IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	**CASE NO. 04-61365**
JOHN S. ROBY,	**CHAPTER 7**
Debtor.	**JUDGE RUSS KENDIG**

MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION FOR RELIEF FROM STAY

Pursuant to Title 11 of the United States Code Section 707(a), The Society of Lloyd's ("Lloyds") requests that this Court dismiss the above-captioned matter on the grounds that the debtor filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code in bad faith. In the alternative, pursuant to 11 U.S.C. § 362(d)(1), Lloyd's requests relief from the stay entered in this matter to allow The Society of Lloyd's v. Charles Robinson, et al., United States District Court, Northern District of Ohio, Case No. 1:04CV0400 to proceed. A memorandum in support is attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OR IN THE ALTERNATIVE MOTION FOR RELIEF FROM STAY

I. PRELIMINARY STATEMENT

Debtor, John S. Roby ("Roby"), filed a Chapter 7 bankruptcy petition to avoid paying a debt he has long owed to a single creditor: The Society of Lloyd's ("Lloyd's"). However, bankruptcy cases are not intended to settle two-party disputes such as the on-going dispute between Roby and Lloyd's that began in the 1990s when Roby lost money on his underwriting at Lloyd's. Even Roby tacitly admits that this case is a two-party dispute. During the first creditor's meeting, Roby commented that the bankruptcy case was filed to fight the British judgment Lloyd's obtained against him (discussed in further detail below). Ironically, his testimony also revealed that he is able to pay his debts. Accordingly, Lloyd's requests that this Court dismiss this case on the grounds that Roby's petition was filed in bad faith. Or, in the alternative, Lloyd's requests that this Court lift the stay in this case so that the District Court case entitled The Society of Lloyd's v. Charles T. Robinson, et al., Case No. 1:04cv0400 (the "Litigation") may proceed.

II. FACTS

In 1978, Roby became a member – or "Name" – of Lloyd's. As a Name, Roby participated in – or became a part of – one or more Lloyd's syndicates.[1] With respect to underwriting at Lloyd's, the syndicates in which Roby participated (and therefore Roby himself) incurred significant financial losses. Roby, however, neither paid his losses nor a premium for reinsurance of his underwriting liabilities.[2] Consequently, Lloyd's filed suit in the High Court of Justice, Queen's Bench Division, Commercial Court in The Society of Lloyd's and John Steiner Roby, 1997 Folio No. 1336 (the "British Action"). Judgment was entered in Lloyd's favor on March 11, 1998 in the amount of £171,606.18 (approximately $324,884.00).[3] (Exhibit A.) To date, Roby has not paid the foreign judgment.

On February 26, 2004, Lloyd's instituted the Litigation to enforce the British Action. (Exhibit B.) While the Litigation was pending, Roby filed a voluntary petition for bankruptcy on March 22, 2004.

On his schedules, Roby:

- Reports a monthly gross income of $10,063.00, excluding his wife's income;
- Lists a monthly expenditure of $600.00 for food for three (3) people;
- Lists over $500.00 in monthly recreation;
- Lists over $500.00 in monthly charitable contributions; and
- Lists over $850.00 in monthly support for his adult children that do not live at home.

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[1] A group of Names forms syndicates to underwrite insurance business.

[2] Lloyd's Central Fund covered Roby's unpaid losses by way of drawdowns as and when Roby did not pay his losses.

[3] Since judgment was entered in The Society of Lloyd's and John Steiner Roby, on March 11, 1998, three (3) credits totaling £141,294.41 (approximately $267,498.00) have been applied to the judgment. Seventy-Four Thousand One Hundred One Pounds and Ninety-Seven Pence (£74,101.97, approximately $140,289.00) is the current outstanding balance, including interest. The Central Fund debt was not a subject of the British Action.

(Exhibit C.) In addition, Roby has either testified or disclosed on his schedules that he:

- Received income in excess of $25,000.00 from discretionary trusts in recent years;
- Receives deferred compensation in the amount of $5,000.00 a year from Bank One;
- Sold his shares in his insurance agency that he has owned with his partners since 1972 for $6,000.00 one month before filing for bankruptcy;
- Is the beneficiary of a revocable marital trust, and the beneficiary of at least two other trusts;
- Recently sold stock within the past two years worth between $35,000.00 - $40,000.00; and
- Prides himself on paying his credit card balances – some upward of $2,500.00 – in full each month.

III. LAW AND ARGUMENT

A. This case should be dismissed for lack of good faith.

It is well-settled that 11 U.S.C. § 707(a)[4] empowers bankruptcy courts to dismiss cases filed in bad faith. In re Zick, 931 F.2d 1124 (6th Cir. 1991) (holding bankruptcy may be dismissed for cause for lack of good faith); In re Tamecki, 229 F.3d 205 (3rd Cir. 2000) (holding chapter 7 case may be dismissed for debtor's lack of good faith where the petition was filed to discharge a substantial debt despite no loss in the debtor's income); and In re Brown, 88 B.R. 280 (D.Haw. 1988) (dismissing bankruptcy filed to avoid payment of medical malpractice judgment where debtor transferred assets to avoid paying tort victim).

1. First, this case should be dismissed for bad faith because it is essentially a two-party dispute.

Bankruptcy protection is being sought in bad faith where the case is a two-party dispute capable of adjudication under state law. In re Hatcher, 218 B.R. 441 (8th Cir. 1998). This is

[4] The statute reads in pertinent part: (a) The court may dismiss a case under this chapter only after notice and a hearing and only for *cause*, including… 11 U.S.C. § 707(a) (emphasis added).

particularly true where the bankruptcy case is frustrating one substantial creditor. Stage I land Co. v. U.S. Housing and Urban Dev. Dep't, 71 B.R. 225 (D.Minn. 1986). "Courts have especially eschewed the use of a bankruptcy proceeding for resolution of a two-party dispute where the intent of the bankruptcy is perceived to be a relitigation of the prior action." In re Paolini, 312 B.R. 295, 307 (E.D.Va. 2004).

Here, the bankruptcy is a two-party dispute between Roby and Lloyd's that has extended over a decade. Roby is seeking to use the bankruptcy as an opportunity to relitigate the British Action in which Lloyd's obtained a favorable judgment against him. Indeed, Roby filed his petition to stay the Litigation instituted by Lloyd's to enforce the foreign judgment. Accordingly, this case should be dismissed.

2. Second, this case should be dismissed because Roby abused the purpose of the Bankruptcy Code.

Dismissal based on lack of good faith must be made on an ad hoc basis. In re Zick, 931 F.2d 1124. "It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." Id. at 1129. The standard is whether the petitioner abused the purpose and spirit of the bankruptcy code. In re Tamecki, 229 F.3d 205. Factors sufficient to support a finding of bad faith include: (1) debtor's manipulations to reduce number of creditors to one; (2) debtor's failure to make significant lifestyle adjustment or repay debt; (3) fact that petition was filed in response to creditor's judgment or award; and (4) unfairness of debtor's use of chapter 7. In re Zick, 931 F.2d 1124; see also In re Griffieth, 209 B.R. 823 (N.D. N.Y. 1996).

The facts here are sufficient to support a finding of bad faith. First, Roby has successfully reduced his creditors to one. He reaffirmed his mortgage and pays his other creditors in full monthly. Further, Roby has not made an attempt to pay Lloyd's despite his multiple sources of income and the substantial sum of money available to him from his various trusts.[5] Roby's failure to even attempt to repay Lloyd's casts doubt on his good faith. Id.

Second, Roby has failed to demonstrate that he needs a fresh start: he has a consistent and substantial income. There is no evidence that he has been forced to change his lifestyle. In fact, he testified that he spends between $500.00 and $1,000.00 each month in recreation and entertainment. "[Bankruptcy] is not intended to allow the clever and determined rich an opportunity to slip away from a single, disfavored creditor." In re Collins, 250 B.R. 645, 657 (N.D. Ill. 2000) (imposing sanctions against debtor and debtor's counsel for filing bankruptcy to thwart Lloyd's efforts to collect a debt after bankruptcy court granted Lloyd's motion to dismiss bankruptcy case on grounds that debtor's petition was filed in bad faith).

Roby continues to make charitable contributions, which is not a constitutionally protected right. In re Griffieth, 209 B.R. 823. "[A] debtor[has] no right to more discretionary income than other debtors merely because they wish to use some of it to make charitable contributions." Id. at 828. Furthermore, a monthly expenditure of $600.00 for food is either grossly excessive or grossly inflated for the debtor, his spouse and one live-in dependent. See, e.g., In re Ciesicki, 292 B.R. 299 (N.D. Ohio 2003). Roby also supports his adult children, including paying for graduate school tuition, insurance, and allowing one of his sons to live on his property for little or no rent. "Generally, parents 'owe no duty to their children to provide them with nonessential luxuries while the debtors' unsecured creditors receive no payment on their just claims'." In re

[5] The credits that Lloyd's applied to Roby's losses were not received directly from Roby, but from funds maintained at Lloyd's as security for his underwriting (i.e., the credits applied to the judgment against Roby do not represent Roby's attempt to pay his liabilities).

Griffieth, 209 B.R. at 828 (quoting In re Studdard, M.D., 159 B.R. 852, 854 (E.D. Ar. 1993)). In light of the amount of money Roby spends on charitable contributions, food, entertainment and recreation, and his adult children's obligations, tightening would allow Roby to begin repaying his debts. See, e.g., In re Ciesicki, 292 B.R. 299.

Third, Roby did not file for bankruptcy until Lloyd's instituted an action in the Northern District of Ohio. "When a bankruptcy filing is motivated by a desire to delay a creditor from enforcing its rights in an ongoing dispute, the filing is an abuse of process," In re Collins, 250 B.R. at 657 (citations omitted), and "an inequitable attempt at litigation derailment." Id. at 658.

The totality of the circumstances here constitutes an egregious case in which the debtor has excessive expenditures and is attempting to avoid a single significant debt. This is illustrated by Roby's gifts of substantial sums of money to his spouse and adult children, the fact that he holds his home and other assets in various trusts, and has relinquished ownership in a company that he has owned since 1972 (the same month the Litigation was filed and one month before filing for bankruptcy, presumably to reduce the number and value of his assets.) Because of Roby's lack of good faith, this case must be dismissed.

B. In the alternative, Lloyd's should be allowed to pursue enforcement of the British Action.

Pursuant to 11 U.S.C. § 362(d), a bankruptcy court may lift an automatic stay for cause. The statute reads, in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest

11 U.S.C. § 362(d)(1). Several courts have held a debtor's bad faith may constitute cause to grant relief from an automatic stay. In re Laguna Assoc., Inc., 30 F.3d 734 (6th Cir. 1994) (holding bankruptcy filed in bad faith was grounds to grant relief from automatic stay); In re Trident Assoc. Ltd. P'ship, 52 F.3d 127 (6th Cir. 1995) (dismissing single-asset organizational debtor's bankruptcy petition on grounds that the petition was filed in bad faith); and Carolin Corp. v. Miller, 886 F.2d 693, 699 (4th Cir. 1989) (holding a chapter 11 case may be dismissed for lack of good faith). For the reasons set forth above in this motion, Roby's bad faith is evident.

Even where cause exists, it is within the bankruptcy court's discretion whether to lift the automatic stay. In re Garzoni, No. 01-1743, 35 Fed. Appx. 179, 2002 WL 962154 (6th Cir. May 8, 2002) (lifting automatic stay in state court action for fraud and breach of fiduciary duty). (Exhibit D.) The bankruptcy court must consider: (1) judicial economy; (2) trial readiness; (3) resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden on the bankruptcy estate. Id.

In applying the factors to the instant action, the first and second factors, weigh in favor of lifting this stay. Only the debtor needs to conduct discovery. Lloyd's does not intend to conduct any discovery in the Litigation. The Litigation is likely to be resolved either in mediation or by motion. As for the third factor, there are few, if any, bankruptcy issues to resolve. Lloyd's is Roby's only significant creditor and, currently, it appears that Roby does not have many non-exempt assets that would benefit Lloyd's. The fourth factor weighs heavily in Lloyd's favor. Lloyd's has obtained a foreign judgment and the only purpose of the Litigation was to enforce that judgment. While the debtor seeks to relitigate the issues underlying the British Action, any attempts to do so would be barred by the doctrine of *res judicata.* Roby was

a party to the British Action, was represented by counsel, and had a right to defend himself in the action.[6] Finally, Lloyd's does not anticipate that the costs of the Litigation will be overwhelming, as it should be resolved in mediation or by motion. Accordingly, this Court should grant relief from the stay in this case, if this case is not dismissed in its entirety.

IV. CONCLUSION

For the foregoing reasons, The Society of Lloyd's requests this Court dismiss John S. Roby's bankruptcy case, or, in the alternative, grant relief from stay to allow the dispute between the debtor and Lloyd's to be resolved in The Society of Lloyd's v. Charles T. Robinson, *et al.*, Case No. 04CV0400.

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[6] Further, as a result of the general Undertaking Agreement's forum selection clause, claims with respect to a Name's membership on underwriting at Lloyd's must be brought in England.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January 2005, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by regular U.S. mail and by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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