ORDERED.

Dated: March 16, 2016

Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

MOJO BRANDS MEDIA, LLC,

Debtor.
_____/

Case No. 6:15-bk-03871-CCJ
Chapter 7

ORDER DENYING BOMOJO INVESTMENT, LLC'S MOTION TO DISMISS BANKRUPTCY CASE

This case came before the Court for hearing on September 16, 2015, for consideration of Bomojo Investment, LLC's Motion to Dismiss Bankruptcy Case (Doc. No. 47; the "Motion to Dismiss"). By the Motion to Dismiss, Bomojo argues that the case should be dismissed because the Debtor was not authorized to file for bankruptcy. Having considered the pleadings, argument of the parties, and the record in this case, the Court denies the Motion to Dismiss for the reasons set forth below.

Background

Bomojo holds a 19% ownership interest in the Debtor by virtue of its agreement to loan the Debtor $800,000 (the "Bomojo Loan Agreement"). The parties to the Bomojo Loan Agreement contemporaneously executed the Second Amended and Restated Operating Agreement (the "Operating Agreement"), which the Debtor was operating under at the time it filed this bankruptcy proceeding. Among other things, the Operating Agreement expanded the number of the Debtor's managers from three to seven, three of whom were to be appointed by Bomojo (collectively, the "Investor Managers"). One such Investor Manager, Richard W. Botnick ("Botnick"), who was also the Manager of Bomojo, was named as the Debtor's Chairman. Under the Operating Agreement, a majority of Managers constituted a quorum--provided that Botnick was present--and the consent of least one Investor Manager and one non-investor manager was required to authorize any action. Notably, the Operating Agreement required Botnick's consent before the Debtor could file a voluntary bankruptcy petition.

Approximately two months prior to the Petition Date, Bomojo declared the Debtor in default under the Bomojo Loan Agreement. The following month, the Debtor's Managers held a meeting to discuss how the Debtor should proceed in light of Bomojo's actions against the Debtor (the "Meeting"). Of the three Investor Managers, only one was present at the Meeting. Botnick was not present. The three non-Bomojo-appointed Managers were present at the Meeting and agreed that the Debtor should file bankruptcy. One month later, the Debtor's President filed a voluntary Chapter 7 petition on the Debtor's behalf, initiating this bankruptcy proceeding.

The bankruptcy case had been pending for approximately three months, during which time Bomojo actively participated in the case, when Bomojo filed the Motion to Dismiss. In support of the Motion to Dismiss, Bomojo primarily argues that the Debtor's bankruptcy filing

was not authorized because (i) there was no quorum at the Meeting because Botnick was not present, and (ii) no Investor Manager consented to the filing.[1] Both the Chapter 7 Trustee and the Debtor's largest creditor, Newtek Small Business Finance, LLC, oppose dismissal.

Discussion

The Court need not address whether the Debtor was authorized to file this bankruptcy case. Regardless of whether or not it was authorized, Bomojo has ratified the filing. It is true that, "where a voluntary petition for bankruptcy is filed [on] behalf of a corporation, the bankruptcy court does not acquire jurisdiction unless those purporting to act for the corporation have authority under local law 'to institute the proceedings.'"[2] If permitted under state law, however, an unauthorized bankruptcy petition filed on behalf of a corporation may be ratified by an entity that had the power to authorize the filing originally, where the entity failed to timely raise the issue of authorization and/or participated in the bankruptcy proceeding.[3]

Like most courts that have allowed ratification on these facts, the Eleventh Circuit has acknowledged that "[a] principal can ratify the unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act."[4] With respect to unauthorized corporate

[1] Bomojo raises additional arguments which the Court declines to address because they elevate form over substance.
[2] *Hager v. Gibson*, 108 F.3d 35, 39 (4th Cir. 1997) (quoting *Price v. Gurney*, 324 U.S. 100, 104 (1945)).
[3] *See Hager*, 108 F.3d at 41; *Peterson v. Atlas Supply Corp. (Matter of Atlas Supply Corp.)*, 857 F.2d 1061, 1064 (5th Cir. 1988); *New Haven Radio, Inc. v. Meister (In re Martin-Trigona)*, 760 F.2d 1334, 1341 (2d Cir. 1985); *In re I.D. Craig Serv. Corp.*, 118 B.R. 335, 337-38 (Bankr. W.D. Pa. 1990) (finding that an unauthorized bankruptcy filing by corporation president was ratified by the board of director's ensuing conduct and waiting more than a year to file a motion to dismiss); *In re Alternate Fuels, Inc.*, No. 09-20173, 2010 WL 4866690, at *13 (Bankr. D. Kan. Nov. 23, 2010) (treating failure of disputed sole shareholder to object for 5 months to allegedly unauthorized bankruptcy filing while accepting benefits of bankruptcy protection as ratification of the filing); *In re Horob Livestock, Inc.*, No. 06-60149-7, 2007 WL 2783361, at *3 (Bankr. D. Mont. Sept. 21, 2007) (holding that fifty percent shareholder's knowledge of, and participation in, the debtor's bankruptcy proceeding for 17 months constituted acquiescence and consent to the bankruptcy filing); *Jape v. Reliable Air, Inc. (In re Reliable Air, Inc.)*, No. 05-85627, 2007 WL 7136475, at *3 (Bankr. N.D. Ga. Mar. 9, 2007) (concluding that principal of corporation ratified allegedly unauthorized bankruptcy filing by failing to object for 11 months, while participating in, acquiescing to, and accepting the benefits of the bankruptcy).
[4] *McDonald v. Hamilton Elec., Inc. of Florida*, 666 F.2d 509, 514 (11th Cir. 1982) (citing Restatement (Second) of Agency § 82, 83 (1958)).

bankruptcy filings, lower courts within the Eleventh Circuit have permitted ratification of such filings after the fact.[5] In *In re Reliable Air*, a bankruptcy court in the Northern District of Georgia found that the principal of a corporate debtor ratified its bankruptcy filing when he actively participated in the case for several months before moving to dismiss for lack of corporate authorization to file.[6] As a result of the principal's ratification, the court determined that the decision to file bankruptcy on the debtor's behalf constituted a properly authorized corporate action under Georgia law as of the time it was made.[7] Likewise, under Florida law, a "principal may subsequently ratify its agent's act, even if originally unauthorized, and such ratification relates back and supplies original authority."[8]

In the present case, Bomojo's ratification of the Debtor's bankruptcy filing is clear. Bomojo knew of the bankruptcy proceeding from its inception and actively participated in the case for nearly three months before filing the Motion to Dismiss. Prior to filing the Motion to Dismiss and without making any objection to corporate authorization, Bomojo: (i) appeared through counsel in the bankruptcy case;[9] (ii) attended the 341 Meeting of Creditors and questioned the Debtor's President; (iii) filed an Expedited Motion for Relief from Stay;[10] (iv) filed a Limited Objection to the Trustee's Report and Notice of Abandonment and the Motion of Newtek Small Business Finance, LLC for Stay Relief;[11] and (v) negotiated with Newtek and the Trustee to resolve the Notice of Abandonment of Property,[12] and Newtek's Motion for Stay

[5] *See In re Reliable Air, Inc., supra*; *see also In re Valles Mech. Indus., Inc.*, 20 B.R. 355, 356 (Bankr. N.D. Ga. 1982) (holding that the board of directors of a corporate debtor could ratify the unauthorized act of the corporate president in filing a bankruptcy petition for the corporation without express authorization of the board).
[6] *See In re Reliable Air, Inc., supra*, at *4.
[7] *Id*.
[8] *Banyan Corp. v. Schucklat Realty, Inc.*, 611 So. 2d 1281, 1282 (Fla. Dist. Ct. App. 1992) (citing *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178 (Fla. Dist. Ct. App. 1985), *rev. den.*, 476 So.2d 675 (Fla.1985)).
[9] Doc. Nos. 4-6.
[10] Doc. No. 13.
[11] Doc. No. 43.
[12] Doc. No. 38.

Relief.[13] Despite Bomojo's participation in the bankruptcy case, it waited until four days after the Court denied its request for stay relief to raise the issue of the Debtor's authority to file the petition.

Bomojo, nonetheless, contends that it is incapable of ratifying the Debtor's bankruptcy filing because it was not a part of the Debtor's Board of Managers and had no power to authorize the filing in the first instance. The Court finds this argument unpersuasive. "If a minority shareholder exercises actual domination and control over the corporation's business affairs, then the minority shareholder is deemed to be a controlling shareholder."[14] A shareholder has control over a corporation where it determines corporate policy, "whether by personally assuming management responsibility or by *selecting management personnel*."[15] Bomojo's control over the Debtor is demonstrated, not only by its appointment of the Investor Managers and its *own* Manager, Botnick, as the Debtor's Chairman, but also by its requirement that Botnick consent to the Debtor filing bankruptcy. The Court concludes that, as a result of its control over the Debtor's management, Bomojo *did* possess the power to authorize the initial bankruptcy filing.

Bomojo cannot have it both ways. Bomojo cannot seek this Court's intervention by moving for relief from stay, and after the Court rules against it, argue that the Debtor's bankruptcy case should be dismissed because its petition was not authorized. To grant the Motion to Dismiss in the face of Bomojo's ratification of the bankruptcy filing would be prejudicial to the creditors holding the 57 other claims filed in this case. It would also prejudice the Trustee, who devoted considerable time to this case in the months before Bomojo filed the Motion to Dismiss. To date, the Trustee has employed several professionals, analyzed the

[13] Doc. No. 42.
[14] *Kearney v. Jandernoa*, 979 F. Supp. 576, 579 (W.D. Mich. 1997) (internal citations omitted); *see also Estes v. N & D Properties, Inc. (In re N & D Properties, Inc.)*, 799 F.2d 726 (11th Cir. 1986) (internal citations omitted) (imparting the same fiduciary duty owed by a majority shareholder to a minority shareholder, where the minority shareholder actually controlled the debtor corporation).
[15] *In re N & D Properties, Inc.*, 799 F.2d at 732 (emphasis added).

Debtor's records and assets, attempted to collect receivables, and examined the estate's potential causes of action. Indeed, one such cause of action is the adversary proceeding the Trustee has brought against Bomojo based upon its alleged self-dealing as both a creditor and insider of the Debtor.

Conclusion

For the reasons set forth above, it is ORDERED that the Motion to Dismiss is denied.

Attorney Jules Cohen is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of this order.