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U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY: /s/Diana Reaves, Deputy

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	:	CHAPTER 11
ENCAP GOLF HOLDINGS, LLC and NJM CAPITAL, LLC	:	CASE NO.: 08-18581 and 08-18590 (NLW)
Debtor.	:	**OPINION**

Before: HON. NOVALYN L. WINFIELD

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This matter is before the court on a motion by the Bank Group for dismissal of the Chapter 11 case, or alternatively, relief from the automatic stay. As set forth below, the court denies both motions.

JURISIDICTION

The following constitutes the bankruptcy court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (G). The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984.

STATEMENT OF FACTS

A. Procedural History

On May 8, 2008 (the "Petition Date"), EnCap Golf Holdings, LLC and NJM Capital, LLC ("Debtors" or "EnCap") filed petitions under Chapter 11 of Title 11, United States Code.[1] From the Petition Date, the Debtors have continued in possession of their property and management of their affairs. On May 21, 2008, the United States Trustee appointed an Official Committee of Unsecured Creditors ("Creditors' Committee").

On June 13, 2008, Wachovia Bank, National Association ("Wachovia"), as agent for the Bank Group, (hereinafter "Wachovia" and/or "Bank Group") filed the instant motion for either dismissal of the Chapter 11 cases or relief from the automatic stay. With regard to dismissal, Wachovia argues that cause exists to dismiss this case either as a "bad faith" filing or because under

[1]NJM Capital, LLC is the majority owner of Encap Golf Holdings, LLC. An order for joint administration of the two cases was entered on May 15, 2008.

§ 1112(b)(4)(A) of the Bankruptcy Code there is a substantial or continuing loss to the estate and an absence of a reasonable likelihood of rehabilitation. Alternatively, Wachovia asks for relief from the automatic stay under § 362(d)(1) of the Bankruptcy Code because EnCap's filing for Chapter 11 relief was done in bad faith and the Bank Group's collateral is not adequately protected against diminution in value. Wachovia also asked for stay relief under §362(d)(2) with regard to certain funds held in a depository account.

Also, in May of 2008, the New Jersey Meadowlands Commission ("NJMC") brought a motion for a determination that the case should be treated as a single asset real estate case as defined in §101(51B) of the Bankruptcy Code. Following a hearing, the NJMC and EnCap entered into a consent order dated July 11, 2008, under which EnCap agreed to file a plan of reorganization by September 30, 2008.

B. <u>EnCap's Business</u>

On October 26, 2000, the NJMC and EnCap entered into a Landfill Closure and Development Agreement ("Redevelopment Agreement") which set the terms and conditions under which EnCap would remediate and develop approximately 785 acres encompassing four solid waste landfills within the Township of Lyndhurst, the Borough of North Arlington and the Borough of Rutherford (the "Project").[2] As part of performance security for completion of remediation and the macro infrastructure component of the Project site, EnCap obtained a performance bond from American Home Assurance ("AHA") in the amount of $148,824,299. The NJMC is the named beneficiary of the performance bond. Additionally, in connection with its liability for the landfill closure costs, EnCap purchased, and is a named insured, on liability insurance policies from

[2]The Redevelopment Agreement was amended and restated three times: March 10, 2003, September 20, 2005 and August 6, 2006.

Lexington Insurance Company ("Lexington"). The Lexington excess cost policy provides aggregate coverage in the amount of $35 million.

The Redevelopment Agreement gives EnCap the right to sell the real property and the development rights to vertical developers once the landfills are completely remediated and closed. Anticipated development included two golf courses, single family housing, a hotel, and multi-unit residences. Prepetition, EnCap negotiated purchase and sale agreements ("Purchase and Sale Agreements") with certain developers for their acquisition of portions of the Project site.[3] EnCap estimates that the minimum aggregate proceeds of the Purchase and Sale Agreements approximate $200 million. EnCap also estimates that this figure is nearly $50 million in excess of the debt owed to Wachovia. However, as Wachovia points out, these Purchase and Sale Agreements are subject to a number of contingencies and conditions precedent. In particular, EnCap's primary obligation under all the agreements is to complete the remediation of the Project site such that the New Jersey Department of Environmental Protection ("NJDEP") issues a "no further action" letter. Wachovia also notes that EnCap is not presently able to perform any of its obligations under the agreements.

It appears that from its inception, EnCap's business operations have been only those associated with the Project. EnCap was formed solely for the purpose of acquiring, remediating and developing the Project site. Certain contractors and their subcontractors have performed the remediation and macro infrastructure work. As such, EnCap has had few employees and postpetition, it employs only James P. Dausch as President and Frank Pizzella as Vice President.

[3]EnCap is the owner of the Project site pursuant to: (a) a Quitclaim Deed and Declaration of Covenants, Conditions, Restrictions, Reservations and Easements from the NJMC dated April 30, 2004 and recorded May 5, 2004, and (b) an Amended and Restated Phase I Quitclaim Deed and Declarations, Reservations and Easements from the NJMC dated June 25, 2004 and Recorded July 15, 2004 (collectively, the "Deeds"). Notably, the Deeds contain a reversionary clause in favor of the NJMC in the event of EnCap's default.

C. Project Financing

Given the scope of the expected remediation and development, funding the Project required significant financing. Because EnCap's defaults under the financing contributed to its need to file for Chapter 11 relief, a review of its structure is helpful in assessing the instant motion.

Initially, EnCap obtained the financing necessary for the Project through the New Jersey Economic Development Authority ("NJEDA"). NJEDA issued revenue bonds ("EDA Bonds") in 2001 and 2004. On or about December 1, 2005, the Project was refinanced through a series of bonds issued by the New Jersey Environmental Infrastructure Trust ("NJEIT") and the Bergen County Improvement Authority ("BCIA"). Altogether, in December 2005, five separate bond issues took place. The two bond issues that involve Wachovia have particular relevance; however, the overall refinancing requires some discussion in order to provide adequate context.

(i) Senior Bonds

The New Jersey Environmental Infrastructure Trust ("NJEIT") issued Environmental Infrastructure Revenue Bonds (Bergen County Improvement Authority-EnCap Golf Holdings, LLC Project) Series 2005 ("NJEIT 2005A Bonds") in the aggregate principal amount of $107,015,000 pursuant to an Indenture of Trust ("NJEIT Indenture") by and between NJEIT and The Bank of New York, N.A. as trustee ("NJEIT Bond Trustee").[4] NJEIT used the proceeds from the NJEIT 2005A Bonds to make a loan to the BCIA in the amount of $107,015,000 ("BCIA Trust Loan"). In turn, from the proceeds of the BCIA Trust Loan, BCIA loaned $107,015,000 to EnCap to refinance existing indebtedness and to pay Project costs. To evidence its obligations to repay the BCIA Trust

[4]The NJEIT Indenture also required the NJEIT Bond Trustee to hold the proceeds of the NJEIT 2005A Bonds in trust until used to pay the approved costs for the remediation work. Under the NJEIT Indenture, the NJEIT Bond Trustee is not authorized to pay out any funds if any events of default have occurred.

Loan, the BCIA issued a Senior Special Purpose Limited Obligation Revenue Bond, Series 2005A ("BCIA 2005A Bond") in the amount of $107,015,000 pursuant to an Indenture of Trust (BCIA Indenture") between the BCIA and Commerce Bank, N.A. as trustee ("BCIA Trustee").[5] Pursuant to the BCIA Indenture, the BCIA, acting as a conduit issuer, also issued Senior Special Purpose Limited Obligation Revenue Bonds (EnCap Golf Holdings, LLC Project) Series 2005B ("BCIA 2005B Bonds") in the aggregate principal amount of $37,985,000 (collectively with the NJEIT 2005A Bonds the "Senior Bonds").

The security for EnCap's obligation to repay the funds loaned to it from the Senior Bonds consisted of two irrevocable direct-pay letters of credit ("Letters of Credit") provided by Wachovia as agent for a syndicate of lenders (the "Bank Group").[6] Simultaneously with the issuance of the Letters of Credit, EnCap entered into a Reimbursement and Security Agreement ("Reimbursement Agreement") with Wachovia setting forth EnCap's obligation to reimburse Wachovia for any draws on the Letters of Credit. Further, to secure EnCap's obligations to Wachovia, EnCap gave Wachovia a Mortgage and Security Agreement ("Mortgage"). Additionally, EnCap granted Wachovia a pledge of the revenues derived by the Project, including fill revenues, revenues derived from the sale of development rights and a portion of any proceeds that might be derived from the sale of Redevelopment Area Bonds ("PILOT Bonds"), which would be paid from property taxes or payments in lieu there of. EnCap entered into preliminary agreements with Lyndhurst and Rutherford regarding PILOT Bonds. However subsequent actions by the municipalities and

[5]Subsequently, Wells Fargo Bank, National Association was substituted as the BCIA Trustee.

[6]The Letters of Credit provided were (i) Irrevocable Letter of Credit No. SM 216949W in favor of the NJEIT Trustee in the aggregate amount not exceeding $108,042,000, and (ii) Irrevocable Letter of Credit No. SM216950W in favor of the BCIA Trustee in the aggregate amount not exceeding $38,350,000.

opposition from the State of New Jersey has meant that no bond offerings have been undertaken.

ii. Subordinate Bonds

Under the BCIA Indenture, BCIA issued two Subordinate Special Purpose Limited Obligation Revenue Bonds (EnCap Golf Holdings, LLC Project): Series 2005C in the aggregate principal amount of $26,770,000 and Series 2005D in the aggregate principal amount of $38,230,000. EnCap's repayment obligations for the proceeds of these bond issues were secured by cash collateral provided by SFTI, LLC ("iStar") in the approximate amount of $45 million, and by Cherokee Loan II LLC ("Cherokee II") in the approximate amount of $20 million. EnCap granted iStar and Cherokee II a subordinate mortgage on the Project site as security.

(iii) Series 2005E Bond

BCIA also caused to be issued a Special Purpose Limited Obligation Revenue Bond, Series 2005E ("2005E Bond") in the aggregate principal amount of $104,306,814. This bond issue pertains to monies obtained by the NJDEP through the Federal Brownfield and Contaminated Site Remediation Act ("Brownfield Act") and advanced to BCIA for loan to EnCap. The principal purpose in issuing 2005E Bonds was to provide matching funds to the funds loaned to EnCap from the NJEIT 2005A Bonds. The 2005E Bond is secured principally by reimbursement revenues EnCap may be eligible to receive from the State of New Jersey under the Brownfield Act and a portion of net PILOT Bond proceeds which were anticipated to result from PILOT agreements with Lyndhurst and Rutherford. EnCap advises that approximately $39.9 million of funding remains under this bond. However, as Wachovia points out, the funds are only available to EnCap if requisitions for payment are fully approved.

D. Events Preceding the Chapter 11

As it is readily evident from the amount and complexity of the financing just described, all parties anticipated that the remediation would be expensive and risky. Further, it would be essential for the Project to meet its time schedule and budget so that the sale of the redevelopment rights could occur by 2008 as EnCap estimated. This did not happen. Wachovia alleges, and EnCap does not dispute, that almost from the start, EnCap failed to meet the progress milestones set forth in the various agreements.

By December 31, 2006, EnCap failed to make a scheduled payment of $10 million to Wachovia to amortize the Senior Bonds. Additionally, EnCap informed Wachovia and the Bank Group that it had lost certain contracts for providing fill material to the Project site. Consequently, EnCap sustained a loss of revenue derived from tipping fees associated with these contracts and simultaneously was faced with increased costs to obtain necessary fill material. Wachovia extended the payment date to June 15, 2007 while the parties negotiated.

As part of its negotiation with EnCap to restructure EnCap's financial obligations, the Bank Group required EnCap to submit revised project budgets and project schedules. Ultimately, EnCap's revised budget presented on June 12, 2007, revealed a cost overrun of approximately $75 million in excess of dedicated sources of funding for the Project. EnCap also estimated that $132 million would be required to complete the Project.

EnCap failed to make the $10 million payment by June 15, 2007. On June 18, 2007, Wachovia gave written notice to EnCap of its default. In July 2007, Wachovia and the Bank Group also discovered the existence of tax sale certificates resulting from EnCap's failure to pay taxes and $2.5 million in mechanic's liens filed against the Property. Thereafter, in August and September of 2007, EnCap defaulted on its obligations to pay monthly interest payments to the bond holders and Wachovia paid $930,502.74 on account of draws against the Letters of Credit. Once again

Wachovia gave written notice of default to EnCap. Further, on September 7, 2007, Wachovia advised EnCap that the Senior Bonds would be called for mandatory purchase on September 28, 2007. This was accomplished and Wachovia and the Bank Group have become the holders of the Senior Bonds.

During this time, the Bank Group was not the only stakeholder giving notice of defaults to EnCap. The NJEIT and NJDEP as well as the NJMC also gave EnCap notice of defaults pursuant to their respective agreements. In particular, in September of 2007, EnCap was notified that the Redevelopment Agreement would be terminated as of November 20, 2007 unless the NJMC, in its sole discretion, elected to rescind the termination notice. Nonetheless, discussions continued among EnCap, its lenders, the NJMC and the insurers regarding restructuring EnCap's debt and resuming remediation work.

While talks were ongoing, the NJDEP required EnCap to fund a $5 million escrow account ("Escrow Account") to be used for environmental remediation work. Certain Cherokee Investment Partners' private equity funds, through their designated affiliated entities funded the escrow account.[7] Also during this time period, EnCap entered into discussions with the Trump Organization to manage the Project, replan and brand the Project site, and conduct a review of the remediation budget to complete the Project. In early November 2007, EnCap and the Trump Organization reached agreement on the terms under which the Trump Organization would participate in managing the Project. EnCap, Cherokee Investment Partners II, L.P., Cherokee Investment Partners III, L.P., Cherokee Investment Partners III Parallel Fund, L.P. and Meadowlands Development Venture I, LLC (an affiliate of the Trump Organization) executed an agreement (the "MDV Agreement"). In essence, Meadowland Development Venture I, LLC ("MDV") became the Project

[7]According to EnCap an additional $4 million has been contributed to the Escrow Accounts by its affiliates.

Manager.

Perhaps as a consequence of all of EnCap's efforts, just prior to the November 20, 2007 deadline, the NJMC agreed to forebear from terminating the Redevelopment Agreement until January 11, 2008, and later further extended the deadline to May 9, 2008. Wachovia and the Bank Group apparently did not view the Escrow Account or the Trump Organization's participation as sufficient reasons to forebear from acting.[8] On December 19, 2007, Wachovia commenced a foreclosure action against EnCap and various other defendants ("Foreclosure Action"). EnCap and two construction lien holders contested the Foreclosure Action. Consequently, the New Jersey Office of Foreclosure referred the Foreclosure Action to the Superior Court of New Jersey, Bergen County, Chancery Division for disposition. Wachovia then moved to strike the contesting answers and remand the matter to the Office of Foreclosure. While Wachovia's motion was pending, the NJMC and AHA, the issuer of the performance bond, moved to intervene. The Superior Court granted these motions on May 6, 2008.[9] Before Wachovia's motion to strike the contested answers could be heard, EnCap filed its Chapter 11 petition.

While Wachovia's Foreclosure Action was pending, EnCap, MDV and the NJMC continued their discussions. On April 18, 2008, EnCap and MDV presented the NJMC with a budget and a schedule for completing the Project. These documents estimated that an additional $125 million would be required to completely close the landfills. Unfortunately, an unconditional financing proposal did not accompany the budget. Thereafter, on May 7, 2008, the NJMC adopted a

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[8]Wachovia points out that EnCap did not consult the Bank Group regarding the MDV Agreement. But it also seems that consultation would not have mattered. Wachovia states that the MDV Agreement was not acceptable to the Bank Group because there was no commitment to provide capital.

[9]AHA contends that as a matter of surety law it has priority over the Bank Group and the NJMC asserts its reversionary rights under the Redevelopment Agreement as a bar to Wachovia's Foreclosure Action.

resolution denying any further extension of the forbearance period. The NJMC action was based on EnCap's defaults under the Redevelopment Agreement and its failure to obtain financing for the $125 million which the Trump Organization estimated as necessary for completion of the remediation of the Project site. As noted earlier, EnCap filed for Chapter 11 relief on May 8, 2008, one day prior to the termination of the Redevelopment Agreement.

F. Post filing Events

Wachovia contends that little has changed since the Petition Date and that any reorganization can only be viewed as speculative. It notes that (i) the NJMC and the NJDEP are performing all continuing remediation efforts, (ii) EnCap currently has no full time salaried employees, (iii) as of June 30, 2008, EnCap has only $88,000 in accessible funds, (iv) EnCap's present income sources are very limited (interest income, rent from radio towers and the prospect of perhaps $5 million in tipping fee revenue), and (v) EnCap has not succeeded in securing new financing. Further, Wachovia is skeptical of EnCap's current proposal to first completely remediate the Project site and then market the Project site to developers. Wachovia points out that EnCap does not even have a good estimate of the costs to completely remediate the Project site. It notes that no other stakeholder has committed to EnCap's current proposal, much less agreed to use the proceeds remaining from the bonds to partially fund the remediation. Indeed, Wachovia emphatically contends that the proceeds from the NJEIT 2005A Bonds that remain in the Project Fund are held in trust for Wachovia and that EnCap has no rights to the remaining funds.

EnCap, of course, rejects Wachovia's characterization of its postpetition efforts. While it concedes that it has no employees to perform remediation work at the Project site, EnCap notes that it is funding the remediation work performed by the NJMC and the NJDEP from the Escrow Account established prepetition. Thus, it contends that it is actively cooperating with the appropriate

agencies. Further, EnCap observes that it has agreed with the NJMC to file a plan of reorganization by September 30, 2008 and that it has agreed with the Trump Organization to terminate exclusivity so that the Trump Organization can file a competing plan. EnCap also points out that it has performed all of its obligations to file its schedules, attend the meeting of creditors, maintain appropriate insurance, and be responsive to requests from the Creditors' Committee and other stakeholders in the case.

With the assistance of its financial advisor, Traxi LLC ("Traxi"), EnCap also sought offers from other entities to participate in the Project. Perry Mandarino ("Mandarino"), a senior managing director at Traxi testified that discussions were held with Fillmore Capital, and an entity known as ProLogis, as well as the Trump Organization. EnCap engaged in discussions with integrated real estate developers who hold large portfolios of real estate in New Jersey. No offers were forthcoming. Based on its discussions, EnCap and Manderino concluded that remediation of the Project was required in order to market the Project to new developers. Because EnCap determined that no acceptable offer would be received under its initial approach, it developed a new proposal.

Manderino testified that EnCap is negotiating with certain of its affiliates to obtain postpetition financing in order to retain the engineers and other professionals needed to prepare a remediation plan and cost estimate for completing work on the Project. After the scope and cost of the work are determined, EnCap envisions issuing a request for qualifications to a number of general contractors who perform large scale remediation work. Then a request for proposals will be made to qualified contractors to perform the work on a fixed-cost basis. Mandarino testified that discussions were had with a number of contractors in New Jersey who expressed interest in bidding on such a contract. Mandarino also testified that EnCap proposes the establishment of a working group comprised of representatives from EnCap, the Creditors' Committee, the insurers, the Bank Group and governmental authorities to oversee the entire process. To fund the remediation, EnCap

intends to negotiate with the parties to use the proceeds remaining from the various bonds, which EnCap estimates as approximately $82 million. In addition, EnCap hopes to obtain a commitment from the insurers to contribute funds from the policies and the performance bond. Though no commitments have been received from any of the stakeholders, it appears that discussions are ongoing. EnCap contends that its proposal is sufficient to demonstrate that a reasonable likelihood of rehabilitation exists.

As to Wachovia's alternative request for relief from stay to proceed against the $42 million in proceeds from the NJEIT 2005A Bonds, EnCap disputes that Wachovia has a security interest in such funds, and contends that even if Wachovia is secured by these funds, they are nonetheless EnCap's cash collateral. Moreover, EnCap disagrees that Wachovia has demonstrated that EnCap lacks equity in such funds. EnCap has commenced an adversary proceeding against Wachovia to establish the validity, priority or extent of the Wachovia lien and for declaratory judgment regarding the alleged lien. At the hearing of the motion to dismiss, Lexington advised that it had also filed an adversary proceeding for the same relief. Lexington contends that the proceeds of the NJEIT 2005A Bonds are available only to fund the remediation work at the Project and cannot be released to Wachovia.

DISCUSSION

Though not an enumerated basis for dismissal under Bankruptcy Code § 1112(b), it is well established in this Circuit that the lack of good faith when filing for Chapter 11 relief constitutes cause for dismissal. *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004); *Solow v. PPI Enters. (U.S.), Inc. (In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197,210-211 (3d Cir. 2001); *In re SGL Carbon Corp.*, 200 F.3d 154, 160-163 (3d Cir. 1999). When faced with a request for dismissal on this ground, the debtor bears the burden of establishing good faith. *SGL Carbon*,

200 F.3d at 162 n.10. "A determination of a debtor's motive for filing centers upon the totality of the circumstances." *In re Walden Ridge Development, LLC*, 292 B.R. 58, 62 (Bankr. D.N.J. 2003) citing *SGL Carbon*, 200 F.3d at 165.

Based on the totality of the circumstances before it, the Court concludes that EnCap's Chapter 11 petition has a valid reorganization purpose and was filed in good faith. The mere fact that EnCap filed its petition on the eve of oral argument on Wachovia's motion to strike EnCap's answer to the foreclosure complaint does not establish bad faith. Even if Wachovia's motion had been heard and granted, entry of a foreclosure judgment would take several months and the scheduling of a foreclosure sale would have been an even more distant possibility as of the Petition Date. Thus, the court finds that the foreclosure proceeding may have been a factor, but it was not a precipitating factor causing the Chapter 11 filing. Instead, the Court views the precipitating factor to be the resolution by the NJMC to not further extend the termination date for the Redevelopment Agreement.

For several months prior to the Petition Date, EnCap, with the assistance of MDV, worked to present the NJMC with a plan and budget for completion of the Project. It appears to the court that EnCap filed its Chapter 11 case in order to benefit from the automatic stay and continue to negotiate with the NJMC and other stakeholders. Only by preserving its rights under the Redevelopment Agreement is EnCap able to meet the principal aims of Chapter 11: (i) preservation of its business and (ii) maximization of payments to all of its creditors.

The Ninth Circuit Court of Appeals has broadly summed up the test for good faith as assessing "whether a debtor is attempting to unreasonably deter or harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis." *Marsch v. Marsch (In re Marsch),* 36 F.3d 825, 828 (9th Cir. 1994). Factors commonly examined to determine whether a Chapter 11 case has a valid reorganization purpose or whether it was filed in bad faith include the following:

(i) The Debtor has only one asset, the Property, in which it does not hold legal title;

(ii) The Debtor has few unsecured creditors whose claims are small in relation to the claims of the Secured Creditors;

(iii) The Debtor has few employees;

(iv) The Property is the subject of a foreclosure action as a result of arrearages on the debt;

(v) The Debtor's financial problems involve essentially a dispute between the Debtor and the secured creditors which can be resolved in the State Court Action; and

(vi) The timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the Debtor's secured creditor to enforce their rights.

In re Y.J. Sons & Co., Inc., 212 B.R. 793, 802 (D.N.J. 1997) citing to *In re Phoenix Picadilly, Ltd.*, 849 F.2d 1393, 1394-1395 (11th Cir. 1988).

Applying the foregoing factors to the matter at hand, it initially appears that some of the factors are met. However, examination of the full context of EnCap's Chapter 11 filing reveals that a valid reorganizational purpose exists and that the petition was filed in good faith. The Project site is certainly EnCap's primary asset and EnCap is in arrears on its obligations to Wachovia. However, EnCap's interest in the project is subject not only to the Wachovia lien, but also the NJMC's reversionary interest. NJMC's intention to declare EnCap in default of the Redevelopment Agreement was the precipitating cause for the Chapter 11. Notably, the NJMC has not moved to dismiss the case. Rather, it sought to accelerate the process for filing a plan of reorganization by bringing a motion to treat EnCap's case as a single asset real estate case under § 101(51B). Importantly, courts have not found that a petition filed on the eve of creditor action constitutes a per se bad faith filing. *Matter of Newark Airport/Hotel, L.P.*, 156 B.R. 444, 449 (Bankr. D.N.J. 1993), aff'd, 155 B.R. 93 (D.N.J. 1993).

EnCap scheduled unsecured claims totaling $102,946,339.08. The secured claims on EnCap's schedules total $353,088,140.98. Although, the unsecured claims are numerically smaller that the secured claims, claims of over $100 million can hardly be termed insignificant. Additionally, the size of the unsecured creditor body and the active role of the NJMC in this case demonstrate that it is not simply a two party dispute. Moreover, the fact that EnCap has few employees is equally of little significance. It never had many employees. The remediation work and macro infrastructure work has been performed by contractors. In the context of this case the real question is not how many persons are employed by EnCap, but what are they doing? The postpetition conduct of EnCap's business demonstrates that its officers are meeting their obligations to negotiate with EnCap's creditors and to formulate a plan of reorganization. As a result of the NJMC motion EnCap has agreed to file its plan in a matter of weeks. Further, EnCap has agreed to terminate exclusivity in order that The Trump Organization may file a plan. Moreover, the Project is insured and EnCap's Escrow Account is being used to fund the remediation managed by the NJMC and the NJDEP.

Finally, as EnCap's counsel noted at the hearing, its is unusual for a motion to dismiss to be premised on a debtor's inability to file a plan when there is a pending creditor's motion to terminate the exclusivity period so that the creditor may file a competing plan. Section 1112(b)(4)(A) provides for dismissal of a case based on "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation. This basis for dismissal is conjunctive and requires not only a consideration of whether a debtor is suffering continuing losses but whether the debtor's business prospects justify continuing the Chapter 11 case. See *In re Great Am. Pyramid Joint Venture,* 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992). Mandarino's testimony regarding EnCap's current strategy demonstrates that it may be able to file a plan in a matter of weeks. Further, the existence of a potential competing plan certainly evidences the prospect of

rehabilitation.

Likewise, because there is no bad faith that warrants dismissal of this case, there is no bad faith that warrants relief from the automatic stay under § 362(d)(1). See *In re Laguna Assocs., L.P.*, 30 F.3d 734, 737 (6th Cir. 1994)(finding no substantive difference between the cause requirement for dismissal under § 1112(b) and the cause requirement for relief from the automatic stay under § 362(d)(1)). Nor does the court find that Wachovia and the Bank Group are suffering a lack of adequate protection with regard to the collateral. The Project site is being maintained by the NJMC and the NJDEP with funds provided from EnCap's Escrow Account. Further, a plan of reorganization is likely to be filed in a matter of weeks. The proceeds of the NJEIT 2005A Bonds remain in the account maintained by the NJEIT 2005A Bond Trustee and are not being utilized, and thus are not being diminished.

Wachovia's additional argument that the proceeds of the NJEIT 2005A Bonds are not property of the estate is not presently persuasive to the court. Not only has Wachovia previously acknowledged the funds to constitute cash collateral, but there are also two separate adversary proceedings pending in which ownership of the NJEIT 2005A Bond proceeds is disputed.

The lack of clarity as to which party has superior rights to the funds is also a separate basis on which the court denies relief from the stay under § 361(d)(1). The refinancing of the EDA Bonds in December 2005 was effected through a series of bond issues which were accompanied by various indentures and other documents memorializing various parties' rights and priorities with respect to the bond funds. The existence of the two adversary proceedings bespeaks the complexity involved in determining which party has the superior right to the funds. Because the funds are not diminishing in value and the court cannot presently determine that Wachovia has the superior interest, there is no basis for stay relief.

Wachovia also argues that stay relief should be granted under § 362(d)(2) with regard to the

NJEIT 2005A Bond proceeds. This section requires stay relief where the debtor lacks equity in the property and the property is not necessary for an effective reorganziation. Both elements of §362(d)(2) must be satisfied in order for the court to grant stay relief. *In re Pegasus Agency, Inc.*, 101 F.3d 882, 886 (2d Cir. 1996). The court finds that Wachovia's request fails because the property is necessary for an effective reorganization.[10] The EnCap case is at an early stage. A plan is due within weeks, which may include use of these funds if the various parties consent or the court rules in EnCap's favor. On these facts the court cannot find that an effective reorganization is not in prospect. Further, the court agrees with *In re Cardell*, that for the purposes of determining the debtors' equity under § 362(d)(2) the value of all the collateral should be considered. 88 B.R. 627, 631-32 (Bankr. D.N.J. 1988). Wachovia has not met its burden under §362(g).

CONCLUSION

Wachovia's motion to dismiss the Chapter 11 case as a bad faith filing is denied. Likewise, Wachovia has not established cause for dismissal under §1112(b)(4)(A). Finally, relief from the automatic stay under §362(d)(1) and (d)(2) is denied.

Dated:

NOVALYN L. WINFIELD
United States Bankruptcy Judge

[10]This of course assumes that resolution of the adversary proceedings results in a determination that EnCap has a property interest in the NJEIT 2005A Bond proceeds and that Wachovia holds a perfected security interest.