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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re: ) Case No. SA 98-12113 JR  
ROBERT K. LOWRY, )  
 ) CHAPTER 11  
 )  
 ) ~~[REPOSED]~~ FINDINGS OF FACT  
 ) AND CONCLUSIONS OF LAW  
Debtor and ) RELATING TO ORDER AND JUDGMENT  
Debtor-in-Possession. ) OF DISMISSAL  
 )  
 ) DATE: July 20, 1998  
 ) TIME: 2:30 p.m.  
 ) PLACE: Courtroom 606  
 ) 34 Civic Center Plaza  
 ) Santa Ana, California 92701  
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On July 20, 1998, this Court conducted a hearing (the "Hearing") on the Motion of Specially-Appearing Creditor The Society of Lloyd's ("Lloyd's") for an order, pursuant to section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code"), dismissing this case for cause (the "Motion"). Debtor

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1 appeared by and through his counsel, Richard Reynolds of Turner  
2 and Reynolds. Lloyd's appeared by and through its counsel,  
3 Debra J. Albin-Riley and Robert E. Gerber (admitted pro hac  
4 vice) of Fried, Frank, Harris, Shriver & Jacobson.

5 This Court held a subsequent hearing on August 7, 1998,  
6 at which it announced its decision on the Motion ("Decision"),  
7 and its determination that this case should be dismissed for-  
8 cause, which Decision was stated orally and recorded in open  
9 court.

10 A separate order and judgment implementing the Decision  
11 is being signed by the Court substantially contemporaneously.  
12 In connection with that order and judgment, this Court makes the  
13 following Findings Of Fact And Conclusions Of Law ("Findings"):

14 Findings of Fact

15 1. Lloyd's moves pursuant to Bankruptcy Code section  
16 1112(b) for an order dismissing the Chapter 11 case of Robert  
17 Lowry, Debtor in this case, for cause.

18 2. In the Motion, Lloyd's requests dismissal of Debtor's  
19 bankruptcy case as a bad faith filing. Lloyd's contends that  
20 Debtor filed in bad faith because, among other things: Debtor  
21 filed to litigate a two-party dispute, and to gain a tactical  
22 advantage in his dispute with Lloyd's; there is no pressure from  
23 creditors other than Lloyd's; Debtor is not in financial  
24 distress; and Debtor is attempting to use the Bankruptcy Code to  
25 ensure that Lloyd's will not be paid.

26 3. Debtor first argues that Lloyd's lacks standing to  
27 move to dismiss the case because Lloyd's does not have an  
28 allowed claim, as Lloyd's has not yet filed a proof of claim.

1           4. Debtor also disputes Lloyd's "bad faith" contentions.  
2 He asserts, among other things, that he had no dealings with  
3 attorney Andrew Grossman, an attorney who filed bankruptcy  
4 petitions in 11 other bankruptcy cases instituted by Names (as  
5 defined in Finding 5 below); that he filed bankruptcy to  
6 eliminate future insurance and reinsurance liabilities; that he  
7 decided to file Chapter 11 in September 1997; that he consulted  
8 with his attorney in this case, Richard Reynolds, in November  
9 1997; that he did not file his bankruptcy petition earlier  
10 because he was awaiting accounting information; that in December  
11 1997, he received a statement of reinsurance premium for  
12 £703,036, of which £222,648 related to an Equitas premium, and  
13 £480,388 related to his pro rata share of assets transferred to  
14 Equitas; and that he did not file bankruptcy based on the  
15 Richards decision (as defined in Finding 7 below).

16 Background

17           5. Various persons participated with Lloyd's in  
18 underwriting insurance. These persons were called "Names."  
19 Debtor was a Name from 1977 to 1990. As a Name, he participated  
20 in a number of insurance underwritings with Lloyd's.

21           6. All Names, as a condition to their underwriting  
22 status, executed a standard agreement called the "General  
23 Undertaking." The General Undertaking included choice of law  
24 and choice of forum provisions (the "Choice Clauses"). The  
25 Choice Clauses require Names to litigate all their disputes  
26 related to their underwriting of insurance coverages in  
27 accordance with English law, and through the exclusive  
28 jurisdiction of the English courts.

1           7. In the early 1990's, hundreds of American Names began  
2 suing Lloyd's in the United States. Seven Circuits (as of the  
3 time of the hearing on this case),<sup>1</sup> including the Ninth Circuit  
4 in Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998)  
5 (en banc), had dismissed these lawsuits based on the  
6 enforceability of the Choice Clauses. Debtor was among the  
7 Names who were plaintiffs in the Richards litigation.

8           8. In 1996, Lloyd's offered settlements to Names to  
9 resolve issues of their liability. Debtor did not accept the  
10 settlement offer. Lloyd's subsequently commenced debt  
11 collection litigation against approximately 950 Names, including  
12 Debtor, in England. Debtor was properly served in that  
13 litigation. The writ issued in litigation against this Debtor  
14 in England asserted claims for payment of premiums due to  
15 Equitas, the reinsurer of the various insurance underwritings.  
16 *The writ alleged that*  
17 Equitas had assigned to Lloyd's all its rights to recover the  
18 premiums. Because Debtor had filed bankruptcy, Lloyd's did not  
19 seek a judgment against Debtor on March 11, 1998, when it did so  
20 against Names who had not filed for protection under the United  
21 States Bankruptcy Code.

22 \_\_\_\_\_  
23 <sup>1</sup> After the Hearing, but before these Findings were signed,  
24 one more Circuit did likewise, see Lipcon v. Underwriters at  
25 Lloyd's, London, No. 97-5114, 1998 WL 44266 (11th Cir.  
26 Aug 5, 1998, and another Circuit reaffirmed its earlier  
27 ruling. See Stamm v. Barclay's Bank, No. 97-9118, 1998 WL  
28 472078 (2d Cir. Aug. 13, 1998). These subsequent rulings  
were not, however, considered by the Court in reaching its  
Decision.

1           9. Some English Names who did not accept the 1996  
2 settlement offers are members of an organization called the  
3 Lloyd's Names Association ("LNA"). The LNA has provided  
4 information about the purported benefits of filing bankruptcy in  
5 the United States in a newsletter. There is no evidence in the  
6 record in this case that Debtor was aware of those statements in  
7 the LNA newsletter, and he has stated that he is not now a  
8 member of the LNA, and was not a member of the LNA when he filed  
9 this case.

10           10. Debtor is, however, a member of an organization of  
11 Names in the United States called the American Names  
12 Association, Inc. ("ANA"). There are 329 ANA members. Jeffrey  
13 Peterson, an employee of ANA, signed declarations in a number of  
14 Names' bankruptcies, including the bankruptcy of this Debtor, in  
15 support of oppositions to various motions for dismissal by  
16 Lloyd's of Names' bankruptcy cases. Similarly, Eugene L.  
17 Goldman, Esq., the lawyer for the plaintiff Names in Richards,  
18 whose firm, McDermott, Will & Emery, represents the ANA, also  
19 signed declarations on behalf of Names in a number of their  
20 bankruptcy cases, and Mr. Goldman similarly executed  
21 declarations in opposition to Lloyd's motions for an extension  
22 of the bar date and for dismissal in this case. About 40 ANA  
23 members have filed bankruptcies in the United States, and 22  
24 bankruptcy cases were filed by Names between February 9 and 13,  
25 1998.

26 Facts Relevant to Standing

27           11. On Debtor's bankruptcy schedules, Debtor lists  
28 Lloyd's claim at \$865,000, but as "disputed."

1 12. Additionally, Lloyd's is potentially impacted by  
2 Debtor's bankruptcy case, in that Lloyd's has contingent claims  
3 against Debtor, and one of Debtor's expressed purposes of filing  
4 this bankruptcy is to discharge this potential liability.

5 Facts Relevant to Cause for Dismissal

6 13. This is primarily a two-party dispute, despite  
7 Debtor's protestations to the contrary.

8 14. With respect the real motivation behind the filing,  
9 Debtor asserts that he filed to discharge his potential  
10 insurance and reinsurance liabilities. He points out that he  
11 has medical problems, and he does not want to worry or possibly  
12 burden his wife with these problems.

13 15. But though Debtor has potential liability to various  
14 insureds on the underwriting projects in which he was involved,  
15 the likelihood that he will ever have to pay under these  
16 contingent liabilities is not very high, in light of the  
17 reinsurance protection provided by Equitas.

18 16. On the other hand, the bankruptcy filing forces  
19 Lloyd's to decide if it wants to submit to this Court's  
20 jurisdiction by filing a proof of claim; if it decides to forego  
21 filing a claim, its claim against Debtor will be discharged.

22 17. Generally, this is not a problem for creditors of  
23 debtors in bankruptcy, because federal or state law applies to  
24 the rights and obligations of the parties. However, here  
25 Lloyd's and this Debtor have been litigating against each other  
26 for a number of years, which litigation has culminated in the  
27 decision in Richards, supra. In that case, the Ninth Circuit  
28 held that English law should apply to the resolution of disputes

1 between the parties, and that this Debtor, and the other  
2 Richards plaintiffs, should litigate any claims against Lloyd's  
3 in England. Under the circumstances, this Court should be very  
4 wary in allowing this case to circumvent the Richards decision.

5 18. The timing of the filing is also suspect. Debtor  
6 says that he decided to file in September 1997, and met with  
7 attorney Reynolds in November 1997. However, the Debtor's  
8 filing did not take place until February 10, 1998, one week  
9 after the Richards decision. Debtor said that the delay was  
10 caused by a need to gather certain accounting information.  
11 However, after reviewing Debtor's bankruptcy schedules, the  
12 Court does not see anything in the schedules that would cause  
13 such a delay. The Court believes that the timing of the filing  
14 was tied to the adverse decision in Richards.

15 19. Additionally, a number of Names also associated with  
16 ANA likewise filed during this time frame. This was not just a  
17 coincidence.

18 20. With respect to Debtor's association with ANA, the  
19 Court finds that the headquarters for ANA is Rancho Santa Fe,  
20 California, ~~where Debtor lives~~. ANA is tasked with following  
21 litigation between Names and Lloyd's throughout the country. A  
22 number of ANA members filed bankruptcy, arguably for the same  
23 purpose for which the Court finds that Debtor did so -- that is,  
24 to thwart Lloyd's from litigating its claims against Names in  
25 England under English law. Lloyd's right to litigate claims  
26 against Names in England under English law was affirmed by seven  
27 Circuit Courts. ANA seems to be involved in supporting efforts  
28 to undercut these Circuit Court decisions, and the Choice

1 | Clauses that govern the relationship between Names and Lloyd's.  
2 | This would indicate that the filing of the bankruptcy here was  
3 | for an improper purpose.

4 |         21. The only creditor that was exerting some pressure on  
5 | Debtor was Lloyd's. The Debtor, along with other parties, and  
6 | Lloyd's had been in litigation for an extended period of time.  
7 | With the Richards decision, Debtor was left with the decision to  
8 | defend Lloyd's claim under English law in London, or file  
9 | bankruptcy in an attempt to force Lloyd's to litigate in a  
10 | bankruptcy court or waive its claim.

11 |         22. After Lloyd's prevailed in long and arduous  
12 | litigation on the applicability of the Choice Clauses, Debtor  
13 | seeks now to undercut Lloyd's victory by filing bankruptcy. On  
14 | its face, this seems unfair. If Debtor had actually had  
15 | concerns about his financial welfare based on contingent  
16 | liabilities, those concerns should have been apparent to him  
17 | before requiring Lloyd's to expend significant funds in  
18 | upholding the Choice Clauses in the federal courts.

19 |         23. Debtor's schedules and proposed disclosure statement  
20 | do not indicate a real need for bankruptcy at this time. Debtor  
21 | is solvent. No creditor other than Lloyd's is pursuing Debtor.  
22 | Debtor has the means to satisfy any judgment that Lloyd's is  
23 | likely to obtain. There is no urgency in filing, unless the  
24 | real purpose here is to undercut the Richards decision.

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1 Conclusions of Law

2  
3 Standing

4 24. Section 1112(b) provides that a party in interest  
5 may bring a motion to dismiss a bankruptcy case for cause.  
6 Certainly a creditor is a party in interest, and has standing to  
7 move for dismissal of a Chapter 11 bankruptcy case under section  
8 1112(b). See Johnston v. JEM Development Co., 149 B.R. 158, 161  
9 (B.A.P. 9th Cir. 1992) ("a creditor may move for dismissal under  
10 Bankruptcy Code § 1112(b) whether or not its claim has yet been  
11 allowed"); In Re Stamford Color Photo, 105 B.R. 204, 206-207 (D.  
12 Conn. 1989) (a party scheduled as a holder of a disputed and  
13 contingent claim who did not file a timely proof of claim  
14 enjoyed section 1112(b) standing as a creditor with a right to  
15 payment, even though the party was not entitled to share in  
16 distribution).

17 25. Consequently, for the reasons set forth in greater  
18 detail in Findings ##11 and 12, and in particular that Lloyd's  
19 is identified by the Debtor himself as a creditor and is  
20 potentially impacted by Debtor's bankruptcy case, Lloyd's is a  
21 creditor and party in interest, and has standing to bring the  
22 Motion.

23 Standards for Consideration of Motion

24 26. Bankruptcy Code section 1112(b) allows a Bankruptcy  
25 Court to dismiss a Chapter 11 case for cause pursuant to  
26 Bankruptcy Code section 1112(b). See In re Marsch, 36 F.3d 825,  
27 828 (9th Cir. 1994).

1           27. Although section 1112(b) does not expressly require  
2 that a petition be filed in good faith, the lack of good faith  
3 in filing a Chapter 11 petition constitutes cause for dismissal.  
4 See St. Paul Self Storage Limited Partnership v. Port Authority  
5 of City of St. Paul, 185 B.R. 580, 582 (B.A.P. 9th Cir. 1995).

6           28. A creditor moving to dismiss a bankruptcy case as a  
7 bad faith filing has the initial burden of establishing a prima  
8 facie case. When a creditor meets that burden, the debtor then  
9 bears the burden of proving good faith. See Duvar Apartment v.  
10 FDIC, 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996). In Duvar, the  
11 holding was that once a prima facie case is established, the  
12 burden shifts to the debtor to demonstrate a good faith business  
13 reason for the filing of the petition. See also Setzer v. Hot  
14 Productions Inc., 47 B.R. 340, 345 (Bankr. E.D.N.Y. 1985)  
15 ("courts have long held that once Debtor's good faith has been  
16 put into question, Debtor bears the burden of proving that the  
17 filing was made in good faith").

#### 18 Bad Faith Filing

19           29. A Chapter 11 case is a bad faith filing if Debtor is  
20 attempting unreasonably to deter and harass creditors, rather  
21 than effect a speedy efficient reorganization on a feasible  
22 basis. See Marsch, 36 F.3d at 828. The term "bad faith" is  
23 somewhat misleading, because though it suggests that Debtor's  
24 subjective intent is determinative, this is not the case. Id.  
25 Rather, the inquiry is into whether Debtor's filings violate  
26 several distinct equitable limitations that courts have placed  
27 on Chapter 11 filings. Id. These limitations are implied to

1 deter filings that seek to achieve objectives outside the  
2 legitimate scope of the bankruptcy laws. Id.

3 30. In determining whether the filing was made in bad  
4 faith, the Court is required to review the totality of the  
5 circumstances. See, e.g., In re Goeb, 675 F.2d 1386, 1391 (9th  
6 Cir. 1982).

7 31. Like In re Stolrow's, 84 B.R. 167, 170 (B.A.P. 9th  
8 Cir. 1987), the ~~facts~~ <sup>Factors</sup> as cited in In Re Little Creek Development  
9 Co., 779 F.2d 1068, 1072-1073 (5th Cir. 1986), dealing with a  
10 single real estate asset case, are not helpful here. However,  
11 in Stolrow's the court did affirm that neither insolvency nor  
12 inability to pay debts is a prerequisite for filing. Nor is a  
13 petition arising from a two-party dispute *per se* a bad faith  
14 filing. See 84 B.R. at 171.

15 32. Here Debtor is solvent, and this is primarily a two-  
16 party dispute, despite Debtor's protestations to the contrary.  
17 But these factors alone cannot support a bad faith dismissal.  
18 Id. They are two of the factors that the Court considers in  
19 examining the totality of the circumstances.

20 33. Various courts have found bad faith in the context  
21 of a two-party dispute. For example, in St. Paul, a filing was  
22 designed to avoid an unfavorable decision in another forum, and  
23 the filing was not motivated by a need for protection and  
24 reorganization under the Bankruptcy Code. See 185 B.R. at 583.  
25 The Ninth Circuit Bankruptcy Appellate Panel affirmed a  
26 dismissal of a chapter 11 case for cause under 1112(b), finding  
27 (1) Debtor's purpose for filing the petition was not to  
28 effectuate a reorganization, but was a litigation tactic; (2)

1 protection under the Bankruptcy Code was not necessary to a  
2 serious and legitimate reorganization; and (3) Debtor's  
3 bankruptcy case was an improper attempt to gain a more  
4 convenient forum for its litigation against the creditor moving  
5 to dismiss. Id. The Court considers it appropriate to also  
6 consider factors like those identified by the Ninth Circuit  
7 Bankruptcy Appellate Panel in St. Paul in analyzing the totality  
8 of the circumstances

9 34. Reviewing the totality of the circumstances, the  
10 Court believes it appropriate to consider, in addition to the  
11 presence of a two-party dispute and the Debtor's solvency, the  
12 following factors:

13 (a) whether the case was filed to gain a tactical  
14 advantage in a litigation between Lloyd's and Debtor;

15 (b) whether the case was filed shortly after a  
16 triggering event in a litigation between the parties in  
17 another forum;

18 (c) whether there was prepetition misconduct by  
19 Debtor;

20 (d) whether creditors other than Lloyd's were  
21 pressuring Debtor;

22 (e) whether the filing was an attempt to treat  
23 Lloyd's unfairly; and

24 (f) whether Debtor has a real need to reorganize.

25 35. In addition to finding that Debtor is solvent and  
26 that this is primarily a two-party dispute, the Court makes  
27 findings as to each of the additional factors described above,  
28 as follows:

1 (a) For the reasons set forth in greater detail in  
2 Findings ##17, 20, 21, 22 and 23, the Court concludes that  
3 this case was filed to gain a tactical advantage in a  
4 litigation between Lloyd's and Debtor. Lloyd's has been  
5 litigating for years with this Debtor, which litigation has  
6 culminated in the Richards decision, where the Ninth  
7 Circuit held that the Choice Clauses should be enforced.  
8 After the Richards decision, Debtor was left with the  
9 decision to defend Lloyd's claim against him under English  
10 law in London, or attempt to force Lloyd's to litigate in a  
11 Bankruptcy Court or waive its claim by not filing a proof  
12 of claim in this bankruptcy case. After Lloyd's prevailed  
13 in long and arduous litigation on the applicability of the  
14 Choice Clauses, Debtor seeks now to undercut Lloyd's  
15 victory in Richards by filing bankruptcy. On its face,  
16 this seems unfair, and the Court should be very wary in  
17 allowing this case to circumvent the Richards decision. As  
18 no creditor other than Lloyd's has pursued Debtor, and  
19 Debtor has the means to satisfy any judgment that Lloyd's  
20 is likely to obtain, there was no urgency in filing, unless  
21 the real purpose here was to undercut the Richards  
22 decision.

23 (b) For the reasons set forth in greater detail in  
24 Findings ##10, 18 and 19, the Court concludes that this  
25 case was in fact filed shortly after a triggering event in  
26 a litigation between the parties in another forum. The  
27 timing of the filing, one week after the Richards decision,  
28 and during a 5-day period in which 22 bankruptcy cases were

1 filed in the United States by Names, is suspect. The Court  
2 also finds that when a number of names also associated with  
3 ANA likewise filed during this time frame, this was not  
4 just a coincidence. The Court believes that the timing of  
5 the filing was tied to the adverse decision in Richards.

6 (c) For the reasons set forth in greater detail in  
7 Finding #10, and in particular the concerted action with  
8 other members of the ANA unrelated to any particular  
9 financial distress on the Debtor's part, the Court  
10 concludes that there was in fact prepetition misconduct by  
11 Debtor.

12 (d) For the reasons set forth in greater detail in  
13 Finding #23, and in particular the fact that no creditor  
14 other than Lloyd's has pursued the Debtor, the Court  
15 concludes that no creditor other than Lloyd's has been  
16 pressuring Debtor.

17 (e) For the reasons set forth in greater detail in  
18 Findings ##17, 20, 21, and 22, and in particular the  
19 Debtor's efforts to use this case to circumvent the  
20 Richards decision and to force Lloyd's to litigate in  
21 Bankruptcy Court after Lloyd's prevailed in long and  
22 arduous litigation on the applicability of the Choice  
23 Clauses, the Court concludes that the filing was an attempt  
24 to treat Lloyd's unfairly.

25 (f) For the reasons set forth in greater detail in  
26 Finding #23, and in particular, Debtor's solvency, the fact  
27 that no creditor other than Lloyd's is pursuing Debtor, and  
28 Debtor's means to satisfy any judgment that Lloyd's is

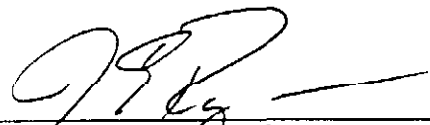
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likely to obtain, the Court concludes that Debtor does not have a real need to reorganize.

36. Upon the Court's analysis of the above factors in particular, and taking the totality of the circumstances into consideration, Lloyd's has established cause for the dismissal of this case, as a bad faith filing.

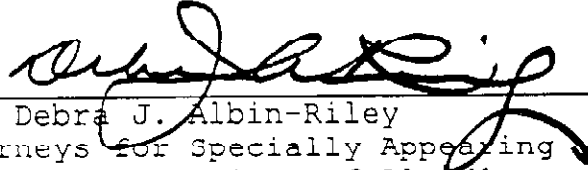
37. Accordingly, the case should be dismissed, for cause.

DATED: ~~September~~ <sup>OCT 5</sup> 1998, 1998

By   
The Honorable John Ryan  
United States Bankruptcy Judge

Dated: September 9, 1998

Submitted by:  
DEBRA J. ALBIN-RILEY  
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

By   
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