IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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In re:	
INTERNATIONAL BUSINESS ADVISORS, INC.,	Bankruptcy Number 94B-21947
Debtor.	[Chapter 7]

MEMORANDUM DECISION AND ORDER DENYING MOTION TO DISMISS, FOR LIFT OF THE AUTOMATIC STAY AND FOR SANCTIONS

Steven F. Allred, Esq., Nielsen & Senior, Salt Lake City, Utah, appeared representing Pamela Gillmor, Movant.

Steven G. Loosle, Esq., Kruse Landa & Maycock, Salt Lake City, Utah, appeared representing Harriet E. Styler, Chapter 7 trustee of the estate of Daniel Brent Vaughn.

R. Kimball Mosier, Esq., McKay Burton & Thurman, Salt Lake City, Utah, appeared representing himself as Chapter 7 trustee of the estate of International Business Advisors, Inc.

George H. Speciale, Esq., Salt Lake City, Utah, appeared representing International Business Advisors, Inc., Debtor.

Pamela Gillmor (Gillmor) filed two motions which were heard by the court on June 29, 1994, related to the chapter 7 case of International Business Advisors, Inc. (IBA). The first was a Motion to Dismiss Bankruptcy Case or Alternatively, for Change of Venue or for Relief from the Automatic Stay. The second was a Motion for Sanctions related to the Motion to Dismiss. This opinion pertains to the portions of the motions related to dismissal, relief from

the stay and sanctions (Motions).[1] The contentions central to the Motions are that this corporate chapter 7 filing was not authorized by resolution of IBA's board of directors, was filed in bad faith constituting grounds for dismissal or cause to lift the automatic stay, and that sanctions should be imposed.

The parties submitted written memorandum before the hearing, and filed certain affidavits with the court both before and at the hearing that are more fully discussed below. The court also heard Gillmor's testimony and received exhibits, heard the arguments of counsel, and made an independent review of the applicable case law. Having carefully considered the evidence and law, the court finds the Motions without merit and denies the same. The rationale is as set forth below.

FINDINGS OF FACT

Parties

1. IBA is a debtor before this court, having filed a petition under chapter 7 of the Bankruptcy Code on April 19, 1994.

2. Daniel Brent Vaughn (Vaughn) is a chapter 7 debtor in a case filed in the United States Bankruptcy Court for the District of Utah, Central Division.

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[1] The Motion for Change of Venue requests that IBA's chapter 7 case be changed to the United States District Court for the District of Nevada, Northern Division, pursuant to 28 U.S.C. § 1412. Motions for change of venue require a report and recommendation containing proposed findings of fact and conclusions of law as provided by Rule 404(d) of the Rules of Practice of the United States District Court for the District of Utah, and are not dealt with herein.

3. Vaughn is a director of IBA, chairman of the board of directors, and allegedly an 85% shareholder of International Business Advisors, Ltd.[2]

4. International Business Advisors Ltd., is a 50% shareholder of IBA, and also a listed unsecured creditor of this estate.

5. Gillmor, who resides in Incline Village, Nevada, is a director and 50% shareholder of IBA.

6. An amended Notice of Commencement of Case dated May 12, 1994, corrected the person appointed as the trustee of IBA's estate to Harriet E. Styler (Styler).

7. Styler withdrew as IBA's trustee due to a potential conflict of interest because she also served as Vaughn's chapter 7 trustee. To the extent IBA's estate produces a dividend to unsecured creditors, or is solvent and there is a return to equity interest holders, including International Business Advisors, Ltd., Vaughn's estate will benefit because of Vaughn's alleged ownership interest in International Business Advisors, Ltd. Based thereon, Styler opposes Gillmor's Motions.

8. R. Kimball Mosier (Mosier) was appointed as IBA's substitute chapter 7 trustee. Mosier supports Styler's opposition to Gillmor's Motions.

9. Counsel representing IBA also supports Styler's and Mosier's opposition to Gillmor's Motions to the extent a chapter 7 debtor has standing to be heard in addition to the trustee appointed to administer the case. Styler, Mosier and IBA are here-in-after referred to collectively as Objectors.

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[2] No evidence was presented in court, or is contained in the affidavits to support this fact. However, no party has challenged the assertion of Vaughn's relationship to International Business Advisors, Ltd.

IBA's Business Characteristics

10. IBA is a Nevada corporation having been incorporated on November 29, 1990. Its incorporator is James L. Rhode and its registered agent in Nevada is Laughlin Associates, Inc.

11. IBA has not filed an annual statement for the 1993-1994 filing period and is in a delinquent status with the Nevada Secretary of State. At the time of IBA's bankruptcy petition, its sole business was the operation of an automobile repair shop.

12. IBA's articles of incorporation provide for a governing board of directors, with the number of directors varying from time to time, but no less than one.

13. IBA's bylaws provided that the stockholders would choose the board of directors annually at the stockholders' annual meeting.

14. The bylaws provided that the board of directors would have the general management and control of the business and affairs of the company, and that each member of the board of directors would have an equal vote. A written resolution, signed by all or a majority of the members of the board of directors, would constitute action by the board of directors. Any such resolution would be kept in IBA's Minute Book.

15. The first board of directors consisted of only one director, James L. Rhode.

16. Vaughn is listed as IBA's only director in a corporate resolution dated December 4, 1990, titled "Consent to Action Without a Meeting of the Directors Electing/Appointing Additional Directors of International Business Advisors, Inc." The

resolution appointed Vaughn and Gillmor as directors of IBA. The resolution appears to be signed by Vaughn as director and bears the signature "Pamela G. Gillmor" as witness thereto.

17. On December 4, 1990, Gillmor purportedly signed a statement entitled "Acceptance of Appointment as Director."

18. IBA's undated bylaws provide that a special meeting of the stockholders may be called at anytime by the president; by all of the directors provided there are no more than three, or if more than three, by any three directors, or by the holder of a majority share of the capital stock of the corporation. Notice of a special meeting of the stockholders must be given at least ten (10) days before such meeting. No business can be transacted at a special meeting except as stated in the notice to the stockholders, unless by unanimous consent of all stockholders present, either in person or by proxy, all such stock being represented at the meeting. A majority of the stock issued and outstanding either in person or by proxy, constitutes a quorum for the transaction of business at any stockholders' meeting.

19. IBA's articles of incorporation, provide that the corporation shall have the power to wind up and dissolve itself, or be wound up or dissolved.

20. The total number of voting common stock originally authorized were 2,500 shares.

21. On December 4, 1990, Gillmor and Vaughn purportedly signed a resolution on behalf of IBA that resolved to issue 12,500 shares of IBA's stock to Vaughn and 12,500 shares to Gillmor.

22. IBA's schedule and statements filed with the court, and the Nevada Secretary of State, list Vaughn as President, Gillmor as Vice President and Secretary, and Susan Daniels (Daniels), as Treasurer. Vaughn and Gillmor are listed as IBA's only directors.

23. Gillmor and International Business Advisors, Ltd., who each now hold 50% of IBA's common stock, were issued their stock interests in return for capital contributions related to the purchase of the IBA's assets and for the contribution of funds for working capital.

24. Since the fall of 1992, IBA's principal office has been in Salt Lake City, Utah. Since then, all of IBA's books and records have been located in Salt Lake City, Utah. IBA has never had an office in Carson City, Nevada.

25. Daniels, IBA's treasurer, has been the custodian of IBA's records and has maintained those records, including financial and bank records. Daniels resides in Bountiful, Utah, and is the person most knowledgeable concerning the financial affairs and books and records of IBA.

IBA's Assets and Liabilities

26. IBA's schedules list assets of $601,937.60 and liabilities of $355,719.42.

27. In 1990, IBA acquired a service station located in Incline Village, Nevada (Real Property) for a purchase price of $553,000.

28. On December 4, 1990, IBA through Vaughn as Director, executed a promissory note (Note) for $279,559. The Note was in favor of Gillmor and was issued in connection with the purchase of the Real Property. The Note's terms require monthly payments of $3,078.18 including interest at 12%, with the final payment due December 7, 2010. IBA's schedules filed with the Bankruptcy Court list Gillmor's claim in the amount of $325,057.48.

29. The Note is secured by a Deed of Trust and Assignment of Rents dated December 4, 1990 (Deed of Trust), encumbering the Real Property. The Deed of Trust is signed by Vaughn as president of IBA and names Gillmor as beneficiary.

30. The Deed of Trust was filed in the official records of Washoe County, Nevada on December 7, 1990.

31. The Real Property is listed in IBA's schedules at a value of $599,000.

32. Competing allegations exist regarding whether the Real Property contains soil contamination that exceeds environmental standards. The weight of the evidence indicates that the State of Nevada does not currently require any action because of residual soil and groundwater contamination remaining from remediation already completed on the Real Property.

33. IBA's schedules do not reflect any payments to Gillmor on the Note made within ninety (90) days immediately preceding the commencement of the case, and she has received no payments from IBA for over two years.

34. Gillmor initiated proceedings against IBA in an attempt to foreclose the Trust Deed and to realize upon the Real Property. IBA's schedules do not indicate that the Real Property was in foreclosure.

35. Foreclosure of the Real Property was to have taken place on April 27, 1994.

36. Before the filing of the bankruptcy petition and scheduled foreclosure, one inquiry was made regarding the amounts needed to satisfy the foreclosure.

37. The Real Property is currently listed with a realtor approved as a professional of the estate. The listing price is $690,000.

38. Marketing efforts for the Real Property have been chilled because of the pending Motions. The realtor believes that if the case were dismissed, IBA likely would not be able to complete any sale.

39. Representatives of an undisclosed national chain have expressed some interest in purchasing the Real Property. Market conditions for commercial realty in Incline Village, Nevada, have improved significantly. A marketing period of between six months and one year is likely to liquidate the Real Property.

40. Because of the pending foreclosure proceeding and the listed equity in the Real Property, Gillmor has an interest adverse to IBA.

41. IBA has additional assets valued at $2,937.60. They consist of a cash register, popcorn machine, an inventory of automobile service items, and various security deposits.

42. IBA scheduled one priority creditor, Allen W. Rosenkranz, with a wage claim of $250 for the period March/April 1992. IBA's remaining priority creditors are the Internal Revenue Service and the State of Nevada with claims totaling $750.10.

43. IBA scheduled five unsecured creditors with claims totaling $29,411.80. Included are unsecured claims for Gillmor for $5,240, and International Business Advisors, Ltd., for $23,388.80 for loans made to IBA.

44. IBA's statement of financial affairs indicates a $3,500 payment made to International Business Advisors, Ltd. in March 1994, within ninety days of filing the within petition.

45. Gillmor believes that Vaughn has received all of the funds from operation of the Real Property and is using the funds for his personal use rather than for the benefit of IBA.

Authorization for Filing

46. Vaughn signed the within petition, indicating that filing of IBA's petition had been authorized.

47. The purpose of the bankruptcy filing was to prevent Gillmor's foreclosure of the Real Property and to preserve any equity in the Real Property for the benefit of IBA's creditors and shareholders.

48. Gillmor did not receive notice of a shareholders' or board of directors' meeting related to the filing of the within bankruptcy petition.

49. Gillmor did not authorize the filing of the bankruptcy petition, nor does she agree to the filing of the bankruptcy petition on behalf of IBA.

50. No evidence was presented that a board of directors' resolution authorized the within filing.

51. Had Gillmor been requested to approve a board of directors' resolution authorizing the filing of the within bankruptcy, she would have refused.

52. No evidence has been presented that Vaughn, although apparently having a shareholder interest in International Business Advisors, Ltd., has an interest that is adverse to IBA.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. §§ 157 and 1334 and by Rule 404 of the Rules of Practice of the United States District Court for the District of Utah. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), and (O). Venue is proper in the Central Division of the District of Utah.

AFFIDAVITS AS EVIDENCE

Consideration of the issues presented by these Motions begins with a determination of what evidence is before the court. At the hearing, Gillmor at first appeared to take the position that the issues raised in the Motions were only issues of law that required no presentation of evidence. After encouragement by the court, Gillmor testified in support of her Motions, as well as presented one affidavit in open court. In addition, Styler and Gillmor filed a variety of affidavits to support their positions prior to the hearing, and all parties appeared content to rely upon those affidavits. No further discussion was presented at the hearing regarding the filed affidavits or their content prior to each party resting. Noting a trend toward the submission of evidence in this manner, a short exploration of the issues raised by the use of affidavits as evidence is in order.

If a determination of issues presented to the court is premised upon an evaluation of facts, evidence must be presented. Fed.R.Civ.P. 43 is made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule 9017. Fed.R.Civ.P. 43(a) states that testimony shall be taken orally in open court. Fed.R.Civ.P. 43(e) provides the following exception:

> Evidence on Motions
> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

The rule is clear that a determination to hear a motion[3] upon affidavits rests with the court, not the parties. Admission of evidence by affidavits has the following shortcomings that must be considered by the court in determining whether to proceed according to Fed.R.Civ.P. 43(e). The affidavits may raise issues of credibility or of such complexity that live testimony would be helpful. *Sanders v. Monsanto Co.*, 574 F.2d 198 (5th Cir. 1978) (judge may require oral testimony where facts are complicated and credibility of witnesses must be evaluated). The affidavits may contain matters that are inadmissible pursuant to the Federal Rules of Evidence. *In re Applin*, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989) (accepting affidavits does not excuse compliance with the requirement that evidence be admissible, including that the affidavits be free from hearsay). The affidavits may be merely the statements of counsel signed by the affiant. *Danning v. Burg (In re Burg)*, 103 B.R. 222, 226 (9th Cir. BAP 1989) (submission of a declaration with the declarant's endorsement is somewhat in the nature of a response to a leading question since the declarant in essence adopts by his or her simple affirmation an already formulated statement rather than original testimony); *see also Adair v. Sunwest Bank (In re Adair)*, 965 F.2d 777, 780 (9th Cir. 1992). The affidavits may not have been filed within the time constraints of Bankruptcy Rule 9006(d) raising issues of lack of due process. *In re Hooker Investments, Inc.*, 116 B.R. 375, 381 (Bankr. S.D.N.Y. 1990)

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[3] Adversary proceedings are outside the scope of Fed.R.Civ.P. 43(e). *Danning v. Burg (In re Burg)*, 103 B.R. 222, 225 (9th Cir. BAP 1989); *In re Mohring*, 142 B.R. 389, 392 n.6 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (9th Cir. BAP 1993), *aff'd*, 1994 WL 192075 (9th Cir. 1994).

(late admission of affidavit would be unduly prejudicial, having afforded no opportunity for cross-examination).

It is the court, not the parties, who must determine whether affidavit evidence is admitted. *Huddleston v. Nelson Bunker Hunt Trust Estate*, 102 B.R. 71, 74 (N.D. Tex. 1989) (court has authority to hear motion on affidavits and may direct matter be heard wholly or partly on depositions). Unless the parties raise the issue of admissibility of affidavits with the court on the record, the court will not know the parameters of the evidentiary basis upon which it should rule. Neither will there be a fixed cut off time for parties to object to the affidavits' admissibility. Adopting a procedure whereby affidavits merely reside in the court's file without any specific action on counsels part to suggest to the court that they are proceeding under Fed.R.Civ.P. 43(e), and requesting a ruling on admissibility, only encourages later challenges regarding the quality or admissibility of the evidence. *In re MacDonald*, 128 B.R. 161, 166 (Bankr. W.D. Tex. 1991) (in claims estimation proceeding, court established procedure at beginning of hearing regarding what evidence would be entertained under Fed.R.Civ.P. 43(e)).

In this case, some of the affidavits filed with the court contain hearsay, may not be directly applicable to the issues raised in the Motions, or are otherwise inadmissible as evidence under a variety of the reasons to exclude affidavit evidence set forth above. However, no party objected to the admissibility of the affidavits, raised any of the issues that concern the ultimate finder of fact, and were generally silent in all respects to the evidentiary issues raised by the affidavits. Although the evidentiary status of the affidavits is questionable, the court is compelled to conclude that the parties waived any objection to the use or content of the affidavits and will rely on the evidence presented therein, such as it is.

DISCUSSION

Gillmor's arguments are twofold. First, she contends that the case should be dismissed because the filing of the petition was unauthorized. Second, she asserts that the failure to obtain proper authorization to file its chapter 7 petition amounts to bad faith. Bad faith constitutes cause within the meaning of 11 U.S.C. § 362(d)(1), and justifies stay relief as well as the imposition of sanctions against Vaughn. Further, Gillmor's Motions assert her interest in the property is not adequately protected, and that IBA has no equity in the property and the property is not necessary to an effective reorganization.[4]

Authorization to File

Authorization for a corporation to file a petition in bankruptcy is found first by reference to the instruments of the corporation, and in their absence, by reference to state laws. *In re Quarter Moon Livestock Co.*, 116 B.R. 775, 778-80 (Bankr. D. Idaho. 1990) (various defects in composition of board of directors under Idaho corporate statutes, and lack of shareholder approval for resolution to file bankruptcy, insufficient to dismiss case); *In re Giggles Restaurant, Inc.*, 103 B.R. 549, 552-54 (Bankr. D.N.J. 1989) (in absence of provision in corporate documents, state law establishes the proper number of directors necessary to approve a voluntary filing in bankruptcy, and meeting that lacked a quorum and majority vote of board was invalid).

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[4] No evidence was presented to support Gillmor's motion to lift the automatic stay based on lack of adequate protection or equity, or that the property was not necessary for an effective reorganization.

Both IBA's bylaws and Nevada Revised Statutes (Nev. Rev. Stat.) § 78.120[5] vest responsibility for the conduct of IBA's business in its board of directors. IBA's bylaws and Nev. Rev. Stat. § 78.315(1)[6] provide that presence of a majority of IBA's board of directors is necessary to comprise a quorum for the transaction of business. Once a quorum is established, a majority vote is necessary to constitute an action by the board of directors. Gillmor argues that Vaughn has no power to unilaterally file a bankruptcy petition without the consent of the majority of the board of directors at a meeting at which a quorum is present. Because Gillmor did not attend a board of directors meeting and did not give consent to the bankruptcy filing as one of two directors, she asserts the filing is void. *In re Moni-Stat, Inc.*, 84 B.R. 756, 757 (Bankr. D. Kan. 1988) (where two directors, each holding a 50% share of corporation's stock could not agree to resolution authorizing bankruptcy filing, Kansas law prohibited action by less than a majority vote of a quorum of the board of directors). *See also* *In re AT Engineering, Inc.*, 142 B.R. 990, 991 (Bankr. M.D. Fla. 1992) (no corporate authorization to file bankruptcy petition could be obtained with deadlocked board of directors); *In re Autumn Press, Inc.*, 20 B.R. 60, 61-62 (Bankr. D. Mass. 1982) (sole director of corporation authorized bankruptcy petition in violation of statute and bylaws that required a minimum of three directors).

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[5] Nev. Rev. Stat. § 78.120 states as follows:
Subject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation.
In addition, Nev. Rev. Stat. § 78.115 states as follows:
The business of every corporation must be managed by a board of directors or trustees. . . .

[6] Nev. Rev. Stat. § 78.315 (1) provides as follows:
Unless the articles of incorporation or the bylaws provide for a different proportion, a majority of the board of directors of the corporation, at a meeting duly assembled, is necessary to constitute a quorum for the transaction of business. . . .

Without more, Gillmor's position is correct. However, the Objectors argue an exception to the general rule. Their position is that if a director has an interest adverse to the corporation, failure to follow formalities established by statute or bylaws, does not defeat the filing of a bankruptcy petition authorized by less than the required number of directors.

Under Nevada law, directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation. Nev. Rev. Stat. § 78.138(1).[7] Directors owe a fiduciary obligation to a corporation that has two prongs, generally characterized as the duty of care and the duty of loyalty. *Buchanan v. Henderson,* 131 B.R. 859, 867 (D. Nev. 1990) *rev'd on other grounds*, 985 F.2d 1021 (9th Cir. 1993). If a director has a personal interest that is adverse to the interest of the corporation, which conflicts with the duty of care and/or loyalty, that status may affect a director's ability to vote on issues of corporate governance, including the ability to vote authorizing a debtor to file a bankruptcy petition.

The Nevada statutes indicate that there are certain conditions, however, under which the actions of a director having an interest adverse to the corporation are valid. Where there is adequate disclosure to concerned parties, where the action is fair to the corporation, and where notice is properly given, interested director's actions can be valid. See generally Nev.

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[7] Nev. Rev. Stat. § 78.138(1) and (3) provide as follows:

Directors and officers shall exercise their powers in good faith and with a view to the interest of the corporation.

. . .

Directors and officers, in exercising their respective powers with a view to the interest of the corporation, may consider:

(a) The interest of the corporation's employees, suppliers, creditors and customers. . . .

Rev. Stat. § 78.140. The votes of interested directors may also be counted if there is authorization, approal or ratification of a transaction. Nev. Rev. Stat. § 78.140(2).[8]

Nevada case law acknowledges the general principle set forth in the Nevada statutes, but employs a broader, more equitable view of whether the vote of a director with an adverse interest may count. The case law indicates that if authorized action was not and could not have been taken for lack of a quorum because of the status of the directors as having an interest adverse to the corporation, the action taken by the board is not void *per se*, nor is it voidable, except for unfairness or fraud for which it will be closely scrutinized in equity. *Foster v. Arata*, 325 P.2d 759, 764-64 (Nev. 1958) (loans made by three directors without approval of a disinterested quorum were valid where loans were essential to preserve corporate assets, made openly in good faith upon fair and reasonable terms for full value while corporation was solvent, and used entirely by the corporation that received and accepted the benefits); *See also In re Crescent Beach Inn, Inc.*, 22 B.R. 155, 158 (Bankr. D. Me. 1982) (if because of the effect bankruptcy would have upon a mortgage owed by a corporation to a director, the director had a personal or adverse interest in the vote authorizing the debtor to file bankruptcy, vote was "fair and equitable" as to the corporation at the time it was authorized or approved under Maine law); *In re Autumn Press*, 20 B.R. at 63 (court could conceive of circumstances where dismissal of a bankruptcy proceeding, for non-compliance with corporate by laws or state law upon the

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[8] Nev. Rev. Stat. § 78.140(2) provides as follows:
Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies a contract or transaction, and if the votes of the common or interested directors are not counted at the meeting, then a majority of the disinterested directors may authorize, approve or ratify a contract or transaction.

motion of a stockholder who holds what otherwise might be a preferential transfer, would be unjustified in both law and equity).

In this case, Objectors advance the argument one step further. They seek not to affirm an action taken by Gillmor as a director with an interest adverse to the corporation. Instead, they seek a determination that, had Gillmor voted against authorization to file the within petition, her action would have been void. Thus, the only director able to conduct IBA's business would have been Vaughn: precisely what actually occurred.

The evidence proves the Objectors' theories. There is equity in the Real Property that would be available to unsecured creditors[9] and equity interest holders. Filing bankruptcy would have hindered Gillmor's plan to foreclose the Real Property and obtain the benefit of the value of the Real Property above the amount of her Trust Deed for herself, rather than promoted IBA's interest in preserving any equity for its creditors. Therefore, Gillmor has an interest adverse to the corporation. Gillmor would have voted not to authorize the bankruptcy filing, but in any event her vote would have been disallowed as the action of a director having an interest adverse to the corporation.

That is not the end of the inquiry, however. If only one disinterested director existed - a number insufficient to constitute a quorum or majority - how would IBA function considering the pending foreclosure? Nevada statues establish a methodology to remedy such

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[9] Gillmor's argument that implies that International Business Advisors, Ltd.'s unsecured claim should be considered only as part of a two party dispute between Gillmor and Vaughn is not supported by the evidence. Nothing has been presented to indicate that International Business Advisors, Ltd., is not a *bona fide* creditor of this estate.

a situation. Nev. Rev. Stat. § 78-650(1) provides as follows:

> Any holder . . . of one-tenth of the issued and outstanding stock may apply to the district court . . . for an order dissolving the corporation and appointing a receiver to wind up its affairs . . . whenever:
>
> . . .
>
> (e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise.

Nev. Rev. Stat. § 78.347(1) provides as follows:

> Any stockholder may apply to the district court to appoint one or more persons to be custodians of the corporation . . . when:
>
> (a) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that a required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division.

The statutory scheme envisions court intervention to protect the interest of creditors and equity interest holders. It also provides a methodology to protect equity interest holders during the receivership.[10]

This is a chapter 7 liquidating bankruptcy where no party argues that IBA's reorganization is desired. The bankruptcy code can accomplish everything to benefit creditors provided in the Nevada statutes. The only advantage in the Nevada scheme flows to directors who have fulfilled their fiduciary duties by allowing their appointment as receivers. There are, however, corresponding advantages in the bankruptcy system that allows recovery of

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[10] Nev. Rev. Stat. § 78.655 provides, generally, for stockholders to attempt to agree upon a plan of reorganization of the corporation and resumption by it of the management and control of its property and business. Nev. Rev. Stat. § 78.650 gives preference in the appointment of receivers to directors who have not been guilty of negligence or active breach of duty.

preferences, nationwide service of process, disinterested trustees, and the initiation of actions against interested parties in one forum within the umbrella of the main case.

It is difficult to see why it would be preferable to dismiss this petition and require a state court receivership to be initiated, rather than to allow this bankruptcy to proceed. All parties will be protected by this proceeding, including Gillmor who will likely be made whole and receive not only the benefit of realizing upon her security, but of payment of her unsecured claim and possible distribution of her equity. The case law cited by Gillmor covers only cases dismissed for failure to follow corporate formalities. It does not cover the circumstances encountered here, where the objecting director has an interest adverse to the debtor, and where dismissal would harm the interest of creditors. Taken in its totality, and mindful of the admonition in *Foster v. Arata* that the court should view these issues in an equitable context, Gillmor's motion to dismiss is denied.

Bad Faith

Gillmor also seeks dismissal or lift of the automatic stay based on the asserted bad faith filing of IBA's petition. The primary basis for the assertion of bad faith is that this case amounts to a two-party dispute between Gillmor and Vaughn over a single asset that can be resolved in state court. Gillmor also argues that because the filing arises from the threatened foreclosure of Gillmor's security interest in the Real Property, IBA or Vaughn's asserted bad faith requires dismissal, stay lift, and possibly sanctions. *In re Huerta,* 137 B.R. 356, 370 (Bankr. C.D. Cal. 1992) (chapter 13 case filed solely to stop or delay a foreclosure, without the ability or intention to reorganize, is an abuse and lacks good faith).

Gillmor cites several cases dealing generally with the "new debtor syndrome" in single asset chapter 11 cases filed to delay with no ability to reorganize.[11] Because the cases relied upon by Gillmor turn on the inability of a debtor to reorganize, they are generally inapplicable to the facts of this chapter 7 liquidation proceeding. That is not to say that dismissal on the basis of bad faith cannot be considered in a chapter 7 case. As set forth in *Quarter Moon Livestock Co.*, 116 B.R. at 781, the court can consider if "the debtor has a frivolous, noneconomic motive for filing a bankruptcy petition, . . . [has] a sinister or unworthy purpose, or when there is an abuse of the judicial process." (citation omitted). Gillmor has proved none of those factors in this case.

Taking the facts presented as a whole, the court finds that Gillmor has not demonstrated that this filing was accomplished in bad faith, with improper motive, or by an abuse of the judicial process. Instead, the stated purpose was to preserve what equity existed in the Real Property for the benefit of creditors and equity interest holders. Based thereon, Gillmor's Motions to dismiss, to lift the automatic stay or for sanctions on the basis of bad faith filing are denied.

Based upon the foregoing analysis, it is hereby

ORDERED, that the motion to dismiss IBA's bankruptcy case is hereby denied, and it is further

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[11] *In re Thirtieth Place, Inc.*, 30 B.R. 503, 505 (9th Cir. BAP. 1983) (single asset chapter 11 debtor created for the sole purpose of filing bankruptcy an imposition of the state that charters the corporation and on the chapter 11 court that serves to rehabilitate and reorganize the corporate debtor); *see also In re Stolrow's Inc.*, 84 B.R. 167, 171 (9th Cir. BAP 1988) (petition in bankruptcy arising out of two-party dispute does not constitute a bad-faith filing, and since there were arguably valid reasons for filing the chapter 11 petition, no abuse of discretion in failing to dismiss case); *In re Landmark Capital Co.*, 27 B.R. 273, 279 (Bankr. D. Ariz. 1983) (chapter 11 a two-party dispute not filed in good faith where sole purpose appeared to be to frustrate enforcement of the power of sale under a deed of trust).

ORDERED, that the alternative motion for relief from the automatic stay for cause is hereby denied, and it is further

ORDERED, that the pending motion for sanctions based upon the assertion of a bad faith filing is hereby denied.

DATED this 13 day of July, 1994.

JUDITH A. BOULDEN
United States Bankruptcy Judge