UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION

IN RE:	:	CHAPTER 11
NATTEL, LLC	:	CASE NO. 06-50421 (AHWS)
Debtor	:	
OCEANIC DIGITAL COMMUNICATIONS, INC.	:	CIVIL ACTION NO.
Appellant	:	3:07 MC 0018 (AWT)
v.	:	
NATTEL, LLC	:	
Appellee	:	FEBRUARY 23, 2007

BRIEF OF THE APPELLEE, NATTEL, LLC

RESPECTFULLY SUBMITTED,
THE DEBTOR: NATTEL, LLC

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Pursuant to Fed. R. Bankr. P. 8006(a)(2), appellee, debtor and debtor-in-possession, NatTel, LLC ("NatTel" or "Debtor"), respectfully submits this brief of the appellee in this pending appeal. As set forth herein, this Court should affirm the judgment of the Bankruptcy Court in all respects.

STATEMENT OF APPELLATE JURISDICTION

The Debtor does not challenge ODC's statement of appellate jurisdiction concerning the finality of the Bankruptcy Court's judgment denying the Motion for Relief from Stay. The Debtor also does not challenge ODC's contention that the Bankruptcy Court's judgment denying the Motion to Dismiss and Motion for Abstention are interlocutory in nature.

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the Bankruptcy Court applied the correct legal standard under the controlling precedent of Sonnax Industries Inc. v. Tri Components Products Corp., 907 F.2d 1280, 1286 (2d Cir. 1990) and In re Cohoes Industrial Terminal, Inc., 931 F.2d 222 (2d Cir. 1991), and properly exercised its discretion in denying ODC's Motion for Relief from Stay because ODC failed to show that the Debtor had filed its Chapter 11 case in bad faith.

2. Whether the Bankruptcy Court's Ruling was supported by the evidence supplied to the Bankruptcy Court at the various hearings on ODC's Motions.

3. Whether the Bankruptcy Court applied the correct legal standard under controlling precedent, as set forth in In re Cohoes Industrial Terminal, Inc., 931 F.2d 222 (2d Cir. 1991), by denying ODC's Motion to Dismiss, either because ODC failed to show that the Debtor had filed its Chapter 11 case in bad faith, or because the Debtor should be given an opportunity to proffer a confirmable plan of reorganization, pursuant to 11 U.S.C. § 1112(b)(2).

4. Whether the Bankruptcy Court properly denied ODC's Motion to Abstain in order to ensure an equitable and orderly liquidation of the Debtor's assets for the benefit of all creditors and equity, rather than permitting ODC to use a closed auction (at which only ODC and its majority shareholder could bid) in order to appropriate the Debtor's sole asset, its Stock in ODC.

STATEMENT OF THE CASE

I. INTRODUCTION

The Debtor filed this Chapter 11 case for a legitimate purpose: to protect its assets for the benefit of *all* creditors and equity. Indeed, the Debtor's bankruptcy filing was necessitated by ODC's attempt to appropriate the Debtor's sole asset, stock in ODC (the "Stock"), in a closed auction structured to allow ODC to appropriate the Stock for less than its fair market value. Through its Motions,[1] ODC sought an order that would have allowed it to enforce an inequitable order (of a Bahamian court), to the detriment of all parties-in-interest in this case, except for ODC. More particularly, ODC attempted to compel the Debtor to forfeit the Stock through an improper auction process, contrived by ODC, at which only ODC, or its shareholders (except for the Debtor), would be allowed to bid. Because the only other shareholders of ODC are aligned with ODC,[2] if ODC had its way, the Stock would have been appropriated by ODC, leaving nothing for the Debtor's other creditors, or for equity.

Despite ODC's assertions, this case does not involve relitigation of prepetition lawsuits and is not a "two-party dispute". The Court should permit continued administration of this Chapter 11 case in order to allow the Debtor an opportunity to propound a liquidating plan of reorganization that will provide for sale of the Stock, at its fair market value, for the benefit of ***all*** creditors, including ODC, and for equity.

[1] As defined infra at § II

[2] ODC's shareholders qualify as "insiders" of ODC under the Bankruptcy Code, 11 U.S.C. § 101 (31).

II. PROCEDURAL HISTORY

On October 5, 2006 the Debtor filed a voluntary petition pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. 101, et seq. Thereafter, ODC filed its *Motion and Incorporated Memorandum of Law of Oceanic Digital Communications, Inc. Pursuant to § 1112(b) of the Bankruptcy Code to Dismiss the Debtor's Chapter 11 Case, or in the Alternative to Abstain from Hearing the Debtor's Chapter 11 Case under § 305(a) of the Bankruptcy Code for Relief from the Automatic Stay under § 362(s)(1) of the Bankruptcy Code* (the "Motions") (Bankr. Doc. ##18, 23).[3]

On November 21, 2006, the Debtor filed its objection and memorandum of law in opposition to the Motions (the "Debtor's Objection") (Bankr. Doc. ## 51, 53). The Bankruptcy Court conducted an initial hearing on the Motions and the Debtor's Objection on November 28, 2006 (the "First Hearing"). At the conclusion of the First Hearing, the Debtor and ODC jointly requested an adjournment of the hearing, for one week, in order to negotiate a potential resolution of the dispute, i.e., a stipulation which would have provided, inter alia, for the sale of the Stock in a commercially reasonable manner.

At the continued hearing, on December 5, 2006 (the "Second Hearing"), the parties jointly requested a second continuance to give them additional time to negotiate a stipulation, and a third hearing was set for December 12, 2006 (the "Third Hearing"). At the Third Hearing, the parties advised the Court that they were unable to reach an agreement on a proposed stipulation concerning a sale of the Stock, and argued positions before the Bankruptcy Court.

[3] Although filed as one motion, the Motions are actually three distinct motions. Hereafter, the Motions are sometimes, individually, referred to as the "Motion to Dismiss", the "Motion for Relief from Stay" and/or the Motion to Abstain."

Thereafter, the Bankruptcy Court instructed the parties to file proposed findings concerning ODC's Motions and the Debtor's Objection thereto.

On December 28, 2006, the Bankruptcy Court denied ODC's Motions. (Bankr. Doc. # 75.) ODC appealed from the denial of its Motion for Relief from Stay, and has sought leave to appeal the interlocutory orders denying its Motion to Dismiss and Motion to Abstain. (Bankr. Doc. ## 84, 85.)

III. FACTUAL BACKGROUND

The Debtor is the founding shareholder of ODC, a closely-held cellular telecommunications company. The majority shareholder of ODC is now SAC Capital Advisors, LLC and/or its affiliates (hereafter, collectively referred to herein as "SAC").[4] Between 1997 and 1999, the Debtor and SAC cooperated in the management of ODC. The principals of the Debtor, served as the president and chairman of ODC during this period. (Arbitration Award at 3-4, App. at 3-4.)

By the end of 1999, however, SAC began to engage in a course of action intended to undermine the Debtor's participation in the management of ODC,[5] culminating in an ODC Board of Directors' meeting on February 24, 2000, at which time the Debtor's principals were forced out of management of ODC. Later, in 2002, the Debtor initiated litigation against ODC because of its corporate misconduct and freeze-out actions. Eventually, related litigation ensued in the Bahamas. The Bahamas Court held that the matters at issue were subject to arbitration. In

[4] SAC became the majority shareholder of ODC, after it made a number of capital investments in ODC by SAC.

[5] App. at 5.

connection with the Bahamas Court litigation, a judgment of costs was entered in favor of ODC, and against the Debtor, in the amount of $97,314.52 (the "Judgment"). (App. at 22, 27-28.)

The disputes between the Debtor and ODC were, principally, litigated in an American Arbitration Association proceeding (the "Arbitration"). During this proceeding, the Arbitration panel found that SAC's treatment of the Debtor and its principals was improper. Indeed, the Arbitration panel found that "events transpired in substantially the way [the Debtor's principals] described in [their] testimony." Moreover, the Arbitration panel found that "the treatment accorded by [Robert B.] Segal [the chairman of ODC] and SAC to the founders of [ODC] was ***shabby and, as a stream of litigation that it has caused shows, it was unwise as well. This was particularly true with respect to [the Debtors principal who served as ODC's chairman], whose conduct throughout appears to have been without reproach."*** (Emphasis added; Arbitration Ruling at 6, App. at 6.) Despite the Arbitration panel's finding that the conduct of ODC and its functionaries was reprehensible, the Arbitration panel determined that there was no basis upon which to award damages to the Debtor under Bahamian law. (App. at 10-11.) The Arbitration panel further dismissed all of the counterclaims raised by ODC: "[ODC's] counterclaims need less discussion, because they all fail for a simple lack of proof." (App. at 9.) The Arbitration panel declined to award attorneys' fees and costs to either party. (App. at 11-12.) Nevertheless, despite the vindication of the Debtor's position and condemnation of ODC conduct, ODC sought to enforce the Judgment.

In September 2006, ODC obtained an ex parte order from the Bahamian Court that the Debtor's Stock be sold at an auction or (the "Auction") to satisfy the Judgment. (Auction Order,

App. at 13) The Auction Order reflected procedures established solely by ODC, [6] pursuant to which, only ODC or its current shareholders (other than the Debtor) would be permitted to bid at the Auction.[7] Other than the Debtor, the only other shareholders of ODC were SAC and SAC's hand-picked management team, all of whom had a role in freezing the Debtor out of ODC after February 2000. Accordingly, the Auction would not have allowed the universe of potential bidders to engage in an arms-length bidding war calculated to generate a fair market value price for the Stock. Further, the Auction Order permitted ODC to credit bid its judgment debt.[8] (App. at 14) Had the Auction gone forward, it would have resulted in the cancellation of the Debtor's interest in ODC (estimated to be worth tens of millions of dollars) for the relatively insignificant amount of ODC's judgment, with no possibility of generating funds sufficient to pay any other creditors. In addition, the Auction would have resulted in a complete forfeiture of the Debtor's equity interest in ODC.

To prevent harm to other creditors and a forfeiture by equity holders, on October 5, 2006 (the "Petition Date"), the Debtor filed its petition for relief pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"). As stated above, the bankruptcy filing was intended to protect the interest of other creditors and equity from ODC's attempt to gain a windfall by appropriating the Stock for *much* less than its fair market value.

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[6] Affidavit of Damian Neville ¶¶9-11, App. at 16, 19-20

[7] The Auction Order states: "[t]he bidders at the auction are limited to [ODC] and its existing shareholders ... (excluding NatTel) and that the Applicant is at liberty to bid the debt owed to it by NatTel...." (Auction Order, Appendix at A 13-14)

[8] See, supra, p. 5, n.4.

LAW AND ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY PLACED THE BURDEN ON ODC TO MAKE AN INITIAL SHOWING OF CAUSE IN THE PROSECUTION OF ITS MOTION FOR RELIEF FROM STAY

A. Standard of Review – Abuse of Discretion

The Bankruptcy Court's decision to deny the Motion for Relief from Stay is reviewable pursuant to an abuse of discretion standard. In re Boodrow, 126 F.3d 43, 47 (2d Cir. 1997); Watkins v. Alpert, 180 Fed. Appx. 295 (2d. Cir. May 16, 2006) (summary order).[9] "A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. A court abuses its discretion if the reviewing court has a definite and firm conviction that the lower court committed a clear error of judgment in the conclusion it reached based on all the appropriate factors." AT&T Universal Card Services Corp. v. Williams (In re Williams), 224 B.R. 523, 529 (2d Cir. BAP 1998) (internal citations omitted). "Notwithstanding, however, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." In re JLM, Inc., 210 B.R. 19, 23 (2d Cir. BAP 1997) (quoting, Brown v. Allen, 344 U.S. 443, 459, 97 L. Ed. 469, 73 S. Ct. 397 (1953)).

Outside the bankruptcy context, the Second Circuit has explained the abuse of discretion standard as:

> abuse of discretion is a standard of review suitable to district court decisions that balance several factors, often including equitable considerations of matters specific to the conduct of the particular action. In such matters, a [trial] court has a comparative advantage over an appellate court. A [trial] court has a familiarity with the

[9] Citation to summary orders of Second Circuit is now permissible under 2d Cir. L. R. App. P. 0.23.

> whole case and a refined sense of the legitimate needs of the parties, and is therefore better able than an appellate tribunal to choose among multiple reasonable but incompatible results.

Slayton v. American Express Co., 460 F.3d 215, 228 (2d. Cir. 2006). Thus, where a trial court reviews a totality of the circumstances, the appellate tribunal should not substitute its factual judgment so long as the correct law is applied. See also, Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d. Cir. 2006) ("Provided that the district court applied the proper legal standards in determining whether to certify a class [action under Fed. R. Civ. P. 23], we review the decision for abuse of discretion."); In Re: Bolar Pharmaceutical Co., Inc., Securities Litigation, 966 F.2d 731, 732 (2d. Cir. 1992) (per curiam): "Abuse of discretion' is one of the most deferential standards of review; it recognizes that the [trial] court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decisions than is an appellate court, which must work from a cold record.").

B. The Bankruptcy Court Found that ODC Failed to Establish Cause and, thus, Denial of its Motion for Relief from Stay was Proper

The Bankruptcy Court did not abuse its discretion because (1) it applied the correct legal standards and procedures and (2) did not base its decision clearly erroneous facts. Pursuant to 11 U.S.C. § 362(d)(1), the proponent of a motion for relief from stay "for cause" has the initial burden of establishing cause for the relief it seeks. Sonnax Industries Inc. v. Tri Components Products Corp., 907 F.2d 1280, 1286 (2d Cir. 1990); In re Worldcom, Inc., 2006 U.S. Dist. Lexis 55284, *6 (S.D.N.Y. Aug. 4, 2006) (App. at 46) (applying Sonnax). The proponent of a motion for relief from stay for cause must make a threshold showing of "cause" before the burden shifted to the debtor under 11 U.S.C. § 362(g). Id. ("Section 362(d)(1) requires an initial

showing of cause by the movant, while Section 362(g) places the burden of proof on the debtor for all issues other than 'the debtor's equity in property,' 11 U.S.C. § 362(g)(1))." Accordingly, "***[i]f the movant fails to make an initial showing of cause,…, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection***." Id. (emphasis added). [10]

In Sonnax the Court encountered facts somewhat similar to those presented herein. In Sonnax, the debtor hired a salesman from its direct competitor, Tri Components Products, Inc. ("TCP"). TCP brought suit in New York state court seeking to enforce a noncompetition agreement and to enjoin the debtor from soliciting customers of TCP. The New York state court granted a preliminary injunction and no stay was permitted on appeal. Id. at 1282. As a "last resort" the debtor filed bankruptcy. Id. at 1287. Thereafter, TCP sought stay relief for "cause", under 11 U.S.C. § 362(d)(1), arguing that the debtor was merely seeking to relitigate the issue it had lost in state court. The Second Circuit affirmed the bankruptcy court and district court rulings denying stay relief:

> In the instant case, however, the state-court injunction, as Tri Component well knew, had the potential of transforming a going concern with other creditors into a dead competitor. So far as can be told on the present record, Sonnax faced the very real threat of being driven out of its market and filed the bankruptcy petition as a last resort. We conclude that the district court correctly found that Tri Component had failed to carry its burden in showing bad faith as cause for lifting the stay.

[10] While ODC informed this Court that it is aware of case law in which an abuse of discretion standard was applied in an appeal from an order resolving a motion for relief from the automatic stay, or motion to dismiss, (ODC Brief at 5), ODC does not even mention to or distinguish, Sonnax. Instead, ODC invites this Court to disregard Second Circuit precedent.

Id. at 1287. Accordingly, it is appropriate to file a bankruptcy petition in order to protect the Debtor's estate for the benefit of other parties-in-interest. Moreover, the reasoning applied in Sonnax is consistent with other sections of the Bankruptcy Code which are subject of this appeal. See, infra at § II; see e.g. 11 U.S.C. § 1112(b) (statute concerning dismissal of chapter 11 cases, for cause, places the burden on the *movant* to show cause). Even ODC concedes that "cause" under 11 U.S.C. §§ 362(d)(1) and 1112(b) are analyzed in the same manner. (ODC Brief at p. 21-22.) Here, the Bankruptcy Court properly applied the controlling law of the Second Circuit, under Sonnax, by requiring ODC to make a threshold showing that the Debtor acted in bad faith by filing this case, even though the Bankruptcy Court did so under the auspices of 11 U.S.C. § 1112(b), because dismissal was the thrust of ODC's motion at the Bankruptcy Court level.[11] Nevertheless, the substantive analysis is the same. Laguna Assocs. L.P. v. Aetna Casualty & Surety Co., 30 F.3d 734, 737-38 (6th Cir. 1994) ("no substantive difference between the cause requirement for dismissal of a petition under Section 1112(b) and the cause requirement for relief from an automatic stay under Section 362(d)(1).").

1. The Bankruptcy Court Applied the Correct Legal Standard in Denying the Motions filed by ODC

The Bankruptcy Court correctly decided that administration of the Debtor's Chapter 11 case was in the best interests of all creditors and equity holders. Where the claimed "cause" for dismissal is bad faith on the part of the Debtor; "a petition will be dismissed if **both** objective futility of the reorganization process **and** subjective bad faith in filing the petition are found." In re RCM Global Long Term Capital Appreciation Fund, Ltd., 200 B.R. 514, 520 (Bankr.

[11] ODC sought dismissal, not stay relief, as its primary remedy and argued primarily for dismissal at the Bankruptcy Court level. ODC has only now decided to press for stay relief because denial of its Motion for Relief from Stay is appealable as of right, denial of a motion to dismiss is interlocutory.

S.D.N.Y.) (emphasis in the original). When considering a motion pursuant to 11 U.S.C. § 1112(b), the Second Circuit has held that the totality of the circumstances of the case must be considered. In re Cohoes Industrial Terminal, Inc., 931 F.2d 222 (2d Cir. 1991). The same standard applies for purposes of a motion for relief from stay "for cause" under 11 U.S.C. § 362(d)(1). Sonnax, 907 F.2d at 1286.

In Cohoes, the Debtor filed for bankruptcy in order to collaterally attack a state court judgment and to obtain a respite from creditors. Denying a creditor's motion for sanctions, the Second Circuit held: "that it was legitimate for Cohoes, a corporation in financial difficulty, to resort to the bankruptcy court to challenge the constitutionality of a judgment rendered against it, as well as to obtain a respite from creditor demands and attempt to reorganize... Indeed, because a major purpose behind our bankruptcy laws is to afford a debtor some breathing room from creditors...." Id. at 228 (internal citations omitted). Thus, the Second Circuit reaffirmed the basic reason for the existence of Chapter 11: a debtor with some prospect of reorganization should be allowed to administer a Chapter 11 case. Id. Courts in the Second Circuit have routinely applied the Cohoes principle and have administered cases involving *both* minority ownership interests (the factual scenario presented in the case at bar) and single asset holding companies.

In In re Sletteland, 260 B.R. 657 (Bankr. S.D.N.Y. 2001), an individual debtor owned a minority interest in two business ventures. The Debtor lost several rounds of litigation against the majority shareholder in a Montana state court, and the majority shareholder obtained a $3 million judgment against the Debtor. The Debtor could not pay the judgment or afford an appeal bond, so he filed a Chapter 11 petition. The Bankruptcy Court for the Southern District of New

York denied dismissal of the case because (a) it was clear that state court litigation was not being relitigated and (b) the Debtor was entitled to attempt to reorganize. Indeed, the Court specifically held that "a creditor's claim that it wholly controls the Debtor's financial destiny [since judgment creditor was majority and controlling shareholder in joint venture] may weigh in favor of giving the individual access to a court of equity rather than against it." Id. at 667. Similarly, in In re 68 West 127 Street, LLC, 285 B.R. 838 (Bankr. S.D.N.Y. 2002), the debtor filed for bankruptcy on the ***day of*** a scheduled foreclosure sale in order to stop an auction of a building it had purchased the previous day. Id., 285 B.R at 841. The building was the Debtor's only asset. Despite the downtrodden nature of the Debtor's only asset, the court found that the debtor was attempting to reorganize and denied dismissal or stay relief, stating: "The Debtor is not trying to relitigate the foreclosure judgment, only restructure it." Id. at 847.

As set forth above, the Bankruptcy Court, although it did not specifically cite Sonnax, applied the standard contained therein in resolving the Motions, by reviewing a totality of the circumstances surrounding the Debtor's bankruptcy filing. In its Ruling the Bankruptcy Court found that ODC failed to establish the requisite showing of bad faith: "That leaves what appears to be the principal thrust of ODC's Motion, i.e. this case was filed in bad faith because the debtor is attempting to use bankruptcy to relitigate a controversy that has been decided." (Ruling at 3, App. at 45) Rejecting ODC's argument the Bankruptcy Court held that "the debtor must be given an opportunity to challenge the preclusive effect of the Bahamian Order. Moreover, the debtor argues that it intends to preserve the fair market value of its ODC stock and pay all allowed claims under a liquidating plan." (Id. at 4, App. at 46) Accordingly, the Bankruptcy Court recognized that either a demonstrated ability to reorganize or a desire to propound a

liquidating Chapter 11 plan of reorganization constitutes a valid basis for filing for bankruptcy. Because the Bankruptcy Court applied the correct legal standard, ODC offers cannot establish that the Bankruptcy Court abused its discretion by denying the Motion for Relief from Stay.

ODC's assertion that the Debtor bears the burden of proof to show *good faith* fails to acknowledge the burden shifting analysis under 11 U.S.C. §§ 362(d)(1) and (g): "This provision does not address the burden of going forward with evidence, which is generally placed on the party seeking relief. Rather, this provision addresses the question of which party has the ultimate burden of persuasion or risk of nonpersuasion once evidence on both sides of an issue has been presented... Failure to prove a *prima facie* case requires denial of the requested relief." 3 Collier on Bankruptcy ¶ 362.10 p. 362-117 (15th Ed. 2005). ODC, however, presses this Court to review the Ruling under a standard that runs contrary to Second Circuit precedent. This Court is obligated to follow Cohoes and Sonnax, not Stamford Color Photo, Inc., 105 B.R. 204 (Bankr. D. Conn. 1989) (a case authored by Judge Shiff who also decided the instant Motions below).

Indeed, In re C-TC 9th Avenue Partnership, 113 F.3d 1304 (2d Cir. 1997) is the only relevant Second Circuit case cited by ODC in its Brief. C-TC, is factually inapposite, however, as the debtor, there, was not to be eligible to file for bankruptcy because it was a partnership with only one partner. Id. at 1309. ("We therefore conclude that a partnership in dissolution is not a 'person' eligible to avail itself of reorganization in Chapter 11."). Thereafter, the Court discussed, in dicta, application of Cohoes to the specific facts presented in that case. C-TC, however, does not modify the Cohoes in any manner and ODC's reliance on that case is of no consequence.

2. The Facts Found by the Bankruptcy Court were Consistent with the Information Supplied to the Court and Argued at the Third Hearing

The Debtor filed its bankruptcy petition for the same reason as the petitions filed in Sonnax, Cohoes, Slettland and 68 West – to afford the Debtor an opportunity to reorganize. In order to maximize the return for the benefit of ***all*** creditors and equity, the Debtor needed a mechanism to preserve the Stock so that it could be sold at fair market value, pursuant to a liquidating Chapter 11 plan of reorganization.[12]

ODC's Brief makes manifest the fact that ODC is either trying to obtain more than recovery of its judgment (i.e., securing the Stock for far less than its fair market value) or simply misunderstands the reasons for the Debtor's bankruptcy filing. ***The Debtor is not trying to relitigate any adverse judgment.*** The Debtor is merely attempting to provide for the equitable liquidation of its assets for the benefit of *all* creditors and equity. If ODC had its way, the Stock would have been sold at an auction where only ODC or SAC, the majority shareholder of ODC, could have purchased the Stock (by credit bidding, moreover). A closed auction, as concocted by ODC, violates basic equitable principles and does not comport with U.S. law. See, infra at § III (Auction Order should not be afforded any comity as it violates basic tenets of auction sales

[12] Preserving the interest of equity security holders is a perfectly legitimate reason to file a bankruptcy case. See, In re: DN Associates, 3 F.3d 512, 516 (1st Cir. 1993) (approving fees for counsel for debtor that fought confirmation of creditors' plan that eliminated equity security holders: "… the fact that DN's counsel's proposals attempted to maintain the viability of investments made by DN Associates' limited partners and also the integrity of the overall business operation does not signify that DN's counsel failed to remain disinterested or held an adverse interest to the estate."); In re: ML Barge Pool VII Partners Series A, 71 B.R. 161, 164 (E.D. Missouri 1987) (court extended automatic stay to prevent governmental secured creditor from foreclosing on debtor's only asset so that the debtor could propose plan: "The Court *may* well be able to confirm Debtor's Plan of Reorganization. If so, [a secured creditor] will be paid the amount of its claim, unsecured creditors will recover 85 percent of the amount of their claims and equity security holders will retain their interest in the reorganized debtor.")

by judgment creditors, secured parties or similarly situated parties under federal and Connecticut law).

Moreover, as stated above, the Debtor's decision to file a bankruptcy petition for the purpose of facilitating an orderly liquidation of its assets through a liquidating plan of reorganization, is not only appropriate, but it is actually demonstrative of the Debtor's good faith. See, In re Jartran, 886 F.2d 859 (7th Cir.1989). Courts regularly allow Chapter 11 filings for the purpose of conducting an orderly liquidation of the debtor's assets even after an attempt at reorganization has failed. Jartran, 886 F.2d at 867; In re Tillotson, 266 B.R. 565, 572 (Bankr. W.D.N.Y. 2001). In Jartran, the Seventh Circuit determined that the debtor's second chapter 11 case was presented in good faith because it was filed the permissible purpose of liquidation. Id. at 867-68. In so ruling, the Seventh Circuit reasoned that by pursuing liquidation through Chapter 11**,** the debtor was not attempting to evade its responsibilities. Id.

In Tillotson, the Bankruptcy Court specifically found that the Debtor's second bankruptcy filing constituted an impermissible effort to modify the prior confirmed plan of reorganization, to the prejudice an objecting creditor, and that the case was filed in bad faith. Notwithstanding, however, Judge Kaplan ***still*** provided the debtor an opportunity to propose a fundamentally fair plan within the time prescribed by the Court. Id. at 571-72. Thus, even in the most extreme cases, it remains proper to permit a debtor to liquidate through Chapter 11.

In this case, the Debtor has expressly stated that the purpose of its filing is ***not*** to relitigate old issues with ODC but, rather, to quickly propound a liquidating plan fair to all parties in interest. The Debtor has retained the country's largest media and telecommunications investment banker (Daniels & Associates) to market and sell the Stock in a commercially

reasonable manner, thereby ensuring that the Stock will be sold in a manner calculated to obtain its fair market value. Consequently, this case was filed for the appropriate purpose of allowing creditors and equity to receive the highest value possible for the Stock.[13] Accordingly, the Bankruptcy Court's Ruling was not premised on any clearly erroneous facts.

C. ODC's Miscellaneous Arguments Should Be Rejected

ODC offered a number of miscellaneous arguments, all of which were irrelevant to issues presented to the Bankruptcy Court, and were properly disregarded. This Court should similarly reject the following propositions:

1. The Debtor is Not in Financial Distress (ODC Brief at 21, 25)*:* Had the Auction gone forward the Debtor would have lost its sole asset, the Stock. In an attempt to minimize the Debtor's financial distress, ODC attempts to make issue of the fact that the Debtor's equity holders have funded certain administrative costs during the Chapter 11 case. However, courts look to the *debtor's* financial distress, not the willingness or ability of its equity holder's to fund a debtor. Further, cases cited in support of this proposition, are off point. In In re First Connecticut Consulting Group, Chapter 11 Case No. Misc. Proceeding # 09-101 (Bankr. D. Vt. Jul. 27, 2004), aff'd, 340 B.R. 210 (D. Vt. 2006) (App. at 57) (bankruptcy court found that the debtor did not have authority to file the chapter 11 cases). Furthermore, in First Connecticut, the Bankruptcy Court noted that "each LLC was a viable entity that had been promptly servicing its debt obligations and paying all of its other bills in a timely manner." First Connecticut, slip op.

[13] Of course, any plan ultimately confirmed would, per se, have to meet the good faith requirements contained within 11 U.S.C. § 1129.

at p. 15. (App. at 71) Here, the Debtor has not paid any bills and has no capacity to pay its bills because it has no income.[14]

2. Desire to Relitigation Matters (ODC Brief at 21, 26-29): The Debtor is not trying to relitigate any decided matters. It is simply trying to sell the Stock for the benefit of all creditors and equity through a plan of reorganization.

3. Inability to Reorganize (ODC Brief at 29-30): This argument is simply a rehash of the "bad faith" argument. Essentially ODC suggests any plan that the Debtor offers would be proposed in bad faith. The Bankruptcy Court found that ODC did not meet its burden to show that the case had been filed in bad faith.

II. THE COURT SHOULD AFFIRM THE BANKRUPTCY COURT'S RULING DENYING THE MOTION TO DISMISS

A. Standard of Review

Denial of a motion to dismiss pursuant to 11 U.S.C. § 1112(b) is subject to an abuse of discretion standard of review. Toibb v. Radloff, 501 U.S. 157, 165, 115 L. Ed. 2d 145, 111 S. Ct. 2197 (1991); see, supra at § I(A). Further, since appeal from denial of a motion to abstain is interlocutory in nature, it should be view even more skeptically.

[14] In In re Fraternal Composite Services, Inc., 315 B.R. 247 (Bankr. N.D.N.Y. 2003) the court held the debtor's bankruptcy filing was premature. Distinguishing Sletteland and Cohoes, the court reasoned that a debtor cannot assume the worst case litigation scenario as cause to file bankruptcy. Here, the worst case has already befallen the Debtor: it was about to lose its only asset, the Stock, in a closed auction. Therefore, the Debtor *was* experiencing a severe financial problem (the imminent loss of its Stock) and Fraternal Composite is inapposite. "....it would premature for this Court to examine the '*Sletteland'* factors since there has as yet been no judgment rendered in the State Court. In addition, allegedly there has been no determination made concerning whether the Debtor would be allowed to satisfy any judgment in installments. The arguments made by Debtor's counsel, asking this Court to conclude that the petition was filed in good faith, are based on what he envisions would be the worst possible scenario should the Debtor be required to pay Karczewski over $ 1 million in satisfaction of any judgment." Fraternal Composite, 315 B.R. at 252-53.

B. Argument

As set forth above, dismissal under 11 U.S.C.§ 1112(b) is judged against the same legal standard as a motion for relief from stay for cause under 11 U.S.C. § 362(d)(1). Additionally, 11 U.S.C. § 1112(b)(1) places the burden of proof on the movant to show cause for dismissal.[15] However, even if a movant can show cause for dismissal, the Court may not dismiss the case, pursuant to 11 U.S.C.§ 1112(b)(2), if a plan can be submitted and confirmed in a timely manner.[16] As stated at the hearings in Bankruptcy Court, the Debtor is ready, willing and able to file a plan in short order. Consequently, even if there had been cause to dismiss the case, the Debtor should still be permitted to file a plan.

Accordingly, for all of these forgoing reasons, this court should affirm the Bankruptcy Court's Ruling denying the Motion to Dismiss.

II. THE COURT SHOULD AFFIRM THE BANKRUPTCY COURT'S RULING DENYING THE MOTION TO ABSTAIN

A. Standard of Review

Denial of a motion to abstain on grounds of international comity is subject to an abuse of discretion standard of review. JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,

[15] 11 U.S.C. §1112(b)(1), provides, in pertinent part: "....after notice and a hearing, absent unusual circumstances specifically identified by the court that establish the requested conversion or dismissal is not in the best interest of the creditors and the estate, the court shall... dismiss a case... if the movant establishes cause."

[16] 11 U.S.C. §1112(b)(2) permits confirmation of plan, even if a case is filed in bad faith where: "….the debtor or another party in interest objects and establishes that- (A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this, or if such sections do not apply, within a reasonable period of time; and (B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A)- (i) for which there exists a reasonable justification for the act or omission; and (ii) that will be cured within a reasonable period of time fixed by the court." 11 U.S.C. § 1112 (b)(2).

412 F.3d 418, 423 (2d Cir. 2005); see, supra at § I(A). Further, since appeal from denial of a motion to abstain is interlocutory in nature, it should be view even more skeptically.

B. Argument

Had the Bankruptcy Court abstained from administering this case, ODC would have taken possession of the Debtor's Stock for much less than its fair market value and obtained an inequitable windfall to the detriment of all other creditors, the Debtor and equity. 11 U.S.C. section 305(a)(1) states: "The court… may… suspend all proceedings in a case in a case under this title at any time if (1) the interests of creditors and the Debtor would be better served by such… suspension." In re RCM Global Long Term Capital Appreciation Fund, Ltd., 200 B.R. 514, 524 (Bankr. S.D.N.Y.). In RCM the court held: a movant-creditor must show how *other* creditors will benefit from abstention). "If dismissal or suspension is not in the best interest of the Debtor, relief under section 305(a)(1) is inappropriate." 2 Collier on Bankruptcy, ¶ 305.02[1], p. 305-5 (15th Ed. 2005).

The Debtor is attempting to reorganize by marketing and selling its Stock at fair market value for the benefit of *all* creditors and equity. Moreover, the Debtor's plan of reorganization is not contingent on defeating ODC in litigation. Here, ODC is the *only* party-in-interest who would benefit if the Bankruptcy Court abstained from administering this case. Abstention would allow ODC to obtain the Stock for well below its fair market value because of the ODC-orchestrated absence of competitive bidding.

Moreover, principles of comity or the availability of the Bahamas as a forum do not warrant absentation. The Debtor has no rights under the auction procedure created by ODC and was *specifically* prohibited from bidding in the Auction. If the Auction Order was merely

intended to facilitate payment of the Judgment, there would have been no reason to preclude the Debtor from bidding on its own Stock or exercising a right of redemption. The boldness of ODC's auction procedure reveals that its true purpose is not to secure recovery of its judgment, but to appropriate (or, more correctly, *mis*appropriate) the Debtor's Stock. Auctions must have procedures that are court-approved and designed to garner the highest price through a public auction or properly brokered private sale, such as a sale under 11 U.S.C. § 363. Similarly, when property of a judgment debtor is seized under either federal or Connecticut state law, the property must be sold by commercially reasonable means. Conn. Gen. Stat. § 52-356a(b); Wilson v. Hryniewicz, 51 Conn. App. 627, 724 A.2d 53 (1999) (public sale of judgment debtor's stock shares is commercially reasonable). Under the Connecticut Commercial Code, secured creditors are only allowed to purchase their collateral: "(1) at a public disposition; or (2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations." Conn. Gen. Stat. § 42a-9-610(c); See, Official Comments to U.C.C. Rev. Art. 9-610. As such, there is no basis upon which the Auction Order should be afforded comity.

The Auction, arranged by ODC as a thinly-disguised asset grab, stands in aberrance to basic principles of equity and due process and should not be entitled to any comity. This Court should permit the Debtor to propose a plan of reorganization by which the Stock may be sold in a commercially reasonable manner. Indeed, there can be no sale more transparent and fair than a sale conducted under the auspices of Bankruptcy Court.

Finally, cases cited by ODC, do not warrant abstention because they are all so factually in opposite as to render them irrelevant to the instant case. In In re Nahas, 95 B.R. 387 (Bankr.

W.D. Penn. 1989), the bankruptcy court dismissed the debtor's petition *without prejudice* and abstained because there was a pending motion to reopen the state court judgment that necessitated the bankruptcy filing in the first place:

> We find that abstention is the best course of action in this case and will enter an order dismissing the bankruptcy without prejudice to refiling, if appropriate, once all state court matters now pending have been resolved. This order will be entered because we find that it is in the best interest of the Debtors and Bruton to have the state courts decide the issues pending before them, to-wit, petitions to strike or to open judgments and/or to stay execution, which will be based entirely on applicable state law.

Id. at 389. Accordingly, in Nahas, if the debtor had been successful in reopening the state court judgment, the bankruptcy may not have been necessary. In this case there is nothing pending in any other forum that would have an affect on this other than consummation of the Auction Order. Thus, Nahas has no similarities with the case at bar.

Similarly in, In re First Financial Enterprises, Inc., 99 B.R. 751 (Bankr. W.D. Tex 1989) the debtor, a holding company for various insurance concerns (ineligible to file chapter 11), filed for chapter 11 in order to avoid state regulatory requirements. Thus, abstention was proper because the debtor was trying to avoid state insurance law: "The obvious purpose of the filing of this Chapter 11 case is an attempt by the Debtor and its sole shareholder to halt the state court receivership and conservatorship of the Debtor's subsidiary insurance companies and take control of their assets." Id. at 754. Here, the Debtor is trying to stop an Auction, with procedures rigged by ODC, and to preserve its assets for the benefit all creditors and equity.[17]

[17] There is no issue concerning the eligibility of the Debtor to have filed.

Finally, In re Spade, 269 B.R. 225 (D. Col. 2001) involved an *involuntary petition*. There, the ***debtor*** sought dismissal of the involuntary petition. Apparently, without a cogent argument, ODC must rely upon cases involving involuntary bankruptcies –bankruptcy cases which are filed by a group of creditors seeking to have a debtor placed into bankruptcy as a mechanism to ensure an orderly liquidation of the Debtor's assets. In the case at bar, the Debtor sought bankruptcy protection to *stop* ODC from appropriating the Stock and to *establish* a mechanism for an orderly liquidation. Consequently, the Bankruptcy Court was correct in to deny ODC's Motion to Abstain. This Court should affirm the Bankruptcy Court's Ruling denying ODC's Motion to Abstain.

CONCLUSION

For the reasons set forth above this Court should affirm the Bankruptcy Court's Ruling in all respects.

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CERTIFICATE OF SERVICE

This is to certify that, a copy of the foregoing **Brief of Appellee, NatTel, LLC with Appendix** was served by electronic means upon those parties entitled to receive notice and/or who have filed appearance on CMECF and/or by First Class U.S. Mail on the date set forth below:

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