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Be Careful What You Ask For: Risks and Benefits of Involuntary Bankruptcy Filings

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Risks And Benefits Of Involuntary Bankruptcy Filings**

**ABI Southwest Conference
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Panel and Materials:

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Discussion Outline

1. Procedures for Filing Involuntary Petitions
 - a. Identity and nature of petitioning creditors
 - i. What is unsecured really?
 - ii. No restriction on an insider being a petitioning creditor
 - b. Allegations, burden of proof
 - c. What is *bona fide* dispute?
 - d. Responsive pleading
 - i. Answer
 - ii. Motion to Dismiss
 - iii. Consent to Entry of Order for Relief / Conversion to Chapter 11
2. Strategic Considerations
 - a. Benefits
 - i. Limited Control
 - ii. Appointment of Interim/Emergency Trustee
 - iii. Strange case of lack of corporate authority for voluntary Chapter 11 filing
 - b. Risks
 - i. Sanctions for petitioning creditors
 - ii. Bad faith
 - iii. Involuntary petitions as litigation tactics
3. Alternatives
 - a. Section 305 suspension—case study
 - b. Brief word about structured dismissals post-*Jevic*

PROCEDURES RELATING TO INVOLUNTARY PETITIONS,
THE BENEFITS OF FILING THEM,
AND POSSIBLE ALTERNATIVE RESPONSES TO THEM

Oren Haker
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I. INTRODUCTION

Is it fair to say that bankruptcy cases commenced by Involuntary Petitions are the worst collection mechanisms available to creditors, other than debtor's prison? If so, then why do they persist? It may be because involuntary bankruptcies are relatively easy and inexpensive cases to commence (i.e., they can be filed by one to three creditors holding claims against a debtor in *de minimis* amounts), and yet, they are ultimately beyond those petitioning creditors' reach to resolve. The fact that those responsible for its existence lack any fiduciary obligation to the parties ultimately affected by it is relatively beyond dispute. This is also unfortunate, because ultimately, interested parties, and in particular unsecured creditors, will judge the success or failure of an involuntary case by measuring the resolution it brings to bear against what could have been achieved through private settlement. If the bankruptcy resolution for the unsecured creditors is suboptimal, it will be hard for unsecured creditors to view the involuntary bankruptcy proceeding as successful. And the frank reality is, if the unsecured creditors are not going to benefit from an involuntary bankruptcy case, then it is probably safe to say that the Involuntary Petition should not have been filed in the first place.

If Involuntary Petitions generally lead to suboptimal results for unsecured creditors, what can interested parties do? Under section 305, bankruptcy courts can abstain from exercising jurisdiction by either dismissing a case or suspending all proceedings in a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1). Abstention by dismissing the case or suspending the proceedings is possible even if the Petitioning Creditors satisfy section 303(h), which provides that the bankruptcy court "*shall* order relief . . . , *only if* (1) the debtor is generally not paying such debtor's debts as such debts become due . . . ; or within 120 days before the date of the filing of the petition, a custodian, receiver, or agent . . . was appointed or took possession [of the debtor's property to enforce a lien]." Case law suggests the bankruptcy court's authority to decline to exercise jurisdiction trumps the bankruptcy court's ability to enter an order for relief if the alleged Debtor fails to respond to the Involuntary Petition or if the Petitioning Creditors otherwise satisfy section 303(h), but query whether this is good policy. In other words, if the alleged Debtor is truly insolvent from an operating perspective, why should the bankruptcy court abstain? Why should the alleged Debtor be allowed to wind-down outside of the purview of the bankruptcy court?

II. TO MAKE SENSE OF WHY INVOLUNTARY PETITIONS ARE FILED, WE ASSUME CERTAIN ABSOLUTE TRUTHS

When Involuntary Petitions are filed, certain facts are often in existence; other facts may be assumed; and certain assumptions may be misplaced. The reality of involuntary bankruptcy cases is that sometimes, the truth is stranger than fiction.

***Assumption No. 1:
The Involuntary Petition Is Competing For Airtime
With Prior Proceedings In Non-Bankruptcy Fora.***

When an involuntary petition is filed in a bankruptcy court by one or more petitioning creditors, there are often other judicial or non-judicial collection proceedings already underway. These non-bankruptcy proceedings may take the form of a judicial or non-judicial foreclosure, a receivership case in state or federal court, or simple collection litigations in state or federal court commenced by creditors to collect an unpaid debt.

***Assumption No. 2:
Unsecured Creditors, Including The Petitioning Creditors, Are Rational Actors.***

Unsecured creditors are, for the most part, rational actors, and want to recover as much as possible from the Debtor on account of their claims for as little additional investment as possible. So, for instance, if Creditor A is owed \$100 from the Debtor and Creditor A's claim is unsecured, Creditor A will not want to spend more on legal fees and collection costs in connection with the involuntary bankruptcy proceeding than Creditor A expects to recover in distributions from the bankruptcy proceeding.

This cost/benefit analysis, however, may be materially different for the Petitioning Creditors than it is for the general unsecured creditors, though the differences may not be as material as one might first anticipate. While the downside risks to the Petitioning Creditors are set forth specifically in section 303(i), there are downside risks to the general unsecured creditors as well, including lost opportunity from private settlements, inability to control the negotiations between the Petitioning Creditors on the one hand and senior creditors and the alleged Debtor on the other, and counterclaims that the alleged Debtor may have against certain of the general unsecured creditors. In addition, rational unsecured creditors are going to want a resolution in the foreseeable future, so a bankruptcy process that drags out indefinitely is going to create tension among the general unsecured creditor class. Thus, speed of recovery, in addition to the amount of recovery is a material consideration.

***Assumption No. 3:
Information Regarding The Debtor's Financial Condition
And Capital Structure Is What Every Petitioning Creditor Wants And Cannot Have,
Unless There Is A Bankruptcy.***

The cost/benefit analysis discussed in the foregoing paragraph may be difficult to run without accurate information about the alleged Debtor's financial condition, including what factors may or may not have caused the alleged Debtor's demise, and sufficient information

about senior creditors' claims to run a waterfall analysis. So we assume that all unsecured creditors will want as much information about the alleged Debtor as possible. In fact, the absence of disclosures by the alleged Debtor to individual unsecured creditors may be responsible, in part, for creating an environment of distrust between the general unsecured creditor body and the alleged Debtor, who may be legally obligated to only share information about its financial condition with its secured creditors. Access to timely information regarding the alleged Debtor's financial condition and capital structure is also important to the general unsecured creditors' ability to assess the fairness of a proposed private settlement.

*Assumption No. 4:
Similarly-Situated Creditors Often Want Different Results.*

The final assumption we make is that not all general unsecured creditors' interests are aligned. In most cases, this assumption will not have significant importance at the beginning of an involuntary bankruptcy proceeding. But if petitioning creditors are disqualified, or if general unsecured creditors of the alleged Debtor continue to do business with non-debtor affiliates, "personal interest" conflicts among the Petitioning Creditors or between Petitioning Creditors and general unsecured creditors may arise. In some instances, events can even trigger ethical conflicts for counsel to unsecured creditors where counsel represents more than one unsecured creditor.

III. FROM INVOLUNTARY PETITION TO WHERE ARE WE NOW?

A. The Effect Of Filing An Involuntary Petition Is . . . A Pot Of Litigation?

The best way to understand the nature and legal effect of an Involuntary Petition is to understand what it is not. An Involuntary Petition is very different from a petition filed by a debtor under chapters 7, 9, 11, 12, 13 or 15 (each, a "Chapter") of the debtor's own choosing at a time of the debtor's own choosing ("Voluntary Petition"). The filing by a debtor of a Voluntary Petition automatically triggers the commencement of a bankruptcy case ("Voluntary Case"). 11 U.S.C. § 301(a). And the commencement of a Voluntary Case constitutes an "order for relief" under the Chapter chosen by the Debtor. 11 U.S.C. § 301(b). Immediately upon the commencement of a Voluntary Case, a bankruptcy estate ("Estate") is created and the automatic stay in section 362 applies to protect the Estate and the Debtor from the latter's prepetition creditors.

An Involuntary Petition, on the other hand, is akin to the filing of a complaint by a plaintiff in a court of competent jurisdiction. Assuming proper service, the Involuntary Petition triggers the legal obligation of the named Debtor to respond within 21 days after service of the summons. FRBP 1011(b) ("Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F. R. Civ. P. . . ."). Absent entry of an order for relief, the named Debtor may continue to operate its business "as if an involuntary case concerning the debtor had not been commenced." 11 U.S.C. § 303(f).

Generally, the named Debtor in the Involuntary Petition has three options, though we will discuss a fourth option (i.e., suspension under section 305) and its implementation

in the West Linn Paper Company chapter 7 case in the Bankruptcy Court for the District of Oregon. The first option is for the Debtor to contest the Involuntary Petition by filing an answer. FRBP 1011. Contesting the Involuntary Petition requires the bankruptcy court to determine the issues in dispute through an evidentiary hearing, if necessary. FRBP 1013(a). The bankruptcy court has relatively wide discretion to determine the manner and course of discovery with regard to a contested Involuntary Petition. The only requirement that the Bankruptcy Code imposes on bankruptcy courts is that they determine the issues of a contested Involuntary Petition “*at the earliest practicable time and forthwith* enter an order for relief, dismiss the petition, or enter any other appropriate order.” FRBP 1013(a) (emphasis added.) One could argue that the phrase “or enter any other appropriate order” in FRBP 1013(a) gives the bankruptcy court authority to craft an order that is bespoke, and that suspends proceedings in the case for a period of time.

The second option is for the named Debtor to file a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure (“FRCP”). FRBP 1011(c). Importantly, creditors other than the Petitioning Creditors may move to dismiss the Involuntary Petition, so the burden of responding to the Involuntary Petition is not wholly on the alleged Debtor’s shoulders. This is exactly what happened in the West Linn Paper Company case. Within days of filing the Involuntary Petition, the Second Lien Lenders moved to dismiss the Involuntary Petition under Sections 303 and 305 in accordance with FRBP 1011 and 9014, and Local Bankruptcy Rule 9013-1.

The third option is for the named Debtor to fail to respond to the filing of the Involuntary Petition or otherwise consent to entry of an order for relief. FRBP 1013. Upon entry of an order for relief, the Debtor’s bankruptcy case shall proceed as if the Debtor filed a Voluntary Petition. *See, e.g.*, FRBP 1007(a)(2) (“the debtor shall file within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms”).

B. What Must I Do To Become A Petitioning Creditor?

1. Anyone Can File an Involuntary Petition. I Mean, “Who Doesn’t Have \$15,775?”

The Bankruptcy Code sets forth exactly what kind of creditor of the alleged Debtor can qualify as a Petitioning Creditor, and how many Petitioning Creditors are necessary to ensure that an order for relief is entered as a result of the filing of an Involuntary Petition. Section 303(b)(1)-(3) sets forth these requirements. Under section 303(b)(1), there must be at least three creditors with claims against the alleged Debtor that are non-contingent as to liability, not the subject of a bona fide dispute as to liability or amount, and together, the non-contingent, undisputed claims of these creditors must aggregate at least \$15,775.

Under section 303(b)(2), the number of necessary creditors satisfying the requirements of section 303(b)(1) is reduced to one creditor if the alleged Debtor has fewer than 12 unsecured creditors with non-contingent, undisputed claims, provided that the one creditor is not an employee or insider of the Debtor or the transferee of any avoidable

transfer, and provided further that the one creditor holds a non-contingent, undisputed, unsecured claim in the aggregate amount of at least \$15,775.

Section 303(b)(3) will apply if the alleged Debtor is a partnership. In that case, the only requirement is that a general partner be one of the Petitioning Creditors; provided that if all of the general partners are already debtors or debtors-in-possession, then the trustee of a general partner or a holder of a claim against the partnership may satisfy the filing requirement.

2. *Are You Really Going to Make Me Prove My Claim Before I Enter Section 303(b)?*

If a creditor is holding a claim against the alleged Debtor, but there is a dispute regarding the contingencies around the claim as to liability or the claim is the subject of a bona fide dispute as to liability and/or amount owed, or perhaps over whether the creditor is even unsecured or undersecured, then the creditor should probably refrain from becoming a Petitioning Creditor. Alternatively, the creditor should expect that its claim will be at issue in the event the alleged Debtor contests the Involuntary Petition by filing an answer or moving to dismiss and that the creditor could very well be disqualified as a Petitioning Creditor and subject to sanctions.

If the alleged Debtor asserts that a Petitioning Creditor fails to satisfy the requirements of section 303(b), that Petitioning Creditor is going to need to introduce evidence at an evidentiary hearing that shows the alleged Debtor is currently liable on the debt to the Petitioning Creditor in an undisputed amount. Bankruptcy courts will apply the “objective test” to determine whether there is a bona fide dispute concerning the liability or amount of the Petitioning Creditor’s unsecured claim. *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057 (9th Cir. 2001) (quoting *In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987) (existence of a bona fide dispute depends on whether or not “there is an objective basis for either a factual or a legal dispute as to the validity of [the] debt”). See also, *In re Sims*, 994 F.2d 210, 221 (5th Cir. 1993); *In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991); *B.D.W. Assoc. v. Busy Beaver Bldg. Ctrs., Inc.*, 865 F.2d 65, 66-67 (3d Cir. 1989); *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1544 (10th Cir. 1988). In *Rimell*, the Court of Appeals for the 8th Circuit discussed the standard and the burden on a Petitioning Creditor and the alleged Debtor:

The petitioning creditor must establish a prima facie case that no bona fide dispute exists. Once this is done, the burden shifts to the debtor to present evidence demonstrating that a bona fide dispute does exist. Because the standard is objective, neither the debtor's subjective intent nor his subjective belief is sufficient to meet this burden. The court's objective is to ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute. This does not mean that the bankruptcy court is totally prohibited from addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exists. Finally, . . . the determination as to whether a dispute is bona fide will often depend . . .

upon an assessment of witnesses' credibilities and other factual considerations

....

Rimell, 946 F.2d at 1365.

In assessing the existence of a bona fide dispute, courts have focused the analysis on whether (1) the counterclaim arises out of the same transaction that forms the basis of the creditor's claim or from a wholly separate transaction, and (2) netting out the claims of debtors could take the petitioning creditors below the amount threshold of § 303. *In re Focus Media, Inc.*, 378 F.3d 916, 925 (9th Cir. 2004) (internal quotations omitted) (quoting *Chicago Title Insurance Co. v. Seko Investment, Inc. (In re Seko Investment, Inc.)*, 156 F.3d 1005, 1008 (9th Cir. 1998)). The *Seko* opinion stated that, "if at least a portion of the debt that is the subject of the petition is undisputed, the undisputed portion is sufficient to create a debt under Section 303(b)(1) not subject to a bona fide dispute."

Setting aside a partnership as the target of an Involuntary Petition, section 303(b) effectively requires creditors to take a really hard look in the mirror before they do something rash like file an Involuntary Petition. And when they look in the mirror, they need to ask and answer certain questions relating to the requirements of section 303(b), including:

- Is the creditor an insider of the Debtor?
- Prior to filing the Involuntary Petition, is the creditor holding a claim that is immediately due?
- Is there a dispute over whether or not the amount owed to the creditor is immediately due? For example, if payment under a contract is due within 30 days after delivery of goods to the Debtor, is there a dispute over whether or not the creditor has delivered the goods to the Debtor? Is there a dispute over whether or not 30 days has passed?
- Is a secured creditor really undersecured in an undisputed amount that satisfied section 303(b)? *In re Tamarack Resort, LLC*, 2010 WL 1049955 (Bankr. D. Idaho, Mar. 17, 2010) (citing *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F. 2d 47 (3d Cir. 1988) to support its holding that secured creditors may be petitioning creditors); *In re Wm. J. Braun Builders*, 262 F. 2d 107 (6th Cir. 1958) (holding that a fully secured creditor may elect to waive only the dollar amount necessary to validate the involuntary petition and have that waiver ineffective as to the balance of the secured claim).
- Does the filing of a claim by the alleged Debtor against a Petitioning Creditor automatically disqualify the creditor as a Petitioning Creditor? Does it matter if the creditor named in the alleged Debtor's complaint answers the complaint or moves to dismiss for failure to state a claim? *In re Vortex Fishing Systems, Inc.*, 277 F. 3d 1066-67 (9th Cir. 2001) (quoting *In re Seko Investment, Inc.*, 156

F.3d 1005, 1008 (9th Cir. 1998)) (“The existence of a counterclaim against a creditor does not automatically render the creditor’s claim the subject of a ‘bona fide dispute.’ So long as the petitioning creditor has established that there is no dispute regarding the debtor’s liability on the creditor’s claim, the creditor has standing under section 303(b) to bring a petition.”).

3. *If the Debtor Contests the Involuntary Petition, or If an Interested Party Has Moved to Dismiss the Involuntary Petition, An Order For Relief Will Only Be Entered If Section 303(h) Is Satisfied*

In addition to satisfying the requirements of Section 303(b), the Petitioning Creditors must also satisfy Section 303(h), presumably at an evidentiary hearing to consider entry of an order for relief or dismissal of the Involuntary Petition. Section 303(h) provides that the bankruptcy court *shall* enter an order for relief *only if* the debtor is not paying debts as they come due, unless such debts are the subject of a bona fide dispute, or, alternatively, if within 120 days prior to the filing of the Involuntary Petition, a custodian or receiver was appointed or took possession of the estate’s assets. 11 U.S.C. §§ 303(h)(1)-(2).

The burden is on the Petitioning Creditors to show that the alleged Debtor is generally not paying debts as they come due. The Ninth Circuit has adopted a “totality of the circumstances” test for determining whether an alleged Debtor is generally paying its debts as they become due. *Focus Media*, 378 F.3d at 928-29 (citing *Hayes v. Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 779 F.2d 471, 475 (9th Cir. 1985)). “A finding that a debtor is generally not paying its debts requires a more general showing of the debtor’s financial condition and debt structure than merely establishing the existence of a few unpaid debts.” *Vortex*, 277 F.3d at 1072 (internal quotations omitted). In *Vortex*, the Ninth Circuit held that the bankruptcy court did not clearly err in finding that Vortex was generally paying its debts as they became due, where “Vortex ha[d] been paying off the debts it ha[d] incurred, including a full settlement of the IRS deficiency that was assessed.” *Id.* The Bankruptcy Court and the BAP found that Vortex was generally paying its debts as they came due, as evidenced by a favorable Dun & Bradstreet credit report and the fact that Vortex has been paying and was remaining current with its tax obligations, payroll, rent, utilities, and operating expenses. *Vortex*, 277 F.3d at 1072. A “balance sheet test” was not dispositive. *Id.*

Alternatively, if a custodian (other than a trustee), receiver or agent is appointed or takes possession of less than substantially all of the alleged Debtor’s property to enforce a lien, section 303(h)(2) requires the bankruptcy court to enter an order for relief. Essentially, Section 303(h)(2) equates the appointment of a custodian or receiver with insolvency. *In re BD Intern. Discount Corp.*, 15 B.R. 755, 764-65 (Bankr. S.D.N.Y. 1981). This is not a common route into bankruptcy. In fact, Judge Samuel Bufford of the Central District of California Bankruptcy Court said, “As a bankruptcy judge for nearly twenty years, I have handled nearly a hundred thousand bankruptcy cases. Perhaps two hundred of these cases have commenced with involuntary bankruptcy petitions. I can recall only one that probably was based on § 303(h)(2).” *In re Marshall*, 300 B.R. 507, 519 n.24 (Bankr. C.D. Cal. 2003).

IV. SUSPENSION UNDER SECTION 305 AND THE WEST LINN PAPER COMPANY CASE IN OREGON

A. Section 303 Does Not Limit The Bankruptcy Court's Discretion To Abstain From Exercising Jurisdiction Over A Case Commenced By The Filing Of An Involuntary Petition

Section 305 of the Bankruptcy Code allows the bankruptcy court to decline to exercise jurisdiction over a case under title 11. Section 305 is titled "Abstention" and provides that the bankruptcy court, "after notice and a hearing, may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time if the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1). *In re Eastman*, 188 B.R. 621, 624 (9th Cir. BAP 1995) ("dismissal is appropriate under § 305(a)(1) only in the situation where the court finds that both 'creditors and the debtor' would be 'better served' by a dismissal" based on the totality of the circumstances.)

A determination by the bankruptcy court to dismiss or suspend, or a decision not to dismiss or suspend, under section 305(a)(1) is not reviewable by the federal court of appeals. 11 U.S.C. § 305 (c). Courts throughout the United States agree that relief under section 305 is an extraordinary remedy. *In re Macke Intern. Trade, Inc.*, 370 BR 236, 247 (9th Cir. B.A.P. 2007) ("Because an order to dismiss under § 305(a) is not reviewable by the courts of appeal, such a dismissal is an extraordinary remedy of narrow breadth, which may be utilized to prevent the commencement and continuation of disruptive involuntary cases.") (internal quotations omitted). *In re Orchards Village Investments, LLC*, 405 BR 341, 351 (Bankr. D. Or. 2009) ("Dismissal pursuant to § 305(a) is an extraordinary remedy, in part because it is generally not appealable beyond the level of the District Court or, in the Ninth Circuit, the Bankruptcy Appellate Panel.").

While it is true that Section 303 does not expressly authorize suspension of the case, Section 303(f) provides that "Notwithstanding section 363 of this title, *except to the extent that the court orders otherwise, until an order for relief in the case*, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced." 11 U.S.C. § 303(f) (emphasis added.) Therefore, Section 303 does envision the alleged Debtor operating its business as if the Involuntary Petition had not been filed during the period between the date on which the Involuntary Petition was filed and the date on which the bankruptcy court enters the order for relief ("Gap Period"). *In re Geothermal Resources International, Inc.*, 93 F. 3d 648 (9th Cir. 1996).

B. The West Linn Paper Company Bankruptcy Case Walked A Thin Line Between Dismissal And Entry Of An Order For Relief For More Than Four Months

The case of West Linn Paper Company, case no. 17-33992 in the United States Bankruptcy Court for the District of Oregon ("Bankruptcy Court"), was an involuntary case under Chapter 7 of the Bankruptcy Code that was filed on October 25, 2017 and dismissed

under section 303(j)(2) on February 2, 2018. The case literally ran for 125 days, the docket is 134 entries long, and the Involuntary Petition ultimately was dismissed with prejudice and without costs to any party. So why is this case interesting?

The case is interesting because it was “suspended” for all 125 days of its existence between filing and dismissal. During the “case,” not much of anything happened in Bankruptcy Court. There were only 11 substantive entries on the docket, all of which related to the following events:

- First, the Second Lien Lenders moved to dismiss the Involuntary Petition under sections 303 and 305 of the Bankruptcy Code, which the Petitioning Creditors opposed; [dkt. 10, 49]
- Second, the Bankruptcy Court’s entry of an order suspending proceedings in the case on November 16, 2017 *nunc pro tunc* to the October 25, 2017 Involuntary Petition date (“305 Suspension Order”); [dkt. 62]
- Third, the Bankruptcy Court’s entry of two more orders, one on January 5, 2018 and another on January 24, 2018, extending the 305 Suspension Order through February 20, 2018; [dkt. 90, 105] and
- Fourth, the Debtor’s filing of a Notice of Intent to Dismiss Involuntary Petition filed by Debtor on February 4, 2018 (w/ Consent to Dismissal under section 303(j)(2)) [dkt. 112];

Copies of the 305 Suspension Order, and the orders extending the suspension period from October 25 through February 20 (“Suspension Period”), are attached hereto.

Rather, all of the action was outside of the Bankruptcy Court. During the Suspension Period, the liquidation of West Linn Paper Company continued on schedule. In fact, the 305 Suspension Order and the two extension orders included budgets that arguably were approved by the Bankruptcy Court insofar as the orders authorized the Debtor to make “any transfers by or transactions with WLPC or its assets during the Suspension Period, so long as they are not inconsistent with this Order,” and authorized the pay down by the Debtor of the outstanding loan to Wells Fargo (which was paid in full during the Suspension Period) and payments to certain professionals including counsel to the Petitioning Creditors and the Debtor, as well as the Second Lien Lenders’ financial advisors.

Moreover, merely five days after the Petitioning Creditors filed the Involuntary Petition, the alleged Debtor filed a complaint against Marubeni America Corporation (“MAC”) in the United States District Court for the District of Oregon (“Breach of Contract Action”), the largest of the alleged Debtor’s unsecured creditors with a claim of approximately \$4.5 million. The complaint filed by the alleged Debtor against MAC asserted a breach of contract claim for \$11 million in damages. As a result of the Breach of Contract Action, the Bankruptcy Court disqualified MAC as a Petitioning Creditor at the November 9, 2017 hearing on the Second Lien Lenders’ motion to dismiss.

In addition, the Second Lien Lenders and the alleged Debtor filed a complaint against five of the alleged Debtor's largest suppliers seeking a declaration that none of the suppliers had a security interest in, or title to, certain paper pulp sitting at a warehouse owned by one of the alleged Debtor's affiliates ("Declaratory Judgment Action"). The Declaratory Judgment Action was also filed in the U.S. District Court for the District of Oregon. Notwithstanding the litigation, certain creditors of the alleged Debtor began working behind the scenes to determine what the optimal outcome would be, and whether obtaining an order for relief was truly in the best interest of the unsecured creditors.

Leading up to a hearing on January 22, 2018, there was significant negotiations outside of the Bankruptcy Court by the alleged Debtor, Second Lien Lenders, the Petitioning Creditors and MAC, all of which ultimately led to settlement terms and the filing of the Notice of Dismissal (with the Consent to Dismissal attached to the Notice) on February 4, 2018. The Consent to Dismissal attached an Exhibit 1, titled "Agreed Upon Terms Governing the Dismissal of Involuntary Petition." The key terms are as follows:

- Dismissal must be with prejudice and without costs to any party;
- In exchange for the Petitioning Creditors agreement to a dismissal on consent under section 303(j)(2), the Second Lien Lenders agreed to fund a creditor trust formed by the alleged Debtor with \$1.5 million in proceeds from the alleged Debtor's liquidation;
- The trust will be funded additionally with 20% of net proceeds from the Declaratory Judgment Action;
- The alleged Debtor, the Second Lien Lenders and MAC agreed to exchange mutual releases, and MAC agreed to waive any recovery from the trust on account of its \$4.5 million claim; and
- Creditor beneficiaries to the trust must execute and deliver an assent and proof of claim in which they waived all claims against the alleged Debtor, the Second Lien Lenders and MAC.

The U.S. Trustee and two creditors who were defendants in the Declaratory Judgment Action objected to the Consent to Dismissal on the grounds that it violated the Bankruptcy Code's priority scheme and violated *Czyzewski v. Jevic Holdings Corp.*, 137 S. Ct. 973 (2017).

In response to these objections, MAC and the Petitioning Creditors filed responses to the objections. The responses focused on the following arguments: First, dismissal under section 303(j)(2) did not require the Bankruptcy Court to consider whether dismissal is in the interests of the Debtor or its creditors, but only whether sufficient notice was given, and whether each of the Petitioning Creditors and the alleged Debtor consented to dismissal. Second, the consent was clearly not a collusive settlement between the Petitioning Creditors and the alleged Debtor. Third, the Consent sought an "immediate dismissal" of the Involuntary Petition, rather than a "structured dismissal" that conditioned dismissal on the

Bankruptcy Court's approval of certain settlements and distributions. None of the necessary parties was seeking the Bankruptcy Court's approval of the trust agreement or any other settlement. MAC and the Petitioning Creditors argued that the holding in *Jevic* was inapplicable because the Bankruptcy Court was not being asked to approve a settlement agreement in contravention of the Bankruptcy Code's priority scheme over non-consenting creditors. Rather, the Bankruptcy Court was only being asked to dismiss the Involuntary Petition under section 303(j)(2).

At the hearing on February 20, the Bankruptcy Court ruled that the case dismissed under section 303(j)(2). However, the dismissal order entered by the Bankruptcy Court two days later struck the phrase "with prejudice" from paragraph 1. As a result, the Second Lien Lenders were not required to fund the creditor trust post-dismissal. Moreover, MAC was not required to waive its claim against WLPC because its settlement was only effective if the Involuntary Petition was dismissed with prejudice. With the Petitioning Creditors' agreement that obligated the Second Lien Lenders to fund a trust with \$1.5 million hanging in the balance, the Petitioning Creditors filed an emergency motion to reconsider the notice of intent to dismiss the Involuntary Petition.

In their emergency motion, the Petitioning Creditors argued that the Bankruptcy Court's elimination of the phrase "with prejudice," which was clearly a material term of the Consent Dismissal, rendered the consent invalid. In other words, by modifying the proposed dismissal order that the Debtor uploaded with the Bankruptcy Court, the Bankruptcy Court approved a form of dismissal that the Petitioning Creditors and West Linn Paper Company had not consented to and that did not reflect the consent of the parties. In addition to filing its emergency motion, the Petitioning Creditors uploaded a form of dismissal order that did reflect the consent of the Petitioning Creditors and the alleged Debtor. Within an hour or two of the filing of the emergency motion, the Bankruptcy Court entered the revised order dismissing the Involuntary Petition with prejudice. With entry of that order, a trust came into being, and certain settlements and releases became effective.

DISTRICT OF OREGON
FILED
November 16, 2017
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.


TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re)	
West Linn Paper Company,)	CASE NO. 17-33992-tmb7
Alleged Debtor.)	ORDER ON MOTION TO DISMISS

This matter came to be heard on the *Secured Lenders' Motion for Order Dismissing Involuntary Petition* filed on November 1, 2017 (Docket No. 10, the "Motion to Dismiss"), as supplemented by the *Supplemental Declaration of Daniel Cairns in Support of Secured Lenders' Motion for Order Dismissing Involuntary Petition* (Docket No. 18, the "Supplement") by Belgravia Pulp Holdings, Inc. and 6200605 Canada Inc. (collectively, the "Second Lien Lenders").¹ The Court held a final evidentiary hearing on the Motion to Dismiss on November 9,

¹ The Motion to Dismiss was joined on November 1, 2017 by West Linn Paper Company through the *Joinder in Secured Lenders' Motion to Dismiss* (Docket No. 17), and on November 2, 2017 by Wells Fargo Bank, National Association through the *Joinder in Motion to Dismiss* (Docket No. 22). On November 7, 2017, West Linn Paper Company joined the Supplement through the *Joinder in Secured Lenders' Supplement to Motion to Dismiss* (Docket No. 45). The foregoing pleadings at Docket Nos. 17, 22 and 45 are collectively, hereinafter, the "Joinders".

2017 (the "Hearing"), at which the Court heard testimony and argument from the parties. The Court has also reviewed the pleadings filed by the parties in this case.

The Court set November 16, 2017 for a status hearing and ruling on the Motion to Dismiss, but certain parties that participated in the Hearing submitted this order to the Court for consideration prior to any such ruling.

Based upon the record in this case, including the statements of representatives of such parties during the Court's November 16, 2017 status hearing on this matter, and good cause appearing therefor,

THE COURT HEREBY FINDS THAT:

A. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157 and Local Rule 2100-1, this case has been properly referred to this Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue over this case and proceeding is proper pursuant to 28 U.S.C. § 1408 and 1409.

B. For the reasons stated on the record, the *Declaration of Robert J. Keach in Support of Secured Lenders' Motion for Order Dismissing Involuntary Petition* (Docket No. 52) is not being considered by the Court.

C. The claim of Marubeni America Corporation ("Marubeni") against West Linn Paper Company (the alleged debtor, "WLPC") is the subject of a "bona fide dispute" as used in 11 U.S.C. § 303(b)(1).

D. Based upon the supplemental declaration filed by Export Development Canada ("EDC"), EDC has complied with the requirements of Fed. R. Bankr. P. 1003(a).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. All of the findings of fact and conclusions of law set forth above are incorporated herein by reference.

2. Pursuant to 11 U.S.C. §§ 105, 303(f), 305(a), 362, 363, 364 and 549:

(a) The commencement date of this case, for all purposes, including, but not limited to, 11 U.S.C. §§ 503(b)(9) and 547, shall be October 25, 2017 (the "Petition Date").

(b) All proceedings in this case are and shall be suspended pursuant to 11 U.S.C. § 305(a) for the period commencing on the Petition Date and ending on the earlier of (i) January 5, 2018, or (ii) the date that is three (3) business days after Wells Fargo Bank, N.A. ("WFB") delivers written notice to counsel for WLPC, the Petitioning Creditors and the Second Lien Lenders that WFB has either (A) elected to cease making "Revolving Loans" (as defined in the Third Amendment to Credit Agreement referenced in the Motion to Dismiss) and remitting cash collateral to WLPC, or (B) has been paid in full; provided, that the Court may, on request from the Second Lien Lenders, the Petitioning Creditors, or WFB, extend such suspension (the "Suspension Period") or terminate the Suspension Period.

(c) The automatic stay and other effects and limitations arising on account of the filing of the Involuntary Petition under 11 U.S.C. §§ 303, 362, 363, 364 and 549 shall not be applicable with respect to any transfers by or transactions with WLPC or its assets during the Suspension Period, so long as they are not inconsistent with this Order.

(d) Throughout the Suspension Period, WLPC shall, via email, no later than the Wednesday following the reporting week at issue, provide counsel for WFB, the Petitioning

Creditors and Second Lien Lenders (i) a variance report showing actual to budget performance as compared to the Agreed Budget (as defined below) for the week, and (ii) a week's end inventory and receivables aging report.

(e) Throughout the Suspension Period, WLPC shall, upon request, provide such other information reasonably requested from time to time by WFB, Petitioning Creditors or Second Lien Lenders regarding the orderly wind-down of WLPC's business during the Suspension Period.

(f) Throughout the Suspension Period, all cash received by or on behalf of WLPC shall be promptly remitted to WLPC's collection account at WFB for application to WFB's accrued and accruing claim against WLPC.

(g) Throughout the Suspension Period, WLPC shall only use proceeds of Revolving Loans from WFB or cash collateral remitted to WLPC by WFB to pay expenses in accordance with the "Agreed Budget" attached hereto as Exhibit 1.

(h) All Revolving Loans made by WFB to WLPC during the Suspension Period shall be deemed secured by first priority liens and security interests in the "Collateral" (as defined in the Third Amendment to Credit Agreement referenced in the Motion to Dismiss) that shall not subject to avoidance, re-characterization or other challenge.

(i) Upon expiration of the Suspension Period, an order for relief shall be entered on the Involuntary Petition, with the chapter under which such order for relief will be entered to be determined at such time based upon WLPC's request, or as otherwise determined by the Court.

4. Except as set forth above, the Motion to Dismiss and Joinders are denied.

5. Nothing in this Order shall be deemed to prejudice the rights of WLPC to file a voluntary petition for relief at any time.

6. This Court retains jurisdiction to hear and determine all disputes and controversies arising out of this Order.

###

/s/ Jeremy M. Downs
Jeremy M. Downs, admitted *Pro Hac Vice*

Presented by:

GOLDBERG KOHN LTD

/s/ Jeremy M. Downs
Jeremy M. Downs
Admitted *Pro Hac Vice*
55 Easy Monroe Street, Suite 3300
Chicago, IL 60603
Telephone: 312.201.4000
Facsimile: 312.332.2196

Attorneys for Wells Fargo Bank, National Association

EXHIBIT 1

See Attached.

PAGE 6 OF 6 ORDER ON MOTION TO DISMISS

Case 17-33992-tmb7 Doc 62 Filed 11/16/17

2018 SOUTHWEST BANKRUPTCY CONFERENCE

West Linn Paper Company

7 Week Forecast - Version 2017-11-16v1

November 13, 2017 thru December 31, 2017

	Week # 1	2	3	4	5	6	7	TOTAL
Week Ending	11/19/17	11/26/17	12/03/17	12/10/17	12/17/17	12/24/17	12/31/17	
Cash Forecast - Operating Account:								
Cash Per Book, Beginning	1,271,981	96,477	161,237	89,033	97,530	83,466	260,247	1,271,981
Less Planned Disbursements	(1,275,504)	(935,240)	(972,203)	(941,503)	(564,063)	(377,219)	(808,656)	(5,874,390)
Advance	100,000	1,000,000	900,000	950,000	550,000	554,000	548,409	4,602,409
Cash Per Book, Ending	96,477	161,237	89,033	97,530	83,466	260,247	0	0
CASH RECEIPTS								
Accounts Receivable	2,353,460	2,567,255	3,551,742	2,510,358	2,039,666	1,098,282	784,487	14,905,249
Inventory- Raw Materials (Latex & Coatings)	-	-	-	-	-	-	176,835	176,835
Inventory- Broke	-	202,514	-	-	-	-	-	202,514
Inventory- Paper Pulp	-	900,000	-	507,858	-	-	-	1,407,858
Inventory- Finished Goods	-	-	-	2,335,006	2,132,097	3,281,913	3,281,913	11,030,929
Rolling Stock	-	-	-	-	-	650,000	-	650,000
TOTAL CASH RECEIPTS	2,353,460	3,669,769	3,551,742	5,353,221	4,171,763	5,030,194	4,243,235	28,373,384
CASH DISBURSEMENTS								
Payroll & Payroll Taxes	213,537	160,636	119,440	136,057	114,091	48,819	277,756	1,070,336
Temporary Services	17,500	10,700	10,700	10,700	10,700	7,900	7,900	76,100
Other Payroll Related Expenses (Med Ins)	151,500	8,000	8,000	93,000	8,000	8,000	8,000	284,500
Other Payroll Related - Retention Bonus	-	-	-	-	-	-	270,000	270,000
Freight	352,000	203,218	356,527	356,527	200,272	50,000	50,000	1,568,544
3rd Party Contract Drivers	60,000	45,000	35,000	25,000	25,000	15,000	15,000	220,000
Warehouse Rent & Expenses	154,232	127,687	207,537	46,220	-	-	-	535,675
Environmental	25,000	20,000	15,000	15,000	10,000	10,000	5,000	100,000
Security	14,000	14,000	14,000	14,000	14,000	14,000	14,000	98,000
Miscellaneous	133,500	100,000	75,000	75,000	50,000	50,000	50,000	533,500
Energy Utilities (Gas & Electric)	135,370	-	10,000	50,000	-	40,000	10,000	245,370
Mill Land Rent	-	16,000	-	-	16,000	-	-	32,000
Telecommunications	6,000	2,500	3,500	2,500	5,000	2,500	-	22,000
Insurance	12,865	20,000	20,000	20,000	20,000	20,000	10,000	122,865
Legal & Professional Fees	-	194,000	84,000	84,000	84,000	104,000	84,000	634,000
Sales Expenses	-	13,500	13,500	13,500	7,000	7,000	7,000	61,500
TOTAL CASH DISBURSEMENTS	1,275,504	935,240	972,203	941,503	564,063	377,219	808,656	5,874,390
NET CHANGE IN CASH	1,077,956	2,734,529	2,579,539	4,411,718	3,607,699	4,652,975	3,434,579	22,498,995
Collections Account								
Beginning Balance	2,800,000	-	-	-	-	-	-	2,800,000
Forecast Collections	2,353,460	3,669,769	3,551,742	5,353,221	4,171,763	5,030,194	4,243,235	28,373,384
Forecast Advances	(100,000)	(1,000,000)	(900,000)	(950,000)	(550,000)	(554,000)	(548,409)	(4,602,409)
Forecast Loan Repayment	(5,053,460)	(2,669,769)	(2,651,742)	(4,403,221)	(3,621,763)	(4,476,194)	(3,571,881)	(26,448,030)
Ending Balance	-	-	-	-	-	-	122,945	122,945
Wells Fargo Loan								
Beginning Balance	26,217,454	21,163,994	18,494,225	15,975,271	11,572,050	7,950,287	3,571,881	
Loan Interest & Fees	0	0	132,788	0	0	97,788	0	
Less Collections Net of Advances	(5,053,460)	(2,669,769)	(2,651,742)	(4,403,221)	(3,621,763)	(4,476,194)	(3,571,881)	
Ending Balance	21,163,994	18,494,225	15,975,271	11,572,050	7,950,287	3,571,881	-	
Employee Count	82	74	61	56	43	37	37	

Case 17-33992-tmb7 Doc 62 Filed 11/16/17

Exhibit 1
Page 1 of 2

AMERICAN BANKRUPTCY INSTITUTE

West Linn Paper Company
Legal & Professional Fees

		19-Nov-17	26-Nov-17	03-Dec-17	10-Dec-17	17-Dec-17	24-Dec-17	31-Dec-17	07-Jan-18	Total
Perkins Coie	WLPC Counsel		25,000	25,000	25,000	25,000	25,000	25,000		150,000
Davis Wright	Inventory Litigation		15,000	15,000	15,000	15,000	15,000	15,000		90,000
Lindsey Hart	CRC Litigation		20,000				20,000			40,000
DSI	Financial Consultant 2nd Secured		34,000	34,000	34,000	34,000	34,000	34,000		204,000
Blakeley, LLP	Unsecured Creditor Counsel		100,000	10,000	10,000	10,000	10,000	10,000		150,000
		-	194,000	84,000	84,000	84,000	104,000	84,000	-	634,000

1 of 1

Case 17-33992-tmb7 Doc 62 Filed 11/16/17

Exhibit 1
Page 2 of 2

DISTRICT OF OREGON
FILED
January 05, 2018
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.


TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re

West Linn Paper Company,

Alleged Debtor.

Case No. 17-33992-tmb7

**ORDER EXTENDING SUSPENSION
OF CASE**

This matter came to be heard on the *Joint Motion for Order Extending Suspension of Case* filed on December 27, 2017 [DE 69] (the “**Motion**”) by West Linn Paper Company (“**West Linn**”), the corporation named as the debtor in the involuntary Chapter 7 petition filed in this Court on October 25, 2017 (the “**Petition Date**”) [DE 1], Belgravia Pulp Holdings, Inc. (“**BPH**”) and 6200605 Canada Inc. (“**605 Canada**,” and together with BPH, the “**Second Lienholders**”). West Linn and the Second Lienholders (the “**Movants**”) contend that continued suspension of the proceedings in this case in favor of the continued orderly liquidation of West Linn’s assets already underway will serve the best interests of West Linn and all its creditors. The Court granted the Movants’ request to shorten notice on the Motion and conducted a hearing on the

Page 1 - ORDER EXTENDING SUSPENSION OF CASE

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Case 17-33992-tmb7 Doc 90 Filed 01/05/18

Motion on January 4, 2018 (the “**Hearing**”) at which the Court heard arguments of counsel for the parties. Based on the Court’s review of all pleadings filed in this case, the entire record of this case, and good cause appearing,

THE COURT HEREBY FINDS that: (a) this Court has jurisdiction over this proceeding under 28 U.S.C. § 1334(b); (b) this case has been properly referred to this Court under 28 U.S.C. § 157 and Local Rule 2100-1; (c) venue for this case is proper in this district under 28 U.S.C. § 1408; and (d) venue for the proceedings on the Motion is proper in this district under 28 U.S.C. § 1409.

Therefore, IT IS HEREBY ORDERED ADJUDGED, AND DECREED that:

1. The Motion is granted in part and denied in part.
2. All proceedings in this case are and shall be suspended pursuant to 11 U.S.C. § 305(a) for the period commencing on the Petition Date and ending on January 22, 2018 (“**Suspension Period**”), absent further order of the Court.
3. Throughout the Suspension Period, West Linn shall only use proceeds of Revolving Loans from Wells Fargo or cash collateral remitted to West Linn by either Wells Fargo or either Second Lienholder to pay expenses in accordance with the Budget attached to this Order as Exhibit 1; *provided that*, notwithstanding anything to the contrary in the Budget, no proceeds shall be used during the Suspension Period to pay prepetition claims other than Wells Fargo’s claim.
4. Throughout the Suspension Period, all cash received by or on behalf of West Linn shall be promptly remitted to West Linn’s collection account at Wells Fargo for application to Wells Fargo’s accrued and accruing claim against West Linn until such claims are satisfied in full; *provided that* to the extent the United States District Court for the District of Oregon

(“**District Court**”) enters any order relating to the deposit of funds in the registry of the District Court by Canfor Pulp and Paper Sales, Ltd. in case no. 17-civ-1880 (the “**Deposited Funds**”), such order shall govern the parties’ rights with respect to the Deposited Funds.

5. In the event Wells Fargo’s claim is paid in full prior to the expiration of the Suspension Period, any excess cash received by or on behalf of West Linn during the Suspension Period shall remain in West Linn’s accounts at Wells Fargo pending further order of the Court.

6. Within five (5) business days after entry of this Order by the Court, West Linn shall provide the Petitioning Creditors and Marubeni America Corporation (“**MAC**”) with a report that identifies all remaining goods in West Linn’s possession, custody and control, and the location of such remaining goods. West Linn shall promptly file such report with the Court.

7. In addition to the parties-in-interest identified in ¶¶ 2(d) and 2(e) of the Prior Order (as defined below), West Linn shall provide MAC with weekly variance reports and inventory and receivables aging reports, and any other information reasonably requested from time to time, and shall file such weekly reports with the Court.

8. For the duration of the Suspension Period, Wells Fargo (through its counsel) shall authorize Edward Hostmann, Inc. (“**EHI**”) to render services consistent with those provided by EHI to date in this case, whether or not West Linn’s loan balance with Wells Fargo has been repaid in full. Wells Fargo shall be entitled to be reimbursed by West Linn for the costs of engaging EHI on such basis.

9. All provisions of the Court’s *Order on Motion to Dismiss* [DE 62] (the “**Prior Order**”) are incorporated herein and remain in full force and effect (including, without limitation, Paragraphs 2(c) and 2(h) of the Prior Order), except to the extent specifically superseded by this Order.

Page 3 - ORDER EXTENDING SUSPENSION OF CASE

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Case 17-33992-tmb7 Doc 90 Filed 01/05/18

AMERICAN BANKRUPTCY INSTITUTE

10. To the extent the parties are unable to agree on a stipulated order with respect to the wind-down of West Linn for the period after the Suspension Period expires on January 22, 2018, any of the Movants, the Petitioning Creditors or MAC may move the Court to seek an extension of or termination of the Suspension Period, or any other relief provided for by the Bankruptcy Code.

11. A status conference in this case shall be held on January 18, 2018 at 9:30 a.m.

12. This Court retains jurisdiction to hear and determine all disputes and controversies arising out of this Order or the Prior Order.

###

Presented by:

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/s/ Oren B. Haker
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Attorneys for Marubeni America Corporation

Page 4 - ORDER EXTENDING SUSPENSION OF CASE

95336955.4 0066665-00001

Case 17-33992-tmb7 Doc 90 Filed 01/05/18

2018 SOUTHWEST BANKRUPTCY CONFERENCE

West Linn Paper Company Suspension Period Extension Budget Final

		Budget		
		WE 01/07	WE 01/14	WE 01/21
Receipts Forecast				
AR Scheduled Due Date	4,440,858	1,823,125	29,089	
Actual Payment of Scheduled AR				
% paid in week due	40%	729,250	11,636	-
% paid 1 week late	25%	326,657	455,781	7,272
% paid 2 weeks late	25%	320,504	326,657	455,781
% paid 3 weeks late	10%	-	128,202	130,663
Currently Past Due 12/10/17	5,460,378			
Less:				
- Trend	(1,933,439)	50,000	50,000	50,000
- American Litho	(281,656)	30,000	30,000	30,000
- Clampett	(71,065)	-	-	-
- Fisher	(40,339)	-	-	-
- Unidentified Uncollectable	(100,000)	-	-	-
Collectable Past Due	3,033,879	606,776	606,776	303,388
Forecast Collection		2,063,187	1,609,051	977,104
New Sales				
Tons WE 12/24	2,000			
Price/ton	\$ 525			
Weekly Sales Dollars	1,050,000			
COD	25%			
Terms 20 Days	75%		787,500	
Tons WE 12/31	1,000			
Price/ton	\$ 525			
Weekly Sales Dollars	525,000			
COD	25%			
Terms 20 Days	75%			393,750
Tons WE 01/07	1,500			
Price/ton	\$ 550			
Weekly Sales Dollars	825,000			
COD	10%	82,500		
Terms 20 Days	90%			
Tons WE 01/14	1,500			
Price/ton	\$ 550			
Weekly Sales Dollars	825,000			
COD	10%		82,500	
Terms 20 Days	90%			
Tons WE 01/21	1,500			
Price/ton	\$ 500			
Weekly Sales Dollars	750,000			
COD	40%			300,000
Terms 20 Days	60%			
Tons WE 01/28	2,500			

Exhibit 1
Page 1 of 3

Case 17-33992-tmb7 Doc 90 Filed 01/05/18

West Linn Paper Company Suspension Period Extension Budget Final

			Budget		
			WE 01/07	WE 01/14	WE 01/21
Price/ton	\$	450			
Weekly Sales Dollars		1,125,000			
COD		100%			
Terms 20 Days		0%			
Collections - NEW COD sales			82,500	82,500	300,000
Collections - NEW Credit sales			-	787,500	393,750
Equipment Sales			-	-	-
TOTAL RECEIPTS			2,145,687	2,479,051	1,670,854
CASH DISBURSEMENTS					
Payroll & Payroll Taxes			211,034	41,916	38,007
Temporary Services			7,000	4,000	4,000
Other Payroll Related Expenses (Med Ins)			39,900	2,500	2,500
Other Payroll Related - Retention Bonus			25,000	1,500	1,500
Freight			180,000	130,000	125,000
3rd Party Contract Drivers			15,000	10,000	10,000
Warehouse Rent & Expenses			40,000	100,000	10,000
Environmental			10,000	10,000	10,000
Security			10,000	5,000	5,000
Miscellaneous			15,000	15,000	15,000
Energy Utilities (Gas & Electric)			45,000	7,500	7,500
Mill Land Rent			16,000	-	-
Telecommunications			3,000	3,000	3,000
Insurance			10,000	10,000	10,000
Legal & Professional Fees			42,000	42,000	47,000
Sales Expenses			5,000	5,000	5,000
TOTAL CASH DISBURSEMENTS			673,934	387,416	293,507
Bank Charges:					
Interest				10,000	
TOTAL BANK CHARGES			-	10,000	-
Loan Balance (Senior secured)					
Beginning			2,036,318	564,565	-
Funds Clearing Sweep			-	-	-
Collections			(2,145,687)	(961,980)	-
Disbursements			673,934	387,416	-
Interest & Adjustments			-	10,000	-
Ending			564,565	-	-
Funds remaining in Operating Account @WF					
Beginning			-	-	1,517,071
Collections				1,517,071	1,670,854
Disbursements					(293,507)
Ending			-	1,517,071	2,894,417

Exhibit 1
Page 2 of 3

Budgeted Legal & Professional Fees*

	WE 01/07	WE 01/14	WE 01/21
Blakeley LLP	10,000	10,000	10,000
Perkins Coie	7,000	7,000	7,000
Davis Wright Tremaine	10,000	10,000	10,000
Lindsay Hart	-	-	5,000
DSI	15,000	15,000	15,000
	42,000	42,000	47,000

* Ed Hostmann & Goldberg Kohn applied directly against ABL facility as a fee by Wells Fargo

Exhibit 1
Page 3 of 3

DISTRICT OF OREGON
FILED
January 24, 2018
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.


TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re

West Linn Paper Company,

Alleged Debtor.

Case No. 17-33992-tmb7

**ORDER FURTHER EXTENDING
SUSPENSION OF CASE**

This matter came to be heard on the *Joint Motion for Order Extending Suspension of Case* filed on December 27, 2017 [DE 69] (the “**Motion**”) by West Linn Paper Company (“**West Linn**”), the corporation named as the debtor in the involuntary Chapter 7 petition filed in this Court on October 25, 2017 (the “**Petition Date**”) [DE 1], Belgravia Pulp Holdings, Inc. (“**BPH**”) and 6200605 Canada Inc. (“**605 Canada**,” and together with BPH, the “**Second Lienholders**”). West Linn and the Second Lienholders (the “**Movants**”) contend that continued suspension of the proceedings in this case in favor of the continued orderly liquidation of West Linn’s assets already underway will serve the best interests of West Linn and all its creditors. The Court granted the Movants’ request to shorten notice on the Motion and conducted a hearing on the

Page 1 - ORDER FURTHER EXTENDING SUSPENSION OF CASE

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Case 17-33992-tmb7 Doc 105 Filed 01/24/18

Motion on January 4, 2018 (the “**January 4 Hearing**”), at which the Court heard arguments of counsel for the parties. Following the January 4 Hearing, the Court entered its *Order Extending Suspension of Case* [DE 90] (the “**Extension Order**”), which, among other things extended the period during which this case remains suspended to January 22, 2018. Following a status conference held on January 18, 2018, the Court held a final hearing on the Motion on January 22, 2018 (the “**January 22 Hearing**”) at which statements of respective counsel for the Movants, the Petitioning Creditors, Marubeni America Corp. (“**MAC**”), and other parties-in-interest were heard. Based on the Court’s review of all pleadings filed in this case, the entire record of this case, and good cause appearing,

THE COURT HEREBY FINDS that: (a) this Court has jurisdiction over this proceeding under 28 U.S.C. § 1334(b); (b) this case has been properly referred to this Court under 28 U.S.C. § 157 and Local Rule 2100-1; (c) venue for this case is proper in this district under 28 U.S.C. § 1408; and (d) venue for the proceedings on the Motion is proper in this district under 28 U.S.C. § 1409.

Therefore, IT IS HEREBY ORDERED ADJUDGED, AND DECREED that:

1. The Motion is granted in part and denied in part.
2. All proceedings in this case are and shall be suspended pursuant to 11 U.S.C. § 305(a) for the period commencing on the Petition Date and ending on February 20, 2018 (“**Suspension Period**”), absent further order of the Court.
3. Throughout the Suspension Period, West Linn shall only use proceeds of Revolving Loans from Wells Fargo or cash collateral remitted to West Linn by either Wells Fargo or either Second Lienholder to pay expenses in accordance with the Budget attached to this Order as Exhibit 1; *provided that*, notwithstanding anything to the contrary in the Budget,

Page 2 - ORDER FURTHER EXTENDING SUSPENSION OF CASE

no proceeds shall be used during the Suspension Period to pay prepetition claims other than Wells Fargo's claim.

4. Throughout the Suspension Period, all cash received by or on behalf of West Linn shall be promptly remitted to West Linn's collection account at Wells Fargo for application to Wells Fargo's accrued and accruing claim against West Linn until such claims are satisfied in full; *provided that* to the extent the United States District Court for the District of Oregon ("District Court") enters any order relating to the deposit of funds in the registry of the District Court by Canfor Pulp and Paper Sales, Ltd. in case no. 17-civ-1880 (the "Deposited Funds"), such order shall govern the parties' rights with respect to the Deposited Funds.

5. After Wells Fargo's claim is paid in full during the Suspension Period, any excess cash received by or on behalf of West Linn during the Suspension Period shall remain in West Linn's accounts at Wells Fargo pending further order of the Court.

6. In addition to the parties-in-interest identified in ¶¶ 2(d) and 2(e) of the Prior Order (as defined below), West Linn shall provide MAC with weekly variance reports and inventory and receivables aging reports, and any other information reasonably requested from time to time, and shall file such weekly reports with the Court.

7. All provisions of the Court's *Order on Motion to Dismiss* [DE 62] (the "Prior Order") are incorporated herein and remain in full force and effect (including, without limitation, Paragraphs 2(c) and 2(h) of the Prior Order), except to the extent specifically superseded by this Order.

8. To the extent the parties are unable to agree on a stipulated order with respect to the wind-down of West Linn for the period after the Suspension Period expires on February 20, 2018, any of the Movants, the Petitioning Creditors or MAC may move the Court to seek an

extension of or termination of the Suspension Period, or any other relief provided for by the Bankruptcy Code.

9. A telephonic status conference in this case shall be held on January 31, 2018 at 1:30 p.m. A hearing on a dismissal of the petition under 11 U.S.C. § 303(j)(2) (a “**Dismissal**”) shall be held on February 20, 2018, at 1:30 p.m. (the “**Dismissal Hearing**”). The Court, for good cause, shortens the regular notice period for any Dismissal such that West Linn and the Petitioning Creditors must provide no less than 14 days’ notice of the Dismissal Hearing to all known creditors of West Linn.

10. This Court retains jurisdiction to hear and determine all disputes and controversies arising out of this Order or the Prior Order.

###

Presented by:

STOEL RIVES LLP

/s/ Oren B. Haker
Timothy W. Snider
Oren B. Haker
760 SW Ninth Avenue, Suite 3000
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Tel: 503.224.3380

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Attorneys for Marubeni America Corporation

Page 4 - ORDER FURTHER EXTENDING SUSPENSION OF CASE

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Case 17-33992-tmb7 Doc 105 Filed 01/24/18

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West Linn Paper Company Suspension Period Extension Budget Final

		Budget				
		WE 01/28	WE 02/04	WE 02/11	WE 02/18	WE 02/25
Receipts Forecast						
AR Scheduled Due Date	1,661,010	869,410	361,015	430,585		
Actual Payment of Scheduled AR						
% paid in week due	40%	347,764	144,406	172,234	-	-
% paid 1 week late	25%	-	217,352	90,254	107,646	-
% paid 2 weeks late	25%	-	-	217,352	90,254	107,646
% paid 3 weeks late	10%	-	-	-	86,941	36,101
Currently Past Due 12/10/17	2,702,799					
Less:						
- Trend	(1,671,810)	50,000	50,000	50,000	50,000	50,000
- American Litho	(88,048)	20,000	20,000	20,000	20,000	8,048
- Unidentified Uncollectable	(100,000)	-	-	-	-	-
Collectable Past Due	842,941	252,882	168,588	168,588	168,588	84,294
Forecast Collection		670,646	600,347	718,428	523,429	286,090
New Sales						
Tons WE 01/28	1,500					
Price/ton	\$ 500					
Weekly Sales Dollars	750,000					
COD	20%	150,000				
Terms 20 Days	80%				600,000	
Tons WE 02/04	2,500					
Price/ton	\$ 450					
Weekly Sales Dollars	1,125,000					
COD	25%		281,250			
Terms 07 Days	25%			281,250		
Terms 20 Days	50%					562,500
Collections - NEW COD sales		150,000	281,250	-	-	-
Collections - NEW Credit sales		-	-	281,250	600,000	562,500
Equipment Sales		-	-	-	-	-
TOTAL RECEIPTS		820,646	881,597	999,678	1,123,429	848,590
CASH DISBURSEMENTS						
Payroll & Payroll Taxes		30,145	25,505	21,181	21,181	21,181
Temporary Services		6,000	6,000	-	-	-
Other Payroll Related Expenses (Med Ins)		2,500	36,100	1,000	1,000	1,000
Other Payroll Related - Retention Bonus		37,424	1,500	1,500	-	-
Freight		100,000	100,000	30,000	-	-
3rd Party Contract Drivers		10,000	10,000	10,000	-	-
Warehouse Rent & Expenses		10,000	90,000	35,000	-	-
Environmental		10,000	10,000	10,000	10,000	10,000
Security		5,000	5,000	5,000	5,000	5,000
Miscellaneous		15,000	15,000	10,000	5,000	5,000
Energy Utilities (Gas & Electric)		60,000	-	70,000	20,000	-
Mill Land Rent		-	-	16,000		
Telecommunications		3,000	3,000	1,000	1,000	1,000
Insurance		10,000	10,000	10,000	10,000	10,000
Legal & Professional Fees		32,000	32,000	32,000	32,000	32,000
Sales Expenses		5,000	5,000	5,000	-	-

2018 SOUTHWEST BANKRUPTCY CONFERENCE

West Linn Paper Company Suspension Period Extension Budget Final

		Budget				
		WE 01/28	WE 02/04	WE 02/11	WE 02/18	WE 02/25
TOTAL CASH DISBURSEMENTS		336,069	349,105	257,681	105,181	85,181
Bank Charges:						
Interest		25,000				
TOTAL BANK CHARGES		25,000	-	-	-	-
Net Cash in Wells Fargo Accounts	Beginning	1,104,596	1,564,174	2,096,665	2,838,663	3,856,911
	Collections	820,646	881,597	999,678	1,123,429	848,590
	Disbursements	336,069	349,105	257,681	105,181	85,181
	Interest & Adjustments	25,000	-	-	-	-
	Ending	1,564,174	2,096,665	2,838,663	3,856,911	4,620,319

AMERICAN BANKRUPTCY INSTITUTE

Budgeted Legal & Professional Fees					
	WE 01/28	WE 02/04	WE 02/11	WE 02/18	WE 02/25
Blakeley LLP	10,000	10,000	10,000	10,000	10,000
Perkins Coie	7,000	7,000	7,000	7,000	7,000
Davis Wright Tremaine	10,000	10,000	10,000	10,000	10,000
Lindsay Hart	5,000	5,000	5,000	5,000	5,000
DSI	-	-	-	-	-
	32,000	32,000	32,000	32,000	32,000

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re
West Linn Paper Company,
Alleged debtor.

Case No. 17-33992-tmb7

**NOTICE OF INTENT TO DISMISS
INVOLUNTARY PETITION**

NOTICE OF HEARING

YOU ARE NOTIFIED that (a) Resolute FP US Inc., Export Development Canada, and West Fraser Forest Products, Inc., the petitioners in this case, (b) West Linn Paper Company, the alleged debtor in this case, and (c) Belgravia Pulp Holdings, Inc. ("BPH") and 6200605 Canada Inc. ("605 Canada," and together with BPH, the "Secured Creditors"), intend to take the following action:

The above parties have consented to the dismissal of the petition with prejudice and without costs to any party, as evidenced by the instrument in writing, duly executed by them, attached as Exhibit A (the "Consent Dismissal").

The Consent Dismissal is in consideration of, among other things, implementation of a trust for the benefit of creditors on the terms set forth on Exhibit 1 to the Consent Dismissal.

YOU ARE FURTHER NOTIFIED that unless you file an objection to this Notice no later than 14 days after the service date setting forth the specific grounds for the objection and your relation to the case, with the Clerk of the Court, 1001 SW Fifth Avenue, Suite 700,

PAGE 1 NOTICE OF INTENT TO DISMISS INVOLUNTARY
PETITION and NOTICE OF HEARING

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Case 17-33992-tmb7 Doc 112 Filed 02/04/18

AMERICAN BANKRUPTCY INSTITUTE

Portland, Oregon 97204, and serve a copy on Tara J. Schleicher, 121 SW Morrison Street, Suite 600, Portland, Oregon 97204, the undersigned will proceed to take the proposed action without further notice.

YOU ARE FURTHER NOTIFIED that a hearing on the Consent Dismissal will be held as follows:

HEARING DATE: Tuesday, February 20, 2018
HEARING TIME: 1:30 p.m.
LOCATION: U.S. Bankruptcy Court, Courtroom #4
1001 SW Fifth Avenue, Suite 700
Portland, Oregon 97204

Dated: February 2, 2018

PERKINS COIE LLP

By: /s/ Jordan A. Kroop
Erick J. Haynie, OSB No. 982482
EHaynie@perkinscoie.com
Jordan A. Kroop (admitted *pro hac vice*)
JKroop@perkinscoie.com
1120 N.W. Couch Street, 10th Floor
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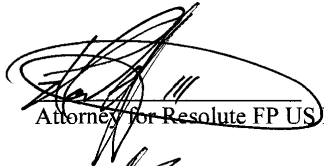
Attorneys for West Linn Paper Company

Exhibit A


Consent to Dismissal

It is agreed and stipulated, by consent of (a) Resolute FP US Inc., Export Development Canada, and West Fraser Forest Products, Inc., petitioners, (b) West Linn Paper Company, alleged debtor, and (c) Belgravia Pulp Holdings, Inc. ("BPH") and 6200605 Canada Inc. ("605 Canada," and together with BPH, the "Secured Creditors"), that this case be dismissed with prejudice and without costs to any party, and that the parties shall form and implement a trust for the benefit of creditors on the terms attached hereto as Exhibit 1.

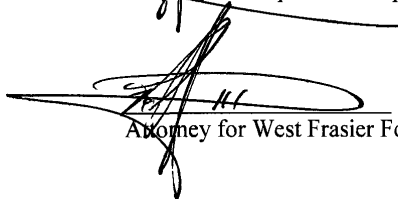
Dated: February 2, 2018



Attorney for Resolute FP US Inc.




Attorney for Export Development Canada



Attorney for West Fraser Forest Products, Inc.



Attorney for Alleged Debtor

Attorney for Belgravia Pulp Holdings, Inc.

Attorney for 6200605 Canada Inc.

Exhibit 1

Agreed Upon Terms Governing the Dismissal of Involuntary Petition

1. Dismissal of the involuntary petition [No. 17-33992] shall be with prejudice and without costs to any party, and shall be in consideration of the formation and funding of a creditor trust (the "Trust") in a form mutually satisfactory to counsel to the petitioning creditors, the alleged debtor, Belgravia Pulp Holdings, Inc. ("BPH") and 6200605 Canada Inc. ("605 Canada," and together with BPH, the "Secured Creditors"), which Trust shall contain, without limitation, a provision providing that creditor beneficiaries to the Trust must execute and deliver to the trustee of the Trust (the "Trustee") an assent and proof of claim as a precondition to receiving any distribution from the Trust and that, by doing so, such creditor beneficiaries release the Secured Creditors and MAC (as defined below, and for the reasons set forth below) as to any and all causes of action relating in any way to the Secured Creditors' (or MAC's, as applicable) relationship to the alleged debtor and any affiliates, or any action or inaction relative to such entities or the administration or liquidation of their assets.

2. The Trustee must be a third party mutually acceptable to the petitioning creditors and the Secured Creditors, which consent shall not be unreasonably withheld by either side. The Secured Creditors and the petitioning creditors agree that Charles G. Klaus is mutually acceptable; Mr. Klaus shall serve as the Trustee at a rate of \$200 per hour, such fees being payable only from the res of the Trust.

3. The Secured Creditors and their affiliates, including, without limitation, Stern Partners and Belgravia Investments, Ltd., agree to not file claims against or take from the Trust assets.

4. The Secured Creditors shall guaranty funding of the Trust, from the proceeds of the liquidation of the alleged debtor's assets, of \$1.5 million, on the following terms and timeline:

- (a) The first \$750,000 will be paid within three (3) business days of the order dismissing the involuntary petition becoming a final order (the "Order Date");
- (b) The remaining \$750,000 (the "Balance") will be paid within thirty (30) days of the Order Date;

provided that if cash receipts permit earlier payment while leaving adequate amounts to fund the costs of continued liquidation in the reasonable discretion of the alleged debtor in consultation with the Secured Creditors, the Balance will be paid at such earlier time(s). In no event shall the Secured Creditors be responsible for funding any additional amounts, or any amounts other than as set forth above, including to fund the fees of counsel to the petitioning creditors, except to the extent set forth in subparagraph 5 below.

5. The Trust will be additionally funded with twenty percent (20%) of the plaintiffs' net proceeds (gross proceeds of settlement or judgment minus all expenses and costs of litigation, including, without limitation, attorneys' fees incurred by the plaintiffs) of the declaratory judgment

action relative to the disputed goods [No. 3:17-cv-01880 (D. Or.)] (the “DJ Action”). The amounts currently alleged to be at issue with respect to the defendants in the DJ Action who are not released pursuant to this settlement are set forth below (the Secured Lenders make no representations as to the validity of the amounts asserted or the likelihood of success on the merits).

AlPac	\$396,302.00
Canfor	\$1,200,000.00
Cargill	\$170,166.00
Resolute	\$1,275,129.00
	<hr/>
	\$3,041,597.00

6. The alleged debtor, the Secured Creditors, and Marubeni America Corporation (“MAC”) shall exchange mutual releases with respect to all pending actions and/or disputed claims between and among them relating to the alleged debtor (including with respect to the DJ Action). Those actions shall be dismissed with prejudice and without costs to any party, except that the DJ Action shall be dismissed only as to MAC and no other party. In addition, in exchange for MAC’s release of its general unsecured claim against the alleged debtor (and MAC’s resulting agreement that it has no beneficial interest in, and shall not take from, the Trust), MAC shall benefit from the Releases from the creditor beneficiaries to the Trust as set forth above. These terms shall be memorialized in a settlement agreement between the alleged debtor, Columbia River Logistics, Inc., the Secured Creditors and MAC that shall become effective on the Order Date, which settlement agreement shall otherwise be satisfactory to the Secured Creditors and MAC.

7. From the Initial Funds, the Trustee shall pay all outstanding fees and expenses of Blakeley LLP related to its representation of the petitioning creditors, which is estimated to be \$100,000.

8. From the Initial Funds, the Trustee shall pay all outstanding fees and expenses of Damon Petticord, Esq., as local counsel to Blakeley LLP in its representation of the petitioning creditors, which is estimated to be \$2,000.

9. The Secured Creditors agree that any settlement (or abandonment) of the DJ Action (or any part thereof, other than the dismissal of MAC hereunder) shall require the mutual consent of the Secured Creditors and the Trustee, which consent shall not be unreasonably withheld by either side.

10. Subject only to the above terms and conditions, the liquidation of the alleged debtor’s assets shall continue for the benefit of the Secured Creditors with respect to all assets of the alleged debtor, and the alleged debtor and petitioning creditors acknowledge the validity, first priority and enforceability of all liens, mortgages, pledges, and security interests in favor of the Secured Creditors. Upon the funding of the Balance to the Trust, the Secured Creditors shall be free to foreclose their liens, mortgages, pledges, and security interests on all assets of the alleged debtor, in their sole and absolute discretion, subject only to the terms and conditions above with respect to the DJ Action.

RISKS OF INVOLUNTARY PETITIONS

Janet Chubb
Kaempfer Crowell; Reno NV

FILING SOUNDS EASY — WHAT COULD POSSIBLY GO WRONG?

11 U.S.C. § 303(i) states:

- (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—
 - (1) against the petitioners and in favor of the debtor for—
 - (A) costs; or
 - (B) a reasonable attorney's fee; or
 - (2) against any petitioner that filed the petition in bad faith, for—
 - (A) any damages proximately caused by such filing; or
 - (B) punitive damages.

Like many statutes, the literal words are the starting point. Section 303 overall provides standards to determine the propriety of an involuntary petition, potential dismissal, and awards of fees or damages. In 2015, the Third Circuit held that even if creditors satisfied Section 303, the petition still could be dismissed as a bad-faith filing. This is in contrast to involuntary cases dismissed for failure to satisfy Section 303, but awarding fees, costs or damages because the inappropriately filed petition also is a bad-faith filing under Section 303(i)(2).

The Ninth Circuit does not have a similar on-point holding, nor have any courts within the circuit addressed the Third Circuit's decision. The Third Circuit did distinguish a contrary decision from the bankruptcy court for the Central District of California that has been cited over the years within the Ninth Circuit. An unpublished decision affirming the bankruptcy court, however, declined to address the theory of a dismissal as a bad-faith filing. Subsequent Ninth Circuit decisions have recognized the distinction without settling the different interpretation.

This section looks at the potential problems facing creditors if an involuntary petition is deemed inappropriate. Below is an analysis of the facts and issues in the Third Circuit's decision, as well as some of the Ninth Circuit's jurisprudence. The short version: Be careful and don't file an involuntary if the following are facts:

- 1) The creditor is using the bankruptcy courts to gain a personal advantage for debt collection or in other pending actions. Forum shopping for an involuntary case, thereby removing a creditor from a state court action, also gives rise to a bad faith finding.
- 2) Consider there may be damages over and above attorneys' fees by the filing which could arise from harm to debtor's credit, interference with business, and driving the debtor out of business.

DISMISSAL — SUBSTANTIAL FEES AND BAD FAITH

In re Forever Green Athletic Fields, Inc., 804 F.3d 328 (3d Cir. 2015), *aff'g Forever Green Athletic Fields, Inc. v. Dawson*, 514 B.R. 76 (E.D. Pa. 2014), *aff'g In re Forever Green Athletic Fields, Inc.*, 500 B.R. 413 (Bankr. E.D. Pa. 2013).

Award of Attorneys' Fees & Costs?

- \$475,000.00 (subsequent unpublished decision)

Award of Damages?

- None

Finding of Bad Faith?

- Yes

Finding and Analysis:

- Pre-petition, there were competing lawsuits between debtor and its petitioning creditors. Debtor sued a competitor run by one of debtor's former employees, claiming diversion of assets. The former employee filed a separate action against debtor, seeking unpaid compensation from his time working for debtor. The former employee obtained a judgment for his fees; the judgement was not satisfied. The former employee became convinced debtor was insolvent and sought to terminate the proceedings of his company's alleged diversion of assets. The former employee ultimately joined with two other creditors to file an involuntary petition.
- The three petitioning creditors met the requirements of Section 303(b), and Debtor was found not to be paying its debts as they became due.
- The Third Circuit looked beyond the provisions of Section 303 to determine the appropriateness of the involuntary petition. The former employee testified under oath that he intended to find any available asset that the alleged debtor had and try to use a lien to seize it. He also wanted to abate the pre-petition arbitration over his alleged diversion of debtor's assets. The creditor also threatened pre-petition to file the involuntary if there was no agreement to terminate the arbitration.

- This case holds that bad faith is a basis for dismissal, noting that meeting the statutory requirement is only the first step. If the petitioning creditors' motives are antithetical to the purpose of bankruptcy, it is not a good-faith filing.
- The purpose for filing the involuntary was deemed improper. The filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor such as loss of credit standing, inability to transfer assets and carry on business, as well as public embarrassment. The bankruptcy court, the district court and the circuit court concluded that there was bad faith of creditors filing the involuntary petition for purely debt collection purposes or to gain an advantage in litigation.

**BAD FAITH IS NOT IN STATUTE OR TRIGGERED WITH
CREDITOR CLAIMS ON APPEAL, AS THERE IS NO BONA FIDE DISPUTE**

Marciano v. Chapnick (In re Marciano), 708 F.3d 1123 (9th Cir. 2013), *aff'g Marciano v. Fahs (In re Marciano)*, 459 B.R. 27 (9th Cir. B.A.P. 2011), *aff'g In re Marciano*, 446 B.R. 407 (Bankr. C.D. Cal. 2010).

Award of Attorneys' Fees & Costs?

- No

Award of Damages?

- No

Finding of Bad Faith?

- No

Finding and Analysis:

- Debtor and his former employees engaged in pre-petition litigation claims and counterclaims. The employees obtained judgments as a discovery sanction. Debtor appealed but did not obtain a stay pending appeal. Meanwhile, other creditors obtained judgments against debtor and initiated collection efforts. The former employees filed an involuntary petition, seeking to stop collection and preserve the rights to set aside any liens or collection obtained by the other creditors.
- Debtor moved to dismiss, arguing the former employees' claims remained subject to a bona fide dispute while on appeal, even without a stay pending appeal. A dispute arose as to whether Marciano could proceed with discovery on the issue of whether the petitioning creditors' filing constituted bad faith, prompting a second dismissal motion.
- The bankruptcy court denied the motion and the bankruptcy appellate panel

affirmed, holding an unstayed judgment is not subject to bona fide dispute as to liability or amount.

- The Ninth Circuit affirming, following the majority *Drexler* rule from *In re Drexler*, 56 B.R. 960, 967 (Bankr. S.D.N.Y. 1986). It rejected the minority *Byrd* approach from *Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357 F.3d 433, 438 (4th Cir. 2004). *Byrd* holds that although it would be an unusual case in which a bona fide dispute exists in the face of claims reduced to state court judgments, those judgments do not guarantee the lack of a bona fide dispute.
- The Ninth Circuit declined the invitation to evaluate the merits of the judgment against Debtor on federalism grounds. The circuit also supported an involuntary petition to prevent the unequal treatment of similarly situated creditors.
- Finally, the circuit rejected debtor's argument that the bankruptcy court erred in denying discovery to evaluate the creditor's alleged bad faith in filing the involuntary petition. The circuit noted that "the Bankruptcy Code does not expressly provide for dismissal of an otherwise proper involuntary petition because of subjective 'bad faith' of the filers." Even accepting the theoretical availability of that defense, the circuit held the discovery would not provide a benefit given the employee creditors' substantial judgments totaling \$105 million. The bankruptcy court also did not abuse its discretion in holding that further discovery was unlikely to produce material evidence to the pending summary judgment motions.

**DISMISSAL — FEES AND PUNITIVE DAMAGES
BASED ON BONA FIDE DISPUTE ON CREDITOR CLAIMS**

Orange Blossom L.P. v. Southern Cal. Sunbelt Developers, Inc. (In re Southern Cal. Sunbelt Developers, Inc.), 608 F.3d 456 (9th Cir. 2010).

Award of Attorneys' Fees & Costs?

- \$745,000

Award of Damages?

- \$130,000 (punitive)

Finding of Bad Faith?

- Yes

Finding and Analysis:

- Thirteen entities filed involuntary petitions against two entities. The bankruptcy court dismissed the petitions after finding that petitioners' claims were the subject of a bona fide dispute. The thirteen petitioning creditors were held jointly and severally

liable for the \$745,000 in costs and attorneys' fees. The court found that the petitioning creditors filed the involuntary petitions in bad faith and held them jointly and severally liable for \$130,000.00 in punitive damages. The bankruptcy court also held the individuals who controlled the petitioning creditors jointly and severally liable for costs and attorneys' fees the debtors incurred in obtaining dismissal of the involuntary petition.

- After a month long evidentiary hearing, the bankruptcy court entered judgment against the controlling individuals of the petitioning creditors and in favor of the alleged debtors. The court determined that Section 303(i)(1) is a fee shifting provision, not a sanction statute. Section 303(i)(1) also authorizes an award of attorneys' fees incurred in litigating claims for those fees and damages under Section 303(i)(1)(2). The award for fees is clearly authorized under Section 303(i)(1). The award for fees incurred in litigating claims for damages is also authorized under Section 303(i)(2).
- The court noted that upon dismissal of an involuntary petition, the court may grant judgment in favor of the alleged debtor for costs and reasonable attorneys' fees whether related to the alleged debtors efforts to dismiss the petition pursuant to Section 303(i)(1) or to prove that bad faith or established damages pursuant to Section 303(i)(2). The award can be for preparation for and attendance at the hearing on attorneys' fees, costs and damages which are occasioned as a result of the involuntary petition. Both are compensable under Section 303(i); again, that award of fees is discretionary with the court. Thus, the damages that can be awarded are an exception to the American rule and the fee shifting categorization supports that. The court also held that an award of punitive damages can be made in the absence of an award of actual damages.
- The bankruptcy court has discretion to hold all or some petitioners jointly or severally liable for costs and fees, to a portion liability according to petitioners' relative responsibility or probability or to deny an award against some or all petitioners, depending on the circumstances.

DISMISSAL — NO FEES

Sofris v. Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.), 556 F.3d 742 (9th Cir. 2009), amended by 559 F.3d 917, *aff'g in part, rev'g in part & remanding Michael N. Sofris, APC v. Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.)*, 375 B.R. 558 (9th Cir. B.A.P. 2007).

Award of Attorneys' Fees & Costs?

- \$42,257

Award of Damages?

- No

Finding of Bad Faith?

- No

Finding and Analysis:

- Litigation arose over control and ownership of debtor's apartment building. Two equity groups claimed control, and one group filed an involuntary Chapter 11 petition in midst of the litigation. The bankruptcy court dismissed the petition, holding the control issue should be decided in the state court.
- Debtor (through the prevailing equity group) viewed one individual as the ringleader of the petitioning creditors and sought fees, costs and damages against the individual (Sofris). Sofris asserted that Section 303(i) requires service on all petitioning creditors. The bankruptcy court held awarded fees and held all served petitioning creditors were jointly and severally liable for the fees. As debtor failed to serve all petitioning creditors, the bankruptcy court held the award ran against less than all of the petitioning creditors.
- The Ninth Circuit held that the tort theory is contrary to the bankruptcy court's discretion in statute to award fees. The bankruptcy court must consider the totality of the circumstances in awarding fees as required by *Vortex Fishing* (below).
- The bankruptcy court may consider the culpability among the petitioners and the motives or objectives of individual petitioners in joining in the involuntary petition, the reasonableness of the respective conduct of the debtors and petitioners and other individualized factors.

**DISMISSAL — FEES AWARD BECAUSE OF
BONA FIDE DISPUTE OVER CLAIMS OF PETITION CREDITOR**

Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701 (9th Cir. 2004), *after remand in Liberty Tool & Manuf'g (In re Vortex Fishing Sys., Inc.)*, 277 F.3d 1057 (9th Cir. 2001).

Award of Attorneys' Fees & Costs?

- Yes (amount not specified in published decision).

Award of Damages?

- No.

Finding of Bad Faith?

- No..

Finding and Analysis:

- Higgins invented a fishing lure which formed the basis for his business. An investor (Scott) agreed to loan \$50,000 in exchange for the right to purchase 45% of the shares and the right to vote Higgins' remaining 55% of the shares. Higgins and Scott wound up in a bitter dispute which resulted in Scott, through his acquired rights, removing Higgins from the corporation.
- Higgins, along with several other creditors, filed a petition for involuntary Chapter 7 against Vortex. The bankruptcy court dismissed the petition due to bona fide disputes on the claims of the petitioning creditors (affirmed in the initial appeal).
- The bankruptcy court subsequently awarded attorneys' fees to debtor. The circuit held that the court may, but need not necessarily, award fees and costs, and that the determination to do so must be based on the totality of the circumstances.
- The circuit noted that any petitioning creditor in an involuntary case should expect to pay the debtor's attorneys' fees and costs if an insufficient petition is dismissed. The petitioner has a right to rebut the presumption that fees and costs are authorized. The circuit held that the following factors should be considered: the merits of the involuntary petition; the role of any improper conduct on the part of the alleged debtor; the reasonableness of the actions taken by the petitioning creditors and the motivation and objectives behind filing the petition. It also held that fees on appeal would not be properly awarded.

DISMISSAL — BAD FAITH

In Re WLB-RSK Venture, 296 B.R. 509 (Bankr. C.D. Calif. 2003), *aff'd by Kaplan v. Breslow (In re WLB-RSK Venture)*, 320 B.R. 221 (table), No. CC-03-1526, 2004 WL 3119789 (9th Cir. B.A.P. 2004), *aff'd by* 223 Fed. Appx. 555 (9th Cir. 2007).

Award of Attorneys' Fees & Costs?

- Not addressed; just evaluation of grounds for dismissal

Award of Damages?

- Not addressed; just evaluation of grounds for dismissal

Finding of Bad Faith?

- Yes (at bankruptcy court; not reached on appeal)

Finding and Analysis:

- An involuntary petition was filed by one of two general partners of the debtor following years of litigation. The bankruptcy court found that the debtor had no real assets except its contractual interest in the third party. It had no ongoing business to reorganize, there were no undisputed unsecured creditors since all of the claims are

in dispute by one or both partners, the debtor did not have any cash flow to fund a plan or litigation or to pay bills, the debtor had no employees and the case was a quasi two-party dispute.

- The bankruptcy court held that a petitioning partner filed the involuntary as a litigation tactic and effectively was forum shopping.
- The bankruptcy court dismissed the case as a bad-faith filing, since the statute allowed the award of fees and damages following the dismissal of an involuntary petition as a bad-faith filing.
- In the Ninth Circuit's unpublished decision, it affirmed the bankruptcy appellate panel's holding that all of the petitioning creditors held disputed claims, thereby compelling dismissal. The circuit declined to reach the question of whether the creditors filed the petition in bad faith.