

Mona L. Burton, #5399
Doyle S. Byers, #11440
Ellen E. Ostrow, #14743
HOLLAND & HART LLP
222 S. Main Street, Suite 2200
Salt Lake City, UT 84101
Telephone: (801) 799-5800
Fax: (801) 799-5700
mburton@hollandhart.com
dsbyers@hollandhart.com
eeostrow@hollandhart.com
Counsel for Official Committee of Unsecured Creditors

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re: THE FALLS EVENT CENTER LLC, Debtor.	Bankruptcy No. 18-25116 Chapter 11 Honorable R. Kimball Mosier
--	--

**JOINDER AND OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF THE FALLS EVENT CENTER LLC TO THE UNITED STATES
TRUSTEE’S MOTION TO DISMISS**

The Official Committee of Unsecured Creditors (the “**Committee**”) appointed in the case of The Falls Event Center LLC (the “**Debtor**”), by and through its counsel, joins in the Debtor’s *Opposition to the United States Trustee’s Motion to Dismiss* (the “**Objection**”) [Docket No. 142]. For the reasons set forth in the Objection and this Joinder, the Committee respectfully objects to the relief requested in the United States Trustee’s *Motion to Dismiss for Relief from Stay and Memorandum in Support* (the “**Motion**”) [Docket No. 95].

In addition to the arguments raised by the Debtor, the Committee joins to emphasize one point: regardless of whether the filing was initially authorized, the members of the Debtor

ratified the filing. The ratification dates back to the Petition Date, and the filing is authorized. Accordingly, the Committee respectfully requests the Court deny the Motion.

Bankruptcy courts across the country have recognized that if an entity did not have authority to file a bankruptcy petition, the filing may be subsequently ratified. *See Hager v. Gibson*, 108 F.3d 35, 39–40 (4th Cir. 1997) (applying Virginia law and finding that the unauthorized filing of a voluntary petition can “be ratified in appropriate circumstances by ensuing conduct of persons with power to have authorized it originally”); *In re Alternate Fuels Inc.*, No. 09-20173, 2010 WL 4866690, at *12 (Bankr. D. Kan. Nov. 23, 2010) (“[T]he unauthorized filing of a voluntary petition of a corporation [under Kansas law] may be ratified by subsequent acts of the persons with power to have authorized it originally.”); *Wilmington Trust v. Pinnacle Land Group, LLC (In re Pinnacle Land Group, LLC)*, No. 17-2339-GLT, 2018 WL 4348051, at *9 (Bankr. W.D. Penn. Sept. 10, 2018) (noting that the unauthorized filing of bankruptcy petition can be remedied “if the defective corporate authorization is subsequently ratified in accordance with applicable law”); *In re Sterling Mining Co.*, No. 09-20178-TLM, 2009 WL 2475302, at *5–8 (Bankr. D. Idaho Aug. 11, 2009) (finding that where equity holders were properly notified and remained silent, the unauthorized filing was either ratified or any objection was waived).

To determine whether an entity’s bankruptcy filing was authorized or ratified, courts look to state law. *See DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re DB Capital Holdings, LLC)*, Nos. CO-40-046, 10-23242, 2010 WL 4925811, at *2 (B.A.P. 10th Cir. Dec. 6, 2010); *Hager*, 108 F.3d at 39. Under Utah law, members of a limited liability company may ratify unauthorized acts, and the ratification relates back to the date of the unauthorized act. *See*

Bullock v. State Dept. of Transportation, 966 P.2d 1215, 1218 (Utah Ct. App. 1998) (citing *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982)) (“It is well-established under Utah law that subsequent affirmance by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, which in general is as effectual as an original authorization.”) (citation and internal quotations omitted); *Simmons Media Group, LLC v. Waykar, LLC*, 335 P.3d 885, 891 (Utah Ct. App. 2014) (addressing ratification by limited liability company).

Ratification can be express or implied and requires that the principal “have knowledge of all material facts and an intent to ratify.” *Dillon v. S. Mgmt. Corp. Ret. Tr.*, 326 P.3d 656, 665 (Utah 2014) (“Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient.”). “Under some circumstances failure to disaffirm may constitute ratification of the agent’s acts. Implied ratification may arise under circumstances of acquiescence or where a duty to disaffirm is not promptly exercised.” *Bullock*, 966 P.2d at 1219–20 (finding that “the principal’s acquiescence in unauthorized acts *once he had reason to know about them*, constituted a ratification sufficient to release the agent from liability”) (emphasis in original). “Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification.” *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982) (quoting *Moses v. Archie McFarland & Son*, 230 P.2d 571 (Utah 1951)).

In *Hager v. Gibson*, the Fourth Circuit Court of Appeals explained that *Price v. Gurney*, 324 U.S. 100 (1945), which found that an unauthorized voluntary petition must be dismissed, does not prevent a court from determining whether an unauthorized bankruptcy filing has been

ratified under state law. 108 F.3d 35, 39 (4th Cir. 1997). The Court explained that “[shareholder/movant’s] reliance on *Price v. Gurney* is valid to a point, but the case does not take him as far as he needs and claims it to do. . . . Critically, [] *Price* did not address whether the required authorization under local law could be found in ratification/relation back doctrine. It therefore does not foreclose that possibility.” *Id.* at 39. The Court further noted that ratification can be by the corporation itself, through conduct or formal actions of a board, or by the shareholders, including through acquiescence. *Id.* at 40, n. 2. Applying Virginia law, the Court found the movant, a 50% shareholder of the debtor, had full knowledge of the bankruptcy filing for over a year, benefited from the filing, and “took no step through available corporate governance procedures to attempt withdrawal of the corporation from the voluntary proceeding.” *Id.* at 40. Accordingly, the Court affirmed the district court’s finding that the unauthorized filing was properly ratified.

In *In re Sterling Mining Co.*, applying Idaho law, the Court found that the Debtor’s petition was not properly authorized pursuant to the Company’s by-laws, but found the filing was either ratified or any objection was waived by the company’s shareholders through acquiescence or “sufficient inaction.” 2009 WL 2475302, at *3–4, 8. The court noted that under *Price v. Gurney*, lack of authority to file a petition generally requires dismissal, but, citing to *Hager*, the court recognized that an improperly authorized filing may be ratified. *Id.* at *7. The Court explained that where the case was pending for five months, equity security holders were disclosed, listed, and received notice of the commencement of the case, all parties in interest received notice of the motion to dismiss and hearing date, and only one equity holder (with less than 0.1% of the outstanding shares) voiced an objection to the filing, the unauthorized filing

was ratified.¹

Here, regardless of whether the filing was properly authorized, the members of the Debtor ratified the filing of the petition. Under Utah law, the members of the Debtor have knowledge of the bankruptcy filing and intended to ratify the filing. First, every equity holder listed on the Debtor's List of Equity Security Holders received notice of the bankruptcy filing. *See* Docket Nos. 4 and 23. Second, all parties in interest received notice of the Trustee's Motion, including members. *See* Docket No. 105. The only member responses received are those requesting the Trustee's Motion be denied. *See* Docket Nos. 119 and 124.² Third, since the inception of this case, Brooks Pickering holds weekly investor calls. The first investor call was two days after the filing of the petition. Members of the Debtor receive notification of the calls by email and participate on the calls. Not a single member has raised a concern that this bankruptcy case should be dismissed, and the members, with knowledge of the material facts, have had ample opportunity to object to the filing. What's more, members have reached out to the Trustee and this Court to indicate their desire to have the Debtor reorganize through a Chapter 11 bankruptcy. *See, e.g., id.* Members have also benefitted from the automatic stay in preserving the Debtor's assets.

¹ Notably, the Court also found that a creditor does not have standing to move for the dismissal of a bankruptcy filing based on lack of authority to file the petition. *Id.* at *6 (citing *Still v. Fundsnet, Inc. (In re Southwest Equip. Rental)*, 152 B.R. 207 (Bankr. E.D. Tenn. 1992), and *Royal Indemnity Co. v. Am. Bond & Mortgage Co.*, 289 U.S. 165, 171 (1933)). In *Royal Indemnity Co.*, the United States Supreme Court explained that “[c]reditors have no standing to plead statutory requirements not intended for their protection. If the stockholders’ rights had been infringed, and they chose to waive them, a creditor could not assert them in opposing an adjudication.” *Golf 6061, LLC* is a creditor and not a member of the Debtor, and the Committee requests that the Court strike *Golf 6061, LLC*’s joinder for lack of standing.

The Committee also doubts whether the U.S. Trustee has standing. The Committee’s counsel has been unable to locate a case where the U.S. Trustee brought a similar motion to the one presented before the Court. Although 11 U.S.C. § 307 generally provides standing to the U.S. Trustee, the language of *Royal Indemnity* appears to limit the issue of authority to members or shareholders of a debtor.

² At least one other member has filed correspondence with the Court, *see* Docket No. 127, and no member has raised any concern that the Debtor should not be in bankruptcy.

Similar to *Sterling Mining Co.*, under Utah law, the affirmative acts of the members and the deliberate inaction by the remaining members, with knowledge of the bankruptcy filing, establishes that the members ratified the filing. *See, e.g., Bullock*, 966 P.2d at 1219 (“Implied ratification may arise under circumstances of acquiescence or where a duty to disaffirm is not promptly exercised.”). Notably, and distinct from both *Sterling Mining Co.* and *Hager*, no equity holder has objected to the filing as unauthorized. The members participate on weekly calls. They received notice of the bankruptcy filing and the Motion. Some members have expressly supported the filing through correspondence filed with the Court and calls to the Trustee. Whether or not authorized, the filing of the petition has been properly ratified, and the ratification dates back to the Petition Date.³

Based on the foregoing, the Committee respectfully requests the Court deny the Trustee’s Motion.

DATED: September 21, 2018

HOLLAND & HART LLP

/s/ Ellen E. Ostrow

Mona L. Burton

Doyle S. Byers

Ellen E. Ostrow

*Attorneys for Official Committee of Unsecured
Creditors, The Falls Event Center LLC*

³ If the Court finds the filing is not authorized and has not been ratified, the Committee respectfully requests the Court stay its ruling to allow the Debtor to ratify the filing of the voluntary petition. If additional evidence is needed to resolve the Motion, the Committee reserves its rights to amend its objection based on any additional evidence.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of September, 2018 a copy of the foregoing was served as follows:

By Electronic Service: I certify that the parties of record in this case as identified below, are registered CM/ECF users:

- James W. Anderson jwa@clydesnow.com, jritchie@clydesnow.com
- David P. Billings dbillings@fabianvancott.com, mparks@fabianvancott.com
- Laurie A. Cayton tr laurie.cayton@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov; Suzanne.Verhaal@usdoj.gov
- Michael R. Johnson mjohnson@rqn.com, docket@rqn.com; dburton@rqn.com
- Ralph R. Mabey rmabey@kmclaw.com
- Adelaide Maudsley amaudsley@kmclaw.com, tslaughter@kmclaw.com
- Elaine A. Monson emonson@rqn.com, docket@rqn.com; pbrown@rqn.com
- Chad Rasmussen chad@alpinalegal.com, contact@alpinalegal.com
- Richard C. Terry richard@tjblawyers.com, cbcecf@yahoo.com
- United States Trustee USTPRegion19.SK.ECF@usdoj.gov
- Brent D. Wride bwride@rqn.com, docket@rqn.com; pbrown@rqn.com

/s/ Ellen E. Ostrow _____