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

In re:	Chapter 11
Iowa Gaming Company, LLC, *et al.*	Case No. 14-13904
Debtors.	(Jointly Administered)

OPPOSITION OF THE DEBTORS TO IRGC, MRHD, AND SCE'S JOINT MOTION TO DISMISS CHAPTER 11 PETITIONS

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Iowa Gaming Company, LLC and Belle of Sioux City, L.P. (collectively, the "Debtors"), by and through their undersigned counsel, respectfully oppose the "IRGC, MRHD, AND SCE'S JOINT MOTION TO DISMISS CHAPTER 11 PETITIONS" (the "Dismissal Motion") filed by the Iowa Racing and Gaming Commission (the "IRGC"), Missouri River Historical Development, Inc. ("MRHD"), and Sioux City Entertainment, Inc. ("SCE"). In support of this Opposition, the Debtors respectfully represent as follows:

I. Introduction.

The Movants—all of whom are hostile parties actively litigating with the Debtors—request that this Court dismiss these chapter 11 cases. Omitting citation to binding precedents of the Third Circuit and this District concerning dismissal of chapter 11 cases, the Movants claim that the Debtors filed these cases in "bad faith" in order to avoid litigation in Iowa, and that seeking federal protection somehow runs afoul of 28 U.S.C. § 959(b). They are wrong.

First, let there be no mistake as to the motivation for filing these cases – these cases were filed to save a business and its employee, customer, and vendor relationships, which are imminently threatened with complete destruction. The Argosy Casino pays millions a year in taxes, has dozens of vendors supplying goods and services, and employs hundreds of individuals, but is on the verge of being shut down. The Debtors' parent company, Penn National, invested tens of millions in the business to make it profitable and a good corporate citizen, with tangible benefits to communities in Iowa and Pennsylvania. A debtor files a petition in good faith when it seeks bankruptcy protection to promote a valid bankruptcy purpose. Seeking to preserve a going concern and save jobs is the paradigm example of a valid bankruptcy purpose. The Movants simply ignore this fact.

Second, the Movants argue that Iowa state court Judge Ovrom has purportedly already ruled that Debtor Belle has no license to operate, and that all the Debtors are seeking from this

Court is to escape her ruling and/or improperly "re-litigate" the merits of her ruling. This assertion entirely without merit.[1] Judge Ovrom's interlocutory decision (the "Hard Rock Stay Order") was a different case in which she reconsidered an order that had enjoined SCE from being licensed to operate its competing casino. Discovery is ongoing in that case, and the underlying merits will be resolved in a trial that is scheduled in September 2014.

While Judge Ovrom has let Hard Rock's development go forward, she did not address the IRGC's decision on April 17, 2014, ordering the closing of the Debtors' Argosy Casino (the "April 17 Ruling"), since that decision did not even exist at that time Judge Ovrom ruled. Further, nothing in the Hard Rock Stay Order addresses the fact that Iowa Code § 17A.18(2) unambiguously and expressly provides for the extension of a license – even one that the IRGC now claims to be "expired" – through a final determination by the IRGC, and then further through the opportunity to seek judicial review, or such longer time as the IRGC orders. Judge Ovrom's ruling – which the Debtors ***do not*** seek to re-litigate here – is irrelevant.

Moreover, this bankruptcy has no effect on any other pending litigation in Iowa,[2] save to stay the closing of the Argosy Casino pending completion of judicial review of the April 17 Ruling. It does not impact at all the four existing petitions for review, which all concern the antics of the IRGC, MRHD, and SCE to give SCE a license to a land-based casino. Moreover, the Debtors are not asking this Court to determine any of the issues in the petition for review of the IRGC's April 17 Ruling, which the Debtors filed on June 5, 2014; those issues will also be decided by the Iowa courts. This bankruptcy does not stay, interfere with, or prevent SCE from

[1] The Movants even assert on page 1 of their Dismissal Motion that the Debtors misled this Court by making no reference to Judge Ovrom's ruling. The Movants appear to forget that the Debtors *attached* Judge Ovrom's decision to the First Day Declaration, included it in the chronology of events attached as Exhibit 1 to the First Day Declaration, and referenced it in paragraph 57 of the First Day Declaration.

[2] For avoidance of doubt, the Debtors do not intend to remove any pending matters in Iowa to this Court.

continuing to build its competing casino or honoring contracts, which it has been doing since the Petition Date, and has done for years in the face of substantial litigation risk that SCE has knowingly undertaken.

Third, the Movants argue that the Debtors acted in bad faith because they should have first sought a stay of the IRGC's April 17 Ruling from courts in Iowa.[3] And though this Court did not appear to be asking in the context of the Debtors' good faith, this Court did ask at the May 16 hearing: "And you're going to have to explain to me that . . . why you think the Iowa Court's injunction jurisprudence is insufficient to allow you to do what you're doing here." May 16, 2014 Tr. at 64:17-20.

Regardless of the likelihood whether an Iowa state court judge would stay the July 1, 2014, closure date pending resolution of Belle's petition for review of the April 17 Ruling, the Debtors reasonably believe that the automatic stay is a more certain source of relief and comfort to the Debtors' employees, vendors, and customers that the business would not be shuttered, and that the employees would not soon be faced with searching for new employment. This is critical to protect the business from falling apart even before the July 1 deadline. The Bankruptcy Code provides protection automatically and immediately; that is a policy Congress believes is critical to preserve a debtor's business and the individuals and entities who rely on such businesses. By contrast, it is entirely speculative whether the process to obtain injunctive relief in Iowa would have proceeded quickly enough to give employees, vendors, and customers comfort and permit the business to sustain operations. Scheduling, much less considering whether to grant,

[3] The Movants simultaneously state that the Iowa courts would be highly unlikely to grant any such stay. Dismissal Motion at 30-31. The Movants' vigorous opposition to a stay in Iowa, even if overruled, would have created additional uncertainty and delay, further harming the Debtors and their creditors. In any event, the Movants make the untenable argument that these cases were filed in bad faith and should be dismissed because the Debtors failed to first pursue relief which the Movants would have vigorously opposed and which the Movants contend that the Debtors would not have obtained.

injunctive relief requests is in the discretion of the Iowa courts. And, under the circumstances and based on past experience, the Debtors believed that it was likely that the IRGC would have actively opposed any request to expedite consideration of a request for a stay. Moreover, there is little doubt that the IRGC would have opposed the imposition of a stay by an Iowa court prior to July 1, 2014. Rather than schedule a special hearing on the Debtors' motion for reconsideration so that there could be a speedy and impartial process, the IRGC ignored the motion for the statutory 20-day period in order to delay and "pocket veto" the motion. The Debtors filed these cases two days later.

To be clear, the Debtors firmly believe that they will prevail on their petition for review of the April 17 Ruling.[4] Like any good faith debtor seeking to preserve an operating business and the hundreds of jobs that go with it, the Debtors simply need breathing space to maintain the status quo while they seek to vindicate their rights.

And as the Debtors previously stated, and has not been contradicted by the Movants, once the business is shut down, it would not be able to recover, even if months down the road the Iowa courts agreed with the Debtors on either the illegality of granting a license to SCE or the illegality of the denial of a license to Debtor Belle. Debtors routinely file bankruptcy in the face of adverse litigation, as recognized by cases within this District, even though in theory they could first seek to obtain injunctive relief to stop whatever harms they face. From the typical debtors facing foreclosure proceedings to Texaco Inc. filing a bankruptcy petition to avoid posting a bond while it pursued an appeal of an adverse multi-billion dollar judgment, the mere fact that a debtor might be able to obtain injunctive relief from a non-bankruptcy court – whether likely or not – is not a basis to dismiss a chapter 11 case on bad faith grounds. It would stretch

[4] The Debtors' reconsideration motion (attached as Exhibit 3 to the First Day Declaration) spelled out many of the errors of the IRGC's April 17 Ruling. As they offered at the May 16 hearing, to the extent that this Court has any questions regarding the chronology or merits of the litigation matters in Iowa, counsel is available to address them.

the boundaries of bad faith beyond any known limits to say that the Debtors, facing the imminent destruction of their operating business, were not entitled to opt for the most certain and timely available relief from the closing deadline.

Last, the Movants argue that unless these cases are dismissed, the Debtors will operate in violation of Iowa gaming laws. Wrong. Far from seeking to operate an unlicensed casino, Belle had as of the Petition Date, and still has, a license to operate the Argosy Casino as a matter of law, pursuant to section 17A.18 of the Iowa Code. It is this license by operation of law that has permitted the Argosy Casino to remain open for many months, long after the IRGC now contends the Debtor Belle's license expired, and explains why the IRGC continues to regulate the Argosy Casino on a daily basis and list the Argosy Casino as a licensed casino, including *after* the Petition Date. It is this license by operation of law that will remain in effect if Belle is permitted to continue to operate after July 1, 2014. And, of course, in continuing under its license by operation of law after July 1, 2014, Belle will continue to comply with all applicable gaming regulations governing public health, safety, and welfare.[5]

At bottom, these chapter 11 cases are about saving an operating, viable business employing hundreds of individuals faced with a total loss for reasons that have nothing to do with any malfeasance or mismanagement. This is what bankruptcy is supposed to promote. This is not a bankruptcy filing to facilitate a quick section 363(f) sale, but the rare case where bankruptcy actually can save an operating business with no loss to anyone (other than perhaps a competitor who is hoping the Debtors go out of business), but absent bankruptcy many individuals and businesses will suffer. That is the definition of good faith.

[5] When the Movants claim that these cases should be dismissed because an Iowa court has concluded that the Debtors have no license to operate, the Movants are not being truthful. As the Debtors will demonstrate at the June 9-10 trial, both the IRGC and MRHD have repeatedly acknowledged that the Debtors have a license to operate as a matter of law, even after the Hard Rock Stay Order was issued.

II. Factual Background

Mindful of this Court's instructions to keep oppositions concise, the Debtors do not believe it is necessary to provide a lengthy history of the Debtors, their operations, the litigation in Iowa, or the events leading up to the commencement of these chapter 11 cases. A detailed account of the factual background leading to the commencement of the Chapter 11 Cases is set forth in the "Declaration Of Paul Huygens In Support Of First Day Motions" (the "First Day Declaration") filed on the Petition Date and incorporated by reference.

The Movants, however, have chosen a different path. They spend a dozen pages discussing aspects of litigation in Iowa. *See* Dismissal Motion at 5-17. Much of this "discussion" is irrelevant to the issues this Court needs to decide in connection with the Dismissal Motion. But much of it is also glaringly wrong, either because the Movants omit material facts or simply misrepresent facts.[6] To the extent necessary to address the Movants' errors as part of the Dismissal Motion, the Debtors do so below in the argument section of this Opposition and in the Opposition to the Movants' Motion To Dismiss Debtors' Complaint for Injunctive Relief.

[6] One misrepresentation undermines a key argument the Movants make. On page 2 of the Dismissal Motion, the Movants assert that Penn National in a press release stated that the "goal of the [Chapter 11] filing is to keep Belle operational while it relitigates the non-renewal decision." Dismissal Motion at 2. The Movants also cite May 16, 2014 Transcript at 10:20-11:2 for the same proposition. The clear import is to suggest to this Court that the Debtors want to "relitigate" Judge Ovrom's decision in this Court.

But that is not what the press release or Debtors' counsel said. The press release does not use the word "re-litigate," but instead says "litigate" matters in Iowa while the bankruptcy is pending. *See* Dismissal Motion App. Ex. 33. Debtors' counsel said: "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." May 16, 2014 Tr. at 10:20-11:2 (emphasis added). Counsel thus made clear there was no intent to "re-litigate" in this Court, but to "litigate" the April 17 Ruling in the Iowa state courts.

III. Argument.

Bankruptcy Code section 1112(b) authorizes the dismissal a of chapter 11 case for cause, which includes commencing the case in bad faith. *See Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 161 n.9 (3d Cir. 1999). The issue for this Court is whether the Debtors acted in good faith when they commenced these cases. The applicable law and facts make clear the answer is yes.

A. The Third Circuit's Good Faith Test.

The Third Circuit has made clear that in determining whether to dismiss a bankruptcy case for lack of good faith, this Court is to consider the totality of the circumstances. *See NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004) ("Whether the good faith requirement has been satisfied is a fact intensive inquiry in which the court must examine the totality of the circumstances and determine where a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.") (internal quotation marks omitted). In developing this "totality of the circumstances" test, the Third Circuit has identified two essential principles – (1) whether the petition serves a valid bankruptcy purpose and (2) whether the petition was filed merely to obtain a tactical litigation advantage. *Id.* at 120.

Over the last fifteen years, the Third Circuit and courts within the circuit have articulated several guideposts and observations when engaging in the good faith analysis.

One, a valid bankruptcy purpose is seeking to preserve a going concern and save jobs. *See Integrated Telecom,* 384 F.3d at 119-20 (noting that a valid bankruptcy purpose includes "preserving a going concern").

Two, whether a debtor is solvent or insolvent as of the petition date is a factor but does not itself determine whether a petition was filed in good faith, because the Bankruptcy Code

expressly contemplates the possibility that a debtor is solvent. *See SGL Carbon*, 200 F.3d at 163; *In re RBGSC Inv. Corp.*, 253 B.R. 352, 366 (E.D. Pa. 2000).

Three, cases are typically dismissed when specific bankruptcy provisions are being tactically used to inappropriately harm parties in interest, but filing bankruptcy to benefit from the automatic stay does not itself establish bad faith. *See SGL Carbon*, 200 F.3d at 162 & n.11 (financially sound debtor improperly filed chapter 11 to impair only antitrust claimants); *Integrated Telecom*, 384 F.3d at 120 (affirmed dismissal of a chapter 11 case that had been filed solely to benefit equity of a non-operating debtor by using Bankruptcy Code section 502(b)(6) to limit a landlord's claim when the debtor was capable of paying all claims in full even without the section 502(b)(6) "cap"); *In re 15375 Mem'l Corp.*, 589 F.3d 605 (3d Cir. 2009) (affirmed the dismissals of chapter 11 cases of debtors that had no employees or operations where the bankruptcy cases were filed solely to avoid liability in a state court case brought against the debtors and the debtors' affiliates).

Four, it is unheard of for a bankruptcy court to dismiss as a bad faith filing a case commenced by an operating debtor which employs hundreds of people and which is facing an imminent threat to its very existence. When a debtor has an operating business with a substantial number of employees, courts will dismiss the petition for bad faith only if the debtor's business was not threatened at all and the case was commenced solely to frustrate one set of litigants. *SGL Carbon*, 200 F.3d at 157.

B. Decisions From This District

Several decisions from this District on good faith filings provide persuasive guidance. In *RBGSC*, a case the Movants neglected to cite, District Judge Dalzell affirmed a bankruptcy court's order denying a motion to dismiss, even though the debtor's equity holder allegedly was seeking to have the bankruptcy filing automatically stay a prepetition state court injunction. *See*

RBGSC, 253 B.R. at 359. Judge Dalzell held that the mere fact that by filing a bankruptcy petition a debtor obtained an advantage in state court litigation was not a basis to disturb a finding of good faith, if the purpose is to attempt to avoid loss of a business asset (in this case, a leasehold interest). *Id.* at 367. As discussed below, the facts in *RBGSC* are analogous to the facts here – filing the bankruptcy here prevents the loss of a business and possible loss of the Debtors' leasehold interests with the City of Sioux City, which is equivalent to the *RBGSC's* filing to stop the loss of a leasehold interest.

In *Lackawaxen Telecom, Inc. v. South Canaan Cellular Investment, LLC (In re South Canaan Cellular Investment, LLC)*, 420 B.R. 625 (E.D. Pa. 2009), another case missed by the Movants, Judge Fox of this Court denied a creditor's motion to dismiss a case, and District Judge Joyner affirmed. The debtors were holding companies formed to own partnership interests in a company providing wireless communications services. Neither of the debtors had employees or operating income; their sole source of income was potential partnership distributions. The debtors had secured debt and, prior to the bankruptcy, defaulted. Though there were years of efforts to resolve the default, on January 23, 2009, the secured creditor served a notice to exercise remedies and filed an action in Colorado state court. Immediately prior to the expiration of a notice period relating to the exercise of remedies, the debtors filed chapter 11 petitions. The "filings were apparently intended to and did invoke the automatic stay of 11 U.S.C. § 362 thereby preventing the loss of the debtor's voting rights in [the joint venture] and enjoining the fixing of LTI's secured claim by the Colorado state court." *Id.* at 628. Shortly thereafter, the secured creditor moved to dismiss on bad faith grounds.

After conducting a day-long hearing, Judge Fox denied the motion, which denial the District Court affirmed. While the District Court noted that "several of the factors evincing

possible bad faith are present insofar as the debtors have no employees, no inventory or vendor or supplier contracts, no other real ongoing business operations, and virtually no assets aside from their partnership interests," the court agreed with Judge Fox that "the evidence presented here renders colorable the debtors' claim that they were motivated to file to preserve SCCCC as an ongoing business concern **and to . . . preserve its equity** and satisfy its and its partners' creditors." *Id.* at 632 (emphasis supplied).

The court was untroubled by the fact that the cases were commenced to take advantage of the automatic stay to stop pending state court litigation commenced by the debtors' only meaningful creditor. *Id. South Canaan* involved a solvent debtor, *see id.* at 628, 632, but that did not establish bad faith. Further, though not expressly referenced in the opinion, there is little doubt that the debtor could have sought to obtain injunctive relief from the Colorado state court instead of relying on the automatic stay to "prevent[] the loss of the debtor's voting rights and enjoin[] the fixing of LTI's secured claim by the Colorado state court." *Id.* at 628. But the court did not find bad faith simply because the debtor did not first seek relief in the nonbankruptcy court.

By contrast, in *In re SB Properties, Inc.*, 185 B.R. 198 (E.D. Pa. 1995), the chapter 11 case was filed by a newly formed debtor that had no employees, no ongoing business, and no significant creditors other than a mortgagee, and with the intent to stymie the mortgagee from forcing a sale of real property in what amounted to a family dispute. *Id.* at 205-06. None of the facts relied on by the court in *SB Properties* are present here.

In re DCNC N.C. I, LLC, 407 B.R. 651 (Bankr. E.D. Pa. 2009), is also distinguishable. The opinion made clear that there was no possible way for the debtors to confirm a plan without consent from the secured creditor (who was not going to provide consent), and there were no

prospects of the debtors refinancing the secured creditor's claims. Given the secured creditor's desire to have the case dismissed, the court granted it. *See* 407 B.R. at 670. Again, no such facts are present here.

C. The Debtors Filed These Cases To Preserve A Going Concern, Which Serves A Valid Bankruptcy Purpose.

There can be no legitimate argument that these cases were filed to preserve the operation of the Argosy Casino, a viable, profitable going concern that employs hundreds of individuals, annually pays millions in taxes, provides entertainment to thousands of customers, and buys goods and services from numerous vendors from around the country. Under binding Third Circuit authority, filing a bankruptcy petition to preserve a going concern serves a valid bankruptcy purpose. *See Integrated Telecom*, 384 F.3d at 119-20 (stating that a basic bankruptcy purpose is to "preserve going concerns"); *see also South Canaan*, 420 B.R. at 630.

Further, although not addressed by any of the Movants, the Debtors benefit from the bankruptcy filing by avoiding the potential loss of the lease with the City of Sioux City (the "City Lease"). The City Lease provides that if the Argosy Casino ceases operation the City Lease automatically terminates. By commencing these cases now, even if the Argosy Casino had to shut down, the Bankruptcy Code's *ipso facto* provisions in Bankruptcy Code sections 365 and 541 would ensure that the Debtors would not immediately forfeit any rights.

Finally, it bears repeating that these cases could have been avoided had the IRGC honored what it had twice represented to the Debtors and represented to the public – that the Argosy Casino could stay open through all appeals. In fact, at the August 15, 2013, IRGC Commission meeting (attended by representatives of both the Debtors and SCE), the IRGC staff recommended denying renewal of Debtor Belle's license to operate, subject to its right to continue to operate through "all appeals." Based on the IRGC's staff recommendation, the IRGC

passed a motion to deny renewal of the license. That representation was reaffirmed in a deposition under oath only a few months ago.

The IRGC now repudiates its representation while accusing the Debtors of bad faith by seeking the same rights to operate through judicial review that the IRGC repeatedly promised. It is that IRGC that is acting in bad faith.

D. The Debtors Are Not Seeking To Re-Litigate Any Matters In This Court That Are Before The Iowa Courts.

The fact that there is a valid bankruptcy purpose served by these chapter 11 cases, alone, defeats the Dismissal Motion. But the Movants wrongly claim that these cases were filed to circumvent and re-litigate matters pending in Iowa, and in that somehow the debtors seek a tactical litigation advantage which requires dismissal. That is false.

These chapter 11 cases are not intended to, and will not have, any impact on the pending Iowa litigation. They will not impact SCE in its efforts to open the land-based casino or the state court litigation between SCE, MRHD, Debtor Belle, and Penn National.[7] They will not stop the four pending judicial review petitions in Iowa state court (which all relate to the award of a license to SCE and not to closing of the Argosy Casino), which are slated to go to trial in September 2014. There is no tactical advantage in the Iowa litigation that the Debtors have gained by filing their bankruptcy petitions. Rather, all they have gained is the right to remain open while pursuing an impartial review by the Iowa state courts of the IRGC's April 17 Ruling .

The facts here are far more favorable than the facts in *South Canaan*, a case where the debtor was found to have acted in good faith. Unlike the debtor in *South Canaan*, the Debtors do

[7] SCE's efforts to open its Hard Rock Casino, including all of its contractual relationships, are likewise not conditioned upon the Argosy Casino being shut down. In fact, after the Petition Date, SCE announced on its Facebook page that it intended to open by August 1, 2014, suggesting the bankruptcy filing has no effect on SCE's efforts. Nor does MRHD or the City of Sioux City lose anything with the Argosy casino being opened even if the Hard Rock Casino opens as planned, since the Debtors will continue to honor their existing contractual relationships with both.

have employees, vendors, suppliers, several real property interests, and, most obviously, an ongoing business. If the debtor's petition in *South Canaan* was filed in good faith because it was "colorable" that the debtors were seeking to preserve an ongoing business , then *a fortiori* so too must the Debtors' cases have been filed in good faith.

By contrast, in *Steinman v. Spencer (In re Argus Group 1700, Inc.)*, 206 B.R. 737 (Bankr. E.D. Pa. 1996), a debtor, with no need to save a business, was fairing badly in state court. It then filed a chapter 11 case and immediately removed the state court litigation to the bankruptcy court. The bankruptcy court held that the immediate removal to the bankruptcy court evidenced bad faith. *Id.* at 753-54. Here, the Debtors have not removed, and have no intention to remove, any pending proceedings in Iowa. Moreover, Belle has filed its petition for review of the April 17 Ruling, which this Court indicated that the Debtors should do "promptly," and the Debtors fully intend to diligently litigate that matter in the Iowa state courts.

E. The Debtors' Reasonable Belief That The Automatic Stay Would Provide Certainty Justifies Not Taking The Speculative Risk Of Seeking Injunctive Relief From An Iowa State Court.

The Movants argue that these cases were commenced in bad faith because the Debtors could have sought from an Iowa court a stay of the IRGC's April 17 pending appeal and chose not to do so. There are at least three fatal flaws in that argument.

One, the Debtors needed immediate and certain relief to avoid the likely total loss of their going concern that would be caused by the July 1, 2014 closing of the Argosy Casino. There was no assurance that any Iowa court would have considered, much less granted, a stay pending appeal prior to July 1. For example, Debtor Belle filed on September 16, 2013, a motion to stay the granting of a license to SCE pending the determination of one of its petitions for review, but the Iowa state court did not hold a hearing until October 10, 2013, and did not rule (in Debtor Belle's favor) until December 10, 2013. Then, when SCE intervened and the Iowa Supreme

Court granted a limited remand (with directions to rule by February 15, 2014), the new Iowa judge (Judge Ovrom) did not hold a hearing until January 30, 2014, and ruled on February 14, 2014. Thus, the entire process of seeking a stay in the Iowa courts took five months. With the July 1, 2014, shut-down date looming, the Debtors simply did not have the luxury of seeking a preliminary injunction in Iowa and hoping that it would be ruled on in time to prevent complete destruction of Belle's business.

And, as stated above, once the Argosy Casino closes, its going concern value would be destroyed, even if the Debtors ultimately prevail months or years from now in the Iowa litigation. Moreover, the Debtors reasonably anticipated an accelerated loss of employees but for a bankruptcy filing. Already the cloud over continued operations of the casino by the IRGC's actions has resulted in the loss of key employees. Thus, even if the Debtors had sought a stay pending appeal – the timing of which is entirely outside the control of the Debtors - at some point enough individuals would have left the business that it could not feasibly operate.

Two, unlike the judicial review action concerning the April 17 Ruling, which only involves the IRGC and Debtor Belle, a chapter 11 case is a collective proceeding that automatically grants standing to a wide array of parties in interest, with the goal of having a single forum available to protect the rights of the Debtors and its creditors and stakeholders. In these chapter 11 cases, the Debtors, the IRGC, MRHD, SCE, the Debtors' employees and their union, the Debtors' vendors, and the City of Sioux City all have a voice. Indeed, many have already chosen to participate. No proceeding in Iowa can duplicate this.

Three, it is common for debtors facing substantial litigation risk to seek, in good faith, bankruptcy protection rather than take on the speculative risk of hoping to obtain injunctive relief

in nonbankruptcy court. *See In re Hyatt*, 479 B.R. 880, 894-95 (Bankr. D.N.M. 2012) (citing cases).

The Movants repeatedly cite to *In re Wally Findlay Galleries (New York), Inc.*, 36 B.R. 849 (Bankr. S.D.N.Y. 1984), where the court dismissed a petition so as to not permit the debtor to use the bankruptcy court to "act as a substitute for a supersedeas bond of state court proceedings." *Id.* at 851. But as noted in *Hyatt*, there is a split in authority on that issue. *See Hyatt*, 479 B.R. at 893-95. Further, many courts that have dismissed cases filed to avoid having to post a supersedeas bond did so where there was unrelated evidence of abuse of the bankruptcy process. *See id.* at 893-94.[8] And, courts have often refused to dismiss bankruptcy petitions the effect of which would relieve the debtor of the need to post a supersedeas bond where the totality of circumstances demonstrated there were valid reasons for filing bankruptcy. *Id.* at 894-95; *see also Marshall v. Marshall (In re Marshall)*, 403 B.R. 668, 690 (C.D. Cal. 2009). Applying the "totality of circumstances" test articulated by the Third Circuit, and following the conclusions of *RBGSC* and *South Canaan*, this Court should deny the Dismissal Motion.

F. The Movants' Remaining Arguments Are Devoid Of Merit.

The remaining arguments are likewise legally and factually deficient. The Movants argue: (1) the Iowa courts have already determined that the Debtors do not have a license and that this case is simply an attempt to re-litigate that issue; (2) this Court should abstain in favor of Iowa state courts; (3) these cases are merely two-party disputes between the Debtors and the IRGC; (4) the Debtors have no hope of reorganization; and (5) the Debtors cannot use this Court to be exempt from, and operate in contravention of, Iowa gaming laws.

[8] The Movants cite *Pac. Rim Invs., LLP v. Oriam, LLC (In re Pac. Rim Invs., LLP)*, 243 B.R. 768 (D. Colo. 2000), a case where the debtor filed chapter 11 to avoid going to trial and to avoid paying state court sanctions. *Id.* at 770.

1. The Debtors Have Not Lost Their License By Operation of Law And There Is No Basis For This Court To Abstain.

The Movants claim the Debtors have acted in bad faith by seeking "a new forum to escape Judge Ovrom's adverse and fatal finding that they did not possess a valid license under Iowa law." Dismissal Motion at 20. The Movants spend pages arguing the "law of the case" and *Rooker-Feldman* doctrines. Dismissal Motion at 21-24. They further argue that this Court should abstain from hearing any issues of Iowa law. *See id.* at 28-30.

As already demonstrated, the assertion that the Hard Rock Stay Order determines that the Debtor Belle does not have a valid license is demonstrably false. Similarly, because no substantive issue relevant to the pending Iowa litigation is impacted by these chapter 11 cases, there is no risk of running afoul of the "law of the case" or *Rooker-Feldman* doctrines, and nothing for this Court to abstain from.[9]

2. These Chapter 11 Cases Involve The Interests And Participation Of Many Parties.

The Movants argue that these cases are essentially a two-party dispute between the Debtors and the IRGC. That is demonstrably incorrect. These cases at least involve the Debtors, Penn National, the Debtors employees (including its union), IRGC, MRHD, SCE, and the City of Sioux City, and most of these parties are already participating. The Movants cite *In re Schlangen*, 91 B.R. 834 (Bankr. N.D. Ill. 1988), but that case is distinguishable. There, it was not the bankruptcy filing itself, but the commencement of an adversary proceeding, that triggered the bad faith finding that the case was in essence a two-party dispute. *Id.* at 837-38 (second chapter 11 filed after secured creditor filed foreclosure actions and obtained appointment of a

[9] It is entirely possible that this Court may have to consider state law as matters arise, such as assumption or rejection of real property leases and executory contracts, but that is by virtue of federal law, and, in any event, no such issues are implicated in the Dismissal Motion. Further, though not issues for this Court, for avoidance of doubt the Debtors dispute the characterization of the interlocutory Hard Rock Stay Order having the preclusive effect the Movants apparently believe it does.

receiver; debtor's adversary proceeding against secured creditor indicated purpose was to litigate in federal bankruptcy court state law matters involving two-party dispute).

By contrast, in *In re Balboa Street Beach Club, Inc.*, 319 B.R. 736 (Bankr. S.D. Fla. 2005), the court determined that there was more than a two-party dispute, even though the debtor only owned one parcel of real property and the debtor was motivated to file the case to reject a burdensome contract for sale of the property. The facts here are far stronger. Indeed, the fact that the Movants requested intervention in the Adversary Proceeding (which only named the IRGC as a defendant) is an implicit admission that the Movants believe that the interests of MRHD and SCE are sufficiently different from the interests of IRGC that the IRGC cannot adequately protect them. *See* Fed. R. Bankr. Pro. 7042; Fed. R. Civ. Pro. 42(a)(2).

But even when there is a clear two-party dispute, courts do not necessarily dismiss petitions. The mere fact that a bankruptcy filing arises out of a two-party dispute does not itself mean a case was commenced in bad faith, *see In re Walden Ridge Dev., LLC*, 292 B.R. 58, 62 (Bankr. D.N.J. 2003), and courts will not dismiss cases simply because they involve two-party disputes. *See In re Star Trust*, 237 B.R. 827, 833-34 (Bankr. M.D. Fla. 2005). Rather, that is just one factor among many considered under the Third Circuit's "totality of circumstances" test.

3. **The Debtors Clearly Have Reorganization Prospects.**

The Movants next argue that the Debtors have no reorganization prospects or other need for chapter 11 either because the Debtors, if successful in Iowa, will have no need for a plan of reorganization (and will likely seek to dismiss the cases), or if unsuccessful can simply liquidate assets outside of bankruptcy. Dismissal Motion at 31-32. [10]

[10] At bottom, this argument by Movants is really a back-door way of saying that these cases should be dismissed because the Debtors are solvent. For reasons discussed above, that position is without any support in the law.

The Movants are wrong that whatever the outcome in Iowa, no reorganization or other chapter 11 relief would be necessary. If the Debtors prevail on their petition for review (which may take a while to finally resolve, for reasons entirely outside the control of the Debtors), the Debtors anticipate proposing a plan that treats all allowed claims as unimpaired and would ensure payment in full. Along the way the Debtors would have to resolve assumption/rejection of certain real estate contracts and would anticipate assuming their collective bargaining agreement with their union. But if the Debtors are forced to shut down the Argosy Casino, they anticipate proceeding with a plan of liquidation, which no doubt is a permitted exit path in chapter 11. A plan of liquidation likely would require rejection or assumption/assignment of leases, rejection of the collective bargaining agreement, rejection of the management agreement with Penn National, and disposition under this Court's supervision of the Argosy Casino boat and furniture, fixtures, and equipment, in order to generate cash to pay allowed claims and interests. The anticipated plan may have to provide for the resolution of certain unliquidated and contingent claims (but with the goal of paying allowed claims in full), and the plan likely would provide for a resolution of the receivable the Debtors' books and records record as being owed by Penn National.

The Movants cite *In re Liberate Techs.*, 314 B.R. 206 (Bankr. N.D. Cal. 2004), but the case is inapposite. In *Liberate*, a solvent debtor filed a chapter 11 petition to use the Bankruptcy Code to disadvantage targeted creditors in two ways; the debtor sought to (i) reject a real property lease and take advantage of Bankruptcy Code section 502(b)(6)'s cap (reducing a claim from $45 million to $8 million), and (ii) discharge litigation claims, leaving such claimants only with a reserve fund. *Id.* at 209. Citing a Ninth Circuit test that a solvent debtor's petition is filed in good faith only if the purpose is to avoid "piecemeal liquidation that destroys the going

concern value of an enterprise," the court concluded there was no present need for bankruptcy protection even in the facing of pending litigation. *Id.* at 212-14. Of course, in these cases bankruptcy relief is necessary to avoid the destruction of the Debtors' going concern value. *Liberate* actually supports the Debtors' position.

4. **The Debtors Have No Intention Of Operating In Contravention Of Iowa Gaming Regulations And Continue To Be Regulated On A Daily Basis.**

Relegated to the end of the Dismissal Motion is the argument that, by virtue of Judge Ovrom's ruling, any continued operation of the Argosy Casino necessarily violates 28 U.S.C. § 959(b). *See* Dismissal Motion at 33. Because Judge Ovrom's ruling in no way impacts Debtor Belle's license by operation of law, the Movants' section 959(b) argument is meritless. Moreover, the Movants fail to cite any cases saying that section 959(b) is an exception to the automatic stay or that failure to comply with section 959(b) is a basis for dismissal, and several courts have held to the contrary. *See State St. Bank & Trust Co. v. Park (In re Si Yeon Park, Ltd.)*, 198 B.R. 956, 965 (Bankr. C.D. Cal. 1996) ("§ 959 is not an additional exception to the automatic stay of § 362."); *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 592 (9th Cir. 1993).[11]

In any event, the Debtors have no intention of operating in contravention of Iowa's gaming regulations. They intend to operate precisely as they have operated since August 2012, when the IRGC determined that the casino was licensed under section 17A.18(2)'s "operation of

[11] Two of the cases the Movants cite do not even involve 28 U.S.C. § 959(b), but instead are cases which were dismissed because the debtors violated the bankruptcy court's orders and rules. *See In re Kerr*, 908 F.2d 400, 404 (8th Cir. 1990); *In re 3868-70 White Plains Rd., Inc.*, 28 B.R. 515, 518-19 (Bankr. S.D.N.Y. 1983). In *In re St. Mary's Hosp.*, 86 B.R. 393 (Bankr. E.D. Pa. 1988), in an emergency circumstance, the bankruptcy court granted an injunction preventing the debtor from shutting down a hospital as part of an "operational plan" where doing so would arguably have violated a City ordinance requiring the maintenance of an emergency room. *Id.* at 400.

law" provision. The Debtors will continue to comply with any day-to-day gaming regulations and have been doing so since the Petition Date.

IV. Conclusion

The Debtors acted in good faith when they commenced these chapter 11 cases in order to save an operating, viable business that employs hundreds of individuals. This is indeed the rare case where bankruptcy can save an operating business with no loss to anyone but, absent bankruptcy, many individuals and businesses will suffer. That is the definition of good faith. This Court should deny the Dismissal Motion.

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