex. 1.

Under the Judicial Code, Debtors must operate the Argosy Casino "according to the requirements" of Iowa law. 28 U.S.C. § 959(b). Debtors cannot transgress state law and operate the Argosy Casino "even if the continued operation of the business would be thwarted by applying state laws." *Matter of Quanta Res. Corp.*, 739 F.2d 912, 919 (3d Cir. 1984) *aff'd sub nom Midlantic Nat. Bank. v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 949 (1986) (noting that section 959(b) provides "evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws"); *In re St. Mary Hosp.*, 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) ("We believe that it is inescapable to avoid the conclusion that 18 U.S.C. § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business."). While the purpose of the Chapter 11 is to rehabilitate the debtor, such rehabilitation may not be done "outside the law." *In re Grand Spaulding Dodge, Inc*, 5 B.R. 481 (N.D. Ill. 1980). Further, Debtors cannot pick and choose those laws it wants to follow – "all laws must be followed by the debtor in possession." *St. Mary Hosp.*, 86 B.R. at 398 (enjoining a debtor to prevent it from violating Pennsylvania state law). Regardless of the consequences to Debtors, the United States Supreme Court has held that bankruptcy courts are powerless to authorize noncompliance with Iowa's gaming laws. *Gillis v. State of Cal.*, 293 U.S. 62 (1934) (holding that a receiver appointed in the reorganization of an oil company must comply with local statutes requiring a bond payments and licensing); *Quanta Res.*, 739 F.2d at 919 (noting that the rehabilitation of a debtor does "not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws"). Thus, this is an additional reason why this Court should dismiss Debtors' case. *See In re Kerr*, 908 F.2d 400, 404 (8th Cir. 1990) (upholding dismissal of Chapter 11 petition where debtor violated court order); *In re*

Matter of 3868-70 White Plains Rd., Inc., 28 B.R. 515, 519 (Bankr. S.D.N.Y. 1983) (dismissing a petition where debtor violated the Bankruptcy Code).

V. CONCLUSION

The Debtors do not have a legitimate need for reorganization or liquidation. They have failed to promptly pursue judicial review or seek interim stays pending final review in Iowa. Debtors seek to misuse this Court for a myriad of improper purposes, including to avoid Judge Ovrom's order and take advantage of any relief from this Court that will prolong its unlawful operations. This Court should not countenance such conduct and should dismiss this improper bankruptcy filing. For all the foregoing reasons, Debtors' Chapter 11 petitions, admittedly filed solely to forestall the effect of the IRGC's valid and binding final action with respect to its license, and for the improper purpose of avoiding a prior Iowa State Court ruling, should be dismissed pursuant to 11 U.S.C. § 1112(b).

Dated: May 27, 2014

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