SO ORDERED.

SIGNED this 19th day of September, 2024.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Oasis Cigar Club, Inc.,	)	Case No. 24-80167
	)	Chapter 7
Debtor.	)	
	)	

ORDER
DENYING MOTION TO DISMISS CASE

THIS MATTER came before the Court on the Motion to Dismiss Case (Docket No. 9, the "Motion") filed by Diggs Restaurant Group, LLC, Theodore Diggs, and Holly Diggs (collectively, the "Movants"). Citing *Price v. Gurney*, 324 U.S. 100, 104 (1945), the Movants assert the case must be dismissed because it was initiated by an entity lacking "the power of management" and authority to file a bankruptcy petition. The Court held a hearing on the Motion on September 12, 2024, at which Lydia Stoney appeared on behalf of the Movants and Kenneth Johnson appeared on behalf of Oasis Cigar Club, Inc. (the "Debtor"). After reviewing the parties' papers as well as the evidence and arguments submitted at the hearing held on September 12, 2024, the Court will deny the Motion for the reasons discussed below.

The Debtor filed a petition for relief under chapter 7 of the Bankruptcy Code on July 11, 2024. While the petition was signed by Rodney L. Coleman, the Debtor's "Secretary/Managing Member," it did not include a corporate resolution in compliance with Federal Rule of Bankruptcy Procedure 1007 and Local Rule 1007-1(a). The Clerk of Court promptly entered a notice of deficiency directing the Debtor to file a copy of the signed resolution of the Debtor's board of directors, managers, general partners, or other governing body authorizing the filing of the petition on or before July 25, 2024. The Debtor ultimately did so on August 1, 2024. (Docket No. 11).

The Movants contend that the Court must dismiss this case because the Debtor cannot demonstrate that the chapter 7 petition was duly authorized in accordance with the Debtor's articles of incorporation, bylaws and applicable North Carolina law.[1] Specifically, the Movants argue that the Debtor's corporate documents suggest it is member-managed and there is no indication that the members affirmatively voted to authorize the Debtor's bankruptcy filing. In its response, the Debtor represents that the board of directors conducted a prepetition meeting on June 17, 2024, at which it authorized and directed Mr. Coleman to file the chapter 7 voluntary bankruptcy petition on behalf of the Debtor. (Docket No. 21, Exs. B, C). The Debtor further argues that there is nothing within its bylaws that

[1] In the Motion, filed on July 29, 2024, the Movants also urged the Court to dismiss the case based on the Debtor's failure to timely file its corporate resolution. (Docket No. 1, ¶ 9). The Debtor, however, filed a Resolution of its Board of Directors and Statement Regarding Authority to Sign and File Petition on August 1, 2024, which ultimately addressed the outstanding deficiency. (Docket No. 11).

would require a membership vote on a decision to initiate this case. (Docket No. 21, ¶ 8). The Movants filed a reply, alluding to inherent inconsistencies between the Debtor's articles of incorporation and bylaws that raise questions as to which party or parties possessed the authority to file a bankruptcy petition on the Debtor's behalf. The Movants also maintain that the Debtor should be judicially estopped from asserting that the board of directors was authorized to file the bankruptcy petition as that position is inconsistent with the Debtor's responses given in state court litigation suggesting it is governed and operated by its members. (Docket No. 24, ¶¶ 6, 18-30).[2]

At the hearing, the Movants continued to urge the Court to dismiss the case based on facial issues they perceived in the Debtor's corporate governance documents that brought into question the board's authority to file the bankruptcy petition. In response, counsel for the Debtor conceded that there may have been clerical errors or mistakes in the corporate filings, but that the board nevertheless possessed authority under the Debtor's internal governing documents and North Carolina law to seek relief under the Bankruptcy Code.

Based on the record before it, the Court is unable to find cause to dismiss the case. The Movants are of the view that simply raising questions or pointing to inconsistencies in corporate documents requires a debtor to prove it has authority to file a bankruptcy petition; this is a misapprehension of the burden of proof on a motion to dismiss. Though this Court is obliged to dismiss a petition filed on behalf

[2] The United States Bankruptcy Administrator also filed a response on the docket on August 29, 2024, indicating he took no position on the Motion.

of a corporation where the party purporting to act for the corporation lacks authority under state law, *Hager v. Gibson*, 108 F.3d 35, 39 (4th Cir. 1997) (citing *Price*, 324 U.S. at 106), "[t]he burden of demonstrating cause for dismissal for lack of authority to file is on the movant." *Polish-Am. Citizen's Club Inc.*, No. BAP MS 22-033, 2023 WL 4259266, at *8 (1st Cir. B.A.P. June 27, 2023) (quoting *In re Curare Lab. LLC*, 642 B.R. 787, 802 (Bankr. W.D. Ky. 2022)). The Bankruptcy Court for the Southern District of New York observed the rationale for allocating the burden in this manner:

> The filing of a bankruptcy petition by a business enterprise is designed to be a short and simple process that allows debtors to protect creditors and/or start rehabilitation immediately.
> …
> Placing the burden of proof on the debtor on a motion to dismiss a filing would invariably allow any party in interest to force a debtor to expend its diminished resources litigating over the issue whether it could seek to rehabilitate or liquidate itself in an orderly fashion under the auspices of the Bankruptcy Code.

In re Quad-C Funding LLC, 496 B.R. 135, 142 (Bankr. S.D.N.Y. 2013). This Court similarly "does not take the issue of dismissal lightly" and "will place the burden of proof entirely on the Movants to demonstrate by a preponderance of the evidence" that a bankruptcy filing is unauthorized. *Id.* (quoting *In re ComScape Telecommunications, Inc.*, 423 B.R. 816, 830 (Bankr. S.D. Ohio 2010)).

When the Movants filed the Motion, the Debtor had yet to comply with Federal Rule of Bankruptcy Procedure 1007 and Local Rule 1007-1(a). In that context, a motion to dismiss that proffered no evidence beyond requesting that the Court take judicial notice of the deficiency would have been sufficient. But the

Debtor has since filed both the Resolution of its Board of Directors and Statement Regarding Authority to Sign and File Petition as well as a response to the Motion with additional documentation attached. The Movants then presented no witnesses and only two documents in support of their Motion—the Debtor's articles of incorporation and articles of amendment.[3] These public filings clearly state that the Debtor had members, but do not definitively explain the scope of their voting powers or the distribution of authority between members and the board of directors. Even if the Court were to consider the Debtor's bylaws, which were attached to the papers but lacking in any foundation to be admitted into evidence, the provisions therein are vague and fail to offer concrete answers as to who possessed the authority to initiate a bankruptcy filing on behalf of the Debtor. Relying solely on the articles of incorporation and articles of amendment, and with no witnesses or other extraneous evidence to elucidate the suite of powers held by the Debtor's members and board of directors, the Court finds the Movants have not met their burden of showing the Debtor lacked authority to file.

The Movants also assert that the Debtor should be judicially estopped from asserting it is operated by a board of directors because that position is inconsistent with its pleadings filed in state court. Judicial estoppel is an equitable doctrine

[3] The Movants requested that the Court take judicial notice of the Debtor's articles of incorporation and articles of amendment as public records. The Debtor did not object to that request and there is clear authority allowing courts to take judicial notice of articles of incorporation. *E.g.*, *Cap. Associated Indus., Inc. v. Cooper*, 129 F. Supp. 3d 281, 288 n.3 (M.D.N.C. 2015) (taking judicial notice of company's formation date in articles of incorporation); *Verduzco v. St. Mary's High Sch.*, No. 2:23-CV-02269-KJM-CSK, 2024 WL 3088467, at *3 (E.D. Cal. June 21, 2024) (taking judicial notice of articles of incorporation, which "are documents not subject to reasonable dispute."); *Stewart v. Truist Fin.*, No. CV DLB-23-1766, 2024 WL 2977886, at *3 (D. Md. June 13, 2024) (taking judicial notice of company headquarters listed in articles of incorporation).

designed "to protect the integrity of the judicial process" and "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also Zedner v. United States*, 547 U.S. 489, 504 (2006) (quoting *New Hampshire*, 532 U.S. at 749). Although the doctrine "is equitable and thus cannot be reduced to a precise formula or test," the Supreme Court identified several factors that inform whether to apply the doctrine.

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position … A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Zedner, 547 U.S. at 504 (internal citations omitted); *accord United States v. Velasquez*, 52 F.4th 133, 141 (4th Cir. 2022). Courts in the Fourth Circuit are instructed to apply judicial estoppel "'with caution' and only 'in the narrowest of circumstances.'" *Gilliam v. Sealey*, 932 F.3d 216, 233 (4th Cir. 2019) (quoting *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996)).

Given the limited evidence provided, the Court finds the Movants fail to show that judicial estoppel would be appropriate in this context. Initially, the Court notes that judicial estoppel is a fact-intensive inquiry, *see Martineau v. Wier*, 934 F.3d 385, 394 (4th Cir. 2019), and given the sparse evidentiary record, the Court is unable to make the findings of fact necessary to apply the doctrine to the Debtor's position on corporate governance. Critically, the Movants offered *no* evidence regarding the intentions of the Debtor or its principals. The Fourth Circuit Court of

Appeals continues to observe "the longstanding principle that judicial estoppel applies only when 'the party who is alleged to be estopped *intentionally* misled the court to gain unfair advantage,' and not when 'a party's prior position was based on inadvertence or mistake.'" *Martineau*, 934 F.3d at 393 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)). Although the Movants allege upon "information and belief" that the Debtor's inconsistent positions are not based on inadvertence or mistake, there is nothing in the record to support that assertion and no indication that the Debtor, its directors, or managing members intentionally misled either court.[4]

The Movants similarly fail to satisfy another key factor regarding the state court's acceptance of the Debtor's earlier position. The Movants acknowledge that no final disposition has occurred in the State Court lawsuit but argue that the Debtor's pleadings in that proceeding—the amended complaint and answer (Docket No. 24, Exs. D, E)—establish the Debtor's position regarding the member-operated status of its club. Regardless of what those pleadings may say about the Debtor's purported position, they do not evidence or establish that the presiding court itself

[4] At the hearing, counsel for the Movants referenced this Court's observation that the bad faith requirement for a finding of judicial estoppel, i.e., that "the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage," is the "determinative factor." *NC & VA Warranty Co. v. Fidelity Bank (In re NC & VA Warranty Co.)*, 554 B.R. 110, 122 (Bankr. M.D.N.C. 2016) (quoting *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007)). The Fourth Circuit Court of Appeals has held that, "[w]ithout bad faith, there can be no judicial estoppel," *Zinkland*, 478 F.3d at 638, but has also reiterated that there is no *presumption* of bad faith. *Martineau*, 934 F.3d at 393 (reversing application of judicial estoppel where district court improperly applied a presumption of bad faith). As previously noted, the Movants proffered no evidence showing the Debtor or its principals adopted inconsistent positions in bad faith. Given this deficient evidentiary record, and the absence of any presumption of the Debtor's bad faith, the Court is both unwilling and unable to apply judicial estoppel to the Debtor's position on corporate governance.

accepted that position. It would, therefore, be inappropriate for this Court to apply judicial estoppel here. *See, e.g.*, *In re Anthony*, 659 B.R. 879, 885 (Bankr. S.D. Ohio 2024) (declining to apply judicial estoppel where motion did not identify any acceptance of the prior representation); *In re Collins*, 631 B.R. 222, 232 n.7 (Bankr. E.D. Pa. 2021) (finding movant provided "no evidence" of party's position in the prior case); *Pierce v. Atl. Specialty Ins. Co.*, No. CV 16-829 JAP/KBM, 2017 WL 3149417, at *5 (D.N.M. June 9, 2017) (finding movant "has not provided any evidence" that party persuaded state court to accept its earlier position). Given the narrow circumstances in which judicial estoppel should be applied and the extremely limited evidentiary record it has been provided, the Court declines to apply the doctrine in this case.

Therefore, based on the foregoing reasoning, IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED.

END OF DOCUMENT

PARTIES TO BE SERVED

Oasis Cigar Club, Inc.

#24-80167

John Paul Hughes Cournoyer, Bankruptcy Administrator
via cm/ecf

Vicki L. Parrott, Trustee
via cm/ecf

Jason L. Hendren on behalf of Creditor Diggs Restaurant Group
via cm/ecf

Kenneth M. Johnson on behalf of Debtor Oasis Cigar Club, Inc
via cm/ecf