

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(EASTERN DIVISION)

In re:

SHAMUS HOLDINGS, LLC,

Debtor.

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Chapter 11
Case No. 07-14572-JNF

**DEBTOR'S OPPOSITION TO MOTION OF LBM FINANCIAL, LLC
TO DISMISS CHAPTER 11 PROCEEDING**

Shamus Holdings, LLC, as debtor and debtor-in-possession herein ("Shamus Holdings" or the "Debtor"), hereby submits its Opposition to the Motion of LBM Financial, LLC to Dismiss Chapter 11 Proceeding (the "Motion to Dismiss"). The Debtor is in need of bankruptcy relief in order to litigate the validity of the claims asserted by LBM Financial, LLC. In further support of this Opposition, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

Following a public foreclosure sale on July 7, 2005, the Debtor's principal, Attorney Steven A. Ross ("Attorney Ross") purchased a 6,000 square foot commercial condominium unit in South Boston for a price of \$760,000. Title to the property was taken by Attorney Ross, as Trustee for the 14 Beach Street Realty Trust, a Massachusetts nominee trust. Two years later, after Attorney Ross and his business partner had invested more than \$3,000,000 renovating the property, acquiring and developing adjacent real estate and preparing both properties for commercial tenants, LBM Financial, LLC ("LBM") -- a notorious "hard money" lender -- commenced a foreclosure sale against the condominium unit based on a highly questionable mortgage. When the party from whom Attorney Ross purchased the property was unable to

obtain injunctive relief preventing the foreclosure sale, a decision was made to commence a Chapter 11 case by the entity now holding title to the condominium unit, Shamus Holdings.

There should be no mystery surrounding the creation of Shamus Holdings. It is well settled that nominee trusts in Massachusetts are not eligible to be debtors under the Bankruptcy Code. For that reason, Shamus Holdings was established to take title to the property and to become a Chapter 11 debtor in the event that the LBM foreclosure sale could not be enjoined. This was the only means by which Attorney Ross could protect and preserve the multi-million investment made by him and his business partner and could avoid having the value of the property decimated through foreclosure by LBM, a notorious predatory lender. Shamus Holdings intends to prosecute its Chapter 11 case aggressively so as to quickly remove the cloud of bankruptcy from the South Boston real estate development which Attorney Ross and his business partner have invested nearly two years of their time and more than \$3,000,000 of their capital bringing to fruition. This case was commenced with the utmost good faith and for the legitimate and well recognized purpose of preserving and protecting a valuable business enterprise.

The only party whose good faith should be examined in this case is LBM Financial, which now claims to be owed more than 350% of an amount it claims to have loaned to 655 Corp. only four (4) years ago. The mortgage at issue in this case was allegedly granted to secure a guaranty which a recently disbarred attorney purports to have signed on behalf of Foundry Realty, LLC. As further set forth below, LBM's claim to the Debtor's property is highly suspicious and most likely invalid. Once the facts surrounding this matter and the claim asserted by LBM become clear, the Court will only be left to wonder about the motivations and good faith of LBM.

FACTUAL BACKGROUND

1. On July 25, 2007 (the "Petition Date"), Shamus Holdings commenced this bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"). Shamus Holdings is a Massachusetts limited liability company that owns a commercial condominium unit known as Unit C-1 of the Foundry Condominium (the "Foundry Property") located at 314-330 West Second Street, South Boston, Massachusetts. The Foundry Property is a 6,000 square foot commercial condominium unit consisting of the entire first floor in a five floor condominium complex that contains approximately 40 residential condominium units.

The LBM/655 Note and Mortgage

2. On or about May 9, 2003, 655 Corp. allegedly received a loan from LBM in the principal sum of \$1,200,000.00 as evidenced by a promissory note (the "LBM/655 Note") which note was secured by a mortgage against property owned by 655 Corp. at 653-659 East Second Street, South Boston, Massachusetts (the "East Second Street Property")¹. Upon information and belief, 655 Corp. was then in the early stages of developing the East Second Street Property into an 18 unit residential condominium complex.

3. On or about May 11, 2003, the President of 655 Corp. Barry Queen, sent a letter to a prospective construction lender, General Bank, indicating that 655 Corp. had recently paid down its \$2,800,000 loan from Wolfpen Financial ("Wolfpen") by \$1,200,000.00.² Upon information and belief, General Bank had insisted that 655 Corp. reduce its outstanding debt before it (General Bank) would provide construction financing for the continued development of the East Second Street Property. According to 655 Corp., the funds allegedly advanced pursuant to the LBM/655

¹ Notably, in its Motion to Dismiss and in a sworn Affidavit from its principal, Marcello Mallegni ("Mallegni"), LBM describes a "loan arrangement" rather than a loan.

² Both LBM and Wolfpen are owned and controlled by Mallegni.

Note enabled 655 Corp to pay down the \$2,800,000 debt to Wolfpen, thereby satisfying General Bank's concern.

4. Upon information and belief, in reliance upon the May 11, 2003 letter from Barry Queen, General Bank consummated a \$5,600,000 construction loan with 655 Corp. Although the proceeds of that loan were used, in part, to satisfy the remaining \$1,600,000 balance of the Wolfpen debt, the mortgage securing 655 Corp.'s loan obligations to Wolfpen was never discharged. Instead, on May 9, 2003 (the same date as the alleged loan from LBM to 655 Corp.), the Wolfpen mortgage was assigned to On Broadway Corporation, an affiliate of attorney Frank D. Kirby. Even more curious is the fact that the East Second Street Property continues to be encumbered by not less than nine (9) separate mortgages in favor of LBM, including the LBM Mortgage that purports to secure the LBM/655 Note.

5. The LBM/655 Note was allegedly guaranteed (the "Foundry Guaranty") by Foundry Realty, LLC ("Foundry Realty") which guaranty was secured by a mortgage against the Foundry Property (the "LBM Mortgage"). Foundry Realty had acquired the property at 314-330 West Second Street on or about May 22, 2002. Both the Foundry Guaranty and the LBM Mortgage were signed on behalf of Foundry Realty by Attorney Stuart Sojcher, who signed both documents as Manager of Foundry Realty. Since this time, Attorney Sojcher has been disbarred³.

The Pine Banks Mortgage

6. On or about November 12, 2003, Foundry Realty granted Pine Banks Nominee Trust ("Pine Banks") a mortgage on the Foundry Property (the "Pine Banks Mortgage") to secure a

³ Not surprisingly, a preliminary investigation of the matter by Shamus Holdings reveals a strange but predictable pattern of bankruptcy cases, lender liability and fraud lawsuits involving loans made by LBM, Wolfpen and affiliates of Marcello Mallegni (upwards of twelve (12) cases) and what can be described, most charitably, as anomalous legal activity by Stuart Sojcher and Michael Norris.

loan from Pine Banks in the sum of \$760,000, the proceeds of which were used by Foundry Realty to satisfy a first mortgage against the Foundry Property.⁴ Prior to this date, LBM, through Mallegni and its counsel, Michael Norris (“Norris”) represented to Pine Banks and its counsel that LBM would subordinate the LBM Mortgage to the Pine Banks Mortgage (a sensible agreement given that LBM was, at that time, junior to an existing first mortgage in the same amount). Upon information and belief, Pine Banks would not have provided take-out financing for Foundry’s first mortgage loan without this representation, and Pine Banks believed thereafter that it held a valid first lien on the Foundry Property.

Acquisition of the Foundry Property by Attorney Ross and Shamus Holdings

7. On or about July 7, 2005, Pine Banks foreclosed upon the Pine Banks Mortgage. On or about September 12, 2005, Pine Banks conveyed the Foundry Property to Attorney Ross, as Trustee of 14 Beach Street Realty Trust (“Beach Street Trust”) by foreclosure deed for consideration paid of \$760,000. The Beach Street Trust is a Massachusetts nominee trust.

8. Thereafter, Attorney Ross and his business partner Richard Glanz spent two years and more than \$3,000,000 improving the Foundry Property, acquiring property adjacent to the Foundry Property and marketing both properties to commercial tenants. Attorney Ross and Mr. Glanz have secured two separate tenants that will make the Foundry Property a vibrant and productive part of West Second Street section of South Boston. The Debtor is seeking a third tenant to occupy the remainder of the Foundry Property.

9. Despite representations to the contrary, however, LBM never delivered a formal subordination agreement to Pine Banks, and LBM now claims that it holds a \$1,200,000 senior

⁴ Under Massachusetts law, this transaction would give Pine Banks a senior lien against the Foundry property by virtue of equitable subrogation. East Boston Savings Bank v Lois J. Ogan, 428 Mass. 327 (1998) (Mortgagee with constructive notice of second mortgage entitled to doctrine of equitable subrogation to subordinate the second mortgage in situation where first mortgage is extinguished as part of a sale); Provident Co-Operative Bank et al. v. James Talcott, Inc., 358 Mass. 180 (1970) (Equitable subrogation applies in refinancing transactions).

mortgage on the Foundry Property, which was not extinguished by the sale. Nearly two years after the foreclosure sale of the property by Pine Banks, LBM commenced its own foreclosure proceeding against the Foundry Property.

10. Confronted with the prospect of a foreclosure sale of property that he had invested two years and more than \$3,000,000 to develop, Attorney Ross urged Pine Banks to seek injunctive relief against LBM. On July 25, 2007, the morning of LBM's scheduled foreclosure sale, Superior Court Justice Allan van Gestel denied Pine Bank's request for injunctive relief.

11. Recognizing the inherent difficulty associated with Pine Bank's efforts to obtain injunctive relief, Attorney Ross also consulted insolvency counsel at which time he learned that Massachusetts nominee trusts are not eligible to be debtors under the Bankruptcy Code. Thus, absent injunctive relief from a state court, the only way to protect the Foundry Property from foreclosure by LBM was to "reincorporate" the owner of the property from a nominee trust to a limited liability company. Attorney Ross established Shamus Holdings and conveyed to it the Foundry Property on or about July 19, 2007.

12. When Pine Bank's failed to secure injunctive relief, Shamus Holdings filed its own petition for bankruptcy relief.

13. Shamus Holdings has good reason to believe that the LBM/655 Note, the Foundry Guaranty and the LBM Mortgage are invalid, avoidable or otherwise unenforceable. Toward that end, on Friday August 17, 2007, Shamus Holdings filed a series of Motions seeking authority from this Court to conduct examinations of LBM Financial, 655 Corp. and Foundry Realty by and through their respective principals, Marcello Mallegni and Michael Norris, Barry Queen and Bernard Laverty and Stuart Sojcher. Once these examinations are complete, Shamus Holdings intends to immediately commence an action to invalidate the Foundry Guaranty and

the LBM Mortgage and to seek compensation from LBM, its principals and agents for the damages suffered in connection with their pursuit of false claims.

ARGUMENT

There is no “Good Faith” Filing Requirement

14. The pending Motion to Dismiss is grounded on the assertion that the Debtor did not file this case in good faith. Section 1112(b) of the Bankruptcy Code, which sets forth grounds for dismissal of a Chapter 11 case, does not contain any provision requiring that a bankruptcy petition be filed in good faith. The absence of an explicit “good faith” requirement for filing is easily recognizable in contrast to Bankruptcy Code provisions for plan confirmation — Sections 1129(a)(3), 1225(a)(3), and 1325(a)(3) — all of which explicitly require that a plan be proposed in good faith. In re N.R. Guaranteed Retirement, Inc., 112 B.R. 263 (Bankr. N.D. Ill. 1990). Such a contrast was recognized by this Court in In re Fort Hill Square Assoc., et al., Case No. 04-13855 (Bankr. D. Mass. June 16, 2004, Feeney, J.) (“The Bankruptcy Code has no express ‘good faith’ filing requirement, compare 11 U.S.C. Section 1112(b) with 11 U.S.C. Section 1129(a)(3).”

15. There is unrest among the Circuits regarding the requirement of good faith in filing a bankruptcy petition. However, in Massachusetts bankruptcy courts, the so-called “good faith” filing requirement referenced in the LBM Motion is questionable at best. The Honorable James F. Queenan rejected the assertion that good faith was a necessary predicate to seeking bankruptcy relief and remarked, “[t]he good faith filing doctrine is an amorphous gestalt, devoid of reasoning and impenetrable to understanding.” In re Victoria Limited Partnership, 187 B.R. 54, 62 (Bankr. D. Mass. 1995); *see also* In re 1606 New Hampshire Ave. Assocs., 85 B.R. 298, 308 (Bankr. E.D. Pa. 1988) (“it is doubtful whether there is any requirement that a Chapter 11

case be *filed* in good faith, as contrasted with the express requirement that a Chapter 11 plan be *proposed* in good faith”) (emphasis in original).

LBM has Failed to Establish that the Petition was Filed in Bad Faith

16. Dismissal of a Chapter 11 case for bad faith “is a power that should be exercised with extreme caution.... Otherwise, Chapter 11 will likely become a protection and remedy easily available only to those who need it the least, while those who need it the most will be left to essentially prove good faith in order to qualify.” In re Mill Place Ltd. Part., 94 B.R. 139, 141 (Bankr. D. Minn. 1988). There is every reason to presume that Chapter 11 cases are filed because the debtors are in genuine need of bankruptcy protection, as such filings impose substantial costs to the debtor. In re N.R. Guaranteed Retirement, Inc., 112 B.R. 263, 273 (Bankr. N.D. Ill. 1990). Debtors can be assumed not to incur these costs without reason. Id. Findings of bad faith in proceedings based on § 1112(b) are based on a “conglomerate of factors” no single factor is dispositive. Id.⁵

17. LBM argues that the creation of, and subsequent conveyance of the Property to, the Debtor is cause for dismissal of the Chapter 11 proceeding. Without question the burden of producing sufficient evidence to establish both that the debtor has no need of bankruptcy protection and that the bankruptcy filing substantially impacts the creditor's non-bankruptcy rights rests squarely with the movant. Bank of America Commercial Finance Corp v. CGE Shattuck, LLC (In re CGE Shattuck), 1999 WL 33457789, at 2-3 (Bankr. D.N.H. Dec. 20, 1999); Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999). LBM has failed to meet its burden of proof because (i) the creation of the new debtor-eligible entity on the eve of

⁵ Even when several factors are present, courts have permitted a debtor to remain in bankruptcy. For example, in In Re The Bible Speaks, 65 B.R. 415 (Bankr. D. Mass. 1986), the court permitted the debtor to maintain its Chapter 11 case even though its petition was primarily motivated by an attempt to stay a looming state court judgment. Although seemingly a two party dispute, the court reasoned that bankruptcy was an appropriate venue to resolve the litigation given its potentially disastrous impact on the debtor's operations, employees, and assets. Id.

foreclosure is not sufficient cause to have a case dismissed (Carolin Corp. v Miller, 886 F.2d 693, 704 (4th Cir.1989)); (ii) the Debtor, in filing for bankruptcy protection, was acting in accordance with the goals well recognized by the Bankruptcy Code (In re McStay, 82 B.R. 763, 768 (Bankr. E.D. Pa. 1988)); and (iii) the delay caused by the filing is procedural, not substantive, in nature and poses no erosion or alteration of the rights of the Debtor's creditors (In re N.R. Guaranteed Retirement, Inc., 112 B.R. 263, 273 (Bankr. N.D. Ill. 1990)).

A. New Debtor Syndrome

18. Certain courts have coined the term "new debtor syndrome" to describe the situation where a new legal entity is created in proximity to filing a bankruptcy petition. A line of cases beginning with In re Victory Construction Co. Inc., 9 B.R. 549 (Bankr. C.D. Cal. 1981), place significant emphasis on the "new debtor syndrome" as practically being dispositive of the issue of good faith where there is a creation of a new entity on the eve of a bankruptcy filing. This view has been modified in subsequent cases by other bankruptcy courts as being "too sweeping in its scope and too simplistic in its approach". In re Beach Club, 22 B.R. 597, 599 (Bankr. N.D. 1982); *see also* In re Northwest Rec. Activities, Inc., 4 B.R. 36 (Bankr. N.D. Ga. 1980); In re Eden Associates, 13 B.R. 578 (Bankr. S.D.N.Y. 1981).

19. An alteration in legal form solely to become eligible to seek the protection of Chapter 11 does "not suffice to establish the subjective bad faith that is a prerequisite to summary dismissal." Carolin Corp. v Miller, 886 F.2d 693, 704 (4th Cir.1989).⁶ In re Land

⁶ *See also* In re Beach Club, 22 B.R. 597 (Chapter 11 petition filed by debtor was not filed in bad faith despite creation of debtor, immediately prior to filing of petition, where valuable piece of property was transferred to new debtor in which there was manifestly large equity cushion, liability of general partner of debtor was unaffected by transfer, and creation of debtor was effected for a good business purpose, and thus creditor was not entitled to relief from stay); In re G-2 Realty Trust, 6 B.R. 549 (Bankr. D. Mass. 1980) (Alteration in legal form solely to become eligible as debtor under Bankruptcy Code is not, standing alone, sufficient to require finding of bad faith warranting dismissal of Chapter 11 petition); In re N.R. Guaranteed Retirement, 112 B.R. 263 (Chapter 11 case of newly created corporation, to whom encumbered property was transferred shortly before bankruptcy was filed, would be dismissed as having been filed in bad faith absent showing that transferor of property was in need of bankruptcy

Stewards, the court held that the case would not be dismissed as a “bad faith” filing, notwithstanding that debtor was created shortly before commencement of bankruptcy case, where the filing was motivated by legitimate desire to preserve value of acquired assets for benefit of all creditors, and where such assets far exceeded total indebtedness of the debtor. In re Land Stewards, 293 B.R. at 369. The court noted that, in fact, the Bankruptcy Code manifestly sanctions, if not encourages, transactions like the Land Stewards' transactions. In re Land Stewards, 293 B.R. at 368. As a basis for its ruling, the court, relied on the reasoning in Carolin, *supra*, in which the Fourth Circuit stated:

By providing for interim emergency relief, including an automatic stay of creditor self-help efforts, the bankruptcy code manifestly sanctions-indeed encourages-not only the eleventh-hour invocation of its protection, but the last minute appearance of new management armed with fresh capital. “It is quite common and not inappropriate for a debtor to use chapter 11 to obtain a respite from a creditor or creditors aggressively seeking to collect on a debt, even when execution is imminent” (citations omitted) In such circumstances, a last ditch attempt to forestall imminent financial collapse would obviously *further* the purposes of Chapter 11 if it ultimately facilitated the emergence of new investors offering an “infusion of capital” and previously unavailable “management expertise.”

Carolin, 886 F.2d at 703-04 (citing In re McStay, 82 B.R. 763, 768 (Bankr. E.D. Pa. 1988) and Meadowbrook Investors' Group v. Thirtieth Place, Inc. (In re Thirtieth Place, Inc.), 30 B.R. 503, 505 (9th Cir. BAP 1983)).

relief or that creditors had not been adversely affected by debtor's filing for relief instead of transferor); In re Spenard Ventures, Inc., 18 B.R. 164 (Bankr. D. Alaska 1982) (Where mortgagors, who transferred mortgaged property to corporation that subsequently filed Chapter 11 petition for reorganization, showed valid reason, i.e., rehabilitation of ongoing business, and mortgagors made no attempt to shelter other assets from the mortgagees and a plan might feasibly be developed to satisfy secured creditors, the absence of unsecured creditors who would be aided by the Chapter 11 reorganization did not require finding that the petition was filed in bad faith); In re Conquest Offshore Intern., Inc., 73 B.R. 171 (Bankr. S.D. Miss. 1986) (Organization of debtor six months before filing did not bring bankruptcy case within "new debtor syndrome" line of cases so as to trigger affirmative finding of bad faith in filing due to chronology of events; rather, in determining whether Chapter 11 filing was in bad faith, court had to take into consideration additional factors, closely scrutinizing transaction that occurred and making on-the-spot evaluation of debtor's financial condition, motives, and local financial realities); In re I-5 Investors, Inc., 25 B.R. 346 (Bankr. D. Or. 1982) (Transfer of assets to new entity solely for purpose of bringing bankruptcy proceeding is not universally subject to dismissal as bad-faith filing under Bankruptcy Code); In re Cinole, Inc., 339 B.R. 40 (Bankr. W.D.N.Y. 2006) (“New debtor syndrome” is among several factors used in a totality of circumstances test to indicate a bad-faith filing); In re Land Stewards, L.C., 293 B.R. 364 (Bankr. E.D. Va. 2002) (Mere fact that a newly created entity has sought the protection of Chapter 11 does not suffice to establish subjective lack of good faith, as required for summary dismissal of case as “bad faith” filing).

20. Here, the motivation behind the creation of Shamus Holdings was anything but bad faith. Shamus Holdings was created to protect the value of a real estate development that was threatened by LBM, a disreputable hard-money lender that waited nearly two years to initiate its foreclosure action, thereby jeopardizing two years of hard work and \$3.0 million of invested capital by Attorney Ross and his business partner, Richard Glanz. Under these circumstances, the creation of Shamus Holdings and the subsequent conveyance of the Foundry Property thereto are actions that fall well within the boundaries of the Bankruptcy Code.

B. The Debtor's Actions are in Harmony with the Goals of the Bankruptcy Code

21. As the court in In re McStay notes, there is no want of good faith in seeking the legitimate protections of the Bankruptcy Code. In re McStay, 82 B.R. at 768. Furthermore, “Chapter 11 is a hospital of sorts, not a morgue, and many debtors headed for trouble would do well to file sooner than later.” Wynco Distribs., Inc. v. Wynn (In re Wynco Distribs.), 126 B.R. 131, 134 (Bankr. D. Mass. 1991) (denying motions to dismiss where debtors financial troubles were result of litigation with the movant). When evaluating good faith, the only appropriate inquiry is to “determine whether the debtor seeks to abuse the bankruptcy law by employing it for a purpose for which it was not intended.” In re PPI Enters., 228 B.R. 339 (Bankr. D. Del. 1998), *aff'd* 324 F.3d 197 (3d Cir. 2003). As this Court noted in In re Fort Hill, “[i]t is not bad faith to seek to gain an advantage from declaring bankruptcy—why else would one declare it?” In re Fort Hill, Case No. 04-13855 (quoting In re W & L Assocs., Inc., 71 B.R. 962, 967-68 (Bankr. E.D. Pa. 1987)).

22. In this case, the Debtor's goal was to invoke the automatic stay in order to prevent foreclosure by LBM of its highly suspicious mortgage securing an equally suspect “loan arrangement.” This Court has recognized that “[t]he invocation of the automatic stay to prevent

foreclosure ... [is a] valid, legitimate purpose of a chapter 11 case.” In re Fort Hill, Case No. 04-13855; *see also* In re King, 83 B.R. 843, 847 (Bankr. M.D. Ga. 1988)(The purpose of the automatic stay is to provide the debtor with a ‘breathing spell’ during which he can develop a plan of repayment or reorganization free from financial pressures); In re 1606 New Hampshire Ave. Assocs., 85 B.R. at 308 (filing to prevent foreclosure is not “a badge of bad faith”).

23. It is quite common and not inappropriate for a debtor to use chapter 11 to obtain a respite from a creditor or creditors aggressively seeking to collect on a debt, even when execution is imminent. In re McStay, 82 B.R. 763, 768 (Bankr. E.D. Pa. 1988); In re Greene, 57 B.R. 272, 275 (Bankr. S.D.N.Y. 1986). Indeed, that is one of the underlying purposes which the bankruptcy process, by virtue of the automatic stay, was meant to serve. Matter of Levinsky, 23 B.R. 210 (Bankr. E.D.N.Y. 1982); In re Spenard Ventures, Inc., 18 B.R. 164 (Bankr. D. Alaska 1982). In and of itself, filing to frustrate the execution efforts of one particular creditor is not an illegitimate bankruptcy purpose. In re Corey, 46 B.R. 31 (Bankr. D. Haw. 1984); In re Alton Telegraph Printing Co., 14 B.R. 238 (Bankr. S.D. Ill. 1981). “It is irrelevant that a debtor’s filing was precipitated by a specific problem or a particular creditor.” In re Fort Hill, Case No. 04-13855 (quoting Queenan, Chapter 11 Theory and Practice, §6.01, at 6:57-8 (Supp. 1997)).

24. Given the Debtor’s need for bankruptcy protection in order to litigate the validity of the claims asserted by LBM, this Chapter 11 case is plainly not an abuse of the bankruptcy process.

C. Alteration of Creditor’s Rights

25. Mere delay imposed upon secured creditors is not a sufficient basis for dismissal. In re I-5 Investors, 25 B.R. at 353. Harm to creditors through the creation of a new entity is evidenced by alteration or erosion of the creditors rights (secured and unsecured) against the

Debtor's assets. In re N.R. Guaranteed Retirement, Inc., 112 B.R. 263, 273 (Bankr. N.D. Ill. 1990). Harm to creditors does not exist in all cases. No challenge exists in the present case opposing the transfers as fraudulent to any unsecured creditor, as there are no known unsecured creditors that are not affiliated with the Debtor. With respect to secured creditors, creation of the Debtor and transfer of the Foundry Property did nothing to divest any legitimate mortgage holder of its right. Indeed, the Debtor's bankruptcy filing preserved value in the Foundry Property by preventing its "fire sale" at public auction.

26. The test for dismissal of a bankruptcy case is not merely whether a transfer of property and a change of entity occurred on the eve of the petition for relief under Chapter 11, as such a test would void all such actions occurring on the eve of filing, but includes a query as to whether "(1) the transferor of the property was itself in need of bankruptcy relief and (2) the rights of the creditor were adversely affected by the debtor's filing instead of the transferor." In re N.R. Guaranteed Retirement, Inc., 112 B.R. at 276. "It is the detriment to the creditors, not the advantage to the prior [entity and its beneficiaries], which this court deems more relevant to the issue of whether the creditors are fraudulently hindered or delayed by the Chapter 11 filing." In re I-5 Investors, 25 B.R. at 353.

27. Here, there has been no fraud upon creditors and no creditor has not been wrongly hindered or delayed in the potential collection of a claim.

CONCLUSION

28. Although the doctrine of good faith filing has no viability in Massachusetts, the petition in this case was unquestionably filed in good faith and for the very purpose for which the Bankruptcy Code was enacted.

Respectfully Submitted,

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