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# FOR PUBLICATION

FILED  
JUL 28 2003  
CLERK U.S. BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY Deputy Clerk

ENTERED  
JUL 29 2003  
CLERK U.S. BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY Deputy Clerk

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re

WLB-RSK VENTURE, a California  
General Partnership,

Alleged Debtor.

Case No. LA 03-16604 TD

Chapter 11

MEMORANDUM OF DECISION RE:  
WARREN L. BRESLOW'S MOTION TO  
DISMISS INVOLUNTARY PETITION AS  
BAD FAITH FILING

DATE: 6/4/03  
TIME: 2:00 P.M.  
PLACE: Courtroom 1345

## INTRODUCTION

Hearing on the Warren L. Breslow's ("Breslow's") Motion to Dismiss Involuntary Petition as a Bad Faith Filing ("Motion") was held on May 14, 2002 and continued for further hearing to June 4, 2003, at the conclusion of which the Motion was taken under advisement.

1 In coming to my decision on the Motion, I have considered the following: the  
2 Motion; Breslow's Request for Judicial Notice; the Joinder of Jona Goldrich and Jerome  
3 Snyder to Breslow's Motion; Petitioning General Partner Raymond S. Kaplan's  
4 ("Kaplan's") Opposition (With Request for Judicial Notice) to Breslow's Motion; Kaplan's  
5 Evidentiary Objection and Motion to Strike Portions of the Breslow Declaration; Breslow's  
6 Reply Brief; and all declarations included with, or related to, the aforementioned  
7 pleadings. I have also considered the involuntary bankruptcy petition and hereby take  
8 judicial notice of it and all other pleadings, orders, and documents I have been asked to  
9 take judicial notice of (on this Motion and on the accompanying motions heard at the  
10 same time), to the extent appropriate under Federal Rule of Evidence 201. I did not  
11 consider Breslow's Supplemental Points and Authorities Based on Subsequently  
12 Occurring Facts or Kaplan's Response to Breslow's Supplemental Points and Authorities,  
13 as these pleadings were unsolicited and were submitted after I took the motion under  
14 advisement. I announced oral rulings on all evidentiary objections at the June 4, 2003  
15 hearing. Based on the evidence presented and the arguments of the parties, I make the  
16 following Findings of Fact and Conclusions of Law. Any finding of fact that should be  
17 considered a conclusion of law should be treated accordingly, and vice versa.

#### 18 19 **FINDINGS OF FACT**

20 Though the history of WLB-RSK Venture ("Venture" or "Alleged Debtor") and  
21 litigation affecting it is complex, for purposes of my ruling on Breslow's Motion, I believe  
22 the pertinent facts can be summarized as follows:

- 23 1. Venture is a California general partnership.
- 24 2. Venture has two general partners, Breslow and Kaplan. Breslow and Kaplan each  
25 has a 50 percent interest in Venture.
- 26 3. Venture was formed primarily as a vehicle through which a 15 percent interest in

- 1 Channel Gateway, LP ("Channel"), as discussed below, could be purchased and  
2 held.
- 3 4. Channel was formed on March 30, 1989.
- 4 5. Channel's general partners are Jerome Snyder ("Snyder") and Snyder Marina  
5 Enterprises, LP, an entity comprised of numerous general partners and limited  
6 partners, including Jona Goldrich ("Goldrich").
- 7 6. Channel's original 15 percent limited partner was Marina East Holding Partnership,  
8 a California partnership ("MEHP"). Alan Robbins ("Robbins") at one time owned 99  
9 percent of MEHP as its general partner.
- 10 7. Robbins borrowed money from Sumitomo Bank ("Sumitomo"). The loan was  
11 personally guaranteed by Snyder and Goldrich, and MEHP's 15 percent interest in  
12 Channel was pledged by MEHP as security for the loan.
- 13 8. Robbins later borrowed money from Independence Bank ("IBank"). This loan was  
14 not personally guaranteed by Snyder and Goldrich, but MEHP again pledged its 15  
15 percent interest in Channel to secure the IBank loan, though it had previously  
16 pledged the interest to Sumitomo.
- 17 9. Subsequently, Robbins was indicted by the United States of America on corruption  
18 charges to which he pleaded guilty.
- 19 10. After Robbins' guilty plea, the Sumitomo loan came due and Robbins defaulted.  
20 Snyder and Goldrich stepped in, acquired Sumitomo's interest, and foreclosed on  
21 the pledge they held in MEHP's 15 percent interest in Channel. Venture was the  
22 successful bidder at the foreclosure sale, which took place in September 1992.
- 23 11. In connection with its purchase and as the sole consideration for its acquired  
24 interest in Channel, Venture executed a promissory note in the sum of \$900,000 in  
25 favor of Goldrich and Snyder ("Note").
- 26

1 12. Shortly after Venture's purchase of the MEHP interest in Channel, the FDIC, as  
2 successor to Ibank, filed an action in the federal district court ("the FDIC Litigation")  
3 against all of the parties involved in the foreclosure and sale seeking to set aside  
4 the sale. As a result of this litigation: (a) two settlement agreements and an  
5 amendment to the Channel partnership agreement were executed in 1995  
6 (collectively, "the Settlement") whereby MEHP was reinstated as a limited partner of  
7 Channel; (b) these agreements apparently were crafted specifically to leave  
8 Venture's interest untouched, though they may have resulted in some dilution of  
9 Venture's interest in Channel; (c) all parties to the FDIC Litigation, including  
10 Breslow but excluding Kaplan and Venture, participated in the Settlement. The  
11 FDIC later dropped its suit against Kaplan.

12 13. Kaplan later simultaneously initiated actions (collectively, "the Kaplan Channel  
13 Actions") in the federal district court ("the Kaplan District Court Action") and Los  
14 Angeles Superior Court ("the Kaplan State Court Action"), among others, seeking,  
15 among other things, to set aside the Settlement. The District Court Action was  
16 dismissed, the dismissal was affirmed by the Ninth Circuit, and petitions for  
17 rehearing *en banc* in the Ninth Circuit and for *certiorari* before the United States  
18 Supreme Court were denied. Kaplan's motion for summary adjudication in the  
19 Kaplan State Court Action was denied in 2001 on the basis of the state court  
20 referee's finding and conclusions that Kaplan lacked standing and the court lacked  
21 jurisdiction to upset the Settlement. The defendants' motion for summary judgment  
22 in the Kaplan State Court Action was granted in 2001. An appeal is pending,  
23 according to oral argument on the Motion.  
24  
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- 1 14. Later, on September 7, 2001, Goldrich and Snyder initiated an action in the state  
2 court against Venture, Breslow, Kaplan, and others seeking to recover on the Note  
3 ("Note Action"). The Note Action is still pending. Kaplan removed the Note Action  
4 to this court, and I remanded it to the state court by separate order.
- 5 15. On March 11, 2003, Kaplan filed an involuntary chapter 11<sup>1</sup> petition against  
6 Venture.

7  
8 **CONCLUSIONS OF LAW**

9  
10 **KAPLAN HAD AUTHORITY TO FILE THE INVOLUNTARY**

11 Pursuant to § 303(b)(3), an involuntary can be filed against a partnership by "fewer  
12 than all of the general partners in such partnership." § 303(b)(3). Therefore, Kaplan had  
13 a statutory basis and standing to file the petition against Venture.

14  
15 **THE PETITION WAS FILED IN BAD FAITH AND, THEREFORE, WILL BE DISMISSED**

16 **Bad Faith Under § 303**

17 Though there is no statute or controlling decision establishing that bad faith is an  
18 independent ground for dismissing an involuntary,<sup>2</sup> since § 303(i)(2) specifically provides  
19 that sanctions can be awarded if an involuntary is filed in bad faith, it would seem to follow  
20 that Congress, in enacting § 303, contemplated the possibility of dismissal of an  
21 involuntary petition based upon bad faith.

22  
23  
24 <sup>1</sup> All chapter and section references herein are to 11  
U.S.C. §§ 101 et seq., unless otherwise noted.

25 <sup>2</sup> But see Basin Electric Power Cooperative v. Midwest  
26 Processing Co., 769 F.2d 483 (8<sup>th</sup> Cir. 1985) (discussing at  
length bad faith in regard to dismissal for failure to meet the  
number of creditors requirement in § 303(b)(1)).

1           Since § 303(i)(2) seems to imply that an involuntary petition can be dismissed for  
2 bad faith, and numerous cases support the proposition that bankruptcy petitions of any  
3 kind should not be employed for improper purposes (See In re Marsch, 36 F.3d 825 (9<sup>th</sup>  
4 Cir. 1994); In re Little Creek Dev. Co., 779 F.2d 1068, 1071-73 (5<sup>th</sup> Cir. 1986).), § 105(a)  
5 would seem to authorize the court to dismiss an involuntary based on a finding of bad  
6 faith. Such a conclusion would not seem to violate the principle that the court cannot  
7 enlarge its authority through the application of § 105(a).

8           In In re Wavelength, 61 B.R. 614 (9<sup>th</sup> Cir. BAP 1986), the BAP identified the  
9 standard to be applied in finding bad faith in the context of an involuntary for the purposes  
10 of awarding damages. As the court stated, "Whether a party acted in bad faith is  
11 essentially a question of fact. Bad faith should be measured by an objective test that asks  
12 what a reasonable person would have believed." Id. at 620 (citations and internal  
13 quotation marks omitted); see also In re Johnston Hawks Ltd., 72 B.R. 361, 365-66  
14 (Bankr. D. Haw. 1987) (finding that involuntary was filed in bad faith and describing two  
15 tests for finding the existence of bad faith in the context of an involuntary: "One view finds  
16 'bad faith' to exist where the petition is motivated by ill will, a sense of malice, or to  
17 embarrass or harass the debtor. . . . A second view finds 'bad faith' to exist when the  
18 creditor's actions were an improper use of the Bankruptcy Code as a substitute for  
19 customary collection procedures.") . Here, Kaplan arguably employed his involuntary  
20 petition to circumvent his lack of success over the past eight years in prior litigation in  
21 other courts and to avoid the state court Note Action now pending against him. In this  
22 context, the question of whether Kaplan filed his involuntary petition in bad faith should be  
23 answered based on an objective inquiry into the evidence before me to ascertain whether  
24 the petition was filed for an improper purpose.

25           The evidence leads me to the conclusion that Kaplan filed this involuntary in bad  
26 faith. Specifically, the petition was filed by Kaplan as part of a forum shopping litigation

1 tactic to (1) stall the Note Action and (2) provide a new opportunity to litigate to set aside  
2 the Settlement after Kaplan's prior litigation efforts to the same end in other courts were  
3 unavailing. When other factors discussed below are taken into account, I believe it  
4 becomes appropriate to dismiss Kaplan's involuntary petition pursuant to my powers  
5 under § 105(a) in conjunction with the Congressional intent as expressed in § 303(i)(2).

6 Bad Faith Under § 1112(b)

7 Section 1112(b) is the usual basis for dismissal of a chapter 11 bankruptcy case on  
8 the grounds that it was filed in bad faith. Whereas bad faith analysis under §1112(b)  
9 focuses on the propriety of the debtor in filing its petition, bad faith analysis in the context  
10 of a pending involuntary petition under § 303 necessarily looks to the propriety of the  
11 petitioning party(s), who may be a creditor or a group of creditors, and who in this instance  
12 happens to be one of two 50 percent general partners in the alleged debtor. Therefore,  
13 the focus of the analysis in an involuntary case prior to entry of an order for relief in this  
14 context normally should be quite different from the analysis applicable in the typical  
15 debtor-originated bankruptcy, and a § 1112(b) bad faith analysis usually would not be  
16 appropriate in an involuntary case . But see In re Wedgewood Golf Associates, Ltd., 86  
17 B.R. 711, 714-15 (Bankr. M.D. Fla. 1988).

18 On the other hand, this is not a typical involuntary. Here, a general partner filed the  
19 involuntary petition, not a creditor. Thus, it seems that the principles of bad faith analysis  
20 as the issue arises under § 1112(b) may be appropriate to the determination of the  
21 Motion before me.

22 The Ninth Circuit has definitively established that, under §1112(b), a chapter 11  
23 case can be dismissed for "cause," including lack of good faith (i.e., bad faith). In re  
24 Marsch, 36 F.3d 825, 828. The Ninth Circuit view is that the existence of good faith in this  
25 context does not to depend on one factor alone, but rather, more appropriately, is to be  
26 judged by looking at the totality of circumstances surrounding the case. Id.

1 The Ninth Circuit Bankruptcy Appellate Panel has expanded on this concept, as follows:

2 To determine whether a debtor has filed a petition in good faith, courts weigh a  
3 variety of circumstantial factors such as whether: (1) the debtor has only one asset;  
4 (2) the debtor has an ongoing business to reorganize; (3) there are any unsecured  
5 creditors; (4) the debtor has any cash flow or sources of income to sustain a plan of  
reorganization or to make adequate protection payments; and (5) the case is  
essentially a two-party dispute capable of prompt adjudication in state court.

6 In re St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 582-83 (9<sup>th</sup> Cir. BAP 1995) ("St.  
7 Paul").

8 The factors announced in St. Paul would seem to support the dismissal of Kaplan's  
9 involuntary petition as having been filed in bad faith for the reasons that: (1) Venture has  
10 no real assets except its contractual interest in Channel; (2) Venture does not have an  
11 ongoing business to reorganize; (3) there are no undisputed, unsecured creditors, since  
12 all of such claims appear to be in dispute by one or both partners;<sup>3</sup> (4) Venture does not  
13

14 <sup>3</sup> The debts purportedly owed by Venture to Kaplan are for  
15 litigation expenses incurred in the Kaplan District Court Action  
16 and the Kaplan State Court Action. The debts purportedly owed by  
17 Venture to Breslow are for costs incurred by Breslow in  
18 preparing Venture's tax returns. All of these unsecured debts  
19 are in dispute. Breslow has stated that he will not seek  
payment for costs incurred in preparing Venture's tax returns  
and surely will dispute the litigation costs incurred by Kaplan  
on behalf of Venture since Breslow has opposed Kaplan's actions  
and positions in all the litigation discussed herein.

20 The fact that Venture does not appear to have any  
21 undisputed, unsecured debts but in fact only debts paid directly  
22 by Breslow or Kaplan out of personal funds, all of which appear  
23 to be heavily disputed between Breslow and Kaplan, would also  
24 support a decision of this court to decline to enter an order  
25 for relief. Pursuant to § 303(h), there are only two  
26 circumstances under which an order for relief can be entered in  
an involuntary. One of those circumstances, that delineated by  
§ 303(h)(2), is not applicable to this case. The other  
circumstance, that delineated by § 303(h)(1) is not satisfied  
due to the fact that there are no discernable undisputed,  
unsecured debts. To the contrary, the disputes concerning the  
alleged debts appear to be long-standing and bona fide. Whether  
the case is dismissed on the basis that it was filed in bad faith  
or because the court has no factual basis to enter an order for  
relief, the outcome is functionally the same.

1 have any cash flow to fund a plan, or litigation, or to pay its bills;<sup>4</sup> (5) Venture has no  
2 employees; and (6) the case is a quasi-two-party-dispute between the Settlement parties  
3 and Kaplan in the FDIC Litigation. These matters already have been adjudicated against  
4 Kaplan in his prior litigation in other courts, and the Note Action is capable of prompt  
5 adjudication in state court.

6 Additionally, bad faith may be found under § 1112(b) where the debtor has filed  
7 bankruptcy as a litigation tactic, e.g., forum shopping. Id. at 583; In re Silberkraus, 253  
8 B.R. 890, 902-03 (Bankr. C.D. Cal. 2000).

9  
10 As mentioned above, it appears that Kaplan filed this involuntary petition against  
11 the alleged debtor as a litigation tactic, after his litigation in other courts was unavailing,  
12 and in a forum shopping effort to avoid the latest, still pending litigation in the state court.  
13 Therefore, the involuntary petition here should be dismissed pursuant to the principles  
14 enunciated by the Ninth Circuit and the Ninth Circuit BAP under §1112(b) on the basis  
15 that Kaplan's petition here was filed in bad faith. Kaplan has failed to offer any convincing  
16 evidence or justification to the contrary, other than by asserting his statutory right as a  
17 general partner to initiate the involuntary process. I conclude the latter is an insufficient  
18 basis to sustain Kaplan's efforts in the face of Kaplan's eight-year prior litigation history  
19 involving Venture and the Note.

---

24 <sup>4</sup> At oral argument on Kaplan's motion to appoint a chapter  
25 11 trustee (which I denied in a separate order), Kaplan offered  
26 to advance \$25,000 to defray the initial expenses of a trustee.  
I rejected Kaplan's offer as an inappropriate, unpredictable,  
and inadequate basis to fund the administration of a chapter 11  
case.

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CONCLUSION

Kaplan's involuntary petition will be dismissed.

DATED: 7/22/03

Thomas B. Donovan

THOMAS B. DONOVAN  
United States Bankruptcy Judge

1  
2 NOTICE OF ENTRY OF JUDGMENT OR ORDER  
AND CERTIFICATE OF MAILING

3 TO ALL PARTIES IN INTEREST LISTED BELOW:

4 1. You are hereby notified that a judgment or order entitled:  
5 MEMORANDUM OF DECISION RE: WARREN L. BRESLOW'S MOTION TO DISMISS  
6 INVOLUNTARY PETITION AS BAD FAITH FILING

7 was entered on 07-29-03.

8 2. I hereby certify that I mailed a true copy of the order or judgment to the persons  
9 and entities listed below on 7-30-03.

10 Office of the U.S. Trustee  
Ernst & Young Plaza  
11 725 S. Figueroa Street  
26<sup>th</sup> Floor  
Los Angeles, CA 90017

12 Edward Wolkowitz  
13 Robinson, Diamant & Wolkowitz  
1888 Century Park East, Suite 1500  
14 Los Angeles, CA 90067

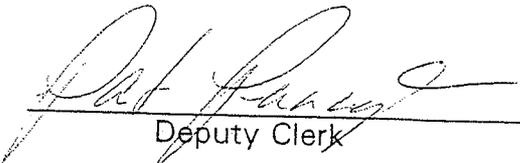
15 Eve H. Wagner, Esq.  
16 Sauer & Wagner LLP  
1801 Century Park East, Suite 520  
Los Angeles, CA 90067

17 Steven R. Friedman, Esq.  
18 433 N. Camden Drive, Suite 810  
Beverly Hills, CA 90210

19 Ira Benjamin Katz  
20 Law Offices of Ira Benjamin Katz  
A Professional Corporation  
21 1901 Avenue of the Stars, Suite 1900  
Los Angeles, CA 90067

22 Marcin & Barrera LLP  
23 John B. Marcin  
1901 Avenue of the Stars, Suite 1900  
24 Los Angeles, CA 90067

25 Dated: 7-30-03  
26

  
Deputy Clerk

FILED  
JUL 28 2003  
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BY Deputy Clerk

ENTERED  
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CENTRAL DISTRICT OF CALIFORNIA

In re

WLB-RSK VENTURE, a California  
General Partnership,

Alleged Debtor.

Case No. LA 03-16604 TD

Chapter 11

ORDER GRANTING WARREN L.  
BRESLOW'S MOTION AND DISMISSING  
INVOLUNTARY PETITION

DATE: 6/4/03  
TIME: 2:00 P.M.  
PLACE: Courtroom 1345

Based on my Findings of Fact and Conclusions of Law entered herein, Breslow's Motion to Dismiss the involuntary petition herein is granted. The involuntary petition filed by Kaplan with respect to WLB-RSK Venture hereby is dismissed.

IT IS SO ORDERED.

DATED: 7/28/03

*Thomas B. Donovan*  
THOMAS B. DONOVAN  
United States Bankruptcy Judge

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3 TO ALL PARTIES IN INTEREST LISTED BELOW:

4 1. You are hereby notified that a judgment or order entitled:  
5 ORDER GRANTING WARREN L. BRESLOW'S MOTION AND DISMISSING  
6 INVOLUNTARY PETITION

7 was entered on 07-29-03.

8 2. I hereby certify that I mailed a true copy of the order or judgment to the persons  
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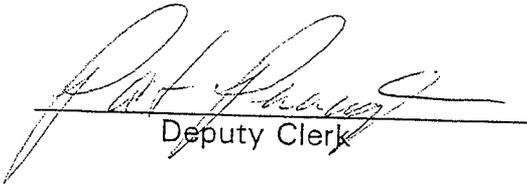
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24 Los Angeles, CA 90067

25 Dated: 7-30-03  
26

  
Deputy Clerk