UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re:	Chapter 11
Quartz Hill Mining, LLC, Superior Gold, LLC,	Case No. 14-15419-AJC Case No. 14-15424-AJC (Jointly Administered)
Debtors /	

MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER DISMISSING CHAPTER 11 CASE WITH PREJUDICE (ECF #108) OR, IN THE ALTERNATIVE, FOR A STAY PENDING APPEAL
(EXPEDITED HEARING REQUESTED)

The Debtors-in-Possession, by and through the undersigned counsel, request that this Court [1] enter an Order transferring these cases to the Bankruptcy Court for the District of Colorado; and [2] amend the Order Dismissing Chapter 11 Case with Prejudice ("Dismissal Order") [ECF #108 entered August 4, 2014] to comport with the evidence of record and resolve the unanswered questions presented; or, in the alternative [3] enter an Order Granting the Debtors-in-Possession a stay pending appeal of the Dismissal Order and state as follows:

FACTUAL BACKGROUND

1. On March 7, 2014, the Debtors filed Voluntary Petitions under Chapter 11 in this Division.

2. The Debtors are the owners of various parcels of real property which contain over 150 mining claims[1]. The parcels and claims are located in Gilpin County, Colorado and are known cumulatively as the "Glory Hole Mine" ("Glory Hole").

[1] *See,* legal description attached as Exhibit "A" to ECF #84 in the Merendon Bankruptcy case.

3. The Debtors' managing members are residents of the State of Illinois.

4. As set forth in Motion to Dismiss filed by The Estate of William B. Kemper and Marjorie Robbins Daggett ("Kemper/Daggett"), Kemper/Daggett has been involved in litigation since 1992 in state District Court, County of Gilpin, Colorado (the "Colorado State Court"), styled *The Estate of William B. Kemper and Marjorie Robbins Daggett v. The Estate of Harold Caldwell, as administered by Personal Representative and Attorney-in-Fact Dawn Fedrigon (substituted for Harold Caldwell, a/k/a Harold D. Caldwell, a/k/a Harold D. Cauldwell, individually and as Trustee for Kenneth J. Caldwell and/or Gregory D. Caldwell and/or Chain O'Mines, and as Trustee For Caldwell Trust of Texas); Caldwell Trust of Texas, an alleged trust, et. al*. (the "Colorado State Court Case").

The Merendon Bankruptcy Case

5. On February 4, 2009, Petitioning Creditors Eileen McCabe, Jane L. Otto, and Diane Kaplan-Berk filed a Chapter 7 Involuntary Petition in the Southern District of Florida against the Debtor, Merendon Mining (Nevada), Inc., a Nevada corporation ("Merendon"), whose principal place of business was in Miami-Dade County, and on June 9, 2009, the Court entered an Order for Relief [ECF #29].

6. On June 10, 2009, Marcia Dunn was appointed as the Chapter 7 Trustee ("Trustee").

7. On December 15, 2009, the Trustee commenced the First Adversary proceeding [ECF #65 in the main case] requesting this Court, in relevant part, to, (i) pierce the corporate veil of certain non-debtor/alter ego entities pursuant to 11 U.S.C. §544(b) and applicable state common law, and (ii) declare, pursuant to applicable state and federal

law, that the assets of such entities, including, title to Glory Hole Mine, Gilpin County, Colorado, are assets of the Debtor Merendon.

8. On January 27, 2010, the Court entered an Order that substantively consolidated the "Alter Ego Defendants" and "Non-Debtor Entities" (as those terms were defined in the First Adversary complaint, the Motion and the SubCon Order), and certain clearly delineated assets, with the Debtor, *nunc pro tunc* to the Debtor's petition date of February 4, 2009 ("SubCon Order") [ECF #84 in the main case; ECF #20 in the First Adversary].

9. Relevant to the issues presently before the Court, the SubCon Order brought in to the Debtor's estate, *nunc pro tunc* to the Debtor's petition date of February 4, 2009, the following property:

a. Title to [the] Glory Hole Mine, Gilpin County, Colorado;

b. Title to the mineral, gas, and oil rights associated with the Glory Hole;

c. Title to the equipment and inventory associated with the Glory Hole;

d. Title to the gold, and unfinished gold product, associated with the Glory Hole.

(collectively, the "Glory Hole") *See* ¶¶ 106(e), 106(g) through 106(i) [page 30], and 122(A) [page 33], SubCon Order.

10. Across the United States, in Gilpin County, Colorado, a lawsuit brought by Kemper/Daggett was pending against, inter alia, the Estate of Harold Caldwell. As part of that lawsuit, Kemper/Daggett brought supplemental proceedings against, *inter alia*, Sentinel and Merendon. Neither Sentinel nor Merendon filed responsive papers and on October 23, 2008, the Colorado court entered defaults against both Sentinel and

Merendon. On September 28, 2009, an Order was entered by Judge Frederic Rodgers in the First Judicial District, Gilpin County District Court, Colorado against Sentinel and in favor of Kemper/Daggett ("KD Order"). On October 7, 2009, based on the KD Order, a Transcript of Judgment against Sentinel was recorded on behalf of Kemper/Daggett in the amount of $1,402,789.10. The recording of this judgment is the basis for Kemper/Daggett's professed security interest in the Glory Hole and as applied to the present issues remaining in the Merendon case, the proceeds of the a settlement reached between the Trustee and the objecting creditors.

11. On February 26, 2010, this Court entered an Agreed Order, in which it authorized the amendment of the complaint in the First Adversary, and the SubCon Order, to include Sentinel Mining Corporation, a Colorado Corporation ("Sentinel") as (i) a defendant in the First Adversary, (ii) a substantively consolidated entity encompassed by the SubCon Order, and importantly, (iii) authorized the inclusion of Sentinel "within the scope of the definition of the 'Alter Ego Defendants' and 'Non-Debtor Entities' as those terms are [were] defined in the Adversary Complaint, the Motion and the SubCon Order." *See* ¶ 11, ECF #109 in the main case; ECF #56 in the First Adversary ("Agreed Order").

12. This Court's SubCon Order ruled that the Glory Hole was property of Merendon's bankruptcy estate, *nunc pro tunc* to February 4, 2009, and by implication, that the Glory Hole was not property of Sentinel.

13. Upon entry of the Agreed Order, the definition of "Alter Ego Defendants" and "Non-Debtor Entities" within the SubCon Order was expanded to include Sentinel. As a result of such an expansion, Sentinel was included within the entities that were substantively consolidated with the Debtor *nunc pro tunc* to February 4, 2009, by the

Court's SubCon Order that was entered the previous month, on January 27, 2010. *See* ¶ 122(A), page 33, SubCon Order; *see also* ¶ 11, page 5, Agreed Order.

14. On March 11, 2010, the Court entered an Order granting summary judgment in favor of the Trustee on Counts II and III in the First Adversary, (i) piercing the corporate veil of Sentinel, and (ii) declaring that the Glory Hole and all mineral, gas and oil rights, equipment and inventory associated with and title to the gold an unfinished gold products of Sentinel, were all property of Merendon's bankruptcy estate. *See* ECF #62 in the First Adversary ("Summary Judgment Order").

15. The Summary Judgment Order ratified the Court's previous actions, including the substantive consolidation of the Glory Hole with the assets of Merendon's bankruptcy estate *nunc pro tunc* to February 4, 2009 (*see* SubCon Order) and the expansion of the definition of "Alter Ego Defendants" and "Non-Debtor Entities" within the SubCon Order to include Sentinel (*see* Agreed Order), however the Summary Judgment Order did not materially alter any of the rights of those affected, it merely confirmed those effects.

16. The Summary Judgment Order also allowed the Trustee to sell Merendon's assets for the benefit of its bankruptcy estate. *See* ¶ K, page 6.

17. Pursuant to the Summary Judgment Order, and having previously substantively consolidated the Glory Hole and its related assets *nunc pro tunc* to Merendon's petition date, on September 27, 2011, the Court entered an Order approving a settlement between the Trustee and various settling parties, including Dawn Fedrigon and Michael Fedrigon (jointly "Fedrigons"), in which the Trustee would transfer title to the Glory Hole to the Fedrigons ISAOA, in return for the payment of $600,000 and other considerations ("Settlement Order") (ECF #282 in the main case).

18. In accordance with the Settlement Order, the Glory Hole mine properties were conveyed by Merendon's bankruptcy estate to Quartz Hill Mining, LLC ("Quartz") and to Superior Gold, LLC. ("Superior").[2]

19. The practical effect of the entry of the Agreed Order, was that Sentinel was substantively consolidated *nunc pro tunc* to February 4, 2009, due to the *nunc pro tunc* effectiveness of the SubCon Order.

20. As a result of the SubCon Order and the Agreed Order, when the Trustee transferred the Glory Hole to Quartz and Superior, Quartz and Superior took title to the Glory Hole free of Kemper/Daggett's lien. The effect of the SubCon Order voided the alleged lien of Kemper/Daggett. The judgment against Sentinel that gave rise to Kemper/Daggett's claimed lien was recorded at a time when the Glory Hole was deemed to be property of the Debtor's estate and accordingly, could not have been Sentinel's property nor could a lien have attached to this real property.

The Key to the Dispute Between these Debtors and Kemper/Daggett, is that Upon the Entry of the Agreed Order, the Glory Hole Was Substantively Consolidated with the Debtor's Estate, *Nunc Pro Tunc* to February 4, 2009 (See ¶9 Above.)

21. Kemper/Daggett's alleged lien against Sentinel was VOID for two important reasons, which necessitated the filing of these cases. First, the SubCon Order, as amended by the Agreed Order caused any purported lien to be void *ab initio* and second, the Glory Hole was no longer property belonging to Sentinel, it became property of Merendon by the very nature of the Summary Judgment Order discussed above, such Order having confirmed the effects of the SubCon Order and the Agreed Order.

[2] Even though Sentinel was Substantively Consolidated into the Merendon bankruptcy case, Sentinel was

22. Further, the Summary Judgment Order ratified the Court's substantive consolidation of the Glory Hole with Merendon's bankruptcy estate, *nunc pro tunc* to Merendon's petition date, by piercing the corporate veil of Sentinel and substantively consolidating the entity itself.

23. Other than ratifying the SubCon Order[3] and establishing finality for Counts II and III of the First Adversary, the Summary Judgment Order did not change or alter any rights of the Fedrigons, Quartz and Superior, Kemper/Daggett, Sentinel, Merendon, its bankruptcy estate or the Trustee. The SubCon Order, as modified by the Agreed Order, had already determined such rights.

Kemper/Daggett Had Knowledge of the SubCon Order and its Effect on its Rights

24. Kemper/Daggett filed its Claim 542 in this case on March 8, 2010, having been signed by the authorized representative on March 3, 2010. It was at this point, at the latest, that Kemper/Daggett was on notice as to what had transpired in Merendon's bankruptcy case, including the entry and effects of the SubCon Order.

25. While the SubCon Order that substantively consolidated the Glory Hole into Merendon's bankruptcy estate was entered on January 27, 2010, the Agreed Order was entered on February 26, 2010, only ten (10) days before the filing of Kemper/Daggett's claim and within the period of time Kemper/Daggett could *timely* request that the Court reconsider the Agreed Order. Upon a showing of excusable neglect, the Court could have reconsidered the SubCon Order or the Agreed Order, but only upon the request of a party

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still listed as the record title owner in Gilpin County, Colorado, where the Glory Hole mine was located, and as a result of this Sentinel was also named as a Grantor on the Deeds to Quartz and Superior signed by the Trustee.

[3] And ratifying the Agreed Order.

in interest. It is the effect of the SubCon Order, as amended, which needs clarification by the Court.

26. The Summary Judgment Order was not entered until after Kemper/Daggett filed its claim, so Kemper/Daggett certainly had adequate time to challenge the Order had it felt that circumstances sufficient to do so existed.[4] Kemper/Daggett has not asserted any deficiencies in the SubCon Order, the Agreed Order or the Summary Judgment Order, the last of which was entered over four (4) years ago and accordingly, is barred from doing so by the doctrine of laches.

The Doctrine of Laches

27. "The doctrine of laches has two elements: (1) an unreasonable delay by the plaintiff in bringing the claim and (2) prejudice to the defendant." *In re Hawkins*, 377 B.R. 761, 768 (Bankr. S.D. Fla. 2007). "The first requirement is that there be a 'lack of due diligence' by the party against whom laches is asserted." *Id*, citing *Kan. V. Colo.,* 514 U.S. 673, 688, 115 S.Ct. 1733 (1995). "The second element of laches is whether the opposing party has suffered prejudice as a result of the delay." *Id* at 769.

28. Having not raised any deficiencies with this Court's Orders in over four (4) years is certainly an unreasonable delay on the part of Kemper/Daggett, if it believes any deficiencies exist.

29. Further, a lack of due diligence on the part of Kemper/Daggett is clear. Kemper/Daggett was aware of the case and had filed its claim *within the timely reconsideration period* for the Agreed Order, and yet considering the immense impact that

[4] While the Summary Judgment Order was not entered in the main case, both the SubCon Order and the Agreed Order were entered in both the main case and the First Adversary.

the Agreed Order would have on Kemper/Daggett's claims, it failed to do anything to challenge this Court's Orders or their effect, in this Court.

30. The Fedrigons relied upon the legitimacy of this Court's SubCon Order, Agreed Order and Summary Judgment Order when they entered into the settlement with the Trustee that led to the Fedrigons' acquisition of the Glory Hole.

31. The doctrine of laches is a bar to any attempt by Kemper/Daggett to challenge this Court's Orders that were entered in 2010, as Kemper/Daggett sat on its rights, waited an unreasonable amount of time and failed to exercise due diligence, and the Fedrigons would be extremely prejudiced if Kemper/Daggett was now permitted to challenge this Court's final Orders.

32. The Fedrigons relied upon the sufficiency and legitimacy of the SubCon Order, the Agreed Order and the Summary Judgment Order when entering into the settlement with the Trustee that provided the Debtor's estate with, *inter alia*, $600,000 in cash, and resulted in the transfer of the Glory Hole to Quartz and Superior.

33. The Fedrigons, and Quartz and Superior, are parties in interest that would suffer if Kemper/Daggett's claim is allowed as a secured claim, as such a ruling would give credence that Kemper/Daggett's claim was a secured claim against Quartz and Superior, despite the fact that the Judgment was filed during the period when the automatic stay, under 11 U.S.C. § 362, was in effect, albeit *nunc pro tunc*.

34. While Merendon's bankruptcy estate would be required to treat Kemper/Daggett as secured in the proceeds that resulted from the settlement, if the claim was allowed as secured, the Fedrigons would have exchanged over $600,000 to the

Trustee in exchange for property encumbered by liens that were effectively avoided by this Court's Orders, the validity of which was relied upon by the Fedrigons.

35. On August 19, 2011, the Trustee filed a Motion to Approve Settlement with the Estate of Harold Caldwell Through its Personal Representative, Dawn Caldwell Fedrigon, and Dawn and Michael Fedrigon (the "Settlement Motion") [ECF #262 in the main case].

36. Notwithstanding the proceedings in the main case of the Merendon bankruptcy, as well as the proceedings in both the First and Second Adversaries, including the Summary Judgment Order, (which *unequivocally* extended the automatic stay to the Sentinel Properties) and the January 2011 Order[5], Kemper/Daggett continued their litigation in the Colorado State Court Case.

37. Notwithstanding the proscriptions ordered by this Court in the Summary Judgment Order and the January 2011 Order, on February 11, 2014, an order was entered by Judge Philip James McNulty of the Colorado State Court finding that Kemper/Daggett was entitled to execute on their Judgment (the "KD Execution Order") on the basis that this Court's SubCon Order was unconstitutional because it constituted "a denial of due process rights under the Fifth Amendment of the United State Constitution" (*Id.* at ¶120)

[5] On January 3, 2011, this Court entered an Order, Granting, in Part, the Fedrigon's Motion for Relief From Stay, in which partial stay relief was granted, subject to certain restrictions ("January 2011 Order") [ECF #209 in the main case]. That Order specifically precluded the Fedrigons or any other individuals or entitles from pursuing litigation "…that seeks to directly or indirectly try to achieve ownership over any of the Subcon Properties, or other property of the Estate." It further stated that (i) "Neither Dunn, the Trustee, the Estate, or any of the Subcon Parties, shall be bound by any rulings, findings of fact, conclusions of law, or any Order or Judgment obtained by Caldwell and Michael Fedrigon or by the other parties to the litigation which may affect the rights of Dunn, the Trustee, the Estate, or any of the Subcon Parties, in property of the Estate, the Subcon Properties, or in any property that in the future may be substantively consolidated into this Estate by this Court", and (ii) that "Nothing in this Order is intended to impair or otherwise diminish the affect [sic] of the rulings contained in the Subcon Orders that is a party has a claim to the Subcon Properties, then it should come and adjudicate that claim before this Court".

The Colorado State Court further held that it would not apply the automatic stay to enforcement of the Judgment and the Debtors were prohibited from challenging the Judgment on the basis that the Judgment is subject to the automatic stay. *Id.* The Debtors' voluntary petitions under Chapter 11 ensued shortly thereafter.

Quartz Hill Mining, LLC, and Superior Gold, LLC Cases

38. On March 25, 2014, Kemper/Daggett filed its Motion to Dismiss (the "Motion to Dismiss") [ECF #31] in which it challenged the Debtors' nexus to the Southern District of Florida and venue in this District.

39. The Motion to Dismiss came before the Court for a non-evidentiary hearing[6] on May 28, 2014 at 2:30 p.m. (the "Hearing") along with the response in opposition (the "Response") [ECF #64] filed by Quartz and Superior.

40. Throughout the Motion to Dismiss, Kemper Daggett reiterated the Debtors' extensive ties to Colorado and its perceived tenuous ties to the Southern District of Florida.

41. In addition to Kemper Daggett's challenge to the Debtors' venue, the Court and the United States Trustee have also indicated concerns regarding the Debtor's connections with this District.

42. While the Debtors believed that the Southern District of Florida was the appropriate place for a judicial determination to be made as to the effect of this Court's prior Orders, the Debtors did not wish to detract from the purely legal issues raised in these cases by engaging in a venue contest and are amenable to transferring these cases to the Bankruptcy Court for the District of Colorado.

43. On June 11, 2014, the Debtors filed their Motion to Transfer Venue [ECF #83] in which they requested that the Court transfer these jointly administered cases (and the underlying adversary proceeding) to the Bankruptcy Court for the District of Colorado.

44. On July 3, 2014, Kemper Daggett filed its Objection to the Debtors' Motion to Transfer Venue (the "Objection to Transfer") [ECF #89].

45. On August 4, 2014, the Court entered its Order Dismissing Chapter 11 Case with Prejudice [ECF #108].

BASIS FOR RECONSIDERATION OF THE COURT'S DISMISSAL ORDER

46. A Chapter 11 bankruptcy petition is presumed to be filed in good faith until proven otherwise by a preponderance of evidence. *See, e.g., In re Shar,* 253 B.R. 621, 628 (Bankr. D.N.J. 1999); *In re Petralex Stainless, Ltd.,* 78 B.R. 738, 743 (Bankr.E.D.Pa.1987) (citing *U.S. Fidelity & Guar. Co. v. DJF Realty and Suppliers, Inc.,* 58 B.R. 1008 (N.D.N.Y.1986)). In order to rebut this presumption of good faith, a party moving for bad faith dismissal has a relatively heavy evidentiary burden, and that burden rests squarely upon the movant. "[T]he burden is on the movant to establish **by a preponderance of the evidence** that cause justifying either conversion or dismissal of the case exists." *In re Pensignorkay, Inc.,* 204 B.R. 676, 680 (Bankr.E.D.Pa.1997) (emphasis supplied); *see also In re Bal Harbour Club, Inc.,* 316 F.3d 1192, 1195 (11th Cir.2003). *See also, e.g., In re Nichols,* 223 B.R. 353, 355 (Bankr.N.D.Okla.1998) (citing *In the Matter of Woodbrook Assoc.,* 19 F.3d 312, 317 (7th Cir.1994)); *see also In re Vista Foods,* 1997 WL 837774 at 4, 226 B.R. 284 (Table Text) (10th Cir. BAP 1997) (unpublished disposition). Once a movant has made a *prima facie* showing of bad faith, the burden falls to the debtor

[6] *See,* ECF #67 which renoticed the Hearing from April 23, 2014 to May 28, 2014.

to establish that the bankruptcy was filed in good faith. *See, e.g., In re Nichols,* 223 B.R. at 355 (citing *In the Matter of Namer,* 141 B.R. 603, 606 (Bankr.E.D.La.1992)). This Court has refused to accept any evidence in this matter making it impossible for Kemper/Daggett to make a showing of bad faith and impossible for the Debtor to establish that the case was filed in good faith and that a serious question of law remains unanswered.

47. Furthermore, the Court's Dismissal Order presents a *Phoenix Piccadilly*[7] case for dismissal for cause under 11 U.S.C. § 1112(b). Under *Phoenix Picadilly*, a bankruptcy court may consider dismissal of a Chapter 11 bankruptcy filing by considering: (1) whether debtor has only one asset, the property at issue; (2) whether debtor has few unsecured creditors, whose claims are relatively small compared to claims of secured creditors; (3) whether debtor has few employees; (4) whether property is subject to foreclosure action as result of arrearages on debt; (5) whether debtor's financial problems essentially are a dispute between debtor and secured creditors which can be resolved in pending state court action; and (6) timing of debtor's filing and whether it evidences intent to delay or frustrate legitimate efforts of debtor's secured creditors to enforce their right***s***. *Id.*

48. In the Dismissal Order, the Court never took into consideration that the Court's own Orders in the Merendon case were the bases for the filing of these cases in the Southern District of Florida, Miami Division. Since the Court refused to accept any evidence, it must have made conclusory assumptions that ignore the critical distinctions between this case and the ordinary bad faith case. The bad faith arguments center around the assertion that the "Debtors have only one asset which is the Colorado real property which is the subject of long standing Colorado litigation and pending foreclosure," and that

the Debtors' "petitions were filed to prevent a sheriffs' sale of the Debtors' real property . . . [and] to avoid posting a *supercedeas* bond in Gilpin County Colorado."[8] *See, Motion to Dismiss* ¶¶ 17b, d-f.

49. What the Dismissal Order fails to address is whether Kemper/Daggett is even a secured creditor. It is without dispute that Kemper/Daggett does NOT hold a claim against these Debtors other than as an alleged lien creditor in the real property. The Debtors seek a Court determination of whether Kemper/Daggett is indeed a lien creditor. This Court has not answered this question.

50. Had the Court taken evidence, the Debtors believe they would have been able to demonstrate that, in fact, the Debtors assets are comprehensive in nature, including over 150 mining claims, equipment, machinery, inventory, finished and unfinished gold and other tangible assets.

51. Had the Court taken evidence, the Court would have been able to consider the Debtors' efforts at obtaining financing that would be contingent upon affording the protections available to a Chapter 11 DIP lender.

52. Had the Court taken evidence, the Debtors would have demonstrated the viability of setting aside significant parcels for development as well as for potential sale or joint ventures for recovery of raw material.

53. Had the Court taken evidence, the Debtors may have been able to demonstrate to the Court that this case has a reasonable likelihood of reorganization.

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[7] *In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393 (11th Cir.1988).

[8] Kemper/Daggett cites *Albany Partners Ltd v. W.P. Westbrook Albany Partner Ltd*., 749 F.2d 670 (11th Cir. 1984) for the proposition that filing of a Chapter 11 bankruptcy petition on the eve of foreclosure sale is evidence of bad faith. However, unlike *Albany Partners*, which involved an

54. Had the Court taken evidence, the Debtors may have been able to demonstrate that Kemper/Daggett was not a creditor of these bankruptcy estates and was not entitled to even hold a lien on the real property.

55. An important factor in determining whether reorganization is possible is whether the debtor corporation has a significant equity cushion in its primary asset. *See In re Dunes Hotel Associates,* 188 B.R. 162, 169 (Bankr.D.S.C.1995) ("Obviously, whether there is net equity in a principal or single asset could be of importance in assessing the possibility of successful reorganization in a particular case."). However, the Court did not conduct an evidentiary hearing and so it was not possible, at that time, to take evidence on the value of the Debtors' property.[9]

56. The very nature of a bad faith inquiry is fact intensive. As the 11th Circuit held in the seminal decision of *Phoenix Picadilly*, "…there is no particular test for determining whether a debtor has filed a petition in bad faith. Instead, the courts may consider any factors which **evidence** "…an intent to abuse the judicial process and the purposes of the reorganization provisions" or, in particular, factors which evidence that the petition was filed "to delay or frustrate the legitimate efforts of secured creditors to enforce their rights" (emphasis supplied). In all of the cases reviewed by the Court on this issue, it would appear that all involved testimony, documentary proof, or both, admitted into evidence on the bad faith, or lack thereof, of the debtor in each instance. *See e.g.*, *Phoenix Picadilly*, at 1394; *In re Bal Harbour Club*, Inc., 316 F.3d 1192, 1194 (11th Cir.

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undisputed secured creditor, this case involves a bona fide dispute over the validity of Kemper/Daggett's judgment.

[9] It is also important to note that the Debtors had engaged several experienced professionals, and sought to employ, among others, its financial adviser and investment banker in this Court (*see* ECF #56).

2003); *In re Pensignorkay, Inc.,* 204 B.R. 676, 680 (Bankr.E.D.Pa.1997); *In re Muskogee Envtl. Conservation Co.*, 236 B.R. 57, 59 (Bankr. N.D. Okla. 1999); *In re Davis,* 378 B.R. 539, 548 (Bankr. N.D. Ohio 2007).

57. The 11th Circuit's requirement that a moving party satisfy its burden of proof is such that this Court, on its own initiative, could not dismiss these Chapter 11 petitions, even if the Court believed that bad faith was present,[10] without holding a full evidentiary hearing. *See In re Moog*, 774 F.2d 1073, 1077 (11th Cir. 1985) ("[w]e hold that absent any evidence of a lack of good faith on the part of the petitioner, the bankruptcy court erred in dismissing the Chapter 11 petition *sua sponte* before the debtor had an opportunity to file a reorganization plan. This holding, of course, would not preclude the bankruptcy court from later dismissing appellant's Chapter 11 case for cause as outlined by § 1112(b).")

58. Dismissal of a Chapter 11 Case for bad faith is an extreme and radical remedy available only after a party has proven by a preponderance of the evidence that the debtor is not entitled to the protections afforded by the Bankruptcy Code and as such that cause exists to dismiss the case. This Court not only refused to accept any evidence, but has not yet addressed the main underlying issue remaining between the parties, that being whether Kemper/Daggett's purported lien was VOID as to the property purchased from the Merendon bankruptcy Trustee. While the Dismissal Order discusses that a lien could pass through a bankruptcy case, it did not discuss whether the claimed Kemper/Daggett lien was ever effective in light of the effect of the SubCon Order, as amended by the Agreed Order, which caused the claimed lien to be void *ab initio*. The Court (i) has misapplied the theory of bad faith dismissal to the facts of this case; (ii) has

heard no evidence at the Hearing to support dismissal at this time; and (iii) may have a case for venue transfer, but not dismissal, and which motion for transfer of venue the Court, at the July 9, 2014 hearing it had scheduled (*see* ECF #84], had initially been granted.

59. Without any evidence the Court simply assumes that these Debtors are "single asset real estate debtors" as defined by 11 U.S.C. §101(51B), thereby establishing one of the requisite factual findings under the *Phoenix Picadilly* analysis, that the Debtors' business consists of the ownership and operation of a single piece of real property, against which there is mortgage debt but no other debt. However, the Debtors filed as "small business debtors," and until adjudicated otherwise by this Court, the Debtor is a "small business debtor," and this is a "small business case," as defined by 11 U.S.C. §§ 101(51)(C) & (D), respectively, and the Court is unable to make a finding otherwise about the nature of the Debtor's business unless Kemper/Dagett moves to determine that the Debtors are single asset real estate debtors by separate motion. Further, it is still unclear whether Kemper/Daggett is even a secured creditor of these Debtors.

60. A Chapter 11 bankruptcy filing on the eve of the entry of a judgment, an execution or foreclosure sale, or any other event, the effect of which would be to divest the debtor of the ownership of its property, without more, is not dispositive of bad faith. *See e.g., In re Harco Co. of Jacksonville, LLC,* 331 B.R. 453, 458 (Bankr. M.D. Fla. 2005) and *In re Mill Place Ltd. P'ship,* 94 B.R. 139, 142 (Bankr. D. Minn. 1988).

61. Additionally all, or nearly all of the cases on bad faith dismissal in this Circuit involved a mortgagee who, after protracted litigation in the State court to foreclose on a

[10] The Court made no such finding here.

mortgage, was met with a Chapter 11 petition which, *after an evidentiary hearing*, was found to have no potential for reorganization. *See generally, Phoenix Piccadilly; In re Albany Partners, Ltd.,* 749 F.2d 670 (11th Cir. 1984)[11] and *In re Bal Harbour Club, Inc.,* 316 F.3d 1192, 1194 (11th Cir. 2003).

62. No such hearing was conducted, and the Court has not had an opportunity to consider evidence, either in favor of reorganization, or against it. Kemper/Dagett is a purported and disputed judgment creditor, not a mortgagee. Kemper/Daggett is NOT owed any money from these Debtors.

63. It is the Debtors' contention that, upon entry of the Agreed Order, the automatic stay was retroactively in effect against Sentinel, and any property it owned, *nunc pro tunc* to the Merendon petition date. Approximately six weeks after this Court issued the Subcon Order, Kemper/Daggett appeared in the bankruptcy case by filing their proof of claim. Three days later, this Court entered partial summary judgment in the First Adversary, determining that the property owned by Sentinel, including the property now owned by these Debtors, was property of the Merendon bankruptcy estate.

64. Accordingly, Kemper/Daggett had notice of both the Subcon Order and the Summary Judgment Order, but did nothing to challenge either Order. Instead, the Debtors contend, Kemper/Daggett continued to participate in the Merendon bankruptcy and assert claims as a secured creditor in the Merendon bankruptcy. The Debtors argue that four

[11] "[F]ollowing a trial in these proceedings, the bankruptcy court issued findings of fact and conclusions of law, together with an order which (1) dismissed the Chapter 11 Petition for Reorganization filed by Albany Partners, Ltd. ("Albany Partners"), (2) annulled the automatic stay, and (3) denied Albany Partners' complaint to set aside a foreclosure sale conducted by the appellees and to adjudicate the appellees. *In re Albany Partners, Ltd.,* 749 F.2d 670, 671 (11th Cir. 1984).

years later, in 2014, while the Merendon bankruptcy was still pending, Kemper/Daggett successfully argued to the Colorado State Court to invalidate the effect of this Court's Subcon and Settlement Orders. The Debtors argue that the Colorado State Court's ruling had no legal effect on the SubCon Order, or on the Glory Hole Mine, and that the SubCon Order, as amended, rendered the Kemper/Daggett judgment void, *ab initio*.

65. In the Eleventh Circuit, actions in violation of the automatic stay are void *ab initio*. *U.S. v. White*, 466 F.3d 1241, 1244 (11th Cir.2006). Such acts are deemed "without effect" and are rendered an absolute nullity. *Matter of Ring*, 178 B.R. 570, 579 (Bkrtcy. S.D. Ga. 1995). As the Ninth Circuit observed in *In re Robert Gruntz*, 202 F.3d 1074 (9th. Cir. 1999):

> The automatic stay is an injunction issuing from the authority of the bankruptcy court, and bankruptcy court orders are not subject to collateral attack in other courts. *See Celotex Corp.,* 514 U.S. at 313, 115 S.Ct. 1493. That is so not only because of the "comprehensive jurisdiction" vested in the bankruptcy courts, *see id.* at 308, 115 S.Ct. 1493, but also because " 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.' " *Id.* at 306, 115 S.Ct. 1493 (quoting *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375, 386, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980)).

66. By enacting the Bankruptcy Code, Congress empowered the Bankruptcy Courts to, under certain circumstances, modify state court orders and judgments. *See Gruntz* (9th Cir. 1999). As the 9th Circuit went on to explain, however, "…state courts are completely without power to restrain federal-court proceedings in *in personam* actions." *Donovan v. City of Dallas,* 377 U.S. 408, 412–13, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) (footnote omitted).

67. The Bankruptcy Court for the Southern District of New York also found it appropriate to nullify a state court judgment as void, *ab initio*, when it was entered in

violation of the automatic stay. *See In re Joanne F. Killmer*, 501 B.R. 208 (Bankr.S.D.N.Y. 2013). In *Killmer*, an *in rem* tax sale of the debtor's property was commenced, the property was sold, and title was transferred between 2008 and 2010—all while the debtor's bankruptcy case remained open and pending. On April 16, 2013, secured creditor, Beneficial Home Service, Corp., instituted a foreclosure action against the debtor in state court. Patrick Conway, the person who purchased the Debtor's property out of the tax sale, appeared and filed a motion to dismiss the foreclosure action on the grounds that he received title to the property free of Beneficial's mortgage from the tax sale and subsequent deed transfer. Beneficial raised the automatic stay as a defense to that motion to dismiss, and the state court granted Conway's motion to dismiss.

68. The *Killmer* court held that, in an exception to the *Rooker-Feldman* Doctrine, a bankruptcy court can "override" a state court judgment if the state court judgment is void *ab initio,* and subjecting that state court judgment to collateral attack in a federal court if the state court acted beyond its power. *Id*. This is because in the 2nd Circuit, as in the 11th Circuit, any proceedings or actions taken in violation of the automatic stay are void and without legal effect.

69. In the present case there is at least a question regarding the applicability of the automatic stay, and Kemper/Daggett's knowledge of it, in the Merendon bankruptcy upon the entry of the SubCon Order and the Summary Judgment Order. As argued by both Kemper/Dagett and the Debtors, the applicability of the automatic stay in the Merendon case was invoked by the Debtors before the Colorado State Court. Rather than attack the constitutionality of the SubCon Order, the more prudent course of action for Kemper/Dagett would have been to seek guidance from this Court. As the Debtors argued

in their filings and at the Hearing, Kemper/Daggett could and should have argued for relief under Rule 60, as made applicable hereto by F.R.B.P. 9024, or simply moved for relief from the automatic stay in the Merendon case. As the *Killmer* court observed, parties who are on notice of the potential applicability of the automatic stay, even if invoked erroneously, are in peril of any relief they seek in another forum being rendered void *ab initio*.

RECONSIDERATION REQUEST

70. The Debtors assert that a real question of law remains unanswered, that being: whether when real property which is owned by a non-debtor entity is declared to be property of a bankruptcy estate by an Order which is *nunc pro tunc* to the date of the Petition can be encumbered by a purported lien recorded against the non-debtor entity which previously held title to the real property? The Debtors believe that answer to this unanswered question is: NO.

71. Further, based on the total lack of evidence submitted and considered by the Court, the Debtors contend that there is no basis to have dismissed this case with a one-year prejudice period from filing a bankruptcy case anywhere in the United States, especially in light of the Court having (albeit momentarily) granted the Motion to Transfer Venue.

72. This Court also dismissed the pending Adversary Proceeding in which these Debtors sought a Court determination of the effect of the SubCon Order. The dismissal of the Adversary Proceeding, without making a determination of the effect of the SubCon Order leaves these Debtors without a remedy or an answer to the very important question that these cases posed to the Court.

STAY PENDING DISPOSITION AND/OR STAY PENDING APPEAL

73. In the event this Court takes the request for reconsideration under advisement or the Court does not amend the Dismissal Order, the Debtors believe that the Court can, and should, enter a Stay Pending Disposition or a Stay Pending Appeal.

74. The U.S. Court of Appeals for the Third Circuit has recognized that "myriad...circumstances can occur that would necessitate the grant of a stay pending appeal in order to preserve a party's position." *In re Highway Truck Drivers & Helpers Local Union #107,* 888 F.2d 293, 298 (3d Cir. 1989). Fed. R. Bankr. P. 8005 provides that, in the first instance, a request for a stay pending appeal "must ordinarily be presented to the bankruptcy judge." *See* Fed. R. Bankr. P. 8005. Whether to grant a motion for stay pending appeal is within the court's discretion. The standards that guide the court in the exercise of its discretion are similar to the standards for granting a preliminary injunction. *See, e.g., In re Del. & Hudson Ry. Co.,* 90 B.R. 90, 91 (Bankr. D. Del. 1988). The party seeking a stay pending appeal must show that: "(1) it is likely to prevail on the merits of its appeal; (2) it will suffer irreparable injury absent a stay; (3) a stay will not cause substantial harm to other interested parties; and (4) a stay will not harm the public interest." *Id.* at 91. *See also U.S. v. Trans World Airlines Inc. (In re Trans World Airlines Inc.),* 18 F.3d 208, 211 (3d Cir. 1994).

75. In the present case, as set forth above, it seems clear by the refusal of the Court to allow any evidence to be taken, that the Court has not only erred, but its refusal to conduct an evidentiary hearing is one of the fundamentals of due process in a proceeding.

The Dismissal of the Adversary Proceeding, without making a determination of the effect of the SubCon Order leaves these Debtors without a remedy or an answer to the very important question that these cases posed to the Court.

76. Further, notwithstanding the fact that the Dismissal Order is not a final Order, Kemper/Daggett has rescheduled a sale of the real property in which it claims to have a lien for October 9, 2014. It is basic property law that all parcels of real property are unique and the sale of these properties at a sale cannot be substituted by money alone since real property is not fungible.

77. Third, there has never been any allegation that [1] the real property is declining in value; or [2] the real property is a public nuisance or that the real property is an environmental danger. Kemper/Daggett only holds a potential lien in the real property and also currently holds a potential secured Proof of Claim in the Merendon Mining case which could result in a $600,000 payment toward its claimed lien should this Court find that Kemper/Daggett was secured in the real property which was conveyed to these Debtors. It is only the passage of time that inconveniences these purported lienholder, which has been contesting title to the property for over twenty (20) years, so a brief delay while the parties' substantive rights are fully evaluated is only equitable under the circumstances.

78. Finally, as stated immediately above, there are no instances of potential harm which could harm the public interest.

79. This Court has the very matter of whether Kemper/Daggett is entitled to a secured Proof of Claim under consideration in the Merendon bankruptcy case. The ruling on that matter could directly impact these cases. That matter came before the Court for hearing on May 28, 2014, at 2:30 PM, upon the filing of the Proof of Claim of William B.

Kemper & Marjorie Robbins Daggett [Claim #542], as amended by Claim #646, the chapter 7 Trustee's Third Omnibus Objection to Certain Proofs of Claims ("Trustee's Objection") [ECF #371], and creditors Quartz Hill Mining, LLC and Superior Gold, LLC's Objection to Claims of the Estate of William B. Kemper and Marjorie Robins Daggett and Joinder in Trustee's Objection to Same Claims ("Objection and Joinder") [ECF #446, #448]. The Court has yet to rule on that matter and a ruling on that issue could positively impact this case.

PRAYER FOR RELIEF

WHEREFORE the Debtors respectfully request that this honorable Court enter an Order which [1] vacates the Dismissal Order, transfers these cases to the Bankruptcy Court for the District of Colorado; [2] dismisses these cases without prejudice; [3] vacates the finding of "bad faith"; [4] vacates the finding that these cases are single asset real estate cases; [5] grants the Debtors' request for a Stay pending disposition or a Stay pending Appeal; or for such further and additional relief as requested by the Debtors.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court of the Southern District of Florida, that I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A) and that a true and correct copy of the foregoing was filed using CM/ECF and served this 14th day of August, 2014 (i) via CM/ECF upon all parties registered to receive Notice(s) of Electronic Filing (NEF) in this bankruptcy case; and via US Mail to all those on the attached Service List.

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113C-1
Case 14-15419-AJC
Southern District of Florida
Miami
Thu Aug 14 09:18:47 EDT 2014

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The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Internal Revenue Service
POB 105404
Atlanta, GA 30348

(d)Internal Revenue Service
Southern District of Florida
99 NE 4 St
Miami, FL 33132

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(u)Miami

(d)Scheid, Cleveland, LLC
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Suite 575
Denver, CO 80209-3825

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