UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: **Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association Trust,** **Debtor.**	**Chapter 11** **Case No. 13-16440**
In re: **Single Employer Welfare Benefit Plan Trust,** **Debtor.**	**Chapter 11** **Case No. 13-16441**

SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION
TO UNITED STATES TRUSTEE'S MOTIONS TO DISMISS

On August 2, 2013, the U.S. Trustee filed an Amended Motion to Dismiss Case with a Bar in the above-caption bankruptcy case of debtor and debtor-in-possession Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association Trust ("REAL VEBA Trust") (Case No. 13-16440, Doc. No. 29) and a Motion to Dismiss Case with a Bar in the above-captioned bankruptcy case of debtor and debtor-in-possession Single Employer Welfare Benefit Plan Trust ("SEWBP Trust") (Case No. 13-16441, Doc. No. 25). On August 12, 2013, the above-captioned Debtors filed a response in opposition to the U.S. Trustee's Motions, arguing that they, as business trusts, are eligible to be debtors. (Case No. 13-16440, Doc. No. 53; Case No. 13-16441, Doc. No. 43.) This supplemental memorandum is submitted in opposition to the U.S. Trustee's arguments that the above-captioned Debtors' voluntary petitions were filed in bad faith, solely for the purpose of frustrating litigation brought by the Secretary of

Labor in the United States District Court for the Eastern District of Pennsylvania, No. 09-0988 (the "District Court Action").

"Chapter 11 bankruptcy petitions are subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith . . . ." *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004). The good faith requirement "ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy, which the Supreme Court has identified as: (1) 'preserving going concerns,' and (2) 'maximizing property available to satisfy creditors.'" *In re South Canaan Cellular Investments, LLC*, 420 B.R. 625, 630 (E.D. Pa. 2009) (quoting *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle Street P'ship*, 526 U.S. 434 (1999)). Courts therefore engage in a "fact intensive inquiry" in which they examine "the totality of facts and circumstances and determine where a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive." *Id.* (quoting *Integrated Telecom*, 384 F.3d at 118; *In re SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999)). If neither of the basic purposes of bankruptcy can be demonstrated, the petition should be dismissed. *Id.*

The premise of the U.S. Trustee's argument in support of its Motions is that these bankruptcy cases were initiated as a result of occurrences in the District Court Action. The Eastern District of Pennsylvania has recognized, however, that "timing, however suspicious, cannot alone justify the finding that [a debtor's] petition was made in bad faith." *In re Stone Resources*, 458 B.R. 823, 831 (E.D. Pa. 2011), *vacated on other grounds*, 482 F. App'x 719 (3d Cir. 2012). In *Stone Resources*, the debtor filed its bankruptcy petition five days after an amended preliminary injunction order was entered against it in a district court action, with which it had not yet complied, and while a motion for attorneys fees, statutory fees, and costs was

pending in that action. *Id.* at 826-27. The bankruptcy court concluded that the bankruptcy was *not* filed in bad faith, and the district court affirmed, reasoning that "[c]ourts have allowed companies to seek the protections of bankruptcy when faced with pending litigation that posed a serious threat to the companies' long term viability." *Id.* at 831 (quoting *SGL Carbon*, 200 F.3d at 164).

Additionally, and contrary to the U.S. Trustee's argument that these bankruptcy cases serve no valid bankruptcy purpose "given that the Debtor has no assets of its own, no employees, offices, or business operations" (which the above-captioned Debtors, as business trusts, vigorously disputed in their initial response to the Motions), the Eastern District of Pennsylvania has declined to dismiss a bankruptcy case with those facts. In *South Canaan Cellular Investments*, the court explained:

> We recognize that several of the factors evincing possible bad faith are present here in so far 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 in SCCCC*. Their primary creditor is LTI. However, the above evidence also lends credence to the debtors' assertion that the bankruptcy filing was in direct response to the correspondence from LTI that it intended to seize control of the South Canaan Cellular entities and its filing of the action in Colorado, and because of the debtors' desire to take advantage of the protections afforded by a bankruptcy reorganization to (hopefully) protect their equity interests in the LLCs.

420 B.R. at 632 (emphasis added) (internal footnote omitted). These facts were not disqualifying.[1]

[1] Relatedly, "it is well established that a debtor need not be insolvent before filing for bankruptcy protection." *Stone Resources*, 458 B.R. at 831 (quoting *SGL Carbon*, 200 F.3d at 163).

Bankruptcy filings with the *sole purpose* of obtaining a tactical litigation advantage are "outside the legitimate scope of the bankruptcy laws." *Id.* Fourteen factors, compiled by the Eastern District of Pennsylvania in *South Canaan Cellular Investments*, "have been held to bear on whether subjective bad faith in filing and/or objective futility in legitimately reorganizing exists." *Id.* These factors are:

> (1) the debtor has few or no unsecured creditors;
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> (2) there has been a previous bankruptcy petition by the debtor or a related entity;
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> (3) the prepetition conduct of the debtor has been improper;
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> (4) the petition effectively allows the debtor to evade court orders;
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> (5) there are few debts to non-moving creditors;
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> (6) the petition was filed on the eve of foreclosure;
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> (7) the foreclosed property is the sole or major asset of the debtor;
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> (8) the debtor has no ongoing business or employees;
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> (9) there is no possibility of reorganization;
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> (10) the debtor's income is not sufficient to operate;
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> (11) there was no pressure from non-moving creditors;
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> (12) reorganization essentially involves the resolution of a two-party dispute;
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> (13) a corporate debtor was formed and received title to its major assets immediately before the petition; and
>
> (14) the debtor filed solely to create the automatic stay.

Id. at 630-31.[2]

[2] Although many of these factors are objective, the debtor's subjective understanding of the context is relevant. *See id.* at 631-32 (court considered testimony regarding doubts about continued increases in revenue stream and intentions regarding management

(continued...)

Ultimately, "[t]he decision to dismiss a petition for lack of good faith rests within the sound discretion of the bankruptcy court which should not lightly infer a lack of good faith and should utilize its powers of dismissal on this basis only in egregious cases." *South Canaan Cellular Investments*, 420 B.R. at 631. For the reasons set forth above, and the facts to be presented at the hearing on the U.S. Trustee's Motions, the U.S. Trustee's bad faith allegations do not warrant dismissal.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: August 16, 2013

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changes); *In re 15375 Memorial Corp.*, 400 B.R. 420, 427 n.22 (D. Del. 2009) ("The court also notes that Debtors' proffered rationale for filing bankruptcy – avoiding piecemeal litigation in disparate fora, compensating for the weakness of its 'dissolution defense,' protecting GSF Entities from potential future exposure on claims made against Debtors – would have justified filing bankruptcy at some earlier date irrespective of the Tebow suit.").