

**IN THE UNITED STATES BANKRUPTCY COURT  
FORT THE DISTRICT OF PUERTO RICO**

In re: BETTERROADS ASPHALT, LLC. Debtor	Case No. 17-04156(ESL) Chapter 11
In re: BETTERRECYCLING CORPORATION Debtor	Case No. 17-04157(ESL) Chapter 11

**OPPOSITION TO MOTION TO DISMISS**

**TO THE HONORABLE COURT:**

**COME NOW**, Firstbank Puerto Rico (“Firstbank”), Banco Santander de Puerto Rico (“Banco Santander”), the Economic Development Bank for Puerto Rico (“EDB”), and Banco Popular de Puerto Rico (“Banco Popular” or the “Administrative Agent” and collectively with Firstbank, Banco Santander and EDB, the “Lenders”) through their undersigned counsel and respectfully file this Opposition (the “Opposition”) to the Motion to Dismiss (the “Motion to Dismiss”) filed by Betterroads Asphalt, LLC (“Betterroads”) and Betterrecycling Corporation (“Betterrecycling”) (collectively the “Debtors”).

**PRELIMINARY STATEMENT**

As set forth more fully below, the Motion to Dismiss should be denied because it fails to contest the validity of the involuntary petitions against each of the Debtors commenced by the Petitioning Creditors (defined below). The Motion to Dismiss requests that the involuntary petitions be dismissed solely on the following grounds: (a) the Lenders’ claims under the syndicated credit facilities are subject to a *bona fide* dispute; (b) Sargeant Marine Inc. and

Sargeant Trading Ltd.'s claims should count as one; and (c) there is no evidence that the Debtors have failed to pay their obligations as they become due.

The Debtors' allegations, even if deemed true (which they are not), are insufficient as a matter of law to require dismissal of the involuntary petitions under section 303 of the Bankruptcy Code. The involuntary petitions satisfy Section 303(b) of the Bankruptcy Code: the involuntary petition as to Betterroads was filed by eight petitioning creditors and seven petitioning creditors filed the involuntary petition against Betterrecycling. Section 303(b) of the Bankruptcy Code requires that the involuntary petition be commenced by **at least three** qualified creditors, whose claims are not subject to a *bona fide* dispute, and whose unsecured and uncontingent claims aggregate at least \$15,775. It follows that, even if the Debtors' allegations were deemed true (which they are not) and the Lenders' claims under the syndicated credit facilities fail to qualify under section 303(b), and Sargeant's claims count as only one claim under section 303(b), that nevertheless each involuntary petition would remain supported by **at least three** qualified petitioning creditors with undisputed, final and unappealable judgments representing unsecured claims that exceed the aggregate applicable Section 303(b) requirement of \$15,775.00. Accordingly, even assuming the Debtors' Motion to Dismiss allegations are true (which they are not) the involuntary petitions are proper and comply with the requirements under section 303(b).

Moreover, the Motion to Dismiss does not deny that the Debtors have failed to pay their claims as they become due. The Debtors' allegations are focused solely on alleging that the Petitioning Creditors have not submitted evidence to prove that the Debtors have failed to pay such claims. That is not enough to defeat the involuntary petitions. First, the Petitioning Creditors properly and specifically alleged that each Debtor was not generally paying its debts as they become due as part of each Involuntary Petition (defined below) and the Court is required to

accept those well-pled allegations in the Involuntary Petition as accurate. Second, the Debtors' Motion to Dismiss does not deny the allegations in the Motion to Appoint a Trustee - that in the year prior to the filing of these cases the Debtors accumulated dozens of legal claims from suppliers and vendors for amounts past due. Indeed, the Debtors admit that in the months prior to the involuntary petition at least 17 complaints were filed by suppliers or vendors against the Debtors for amounts past due. Further, in the month and a half since the filing of the involuntary petitions, aside from the Petitioning Creditors, additional creditors have filed proofs of claim against the Debtors for unpaid amounts due as of the involuntary petition date that aggregate approximately \$1.5 Million.

In short, the Motion to Dismiss must be denied because the Petitioning Creditors have alleged a *prima facie* case under section 303(b) for the Court to grant the involuntary petitions and enter an order for relief. Accordingly, and for additional reasons set forth more fully below, the Court should deny the Motions to Dismiss and enter an order for relief.

### **FACTUAL BACKGROUND**

1. On June 9, 2017, Champion Petroleum, Inc., Control Force, Corp., St James Security Services, Inc., Facsimile Paper Connection, Corp., Sargeant Marine, Inc. and Sargeant Trading LTD, and the Lenders (collectively, the "Petitioning Creditors") filed an involuntary bankruptcy petition against each of the Debtors (collectively, the "Involuntary Petitions"). See Docket No. 1.

2. On June 27, 2017, the Debtors filed a Motion to Dismiss the Involuntary Petitions Pursuant to Fed. R. Civ. P. 12(b) (the "Motion to Dismiss", and collectively with the Involuntary Petitions, the "Involuntary Petition Contested Matter"). See Docket No. 46.

3. On June 30, 2017, the Debtors and the Lenders filed a Joint Motion on Discovery Schedule (the "Joint Discovery Motion") setting forth the agreement as to the deadlines

regarding the discovery schedule relating, among others, to the Involuntary Petition Contested Matter. See Docket No. 58.

4. On August 3, 2017, the Lenders filed a Motion for Protective Order Limiting the Scope of Discovery for the Contested Matters Relating to the Motion to Appoint Trustee and the Involuntary Petitions (the “Motion for Protective Order”). See Docket No. 73.

5. The Lenders submit this Opposition to the Motion to Dismiss reserving the right to amend and supplement this opposition with evidence, documents, and testimony obtained as part of the ongoing discovery process.

### **OPPOSITION AND BASIS THEREFOR**

#### **I. Standard to Determine Motion to Dismiss**

6. The Motion to Dismiss was filed under Federal Rule of Civil Procedure 12(b) (“Rule 12(b)"). See Motion to Dismiss, ¶ 8.

7. Rule 12(b) and case law interpreting it set the standard for this court’s determination of the Debtors’ Rule 12(b) motion. It is black letter law that the court should accept the well-pled facts in the complaint (here, the Involuntary Petitions) as true. See e.g., Diaz Aviation Corp. v. Airport Aviation Servs., Inc., 762 F. Supp. 2d 388, 392 (D.P.R. 2011) (A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is subject to a similar standard of review as a motion brought pursuant to Rule 12(b)(6): “[w]hen a district court considers a Rule 12(b)(1) motion, it must credit the plaintiff’s well-pled factual allegations and draw all reasonable inferences in the plaintiff’s favor.”) citing Merlonghi v. U.S., 620 F.3d 50, 54 (1st Cir.2010); Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir.1994)); see also Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007) (Court must accept as true all the factual allegations contained in the complaint.)

8. Under the standard of Rule 12 (b) the Petitioning Creditors have unquestionably established a *prima facie* case for relief pursuant to section 303 of the Bankruptcy Code with the Involuntary Petitions and the allegations therein.

**II. The Involuntary Petitions Satisfy Section 303(b) of the Bankruptcy Code**

9. The allegations in the Involuntary Petitions establish a *prima facie* case under Section 303 of the Bankruptcy Code. Section 303 of the Bankruptcy Code sets forth the requirements for creditors to file an involuntary bankruptcy petition, providing in pertinent part, as follows:

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by *three or more entities*, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$15,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; ...

11 U.S.C. §303(b) (emphasis added).

10. Accordingly, pursuant to the language of section 303(b), for involuntary relief to be granted, an involuntary petition must be filed by (i) at least three or more petitioning creditors; (ii) with claims that are not contingent as to liability or that are not the subject of a bona fide dispute as to liability or amount; and (iii) whose unsecured, noncontingent, undisputed claims are at least in the aggregate amount of \$15,775. See 11 U.S.C. §303(b).

**A. The Debtors' Allegations are Insufficient to Contest the Involuntary Petitions**

11. The Debtors' allegations in the Motion to Dismiss are insufficient because they are limited to the following asserted failures to comply with section 303(b): (i) the Debtors allege that the Lenders' claims under the syndicated credit facilities are allegedly subject to a bona fide dispute since there is a pending counter claim in the local court litigation. (e.g., pages 8-12 of

the Motion to Dismiss); and (ii) the Debtors allege that the claims of petitioning creditors Sargeant Trading, LTD and Sargeant Marine, Inc. should count as claims of a single petitioning creditor (not two). See e.g., Paragraphs 56-58 of the Motion to Dismiss. The Debtors' Motion to Dismiss otherwise fails to challenge or dispute the claims of any other Petitioning Creditor, and does not challenge or dispute additional claims of the Lenders that are not claims under the syndicated credit facilities provided by the Lenders.

12. Even if somehow the Debtors' allegations in their Motion to Dismiss were credited as true (which they are not), if the Court were to find that the Lenders' claims under the syndicated credit facilities are subject to a bona fide dispute and that Sargeant's claim should count as only a single claim, the Petitioning Creditors have still presented a proper *prima facie* case for relief that justifies the granting of the Involuntary Petitions. Each involuntary petition is indisputably supported by: (a) at least three (3) petitioning creditors with claims that are not contingent or subject to a bona fide dispute as to liability or amount; and (b) that the aggregate of their unsecured, noncontingent undisputed claims aggregate more than the statutory threshold of \$15,775.

13. The Involuntary Petitions each include an **Exhibit A** that lists each of the Petitioning Creditors and a detail on each of their respective claims.

14. Specifically, as set forth on **Exhibit A** to the Involuntary Petition filed against Betterroads, the following Petitioning Creditors (excluding the Lenders) asserted qualifying claims as follows:

- (1) St. James Security Inc., holding a final and unappealable judgment in the amount of \$184,242.84;
- (2) Sargeant Marine, Inc. holding a final and unappealable judgment of \$165,074.84;

(3) Sargeant Trading Ltd., holding a final and unappealable judgment of \$104,355.38; and

(4) Facsimile Paper Connection Corp., holding a final and unappealable judgment in the amount of \$9,874.80.

15. Each of the above Betterroads' Petitioning Creditors hold final and unappealable judgments that have not been contested by the Debtors.

16. Exhibit A to the Betterroads Petition also itemizes the Lenders' respective claims against Betterroads, including updated claims balance as of the date of the filing of the Betterroads Petition. See Exhibit A to the Betterroads Petition. Exhibit A also shows that the Lenders, particularly Banco Popular and FirstBank, hold claims against Betterroads that are not part of the syndicate and are not claims subject to objection by the Motion to Dismiss. Id.

17. Further, as set forth on Exhibit A to the Involuntary Petition filed against Betterrecycling, the following Petitioning Creditors (excluding the Lenders' claims) asserted qualifying claims as follows:

(1) St. James Security Inc., holding a final and unappealable judgment in the amount of \$60,020.48;

(2) Control Force Corporation holding a final and unappealable judgment of \$56,872.14; and

(3) Champion Petroleum Inc. holding a final and unappealable judgment in the amount of \$5,204.88.

18. Each of the above Betterrecycling Petitioning Creditors hold final and unappealable judgments that have not been contested by the Debtors.

19. Exhibit A to the Betterrecycling Petition also itemizes the Lenders' respective claims against Betterrecycling, including an updated claims balance as of the date of the filing of

the Betterecycling Petition. See Exhibit A to the Betterecycling Petition. Exhibit A shows that one of the Lenders, particularly Banco Popular, hold claims against Betterecycling that are not part of the syndicate and are not claims subject to objection by the Motion to Dismiss. Id.

20. It follows that the Petitioning Creditors have filed Involuntary Petitions that comply with the requirements of section 303(b) even if the Court were to credit and accept as true the allegations in the Motion to Dismiss (which the Court should not do).

**B. The Court Should Reject the Debtors' Insufficient Allegations**

21. Moreover the Court should reject the arguments in the Motion to Dismiss that are legally irrelevant to determining whether the Involuntary Petition meets the requirements of section 303(b).

22. First, as to the Lenders' claims, Banco Popular and Firstbank each hold and assert separately other credit facility claims against the Debtors (apart from the eight Lenders' syndicated credit facility claims) as listed on Exhibit A to the Involuntary Petitions (as amended). Such other claims are not contested by the Motion to Dismiss. For example, Banco Popular asserts claims relating to obligations under credit cards held by the Debtors, which are not subject to a bona fide dispute, and also claims under commercial obligations that are subject to a local court litigation (separate and independent from the litigation relating to the Lenders' syndicate claims) where the Debtors have not yet answered the complaint or asserted any counter claims. The Debtors did not address these separate and independent Banco Popular claims in their Motions to Dismiss because these Banco Popular claims are not subject to a bona fide dispute. See In re Fustolo, 816 F.3d 1, 4 (1<sup>st</sup> Cir. 2016) (court finding that a petitioning creditor may assert as part of an involuntary petition separate claims for purposes of section 303(b), some of which may be subject to a bona fide dispute and others which may not).

23. Second, the Debtors allege that Sargeant Trading Ltd and Sargeant Marine, Inc. are joint holders of a single obligation owed by Betterroads and therefore may be counted as only a single petitioning creditor for purposes of Section 303(b). The Debtors' allegations in this regard are incorrect and disproven by public documents supporting the different Sargeant Trading Ltd and Sargeant Marine, Inc. claims. Pursuant to a Decision and Final Award of Arbitration (the "Decision and Final Award"), which was subsequently confirmed by the U.S. District Court for the Southern District of New York (the "SDNY Judgment"), each of these Sargeant entities separately hold distinct and separate claims against Betterroads. The amounts owed to each Sargeant entity, respectively, are specifically itemized in the Decision and Final Award, in the SDNY Judgment and consequently in the Betterroads Petition.

24. The Motion to Dismiss falls short of showing that the Sargeant entities separately asserted claims fail to qualify separately under Section 303(b). To qualify as a petitioning creditor under section 303(b), the petitioning creditors must be "entities" and each petitioning creditor must be a "holder of a claim". Several courts have held that multiple creditors holding a single judgment may be considered as separate creditors for purposes of section 303(b)(1) of the Bankruptcy Code, if each has an enforceable right to payment derived from the judgment. In re Zapas, 530 B.R. 560, 568-71 (Bankr. E.D.N.Y. 2015) See also In re Mid-America Indus., Inc. 236 B.R. 640 (Bankr. N.D. Il 1999).

25. That a single judgment evidences that Sargent Trading Ltd and Sargent Marine Inc. are owed separate obligations does not help the Motion to Dismiss. In In re Mid-America Indus., Inc., 236 B.R. 640 (1999), the Bankruptcy Court for the District of Massachusetts held:

"[A] debt on which judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought..."

In re Richard A. Turner Co., Inc., 209 B.R. 177, 180 (Bankr. D. Mass. 1997) citing Boynton v Ball, 121 U.S. 457, 466 (1887).

26. In sum, even assuming *arguendo* that the Debtors' allegations in their Motion to Dismiss are true (which they are not), the Debtors have: (i) failed to present an allegation that shows that the Involuntary Petitions are not supported by at least three creditors whose claims are not subject to a bona fide dispute; (ii) failed to challenge that the aggregate of these claims do not exceed the \$15,775 threshold of Section 303(b); and (iii) failed to present evidence or demonstrate that the Petitioning Creditors' claims are subject to a bona fide dispute. It follows that the Petitioning Creditors have clearly met their burden of filing valid involuntary petitions that each fully comply with the requirements of Section 303(b) of the Bankruptcy Code.

**III. A Petitioning Creditor's Good or Bad Faith in Filing an Involuntary Petition is Not a Basis for Dismissal**

27. The Motion to Dismiss alleges that the Lenders joined the filing of the Involuntary Petitions in bad faith. Without any evidence, the Debtors allege that: (a) the Involuntary Petitions were filed for an "improper purpose"; and (b) the Petitioning Creditors filed the Involuntary Petitions as a "weapon" to exert pressure on the Debtors and to gain collection advantage over other creditors.

28. The Lenders deny all of the Debtors' allegations of bad faith. Without any evidence to support their putative "bad faith" allegations, the Debtors merely request that the Court allow discovery to find evidence to support their unfounded allegations.

29. On August 3, 2017, the Lenders filed their Motion for Protective Order against the unnecessary, inappropriate and unduly burdensome discovery request of the Debtors that are predicated on "bad faith" allegations.

30. In their Motion for Protective Order, the Lenders set forth the reasons why the Debtors' bad faith allegations are not a proper defense to an involuntary petition and why the Court should refuse to consider the Debtors' allegations at this stage. In the interest of brevity, the Lenders hereby incorporate by reference, as if fully set forth herein, the reasons stated in the Motion for Protective Order as to why the Debtors' allegations of putative bad faith are not a cognizable defense against the merits of the Involuntary Petitions.

**A. Alleged Bad Faith Is Not a Cognizable Defense to an Involuntary Petition**

31. Section 303 of the Bankruptcy Code sets the standards for granting or denying an order for relief on an involuntary petition. Specifically, Sections 303(b) and (h) of the Bankruptcy Code provide in relevant part:

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

...

...

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount...

32. Section 303 does not provide a "bad faith" defense to those who contest an involuntary petition. Rather, Section 303 refers to "bad faith" only in Section 303(i)(2), which provides that *if the court dismisses an involuntary petition*, it may award damages against any creditor "that filed the petition in bad faith". 11 USC §303(i)(2).

33. As for “bad faith filing” of an involuntary petition, Section 303(i)(2) provides only that:

***If the court dismisses a petition under this section*** other than on consent of all petitioning creditors and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

- ...  
(2) **against any petitioner that filed the petition in bad faith**, for—  
(A) any damages proximately caused by such filing; or  
(B) punitive damages.

34. A number of courts following the plain meaning of Section 303 of the Bankruptcy Code have decided that bad faith is not an independent basis to contest a properly filed involuntary petition under the Bankruptcy Code.

35. As the Bankruptcy Appellate Panel for the Ninth Circuit held, Section 303(b) “does not contain any language regarding the good faith of the petitioning creditors. Nor does §303(h)”. *In re Marciano*, 459 B.R. 27, 44 (BAP 9<sup>th</sup> Cir. 2011), *aff’d*, 708 F.3d 1123 (9<sup>th</sup> Cir. 2013). Section 303(i)(2) “makes plain that bad faith is not relevant unless consequential and punitive damages are under consideration”. *In re Marciano*, *supra* at 44, *citing In re Kidwell*, 158 B.R. 203, 217 (Bankr. E.D.Cal. 1993). If the grounds for sustaining an involuntary petition for bankruptcy relief exist under Section 303, the “good faith of the petitioning creditors appear irrelevant”. See *In re WLB-RSK Venture*, 320 B.R. 221, at 6 (9<sup>th</sup> Cir. BAP 2004).

**B. The Court Should Follow Precedents Finding that Bad Faith is not an Independent Defense**

36. This Court should follow numerous other courts that have determined that bad faith is not a cognizable defense to an involuntary petition. For instance in *Marciano*, the Court of Appeals for the Ninth Circuit reviewed a bankruptcy court order granting a motion for protective order sought by petitioning creditors who were subject to “bad faith” allegations. The bankruptcy court had ruled that it would not reach the issue of bad faith nor allow discovery on

alleged bad faith issues “unless and until” the involuntary petition was dismissed. *Id.* The bankruptcy court reasoned that because bad faith was not an issue *and may never become an issue*, it would not ‘deny’ discovery but would ‘stage’ discovery for future proceedings, depending on the developments of the case. *Id.*

37. The 9<sup>th</sup> Circuit Court of Appeals (and the 9<sup>th</sup> Circuit BAP) affirmed the bankruptcy court’s decision:

**The Bankruptcy Code does not expressly provide for dismissal of an otherwise proper involuntary petition because of the subjective “bad faith” of the filers.** But even assuming the theoretical availability of such a defense, we cannot perceive the benefit of discovery on the issue here, where each of the Petitioning Creditors held a substantial judgment against Marciano. **The bankruptcy court did not abuse its discretion in concluding that further discovery would have been unlikely to produce any evidence material to the pending summary judgment motions.** *See* Fed.R.Civ.P. 26(b)(2)(C)(iii) (requiring a protective order if the “burden or expense of the proposed discovery outweighs its likely benefit”); Fed. R. Bankr.P. 7026 (providing that Fed.R.Civ.P. 26 applies in adversarial bankruptcy proceedings).

In re Marciano, 708 F.3d 1123 (9th Cir. 2013) (emphasis added).

38. Likewise, in General Trading, Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1505 (11th Cir.1997) when analyzing other issues relating to an involuntary bankruptcy filing, the 11<sup>th</sup> Circuit Court of Appeals held that “if the petition was not dismissed, [the petitioning creditor] could not under the Bankruptcy Code have been subject to the bad faith inquiry.”

39. Other courts agree. In In re Basil St. Partners, the bankruptcy court for the Middle District of Florida held:

Nowhere in the eligibility requirements of § 303(b) is there any reference to the motivation of the petitioning creditor(s), or any requirement that the petitioning creditor(s) demonstrate either good faith or the absence of bad faith in filing the petition. In fact, the law presumes good faith on the part of the petitioning creditors. *[citations omitted]*. Rather, the only mention of bad faith in § 303 is contained in § 303(i)(2), which governs the assessment of damages against any petitioner who filed the petition in bad faith. However, it is clear from a plain

reading of the statute that § 303(i) is triggered only after the court has dismissed the petition. In other words, dismissal of the petition is a prerequisite to a bad faith inquiry and analysis. The concept of bad faith has no bearing on a bankruptcy court's determination of whether to dismiss the petition in the first place. See *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1505 (11th Cir.1997) (noting that “if the petition was not dismissed, [petitioning creditor] could not under the Bankruptcy Code have been subject to the bad faith inquiry”).

In re Basil St. Partners, LLC, 477 B.R. 846, 849 (Bankr. M.D. Fla. 2012). See also, In re Kennedy, 504 B.R. 815, 823–24, (Bankr. S.D. Miss. 2014) (“Good faith is not an explicit requirement for granting involuntary relief under § 303. And the plain language of § 303(i)—where bad faith is mentioned—contemplates bad faith only as a requirement for the recovery of actual or punitive damages *after* the involuntary petition is dismissed. Thus where, as here, a petitioning creditor meets the prerequisite requirements under § 303, a finding of bad faith [is] inappropriate.”). See also Aigner v. McMillan, 2013 WL 2445042, at \*4 (Bankr. N.D. Tex. June 4, 2013), *subsequently aff'd in part sub nom. In re McMillan*, 614 F. App'x 206 (5th Cir. 2015) (“Given the court’s conclusion that petitioner has satisfied the prerequisites set forth in Code section 303, a finding of bad faith would be inappropriate.”); In re WLB–RSK Venture, 320 B.R. 221, at \*6 n. 13 (9th Cir. BAP 2004) (“Section 303 sets forth the standards for granting or denying an order for relief on an involuntary petition. If the grounds for relief exist under section 303, the good or bad faith of the petitioning creditor appears irrelevant....”); In re Smith, 243 B.R. 169 (Bankr. N.D.Ga. 1999) (analyzing petitioning creditor's alleged bad faith for purposes of assessing damages under § 303(i) only after court had previously dismissed the petition); In re Knoth, 168 B.R. 311, 315 (Bankr. D.S.C. 1994) (holding that under terms of Section 303 a prerequisite for a bad faith claim is that the court must have dismissed the involuntary petition; such prerequisite was not established because the court granted the involuntary bankruptcy petition, saying: “the motivation of the petitioning creditors is irrelevant

on the question of whether the involuntary petition should be granted.”); In re Kidwell, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993) (“statute makes plain that bad faith is not relevant unless consequential and punitive damages are under consideration”); In re Ross, 63 B.R. 951, 955 (Bankr.S.D.N.Y.1986) (holding that the court need not reach the affirmative defense that the involuntary petition was not filed in good faith if an order for relief is entered).

40. The Lenders respectfully submit that the Court should follow the cases detailed above, particularly since the Petitioning Creditors have established a prima facie case under section 303(b) pursuant to the Involuntary Petitions, and thus refuse to consider any bad faith allegations at this stage.<sup>1</sup>

#### **IV. The Debtors are Generally Not Paying Their Debts as Such Debts Become Due**

41. The Involuntary Petitions each establish that there are at least three (3) Petitioning Creditors holding debts against each of Betterroads and Betterrecycling that are not subject to a bona fide dispute. Accordingly the Court is required to (“shall”) enter an order for relief against Betterroads and Betterrecycling, if they are “generally not paying [their] debts as such debts become due [...]”. 11 U.S.C. §303(h)(1).

42. Drawing all reasonable inferences posed by the allegations in the Involuntary Petitions in favor of the Lenders’ and the Petitioning Creditors, it is clear as a matter of law that

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<sup>1</sup> In their Motion to Dismiss, and as asserted support for the discovery they seek to attempt to sustain their bad faith allegations, the Debtors rely on In re Forever Green Athletic Fields, Inc., 804 F.3d 328 (3<sup>rd</sup> Cir. 2015) which held that bad faith may serve as a separate basis for dismissal, even where an involuntary petition appears properly filed. The Lenders understand that other cases allowing discovery on bad faith at this stage, which the Lenders submit the Court should not adopt, do so on *equitable* grounds. Specifically, these cases find that while bad faith is not a defense included in the text of Sections 303(b) or (h) to contest an involuntary petition (it is only an element as to damages under an improperly filed petition, once and if such petition is dismissed), these courts insert such a defense into the Bankruptcy Code on *equitable* grounds. Nonetheless, as this Court already noted in its decision in In re Edgar Colon Reyes, the Court should not use equity to expand on exceptions that are not included within the text of Section 303 of the Bankruptcy Code. In re Edgar Reyes Colon, 558 B.R. 563 (Bankr. D.P.R. 2016). Based on such limitations, and for the reasons detailed above, the Court should adopt the line of cases limiting discovery as to bad faith.

the Petitioning Creditors properly alleged that the Debtors are “generally not paying [their] debts as they become due [...]” See Involuntary Petitions at ¶11.

43. Indeed the Debtors’ Motion to Dismiss fails to deny that they are not generally paying their claims as they become due. Rather the Debtors contend only that the Petitioning Creditors have not provided supporting evidence for their allegations that the Debtors are not paying their claims as they became due. There is no merit to the Debtors’ contention.

44. First, in their Motion to Dismiss, the Debtors admit that at least since July 2016, when the Lenders started to exercise remedies under the syndicated credit facilities, the Debtors are not ‘conducting their affairs in a manner consistent within the established course of business with its lenders and suppliers. See Motion to Dismiss, ¶16.

45. Second, the record shows that since the filing of the Involuntary Petitions, additional unpaid claims (in addition to those of the Petitioning Creditors) have been filed against the Debtors. During less than two months from the filing of the Involuntary Petitions, eight additional claims have been filed against Betterroads, and five additional claims against Betterrecycling (for a total of thirteen (13) claims). This is additional evidence, for which the Court can take judicial notice, that the Debtors are not paying their debts as they become due.

46. More specifically, the following claims have been filed against Betterroads:

<u>Proof of Claim No.</u>	<u>Creditor</u>	<u>Amount Owed</u>
2	Puerto Rico Electric Power Authority	\$36,768.53
3	Triple-S Salud, Inc.	\$53,590.11
4	IRS	\$668,599.40
5	Puerto Rico Telephone Company	\$1,173.58
6	NY Wiping Industrial Products, Inc.	\$2,756.45
7	World Professional Group, LLC	\$72,200.00
8	Total Petroleum Puerto Rico Corp.	\$339,476.80
9	BMW Financial	\$4,190.45
Total:		\$1,178,755.32

47. The additional claims filed against Betterecycling are as follows:

<u>Proof of Claim No.</u>	<u>Creditor</u>	<u>Amount Owed</u>
1	IRS	\$312,275.81
2	Puerto Rico Telephone	\$2,805.13
3	NY Wiping Industrial Products, Inc.	\$7,705.83
4	Carolina Building Material	\$993.47
5	Jorge L. Resto Rosado	\$25,702.81
Total:		\$349,483.05

48. The foregoing additional proofs of claim filed by unpaid creditors evidences that Betterroads and Betterecycling owe at least \$1,528,238.37 to creditors not counting the claims of the Petitioning Creditors which exceed \$90 Million.

49. Further, the proofs of claim filed by the IRS shows that both of the Debtors' outstanding federal tax liabilities, which amount to approximately \$980,875.21, date back as far as 2015. See Proofs of Claim; See also Notice of Levy. This is ample evidence that the Debtors are not paying their claims as they become due. Moreover, the additional proofs of claim show that Debtors are not paying their utility creditors such as PREPA and the Puerto Rico Telephone Company.

50. Third, the Court should consider and take judicial notice of the Lenders' Motion to Appoint a Trustee, in which the Lenders assert and submit evidence showing that during the past year, dozens of the Debtors' creditors and suppliers have filed legal claims against the Debtors for past due amounts. In the Motion to Dismiss, the Debtors admit that at least 17 such claims and legal proceedings have been filed.

51. In sum, there is clear evidence that the Debtors have not paid and cannot pay their claims in the ordinary course of business. It follows that not only has Section 303(b) of the Code has been satisfied, but also Section 303(h)(1). In any event, the Lenders are taking discovery on

this issue as part of the Joint Discovery Schedule agreed to by the parties, and intend to supplement the Involuntary Petitions with additional evidence on this point.

**V. The Debtors' Request for Abstention Should be Denied**

52. It has generally been held that “[w]hen a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority” Mata v Lynch, 135 S. Ct. 2150, 2156 (2015). “Although abstention in a properly filed bankruptcy case is an extraordinary remedy that should be used sparingly, dismissal is appropriate where the court finds that *both* creditors *and* the debtor would be better served by dismissal than they would by the continuation of the case.” 11 U.S.C.A. §305(a). In re Efron, 529 B.R. 396, 405 (B.A.P. 1<sup>st</sup> Cir. 2015) (Emphasis Added). See also In re Monitor Single Lift I, Ltd., 381 B.R. 455, 462 (Bankr. S.D.N.Y. 2008) (Holding that “[g]ranting an abstention motion pursuant to §305(a)(1) requires more than a simple balancing of harm to the debtor and creditors; rather, the interests of both the debtor and its creditors must be served by granting the requested relief.”). “[B]ecause of this requirement, few fact patterns fall within section 305(a).” 2 Collier on Bankruptcy, ¶305.02[1] (16<sup>th</sup> Ed. 2017). The abstention doctrine should not be used as a remedy in substitution of a motion to dismiss under other applicable sections of the Bankruptcy Code. See 2 Collier on Bankruptcy ¶305.020[1] (16<sup>th</sup> Ed. 2017). See also In re Costa Bonita, 479 B.R. 14 (DPR 2012) (“Dismissing a case pursuant to 11 U.S.C. §305(a)(1) is a discretionary remedy determined by courts on a case by case basis”).

53. In their Motion to Dismiss, the Debtors fail to establish or even argue that the interests of their creditors would be better served by abstention rather than by allowing these properly-filed involuntary bankruptcy cases to continue. For this reason alone, the Debtors' request for abstention under Section 305(a)(1) should be denied. See Macke Intern. Trade, Inc., 370 B.R. 236, 247-48 (BAP 9<sup>th</sup> Cir. 2007) (“Before a court may refrain from exercising

jurisdiction over an otherwise proper case, it must make specific and substantiated findings that the interests of the creditors and the debtor will be better served by dismissal”).

54. There is no merit to or support for Debtors’ incredulous statements that “[i]f there is no bankruptcy proceeding, the Company will be able to continue its ongoing litigation with the Petitioning financial institutions and move forward with its business plan, *benefiting all other creditors and eventually the stockholders.*” (emphasis added), or that “[t]he Company has had good relationships with the majority of its creditors, and is able to work with them if allowed without issue.” See Motion to Dismiss at ¶72. The litigation to date in these involuntary cases, the number of petitioning creditors joining in the Involuntary Petitions, and the record of litigations that have been commenced against the Debtors during the past 2 years clearly show that abstention and dismissal of these cases would not be in the interest of creditors. Moreover, the Debtors have been transferring their assets as described in the Motion to Appoint a Trustee, and creditor remedies to avoid these transfers are available only in bankruptcy.

55. The cases relied upon by the Debtors to support abstention are also inapposite. The Involuntary Petitions clearly do not involve a “two-party dispute” that the pending State Court litigation could fully resolve. The Involuntary Petitions were filed by at least seven creditors, with different claims. Further, the State Court litigation would not resolve or avoid the substantial avoidable transfers that the Debtors have undertaken prior to the bankruptcy filing nor provide an orderly process for all creditors to assert their claims. Essential to the holding of every case cited by the Debtors was a finding that either (1) the need for bankruptcy was contingent upon the disposition of ongoing litigation; or (2) the dispute between the parties could be resolved – in its entirety – upon completion of a pending federal or state court litigation. The Debtors have not met their burden of establishing that abstention under 11 USC §305(a) is in the best interest of both Debtors and all the creditors. In re Costa Bonita, 479 B.R. 14 (DPR 2012).

56. In sum, the Lenders submit that an involuntary petition is the proper remedy to address the Debtors' pre-filing transfers of property, maximize recoveries for creditors, and orderly resolve the various and substantial claims against the Debtors.

**WHEREFORE**, for the reasons above discussed, the Lenders respectfully request that the Court enter orders (i) denying the Debtors' Motion to Dismiss; (ii) granting the relief requested in the above-referenced Involuntary Petitions, and (iii) granting the Lenders such other relief as is just and proper.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, on August 3<sup>rd</sup>, 2017.

**WE HEREBY CERTIFY** that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in the case, including the Debtors.

**O'NEILL & BORGES LLC**

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