

# 33<sup>rd</sup> Annual Bankruptcy Year in Review Seminar

*March 9, 2018*



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# Speaker Biographies

**James Askew** has developed a reputation as an aggressive and practical bankruptcy attorney. He brings 32 years of experience representing secured creditors, business debtors, creditor committees, trustees and other parties in interest in bankruptcy proceedings and out-of-court workouts. Additionally, he has an active commercial and business litigation practice.

Mr. Askew served as law clerk to the Honorable Stewart Rose, U.S. Bankruptcy Judge, District of New Mexico, from 1987-1989.

Mr. Askew is listed in Best Lawyers in America for his expertise in Bankruptcy and Creditor-Debtor Rights Law. Mr. Askew has achieved the highest Martindale-Hubbell rating.

**Michael K. Daniels** is a sole practitioner whose practice is primarily limited to representing debtors and creditors in chapter 7, 11 and 13 bankruptcy cases. Before forming his own practice in 1991, Mr. Daniels was employed by Behles & Davis, P.C. for almost 5 years. During law school Mr. Daniels clerked at several law firms and performed a judicial externship during the summer of 1984 at the New Mexico Supreme Court for Justice Harry Stowers. Before law school Mr. Daniels was employed at McKercher Rehabilitation Center, a sheltered workshop for handicapped adults for five years after college. Mr. Daniels is a member of the State Bar of New Mexico, the Federal Bar for the State of New Mexico, and the Tenth Circuit Bar. Mr. Daniels was admitted to the Supreme Court bar, although only to defend an application for certiorari. Mr. Daniels earned his J.D. from University of New Mexico School of Law in 1986 and his B.A. from Kalamazoo College in 1979.

Mr. Daniels received the American Jurisprudence award as the top grade for his first year Torts examination at the University of New Mexico School of Law. Mr. Daniels is a frequent speaker on the topic of bankruptcy at various local seminars.

He is a member of the AYSO National Legal Commission, which provides legal advice to the National Board of Directors of AYSO and conducts various internal investigation. Mr. Daniels assists at monthly low income consumer debtor workshops put on by the State Bar of New Mexico and various other low income bar functions. The Bankruptcy Section of the State Bar of New Mexico recognized Mr. Daniels' commitment to pro bono work on March 4, 2011.

Mr. Daniels does not particularly like pina coladas or getting caught in the rain. Which is a good thing because it doesn't rain very often in New Mexico.

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**Paul M. Fish** is a shareholder of the Albuquerque law firm of Modrall Sperling Roehl Harris & Sisk, P.A., where his practice focuses on commercial litigation, including creditor representation in commercial bankruptcy proceedings. He received a B.A. degree from Drake University and his J.D. degree from Harvard Law School. Mr. Fish is a member of the State Bar of New Mexico (past chairman, Bankruptcy Law Section), is a fellow of the American College of Bankruptcy, has been named as a "SuperLawyer" for

the past several years, and has been listed in every edition of the *Best Lawyers in America*. Mr. Fish has several times served as a member of the Judicial Selection Panel for the 10<sup>th</sup> Circuit Court of Appeals for the Selection of a new Bankruptcy Judge. He is a frequent speaker on creditor's rights in bankruptcy law.

**Thomas D. Walker** is a shareholder in the Albuquerque law firm of Walker & Associates, P.C., where he concentrates his practice in the areas of bankruptcy law, commercial litigation and real estate law. He regularly represents businesses, individuals, committees and trustees in bankruptcy cases, and represents parties in business litigation and transactions, foreclosure actions, workout negotiations, real estate and lease negotiations and other commercial matters. Mr. Walker speaks frequently on bankruptcy and other business litigation topics.

He received an undergraduate degree in economics from Tulane University in 1981, attended the Institute of Political and Economic Studies in London, England, and received his J.D. degree from the University of New Mexico School of Law in 1985. He has been a member of the State Bar of New Mexico since 1985 and is a member of the United States District Court for the District of New Mexico and the Tenth Circuit Court of Appeals.

Walker is a past chair of the Bankruptcy Law Section of the State Bar of New Mexico, and has served on its Board of Directors since 1990. Mr. Walker is "AV" peer-review rated in the Martindale Hubbell Law Directory, is listed in Best Lawyers in America in the areas of Bankruptcy and Creditor-Debtor Rights, was awarded Best Lawyers "Lawyer of the Year" in 2015 in the areas of Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law for Albuquerque, and is recognized as a SuperLawyer in the areas of Bankruptcy and Creditor-Debtor Rights in the SuperLawyers national corporate counsel edition and the Southwest edition. Walker & Associates, P.C. is recognized as one of the "Best Law Firms" in New Mexico as published in U. S. News and World Report, and as among the "Best Law Firms" in Albuquerque in the 2018 Edition Best Lawyers in the areas of Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law for Albuquerque.

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**Hon. Robert H. Jacobvitz** is Chief Judge of the United States Bankruptcy Court for the District of New Mexico and a judge on the Tenth Circuit Bankruptcy Appellate Panel. Judge Jacobvitz earned his J.D. from the University of Iowa College Of Law in 1979, Order of the Coif; and his B.A. in Philosophy from the University of Colorado in 1975, Phi Beta Kappa and with High Distinctions. He is the Tenth Circuit representative on the Board of Governors of the National Conference of Bankruptcy Judges and is Chair of its Technology Committee. In 2008, he was inducted as a Fellow in the American College of Bankruptcy. In 2004 and 2010 he taught bankruptcy law courses at the University Of New Mexico School Of Law as an Adjunct Professor. Before his appointment to the bench on August 10, 2009, he was in private practice in Albuquerque, New Mexico for about 30 years, including sixteen years as a partner of Jacobvitz, Thuma & Walker P.C. He practiced mainly in the areas of bankruptcy law, out-of-court workouts, business transactions, real estate matters, and commercial litigation. He served as lead counsel for numerous debtors in possession, as well as for creditors and creditor committees.

**Hon. David T. Thuma** is a United States Bankruptcy Judge for the District of New Mexico. He was sworn in on August 14, 2012. Judge Thuma grew up in Indianapolis, Indiana. He received his undergraduate degree from the University of Chicago in 1980 and his law degree from Duke University in 1984. Judge Thuma practiced law in a large Indianapolis firm for five years before moving to New Mexico. He practiced law in New Mexico between 1989-2012, concentrating in bankruptcy and commercial litigation.

Judge Thuma lives in Albuquerque. He is married to Rebecca Thuma; they have one daughter, Kate Thuma, born in 2003. In his free time Judge Thuma enjoys reading, bird watching, cars, and ferrying Kate from one activity to the next.

**Alice Nystel Page** is employed as one of the trial counsel for the Office of the U.S. Trustee in Albuquerque. Immediately prior to rejoining the UST program in June, 2004, she was employed for four and a half years as one of the corporate counsel for Sun Healthcare Group, Inc. in Albuquerque. Mrs. Nystel Page worked for Rodey, Dickason, Sloan, Akin & Robb in Albuquerque from 1995-2000, was a Senior Attorney/Advisor and Assistant U.S. Trustee from 1991-1995 for the Office of the U.S. Trustee in Regions 6 and 16 (Dallas, San Bernardino, and Los Angeles), and was in private practice in Dallas from 1983-1991, specializing in bankruptcy practice. She earned her J.D. degree from Texas Tech University in 1983 and her B.A. degree in English from Texas Tech University in 1979. Mrs. Nystel Page was the Section Chair for the Bankruptcy Law Section for 2005 and the Editor of the Bankruptcy Law Section newsletter from 1996-2004, was a member of the Bankruptcy Law Section board of directors from 1998 to 2007 and 2010-13 and was a member of the Local Rules Advisory Committee from 1996-1998. She has been a speaker at the Section's Bankruptcy Year in Review programs, the State Bar Annual Meeting program on bankruptcy legislation in 2001, and the 2007 State Bar Annual Meeting program on bankruptcy and the elderly. She has also been a speaker for the U.S. Trustee program at the National Advocacy Center. She is a member of the State Bar of Texas as well as the State Bar of New Mexico.

**Leonard Martinez-Metzgar** is a trial attorney with the United States Trustee Office. He has a B.S. degree in Psychology; a MA degree in Psychology; a Master's in Business Administration; and a J.D. degree received from the University of New Mexico in 1982. Prior to joining the UST program he was a criminal attorney for five years. Over the last three decades, he has presented at various bankruptcy seminars and at the DOJ Training Center in Columbia, South Carolina.

**Jeffrey H. Davidson** is a partner in the Los Angeles office of Pachulski Stang Ziehl & Jones LLP and has a national practice in bankruptcy reorganizations and out-of-court restructurings. He has frequently served as lead counsel representing both public and private business entities in a variety of industries. In addition, he commonly represents hedge funds and other significant holders of securities in connection with complex chapter 11 reorganizations and workouts, and has handled many insolvency-related sales and acquisitions. He is a fellow of the American College of Bankruptcy and is a member of its Board of Regents, chair of its Ninth Circuit Council, a past member of its Nominating Committee, and immediate past chair of its Ninth Circuit Educational Programs Committee. Mr. Davidson was named a "Lawyer of the Year" for Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law in the 20th edition of *Best Lawyers in America*, and again for Litigation - Bankruptcy in the 21st edition. He has been listed by the *Best Lawyers in America* every year since 2001; by Chambers USA in the practice area of Bankruptcy / Restructuring; by Southern California Superlawyers in the practice area of Bankruptcy & Creditor/Debtor Rights every year since 2004; and by Who's Who in America; and Who's Who in

American Law. Mr. Davidson has published and lectured on a variety of bankruptcy-related topics. For several years he has presented annual bankruptcy update programs for the Financial Lawyers Conference, for the Bankruptcy Section of the State Bar of New Mexico, and previously for the Business Law Section of the State Bar of California. He has also presented several educational programs for ALI-ABA, ALI CLE, American Bankruptcy Institute, Association of Insolvency and Restructuring Advisors, California Continuing Education of the Bar, Renaissance American Management, Beard Group, and Turnaround Management Association. Mr. Davidson received his J.D. degree, *cum laude*, from Harvard Law School and his B.A., *cum laude*, from Harvard College, where he was a member of Phi Beta Kappa.

**Tiffany Cornejo**, Chapter 13 Standing Trustee of New Mexico received her Bachelor of Science in Journalism (B.S.J.) degree at the University of Kansas, Lawrence, Kansas in 2002 and then remained there to obtain her Juris Doctorate (J.D.) in 2005. Tiffany was awarded the Dean's Scholarship Award and Bremeyer Scholarship Award. During law school Tiffany was a *voting* member of the Admission's Committee for the 2005-2006 incoming class.

While in law school Tiffany worked as a law clerk for Cloon Legal Services (Baldwin, Kansas), a bankruptcy firm practicing solely in consumer bankruptcy law. From there Tiffany was asked by one of the Partners to aid in the start-up of his own firm; Tiffany accepted and continued her work as a law clerk for The Law Office of Garret & Coons (Lawrence, Kansas) practicing primarily consumer bankruptcy law.

After graduating law school Tiffany worked as an Associate for Shapiro & Mock (Overland Park, Kansas) representing mortgage companies in the areas of foreclosures, bankruptcy, creditors' rights, commercial litigation, collections, replevins, evictions, and landlord-tenant law, all in both Kansas and Missouri.

From there, Tiffany moved to Saint Louis, Missouri to accept her current position as Senior Staff Attorney for Russell C. Simon, Standing Chapter 13 Trustee in the Southern District of Illinois where she not only represents the Trustee and trust, but supervises four paralegals, two mortgage administrators and a legal clerk. Tiffany was in this position for nine years.

On December 1, 2017, Tiffany was appointed as the Chapter 13 Trustee in New Mexico.

Tiffany is admitted to practice in the Federal District Courts of Kansas, Western Missouri and Southern District of Illinois, and in the states of Kansas, Missouri and Illinois.

**Gerald "Jerry" Velarde** is a sole practitioner in Albuquerque. His practice mainly involves consumer and small business bankruptcy or workouts. Mr. Velarde serves as on the Chapter 13 Plan Revision Committee appointed by the Bankruptcy Court. He serves as a board member for the Bankruptcy section of the State Bar and is a past chairperson of the section. From 1980 through 1991, Mr. Velarde practiced bankruptcy law in Dallas, Texas. Since moving back to New Mexico in 1991, he has practiced bankruptcy law mainly as a sole or small-firm practitioner. He earned his B.S in Chemical Engineering and J.D. degrees from the University of New Mexico. Mr. Velarde has been a speaker at several Annual Bankruptcy Year in Review seminars presented by the Bankruptcy Law Section of the State Bar of New Mexico and other seminars dealing with consumer bankruptcy matters.

Mr. Velarde has prepared numerous papers which accompany his presentations. He has also co-authored an article with Judge James Starzynski entitled: When Worlds Collide Bankruptcy and Domestic Relations: When to go to (Bankruptcy) Court and When Not to.

**William D. Slease** is Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. In addition to his duties as Chief Disciplinary Counsel, he serves as an adjunct professor at the University of New Mexico School of Law where he had taught ethics, trial practice skills and employment law. He also chairs the Supreme Court of the State of New Mexico's Proactive Attorney Regulation Committee, the Court's Lawyer's Succession and Transition Committee and serves on the State Bar of New Mexico Commission on Professionalism which is responsible for operating and administering the "Bridge the Gap: Transitioning Into the Profession Program" for new Lawyers in New Mexico. He is a member and the 2017-18 immediate past president of the National Organization of Bar Counsel.

# Annual Bankruptcy Case Review

**The 33rd Annual Bankruptcy Year in Review Seminar**  
Friday, March 9, 2018, State Bar Center

## **Annual Bankruptcy Case Review**

*James A. Askew, Askew & Mazel, LLC*  
*Michael K. Daniels, Michael K. Daniels, Esq.*  
*Paul M. Fish, Modrall Sperling Roehl Harris & Sisk, P.A.*  
*Thomas D. Walker, Walker & Associates, P.C.*



| TOPIC                                                                                                          | Summary<br>Number | Cross<br>Reference |
|----------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <b>ADMINISTRATIVE EXPENSES</b>                                                                                 |                   |                    |
| In re Bryan; Peters v. Clark; 857 F.3d 1078 (10 <sup>th</sup> Cir., 2017)<br>MKD                               | 1                 |                    |
| <b>APPEALS</b>                                                                                                 |                   |                    |
| Sian v. Montoya; 2017 WL 3725924 (10 <sup>th</sup> Cir. BAP, 2017)<br>MKD                                      | 2                 |                    |
| Duran v. Recreational Equipment, Inc. (In re: Railyard Company, LLC) 2017<br>WL 4534842 (D.N.M., 2017)<br>JAA  | 3                 |                    |
| In re Kelley; Weinman v Kelley; 703 Fed.Appx. 668 (10 <sup>th</sup> Cir. 2017)<br>MKD                          | 4                 |                    |
| <b>ANNULMENT OF STAY</b>                                                                                       |                   |                    |
| <i>In re Franco (Franco v. Franco, et al.)</i> , 574 B.R. 730 (Bankr.D.N.M., 2017)<br>TDW                      |                   | 11                 |
| <b>ATTORNEY'S FEES</b>                                                                                         |                   |                    |
| <i>In Re: Railyard Company, LLC</i> , 2017 WL 3017092 (Bankr. D.N.M., 2017)<br>TDW                             | 5                 |                    |
| Harpole Construction, Inc.; 2017 WL 1501384 (Bankr.D.N.M., 2017)<br>MKD                                        | 6                 |                    |
| <i>In Re: Hungry Horse, LLC</i> , 2017 WL 3638182 (Bankr.D.N.M., 2017)<br>TDW                                  | 7                 |                    |
| <i>In Re: Blue Jet, Inc.</i> , 2017 WL 785606 (Bankr., D.N.M., 2017)<br>TDW                                    | 8                 |                    |
| <i>In Re Peyrano, Debtor/ Peyrano v. Sotelo.</i> , 2017 WL 6616890 (10 <sup>th</sup> Cir. BAP,<br>2017)<br>PMF |                   | 24                 |

| TOPIC                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Summary<br>Number                                                                                              | Cross<br>Reference |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|--------------------|
| <p>In re John Thomas Bird, Case No. 12-17345 (10<sup>th</sup> Cir. BAP, 2017)(Utah)<br/>consolidated for appeal with<br/>In re Brent David Christensen, Case No. 15-29773 (10<sup>th</sup> Cir. BAP, 2017)(Utah)</p> <p><b>AUTOMATIC STAY</b></p> <p><i>In Re: JSS of Albuquerque, LLC</i>, 2017 WL 3575654 (Bankr.D.N.M., 2017)<br/>PMF</p> <p>In re Cowen, WD Equip. v. Cowen; 849 F.3d 943 (10<sup>th</sup> Cir., 2017)<br/>MKD</p> <p><i>In re Franco (Franco v. Franco, et al.)</i>, 574 B.R. 730 (Bankr.D.N.M., 2017)<br/>TDW</p> <p><i>Spencer v. State of New Mexico</i>, 2017 WL 4277713 (D.N.M., 2017)<br/>PMF</p> <p><i>Spencer v. State of New Mexico</i>, 2017 WL 4179991 (D.N.M., 2017)<br/>PMF</p> <p><i>Spencer v. State of New Mexico</i>, 2017 WL 3835939 (D.N.M., 2017)<br/>PMF</p> <p>In re Hamilton, 2017 WL 1533382 (Bankr. N.M. 2017)</p> <p><b>BARTON DOCTRINE</b></p> <p>Lankford v. Wagner, 853 F.3d 1119 (10<sup>TH</sup> Cir., 2017)_<br/>JAA</p> <p><b>CHAPTER 13 CONFIRMATION</b></p> <p>In re Novak, 2017 WL 1104052 (Bankr. N.M. 2017)</p> | <p>Ch. 13</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>Ch. 13</p> <p>15</p> <p>Ch. 13</p> |                    |

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|------------------------------------------------------------|
| <p><b>CHARGING LIENS</b></p> <p><i>In Re: Blue Jet, Inc.</i>, 2017 WL 785606 (Bankr., D.N.M., 2017)<br/>TDW</p> <p><b>CLAIMS</b></p> <p><i>In Re: Harpole Construction, Inc. (Harpole Construction, Inc. v. Medallion Midstream, LLC)</i>, 565 B.R. 1993 (Bankr.D.N.M., 2017)<br/>PMF</p> <p><b>CLAIMS OBJECTIONS</b></p> <p>Midland Funding, LLC v. Aleida Johnson (In re Aleida Johnson), 137 S.Ct.1407 (2017)</p> <p><b>CONFIRMATION OF CH.11 PLAN</b></p> <p>Sandridge Energy, Inc. v. Ward et al; 875 F.3d 1297 (10<sup>th</sup> Cir. 2017)<br/>MKD</p> <p><b>CONFLICT OF INTEREST</b></p> <p>WM Distribution, Inc.; 571 B.R. 866 (2017) (Bankr.D.N.M., 2017)<br/>MKD</p> <p><b>CONTINGENT DEBT</b></p> <p><i>In Re: Lamey (Los Alamos National Bank v. Lamey)</i>, 2017 WL 3835797 (Bankr.D.N.M., 2017)<br/>PMF</p> <p><b>CONVERSION</b></p> <p>In re Lamey, 2017 WL 3575845 (Bankr. N.M. 2017)</p> | <p></p> <p></p> <p></p> <p>Ch. 13</p> <p>16</p> <p>17</p> <p>18</p> <p>Ch. 13</p> | <p>8</p> <p>53</p> <p></p> <p></p> <p></p> <p></p> <p></p> |

| TOPIC                                                                                                                                                    | Summary<br>Number | Cross<br>Reference |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <b>CORPORATIONS</b>                                                                                                                                      |                   |                    |
| Sandia Tobacco Manufacturers, Inc.; 571 B.R. 449 (Bankr.D.N.M., 2017)<br>MKD                                                                             | 19                |                    |
| <b>COSTS</b>                                                                                                                                             |                   |                    |
| <i>In Re: Harpole Construction, Inc. (Harpole Construction, Inc. v. Medallion Midstream, LLC)</i> , 2017 WL 401174 (Bankr.D.N.M., 2017)<br>PMF           | 20                |                    |
| <b>DEBTOR'S DUTIES</b>                                                                                                                                   |                   |                    |
| <i>In re Auld (Rupp v. Auld)</i> 561 B.R. 512 (10 <sup>th</sup> Cir. BAP 2017)<br>TDW                                                                    | 21                |                    |
| <b>DISCHARGE</b>                                                                                                                                         |                   |                    |
| <i>Cronk, Ashcraft &amp; UST v. Bushey</i> ; 568 B.R. 821 (Bankr.D.N.M., 2017)<br>MKD                                                                    | 22                |                    |
| <i>In re Sears (Martinez v. Sears)</i> , 565 B.R. 184 (10 <sup>th</sup> BAP 2017)<br>TDW                                                                 | 23                |                    |
| <i>In Re Peyrano, Debtor/ Peyrano v. Sotelo.</i> , 2017 WL 6616890 (10 <sup>th</sup> Cir. BAP, 2017)<br>PMF                                              | 24                |                    |
| <i>In Re: Van Winkle (Sprague, personal representative of the estate of Van Winkle v Williams, et al.)</i> , 2017 WL 562430 (Bankr.D.N.M., 2017)<br>PMF  | 25                |                    |
| <i>In Re: Van Winkle (Sprague, personal representative of the estate of Van Winkle v. Williams, et al.)</i> , 2017 WL 562430 (Bankr.D.N.M., 2017)<br>PMF | 26                |                    |
| <i>In Re: McNally, Debtor/ Carns v. McNally</i> , 2017 WL 4082093 (10 <sup>th</sup> Cir. BAP, 2017)<br>PMF                                               | 27                |                    |

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| <p><b>DISCHARGE OBJECTION</b></p> <p><i>In Re: Lamey (Los Alamos National Bank v. Lamey)</i>, 574 B.R. 240 (Bankr.D.N.M., 2017)<br/>PMF</p> <p><b>DISCHARGEABILITY</b></p> <p>Shapiro v. Morrow; 2017 WL 2062859 (Bankr.D.N.M., 2017)<br/>MKD</p> <p>Musacco v. Walden, 2017 WL 4512214 (D.N.M., 2017)<br/>JAA</p> <p>Medical Lien Mgt. v. Dampier; 2017 WL 1327634 (10<sup>th</sup> Cir. BAP, 2017)<br/>MKD</p> <p>Lujan v. Davide (In re: Davide), 2017 WL 6333917 (Bankr.D.N.M., 2017)<br/>JAA</p> <p>Terrell v. IRS; 2017 WL 656275 (10<sup>th</sup> Cir.BAP, 2017)<br/>MKD</p> <p>Carns v. McNally (In re: McNally), 2017 WL 4082093 (Bankr.D.N.M., 2017)<br/>JAA</p> <p>Monge v. Jayme (In re: Jayme), 2017 WL 2533340 (Bankr.D.N.M., 2017)<br/>JAA</p> <p>Davis v. Arellano (In re: Arellano), 574 B.R. 251 (Bankr.D.N.M., 2017)<br/>JAA</p> <p>Shirley v. Lopez (In re: Lopez), 566 B.R. 255 (Bankr.D.N.M., 2017)<br/>JAA</p> | <p>28</p> <p>29</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p> <p>34</p> <p>35</p> <p>36</p> <p>37</p> |                    |

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| <b>DISCOVERY</b><br><br><i>In Re: Milholland, Debtor/ Colby v. Milholland</i> , 2017 WL 895752 (10 <sup>th</sup> Cir., 2017)<br>PMF                                                                                     | 38                |                    |
| <b>DISMISSAL</b><br><br>In re Spoverlook, LLC; 2017 WL 3084898 (Bankr.D.N.M., 2017)<br>MKD                                                                                                                              | 39                |                    |
| <b>EMPLOYMENT OF PROFESSIONALS</b><br><br><i>In re: Lightning Dock Geothermal HI-01, LLC. et al.</i> , 2017 WL 2484826 (Bankr.D.N.M., 2017)<br>TDW                                                                      | 40                |                    |
| In re: Hungry Horse, LLC, 574 B.R. 740 (Bankr.D.N.M., 2017)<br>JAA                                                                                                                                                      |                   | 42                 |
| <b>EXECUTORY CONTRACTS</b><br><br><i>In Re: John Q. Hammons Fall 2006, LLC et al. Debtors/JD Holdings, LLC v. John Q. Hammons Fall 2006 Fall 2006, LLC et al.</i> , 2017 WL 6616890 (10 <sup>th</sup> BAP, 2017)<br>PMF |                   | 52                 |
| <b>EXEMPTIONS</b><br><br>In re Steven & Debra Dollman; 2017 WL 4404242 (Bankr.D.N.M., 2017)<br>MKD                                                                                                                      | 41                |                    |
| <b>FAIR DEBT COLLECTION PRACTICES ACT</b><br><br><i>Midland Funding, LLC v. Johnson</i> , 137 S.Ct. 1407 (2017)<br>TDW                                                                                                  |                   | 61                 |

| TOPIC                                                                                                                                  | Summary<br>Number | Cross<br>Reference |
|----------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <b>FEE APPLICATIONS</b>                                                                                                                |                   |                    |
| In re: Hungry Horse, LLC, 574 B.R. 740 (Bankr.D.N.M., 2017)<br>JAA                                                                     | 42                |                    |
| In re: ABQ Manufacturing, Inc. 2017 WL 2304226 (Bankr.D.N.M., 2017)<br>JAA                                                             | 43                |                    |
| In re: Wallace, 2017 WL 4773106 (Bankr.D.N.M., 2017)<br>JAA                                                                            | 44                |                    |
| <b>FRAUD</b>                                                                                                                           |                   |                    |
| <i>In Re: Otero County Hospital Association, Inc.</i> , 2017 WL 5591399<br>(Bankr.D.N.M., 2017)<br>PMF                                 | 45                |                    |
| <b>JUDICIAL ESTOPPEL</b>                                                                                                               |                   |                    |
| <i>ASARCO, LLC v. Noranda Mining, Inc.</i> , 844 F.3d 1201 (10 <sup>th</sup> Cir., 2017)<br>PMF                                        | 46                |                    |
| <i>Anderson, et al. v. Seven Falls Company</i> , 696 Fed.Appx. 341 (10 <sup>th</sup> Cir., 2017)<br>PMF                                | 47                |                    |
| <i>Hermann v. Hartford Casualty Insurance Company</i> , 675 Fed.Appx. 856 (10 <sup>th</sup><br>Cir., 2017)<br>PMF                      | 48                |                    |
| <b>JUDICIAL IMMUNITY</b>                                                                                                               |                   |                    |
| Lankford v. U.S. Department of Justice, 2017 WL 5564568 (D.N.M., 2017)<br>JAA                                                          |                   | 74                 |
| <b>JURISDICTION</b>                                                                                                                    |                   |                    |
| Estate of Coleman v. Mladek; 2017 WL 5198152 (Bankr.D.N.M., 2017)<br>MKD                                                               | 49                |                    |
| Viper Services, LLC v. Fora Financial Business Loans, LLC (In re: Viper<br>Services, LLC), 2017 WL 5499155 (Bankr.D.N.M., 2017)<br>JAA | 50                |                    |

| TOPIC                                                                                                                                                                                       | Summary<br>Number | Cross<br>Reference |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <p><i>In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.)</i>, 2017 WL 1067754 (Bankr., D.N.M., 2017)<br/>TDW</p>                                  | 51                |                    |
| <p><i>In Re: John Q. Hammons Fall 2006, LLC et al. Debtors/JD Holdings, LLC v. John Q. Hammons Fall 2006 Fall 2006, LLC et al.</i>, 2017 WL 6616890 (10<sup>th</sup> BAP, 2017)<br/>PMF</p> | 52                |                    |
| <p><b>JURY</b></p>                                                                                                                                                                          |                   |                    |
| <p><i>In Re: Harpole Construction, Inc. (Harpole Construction, Inc. v. Medallion Midstream, LLC)</i>, 565 B.R. 1993 (Bankr.D.N.M., 2017)<br/>PMF</p>                                        | 53                |                    |
| <p><b>LAW OF THE CASE</b></p>                                                                                                                                                               |                   |                    |
| <p>Wagner v. Lankford (In re: Vaughn Company Realtors), 2017 WL 2470858 and 2017 WL 6372463 (Bankr.D.N.M., 2017)<br/>JAA</p>                                                                |                   | 59                 |
| <p><b>LIEN PERFECTION</b></p>                                                                                                                                                               |                   |                    |
| <p><i>In Re: Lamey (Los Alamos National Bank v. Lamey)</i>, 2017 WL 1839154 (Bankr.D.N.M., 2017)<br/>PMF</p>                                                                                | 54                |                    |
| <p><b>NONDISCHARGEABILITY</b></p>                                                                                                                                                           |                   |                    |
| <p>O'Brien v. Montoya; 2017 WL 6561089 (Bankr.D.N.M., 2017)<br/>MKD</p>                                                                                                                     | 55                |                    |
| <p><i>In re Smith (Boyer Insurance Group LLC v. Smith)</i>, 2017 WL 5198149 (Bankr.D.N.M., 2017)<br/>TDW</p>                                                                                | 56                |                    |
| <p><i>In re Whitaker (Peplinski v. Whitaker)</i>, 2017 WL 354314 (Bankr.D.N.M., 2017)<br/>TDW</p>                                                                                           | 57                |                    |



| TOPIC                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Summary<br>Number                                                                                         | Cross<br>Reference                                                                            |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| <p><b>NOTICE</b></p> <p><i>In Re: McNally, Debtor/ Carns v. McNally</i>, 2017 WL 4082093 (10<sup>th</sup> Cir. BAP, 2017)<br/>PMF</p> <p>Musacco v. Walden, 2017 WL 4512214 (D.N.M., 2017)<br/>JAA</p> <p>Carns v. McNally (In re: McNally), 2017 WL 4082093 (Bankr.D.N.M., 2017)<br/>JAA</p> <p><b>PLAN TERMS</b></p> <p><i>Czyzewski, et al. v. Jevic Holding Corp., et al</i>, 137 S.Ct. 973 (2017)<br/>PMF</p> <p><b>POST-JUDGMENT MOTIONS</b></p> <p>Wagner v. Lankford (In re: Vaughn Company Realtors), 2017 WL 2470858 and 2017 WL 6372463 (Bankr.D.N.M., 2017)<br/>JAA</p> <p><b>PREFERENCES</b></p> <p>Garcia v. P2 Properties (In re: Garcia), 570 B.R. 635 (Bankr.D.N.M., 2017)<br/>JAA</p> <p><b>PROOFS OF CLAIMS</b></p> <p><i>Midland Funding, LLC v. Johnson</i>, 137 S.Ct. 1407 (2017)<br/>TDW</p> <p><b>PROPERTY OF THE ESTATE</b></p> <p>Sender v. Werth, 2017 WL 1832210 (Bankr.D.N.M., 2017)<br/>JAA</p> <p><i>In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.)</i>, 2017 WL 5989169 (Bankr., D.N.M., 2017)<br/>TDW</p> | <p></p> <p></p> <p></p> <p>58</p> <p>59</p> <p></p> <p></p> <p></p> <p>61</p> <p></p> <p>62</p> <p>63</p> | <p>27</p> <p>30</p> <p>34</p> <p></p> <p></p> <p></p> <p></p> <p></p> <p></p> <p></p> <p></p> |

| TOPIC                                                                                                                                                                 | Summary<br>Number | Cross<br>Reference |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <b>REAFFIRMATION</b><br><br>SMS Financial v. Cope, 685 Fed.Appx. 648 (10 <sup>th</sup> Cir., 2017)<br>JAA                                                             | 64                |                    |
| <b>RECONSIDERATION</b><br><br>In re Sandia Resorts, Inc.; 2017 WL 1067749 (Bankr.D.N.M., 2017)<br>MKD                                                                 | 65                |                    |
| <b>RECOUPMENT</b><br><br><i>In Re: Alliance Well Service, LLC (Alliance Well Service, LLC v. J.S. Ward &amp; Son, Inc.)</i> 577 B.R. 389 (Bankr.,D.N.M., 2017)<br>TDW |                   | 72                 |
| <b>RELIEF FROM AUTOMATIC STAY</b><br><br>Jean & Dennis Montoya; 2017 WL 5713198<br>MKD                                                                                | 66                |                    |
| <b>RELIEF FROM JUDGMENT; RULE 60(b)</b><br><br><i>In re Shifren (Sender v. Shifren)</i> 2017 WL 4161897 (10th Cir. BAP 2017 (Unpublished)<br>TDW                      | 67                |                    |
| <b>RES JUDICATA</b><br><br><i>In Re: Lamey (Los Alamos National Bank v. Lamey)</i> , 2017 WL 1839154 (Bankr.D.N.M., 2017)<br>PMF                                      |                   | 54                 |
| <b>SALES OUT OF THE ORDINARY COURSE</b><br><br>In re: Sasso, 572 B.R. 331 (Bankr.D.N.M., 2017)<br>JAA                                                                 | 68                |                    |
| <i>In Re: Railyard Company, LLC</i> , 572 B.R. 766 (Bankr. D.N.M., 2017)<br>TDW                                                                                       | 69                |                    |

| TOPIC                                                                                                                                                        | Summary<br>Number | Cross<br>Reference |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|--------------------|
| <b>SECURED CLAIMS</b>                                                                                                                                        |                   |                    |
| <i>In Re: Chacon (Chacon v. The Greenbriar Townhouses, Inc.), Adv. No. 16-01027 t (August 8, 2017)</i><br>PMF                                                | 70                |                    |
| <b>SECURITY INTERESTS</b>                                                                                                                                    |                   |                    |
| <i>In re Gracy; Morris v. AVCU; 689 Fed.Appx. 590(10<sup>th</sup> Cir., 2017)</i><br>MKD                                                                     | 71                |                    |
| <b>SETOFF</b>                                                                                                                                                |                   |                    |
| <i>In Re: Alliance Well Service, LLC (Alliance Well Service, LLC v. J.S. Ward &amp; Son, Inc.) 577 B.R. 389 (Bankr.,D.N.M., 2017)</i><br>TDW                 | 72                |                    |
| <b>SETTLEMENTS</b>                                                                                                                                           |                   |                    |
| <i>Liberty Bank, F.S.B. v. Christie, Inc.; Christie; Glenn; Meyer; Pratt, 681 Fed.Appx. 664 (10<sup>th</sup> Cir., 2017)</i><br>PMF                          | 73                |                    |
| <b>SOVEREIGN IMMUNITY</b>                                                                                                                                    |                   |                    |
| <i>Lankford v. U.S. Department of Justice, 2017 WL 5564568 (D.N.M., 2017)</i><br>JAA                                                                         | 74                |                    |
| <b>SPECIAL COUNSEL</b>                                                                                                                                       |                   |                    |
| <i>In re: Lightning Dock Geothermal HI-01, LLC. et al., 2017 WL 2484826 (Bankr.D.N.M., 2017)</i><br>TDW                                                      |                   | 40                 |
| <b>STANDING</b>                                                                                                                                              |                   |                    |
| <i>In Re: Flying Star Cafes, Inc. (NM Enterprises, Inc. d/b/a NM Bakery Service Company v. Harrington, et al.), 568 B.R. 129 (Bankr.D.N.M., 2017)</i><br>PMF | 75                |                    |
| <i>In re Eurogas, Inc., Slovakia v. Loveridge et al; 576 B.R. 648 (10<sup>th</sup> Cir., BAP, 2017)</i><br>MKD                                               | 76                |                    |

| TOPIC                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Summary<br>Number | Cross<br>Reference                              |
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| <p><b>SUSPENSION OF CASE</b></p> <p><i>In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.),</i> 2017 WL 1067754 (Bankr., D.N.M., 2017)<br/>TDW</p> <p><b>TAX LIENS</b></p> <p><i>In Re: Aquatic Pools, Inc.,</i> 567 B.R. 376 (Bankr.D.N.M., 2017)<br/>PMF</p> <p><b>TURNOVER</b></p> <p>Sender v. Werth, 2017 WL 1832210 (Bankr.D.N.M., 2017)<br/>JAA</p> <p><i>In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.),</i> 2017 WL 5989169 (Bankr., D.N.M., 2017)<br/>TDW</p> <p><i>In re Auld (Rupp v. Auld)</i> 561 B.R. 512 (10<sup>th</sup> Cir. BAP 2017)<br/>TDW</p> | <p></p> <p>77</p> | <p>51</p> <p></p> <p>62</p> <p>63</p> <p>21</p> |

SUMMARY NUMBER: MKD

KEY CODE SECTION(S): §506(c)  
KEY TOPIC(S): Administrative Expenses

COURT and JUDGE: Tenth Circuit; J. Tymkovich author (Briscoe & Murphy)  
CASE NAME and CITE: In re Bryan; Peters v. Clark; 857 F.3d 1078  
CASE NUMBER and DOCKET NUMBER: 10<sup>th</sup> Cir No. 16-1172; 16-1213; 16-1214  
DATE DECIDED: May 24, 2017

NOTEWORTHY ISSUE:

1. Should the Bankruptcy Court have marshalled the funds?
2. Was the surcharge proper?
3. Was the Aurora 2<sup>nd</sup> mortgage position correctly assigned to the estate?

HOLDING:

1. No.
2. Yes. Surcharging the collateral for setting aside the trust and selling the residence directly benefitted Clark; no surcharge was appropriate for the lien priority adversary because the Trustee was directly adverse to Clark.
3. Ms. Bryan lacks standing to challenge the 2<sup>nd</sup> mortgage position. The 2<sup>nd</sup> mortgage position was superior to her interest; it was uncontested at trial.

The Tenth Circuit adopted the BAP opinion from last year. Judge Briscoe concurred in part and dissented in part (suggesting remand to the Bankruptcy Court to consider whether the Trustee's commission should be part of the §506(c) surcharge.

Elements of marshaling are (1) two creditors of the same debtor, (2) two funds belonging to the debtor and (3) one creditor has claims against both funds, one only against one fund. The first element "common debtor requirement" is absent; only Ms. Bryan owes money to Aurora.

Generally administrative expenses in a Chapter 7 case may not be surcharged against secured collateral. There is an exception; §506c; trustee may recover from collateral reasonable necessary costs & expenses of preserving or disposing of such property to the extent of any benefit to the holder of the claim, including payment of ad valorem property taxes. Trustee must prove expenses were (1) necessary, (2) reasonable, and (3) the creditor benefitted in concrete and quantifiable fashion.

There were three components of the Trustee's fees. Sham Trust adversary, Sale of Residence and Lien Priority Adversary. Sham Trust fees were beneficial to Clark; no house to sell without them and Clark was unsecured until then. Residence Sale fees created a fund of money for the parties to argue over; fees were sound and necessary. No dispute over amount. Lien Priority case was directed by the Bankruptcy Court if the parties couldn't resolve their disputes. Findings on the reasonableness of these fees aren't clearly erroneous, but the question is whether they should be borne by the bankruptcy estate or surcharged against the sales proceeds to Clark's detriment. Did these fees benefit Clark? Clark points out the

Trustee actively objected to Clark's secured status. Trustee argues the Lien Priority adversary was necessary. The issue is whether the Trustee provided direct benefit to Clark, not just some benefit. No surcharge against Clark is reasonable on the lien priority adversary fees because there was no benefit to Clark. The BAP remanded to allocate the costs between these three categories.

#### FACTS:

The Bryans (she is a NFS), his Trustee and judgment creditor Arthur Clark are the parties fighting over sales proceeds for a residence. Bryans deeded the house in and out of a trust to secure loans 4 or 5 times between 2001 & 2005. In 2002 Bryans hired Clark for environmental remediation; it went south, he sued and in 2004 got a \$211,000 judgment, which he transcribed. At that time the house was titled in the name of the Trust.

Mr. Bryan filed a Chapter 13 case in 2005, which converted to 7 in 2006. Peters was appointed Trustee and filed two adversaries; first one to set aside the trust which succeeded and resulted in the sale of the Residence. The second was to determine lien priorities. The trust was set aside, the Trustee got an order authorizing him to sell the Residence and pay half the net proceeds to Ms. Bryan. The title company found the Clark lien and refused to insure title. An amended sale order authorized payment of commission and closing costs and escrowed the balance pending court decision on lien priority and the Trustee's surcharge request under §506c. After paying the first mortgage the Trustee held \$175k, half of which went to Ms. Bryan. The Bankruptcy Court ruled Clark had no lien, Clark appealed & lost, the 10<sup>th</sup> Circuit reversed, holding Clark's lien valid, and remanded to determine lien priority between Clark and the second mortgage (Aurora).

Bankruptcy Court on remand found no basis for marshalling (no proof by Clark and a lack of the common debtor requirement), ordered the remaining proceeds split between Ms. Bryan and the bankruptcy estate. Of the bankruptcy estate portion, Clark's lien was found to be in second position followed by Aurora (whose 2<sup>nd</sup> mortgage had been assigned to the Trustee). As to Ms. Bryan's share, Aurora was in 2<sup>nd</sup> position behind the first mortgage. The Court ruled the estate's share was subject to surcharge for the Trustee's fees and expenses (\$65k 1<sup>st</sup> adversary \$31k 2<sup>nd</sup> adversary). Clark contested the 2<sup>nd</sup> adversary fees and got them reduced by \$10k. The Trustee got \$86k, Clark got \$1300. For the Bryan half of the proceeds, \$75k due under the Aurora 2<sup>nd</sup> mortgage went to the Trustee, the remaining \$12k went to Ms. Bryan.

The BAP affirmed the Bankruptcy Court in all ways but one; surcharging collateral for expenses incurred contesting the validity of the secured creditor's lien. A three party appeal followed to the 10<sup>th</sup> Cir.

SUMMARY NUMBER:  
MKD

**2**

KEY CODE SECTION(S): §363(m)  
KEY TOPIC(S): Appeals

COURT and JUDGE: Tenth Circuit BAP; J. Karlin author (Nugent & Mosier)  
CASE NAME and CITE: Sian v. Montoya; 2017 WL 3725924  
CASE NUMBER and DOCKET NUMBER: BAP No. NM 17-003  
DATE DECIDED: August 30, 2017

NOTEWORTHY ISSUE:

1. Is the appeal moot?

HOLDING:

1. Yes. Appeal is dismissed.

11 U.S.C. §363(m) prevents a reversal on appeal from affecting the validity of a sale of property to a good faith purchaser.

Appellant did not challenge purchaser's good faith in his sales objection. We can't tell if he made an oral objection at a hearing because Appellant failed to provide a transcript. Lack of a required transcript leaves an appellate court no choice but to affirm. Even providing a liberal review to a *pro se* appellant we see no evidence of bad faith by the purchaser.

FACTS:

The second Sandia Resorts Chapter 11 case is converted to Chapter 7, the Trustee sells the hotel to the secured lender (NCG). Judge Thuma authorized sale of the hotel, the principal of the Debtor appeals *pro se*. He requested a stay of the order authorizing sale pending this appeal, but Judge Thuma denies the motion and the sale closes.

SUMMARY NUMBER:  
JAA

3

KEY CODE SECTION(S): Rules 8009, 8010  
KEY TOPIC(S): Appeals

COURT: USDC-NM  
JUDGE: Martha Vazquez  
CASE NAME: Duran v. Recreational Equipment, Inc. (In re: Railyard Company, LLC)  
CITE: 2017 WL 4534842 and Doc. No. 12.  
CASE NUMBER: 16-cv-295 MV/CG  
DATE DECIDED: February 10, 2017

NOTEWORTHY ISSUE: What happens to the Appellant when he fails to provide a transcript and other items for the record on appeal to the U.S. District Court?

HOLDING: The appeal will be denied and the ruling from the bankruptcy court will be affirmed.

FACTS: Duran appealed the order to appoint a Ch. 11 Trustee in the *Railyard Company* bankruptcy. When his request for a stay pending appeal was not granted, he failed to supply a transcript of the hearing appealed from and other items for the record on appeal. The bankruptcy court order was affirmed as a consequence.



SUMMARY NUMBER:  
MKD

4

KEY CODE SECTION(S): None  
KEY TOPIC(S): Appeals

COURT and JUDGE: Tenth Circuit; J. Holmes author (Lucero & Bacharach)  
CASE NAME and CITE: In re Kelley; Weinman v Kelley; 703 Fed.Appx. 668  
CASE NUMBER and DOCKET NUMBER: 10<sup>th</sup> Cir No. 16-1498  
DATE DECIDED: August 9, 2017

NOTEWORTHY ISSUE:

1. Did the BAP violate Kelley's due process rights when he missed oral argument?
2. Did the Trustee perpetrate a fraud on the Bankruptcy Court under R. 60(b)(3)?
3. Did the North Carolina state court action reach an erroneous judgment?
4. Should the Bankruptcy Court have granted relief under R. 60(b)(4)?

HOLDING:

1. No; Kelley provided the BAP a bad phone number for the oral argument.
2. Kelley provided no evidence of fraud below; the Bankruptcy Court did not err.
3. This argument, raised for the first time on appeal, is waived.
4. This argument, raised for the first time on appeal, is waived.

The Bankruptcy Court is affirmed.

FACTS:

Kelley filed a North Carolina Chapter 11 to prevent his tenants from recovering their security deposits. That case was dismissed. The North Carolina AG sued for unfair trade practices, and obtained judgment for restitution, civil penalties and attorney fees; he was enjoined from accepting additional security deposits.

Kelley filed a Colorado bankruptcy. His trustee objected to discharge under §727(a)(2-5); destroying, concealing or transferring assets, failure to keep business records and failure to explain loss of assets. The Trustee served Kelley by mail (in Colorado and also North Carolina), Kelley did not respond, the Court entered a default judgment. Kelley moved to set the default aside two weeks later; the court denied the motion. The judge considered the failure to respond part of a pattern of evasion and obfuscation, and noted the lack of an alleged meritorious defense. Kelley moved to reconsider, which was denied. Kelley appealed to the BAP, raising a new argument under Rule 60b4; the BAP declined to consider the new argument and affirmed the denial of discharge.

Kelley's *pro se* brief is incoherent, but we distill four arguments upon application of a solicitous construction reserved for *pro se* litigants.

SUMMARY NUMBER:  
TDW

5

KEY CODE SECTION(S): 330(a)  
KEY TOPIC(S): Attorney's fees

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In Re: Railyard Company, LLC*, 2017 WL 3017092 (Bankr. D.N.M., 2017)

CASE NUMBER: Case No. 15-12386

DATE DECIDED: July 14, 2017

**NOTEWORTHY ISSUE:** The Court allowed compensation to attorney for debtor-in-possession applying the criteria for attorney compensation under §330(a) to the specific facts in this case.

**HOLDING:** The Court found that counsel satisfied all the criteria for compensation and allowed the requested amount, reduced by “5%,” stating that the time spent seemed “a bit high,” and that the total fee was “slightly high,” and a “little high.”

**FACTS:** Debtor owned a retail building in Santa Fe, which it mortgaged to Lender in December 2014 to secure a bridge loan that retired existing debt. In January 2015, Flying Star Cafes filed bankruptcy and closed its restaurant at the building. In June 2015, Lender declared default and filed a foreclosure action in state court. Debtor was in disputes with others, including REI (debtor's anchor tenant), the ground lessor, and the City of Santa Fe, which owns part of the building.

In September 2015, Debtor filed chapter 11 and hired William F. Davis & Assoc., P.C. as its bankruptcy counsel. A month after the case was filed, Lender moved for appointment of a chapter 11 trustee, and trial was held in February 2016. The Court issued a written opinion in March 2016 appointing a trustee. Debtor's members were very upset. Counsel moved to withdraw a few days later but kept working on the case pending the ruling on the motion to withdraw.

In August 2016, Counsel filed its application to allow attorney's fees. Debtor's members objected focusing mostly on the outcome of the trustee trial. Applying the facts to the “necessity” factors, the Court found that counsel “effectively represented the Debtor” and that counsel's services were “actual, beneficial and necessary.”

Code §330(a) governs debtor's attorney's fee application. To be compensable, the fees must be for services that were “actual” and “necessary.” § 330(a)(1)(A). If actual and necessary, then the fees must be “reasonable” to be allowed. Reasonableness is evaluated using the criteria in §330(a)(3) and the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

SUMMARY NUMBER:  
MKD

6

KEY CODE SECTION(S): 11 U.S.C. §330  
KEY TOPIC(S): Attorney's Fees

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: Harpole Construction, Inc.; 2017 WL 1501384  
CASE NUMBER and DOCKET NUMBER: Case. No. 11-15-12630 TA; Docket No. 489  
DATE DECIDED: April 26, 2017

NOTEWORTHY ISSUE:

1. May UCC counsel charge \$325/hr?

HOLDING:

1. Not in this case. Counsel charged \$280/hr in all recent Chapter 11 cases, and failed to carry his burden of proving similar attorneys charge \$325/hr for similar work. The application is approved, but the rate is reduced to \$280/hr.

Attorney compensation is governed by §330(a). Fees must be for services that were actual and necessary. If they pass that test they must be reasonable, using the *Johnson* factors (somewhat duplicative of factors found in §330(a)(3)):

1. The time & labor required
2. The novelty & difficulty of the question
3. The skill requisite to perform the service
4. The preclusion of other employment for the attorney due to the case
5. The customary fee
6. Whether the fee is fixed or contingent
7. Time limitations imposed by client or circumstances
8. The amount involved and results obtained
9. The experience, reputation and ability of the attorney
10. The undesirability of the case
11. The nature & length of the professional relationship with the client
12. Awards in similar cases

FACTS:

Debtor does construction work in eastern New Mexico. Three weeks after the petition was filed, the US Trustee appointed an unsecured creditors committee. The UCC hired counsel at \$325 per hour; the employment order cautioned that the hourly rate would be decided at the fee application stage. Counsel filed an \$83,000 fee application, the Debtor and Four Corners Bank objected.

SUMMARY NUMBER:  
TDW

7

KEY CODE SECTION(S): 330(a)  
KEY TOPIC(S): Attorney's fees

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In Re: Hungry Horse, LLC*, 2017 WL 3638182 (Bankr.D.N.M., 2017)

CASE NUMBER: Case no. 16-11222 t11

DATE DECIDED: 08/23/2017

**NOTEWORTHY ISSUES:** The Court's decision discusses billing for clerical work and e-filing, reasonableness of fees, splitting part of the bill with the other defendants, and reduced hourly rates for associate tasks. Clerical services are not compensable. This includes e-filing, no matter who does it, and typing attorney's drafts and dictation. Without further evidence, the Court will not reduce an attorney's hourly rate for "associate-level" tasks.

**FACTS:** Former counsel for the debtor in possession filed an interim fee application. The U.S. Trustee and the Unsecured Creditors' Committee objected, arguing that some of the fees were for clerical work, were duplicative, were for work that did not benefit the estate, were unreasonable, or were supposed to be paid by others. Also at issue were fees charged in an adversary proceeding involving other defendants for which the Court entered an order providing that the estate would share equally (50%) the fees charged with the other parties..

Attorney compensation in chapter 11 cases is governed by §330(a). Fees must be for actual and necessary services, and must be "reasonable." For necessity, courts ask "whether they were necessary to the administration of, or beneficial toward the completion of, a case, which is basically what §330(a)(3)(C) says. Potential benefit is measured when the services are provided, not when the fee application is heard. Courts consider the factors in §330(a)(3) and the twelve-factor analysis from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (applied by the Tenth Circuit in *In re Lederman Enterprises, Inc.*, 997 F.2d 1321, 1323 (10th Cir. 1993). Also, §331 authorizes the allowance of interim compensation and reimbursement for expenses that are otherwise allowable under §330.

Code §330(a)(3) non-exclusive factors are: (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

The Johnson factors are: (1) The time and labor required; (2) The novelty and difficulty of the

questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The “undesirability” of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.

- Clerical tasks are not compensable, no matter who performs them.
- Routine court filing, including e-filing, is considered clerical.
- Some complex e-filing in chapter 11 cases may be compensable, for example, where the task involves professional or para-professional judgment.
- The party requesting the fees bears the burden of showing they are compensable.
- Typing handwritten drafts and dictation is non-compensable clerical work.

The Court rejected the UCC’s argument that debtor’s Counsel’s hourly rate should be reduced for “associate-level” tasks. The Court noted that some courts have set different hourly rates based on different types of litigation tasks. The Court stated that it is unaware of other firms reducing their hourly rates for certain tasks, and would not do so without further evidence. Here, the Court found that Counsel’s rate of \$275 is “reasonable and in line with the prevailing market rate in New Mexico, for lawyers of their skill and experience.”

SUMMARY NUMBER:  
TDW

8

KEY CODE SECTION(S): 327  
KEY TOPIC(S): Attorneys' fees; charging liens

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In Re: Blue Jet, Inc.*, 2017 WL 785606 (Bankr., D.N.M., 2017)

CASE NUMBER: 16-13037 t11

DATE DECIDED: February 28, 2017

NOTEWORTHY ISSUE: (1) Can Debtor's counsel obtain, pre-petition, collateral to secure payment of its chapter 11 fees and still qualify for retention under Code § 327? (2) May debtor's counsel impose an attorney's charging lien without creating a disqualifying interest under § 327(a)?

HOLDING: (1) Maybe. (2) No. A charging lien is improper for general bankruptcy representation; it does not pass the test for disinterestedness. The Court refused to approve Counsel's retention under § 327(a) unless the charging lien proposal is waived

FACTS: Debtor applied to employ general bankruptcy counsel. The UST objected. The sole dispute is whether counsel's attempt to obtain an attorney's charging lien creates a disqualifying interest under § 327(a).

Counsel's retainer agreement reserved a contractual right to enforce an attorney's charging lien against any client's judgment, award, or recovery. The UST's objection was that the charging lien made Counsel a secured creditor and disqualifies it from employment because it holds an interest adverse to the estate.

Counsel argued that it would seek to enforce a charging lien only if the case converts to Chapter 7. Counsel argued that it is unfair to pay chapter 7 administrative expenses ahead of its unpaid chapter 11 fees.

Counsel asserted an attorney charging lien in another case in this district, *In re DC Energy, LLC*, case no. 14-12923, employing identical language. DC Energy started as a chapter 11 case and was converted to chapter 7. Given Counsel's position in the DC Energy case, the Court found that Counsel's request was for a charging lien that would encumber Debtor's post-petition accounts receivable and cash.

Section 101(14) provides: "the term disinterested person means a person that— (A) is not a creditor, an equity security holder, or an insider; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

Code §327(a) provides that general counsel for the trustee [or debtor in possession] may not hold or represent an interest adverse to the estate, and must be a disinterested person.

An “interest adverse to the estate” is defined as: (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under the circumstances that render such a bias against the estate.

Collateral Generally. Based on the language in Code §328, most courts have held that debtor in possession counsel may obtain a pre-petition retainer and remain disinterested under § 327(a). Courts are more skeptical about other forms of collateral, but most have ruled that there is no *per se* bar. Instead, the Court reviews the proposed collateral on a case by case basis. The leading case is *In re Martin*, 817 F.2d 175 (1st Cir. 1987). In *Martin* the court of appeals held that a debtor’s pre-petition mortgage granted to counsel to secure payment of chapter 11 fees was not *per se* prohibited by § 327(a); it depends upon the facts and circumstances of each case. *Martin* outlined a ten-factor test, used to determine whether a proposed collateral arrangement is permissible. 817 F.2d at 182 (as enumerated in *In re Watson*, 94 B.R. 111 (Bankr. S.D. Ohio 1988)).

Attorney Charging Liens. The Court described the four elements of a charging lien in New Mexico has four requirements for the imposition of an attorney charging lien: (1) a valid contract between the attorney and the client; (2) a judgment, or “fund,” that resulted from the attorney’s services; (3) clear and unequivocal notice to the appropriate parties that the attorney intends to assert a lien; and (4) and timely notice, i.e., before the proceeds from the judgment have been distributed. *In re Esparsen*, 545 B.R. 330, 335 (Bankr. D.N.M. 2016). Notice of the attorney charging lien must be filed in the same action that gave rise to the judgment. The contract is not required to grant or even allude to the charging lien.

The Court found that the *Martin/Watson* factors weigh against approving the charging lien for work in the main case. The Court’s observations included (1) It is very uncommon in this jurisdiction for DIP counsel to seek a charging lien to secure payment for their services, (2) A charging lien on all accounts receivable and cash appears to be overreaching, and, (3) The reasonable public perception likely would be that it is unfair for Counsel to have a first lien on all of Debtor’s liquid assets.

**SUMMARY NUMBER:**  
GRV

**Ch. 13**

**KEY CODE SECTION(S):** §§330, 503(b), 507  
**KEY TOPIC(S):** Attorney's Fees

**COURT/JUDGE:** U.S. BAP 10<sup>th</sup> Circuit (Bankruptcy Judge Hall with Judges Romero and Hall)

**CASE NAME/NUMBER:**

In re John Thomas Bird, Case No. 12-17345 (Utah) consolidated for appeal with  
In re Brent David Christensen, Case No. 15-29773 (Utah)

577 B.R. 365 (10<sup>th</sup> Cir. BAP 2013)

**DATE DECIDED:** November 30, 2017

**NOTEWORTHY ISSUE(S):**

Whether the Chapter 7 Trustee and its counsel were entitled to an award of fees and costs set forth in their fee application.

**HOLDING(S):**

No. The requested fees and costs were for services neither necessary to administration of the cases nor reasonably likely to benefit debtors' estates.

**FACTS:**

Debtors filed Chapter 7 cases in which their homesteads were encumbered with mortgage liens (in first position), tax liens held by the IRS (in second position) and other liens which were well in excess of their scheduled value. Debtors claims exemptions in their homesteads under the Utah homestead law.

The Chapter 7 Trustee entered into a stipulation with the IRS wherein the IRS consented to: (1) sale of the homesteads; and (2) a "carve-out" of \$10,000 of the proceeds from the sale of each homestead subject to the IRS's liens for the benefit of the bankruptcy estate.

Trustee files a motion to sell the homesteads which would have exceeded the total encumbrances by minimal amounts. Proceeds from the sale would be subject to payment of Trustee's and counsel's fees and expenses and payment of a realtor commission.

Debtors file motions to convert case to chapter 13. The motions are granted. Chapter 7 Trustee files Fee Applications requesting professional compensation be allowed as an administrative expense in the Chapter 13 cases.

Bankruptcy court denies the Fee Applications on the basis the fees and costs sought were for services neither necessary to administration of the cases nor reasonably likely to benefit Debtors' estates. Bankruptcy court found that when the homesteads have no equity value in



excess of liens but were subject to valid homestead exemptions, Trustee had no obligation to seek carve-outs from secured creditors or sell encumbered property subject to such agreements.

In affirming the bankruptcy court, the court noted as the Chapter 7 Trustee's critical role in performing the bankruptcy system's balancing act: the bankruptcy's fresh start policy for honest but unfortunate debtors and payment of a dividend to unsecured creditors. In this case, the court found that abandonment of the homesteads would have better comported with a chapter 7 trustee's duties and responsibilities. Why in this case:

1. Liquidation will result in little or no payment to unsecured creditors.
2. Carve out agreements are only permitted if they result in meaningful distributions to creditors. The carve out in these cases would shift estate assets away from the IRS to professionals, causing harm to the debtors.
3. Homesteads should not be sold where the proceeds of liquidation will primarily benefit the trustee or professionals or unduly delay the resolution of the case.
4. Sale of a fully encumbered asset is generally prohibited.
5. Sale of the homesteads might have minimally benefitted unsecured creditors; however, the proceeds would primarily benefit the Trustee and its counsel to the detriment of debtors and the exemptions to which they were entitled.

SUMMARY NUMBER:  
PMF

9

KEY CODE SECTION(S): § 362  
KEY TOPIC(S): Automatic Stay

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Jacobvitz

CASE NAME and CITE: *In Re: JSS of Albuquerque, LLC*, 2017 WL 3575654

CASE NUMBER: 11-10092 JA

DATE DECIDED: August 10, 2017

NOTEWORTHY ISSUE: Whether actions taken by the state regulatory authorities were stayed by the automatic stay.

HOLDING: Regulatory actions by the government are not stayed. Collection actions by the government are stayed. The issues are labeled the “public policy” test and the “pecuniary interest” test. If the action is taken to further the public policy of the government, the action is not stayed pursuant to § 362(b)(4) regarding the government’s police or regulatory authority. That exception is to be given a narrow construction. If the action is taken to collect money for the state, the action is stayed.

The court reviewed each of the 13 separate prayers for relief (some by the time of the decision moot or waived) in the state’s complaint and parsed whether the relief sought was for “public policy” or “pecuniary interest.” For example, a determination that there was a violation of the relevant statutes, that the debtor’s scheme was fraudulent, and that the debtor’s real estate licensees were cancelled were found within the police and regulatory power. The relief of disgorgement of moneys collected was found to relate to the pecuniary interest. However, civil penalties were within the police powers, but attorneys’ fees assessment was not.

FACTS: Debtor faced a suit by the Attorney General arising out of its allegedly fraudulent real estate scheme for the purchase of real estate contracts. The AG filed suit for injunctive relief under a number of mortgage loan origination and licensing type statutes. The decision does not resolve the merits of any of the allegations but does a good analysis of which type of requested relief is stayed and which will be held to be outside the reach of the automatic stay.

SUMMARY NUMBER:  
MKD

10

KEY CODE SECTION(S): §362(a)(3)  
KEY TOPIC(S): Automatic Stay

COURT and JUDGE: Tenth Circuit; J. McKay author (Kelly & McHugh)  
CASE NAME and CITE: In re Cowen, WD Equip. v. Cowen; 849 F.3d 943  
CASE NUMBER and DOCKET NUMBER: 10<sup>th</sup> Cir No. 15-1413  
DATE DECIDED: February 27, 2017

NOTEWORTHY ISSUE:

1. Was the refusal to turnover the vehicles a stay violation?

HOLDING:

1. No; the stay prevents action to obtain possession, not passively holding an asset.

Somehow preventing the Chapter 13 Debtor from earning a living by detaining two commercial trucks he needed to operate was not an act: "...to exercise control over property of the estate."

Stay violations are a core matter; the bankruptcy court has jurisdiction over them. The dismissal of the underlying Chapter 13 did not terminate that jurisdiction.

The Tenth Circuit noted Defendants may still be liable for damages under the proper application of §362(a)(3) and 105 for conduct abusive to the judicial process (ie the Defendants perjured testimony and forged documents).

FACTS:

Cowen borrowed from WD Equipment to finance repairs to his 2000 Peterbilt 379; he used the truck for collateral. The truck broke down again a few weeks later and was towed to a repair shop, with an estimated \$9,000 repair cost. Cowen tried to refinance, WD provided conflicting payoff information. Cowen defaulted on another truck loan to Mr. Dring (father in law of WD's principal); Dring repossessed under harsh circumstances; Cowen filed Chapter 13 and requested WD and Dring return the trucks; they refused. Cowen sued and got turnover orders from the Bankruptcy Court; Dring & WD refused to return the trucks. Cowen sued for stay violations; the underlying 13 was dismissed for lack of regular income; the stay violation adversary continued. The Bankruptcy Court ruled Dring & WD had forged documents and given perjured testimony, and assessed actual and punitive damages. Defendants appealed; the District Court affirmed but changed the damage calculation. Defendants appealed again, objecting to bankruptcy court jurisdiction.

SUMMARY NUMBER: 11  
TDW

KEY CODE SECTION(S): 362; 554

KEY TOPIC(S): Automatic Stay; Annulment of Stay; Property of the Estate

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In re Franco (Franco v. Franco, et al.)*, 574 B.R. 730  
(Bankr.D.N.M., 2017)

CASE NUMBER: Case No. 03–13492 tr7, Case No. 13–12941 tr7, Adv. No. 16–1074 t

DATE DECIDED: July 28, 2017

**NOTEWORTHY ISSUES:** Post-petition state court action to quiet title in mineral rights in which the Chapter 7 estate asserted a competing interest violated automatic stay. Judgment entered by state court in post-petition action was void *ab initio* and not binding on bankruptcy court. Bankruptcy court would not annul automatic stay in order to validate judgment entered in postpetition state court action.

**FACTS:** Debtor and deceased husband transferred property to their son. The deed did not reserve minerals (the “Disputed Mineral Rights”). Later, debtor executed another deed (the Correction Deed) to son that reserved mineral rights in the same property. The Correction Deed was granted apparently in connection with a loan, secured by a mortgage, and a commitment for mortgagee’s title insurance, that required the correction deed.

Bankruptcy Cases and State Court Action. In 2003 debtor filed chapter 7, and filed a second chapter 7 case in 2013. She received a discharge in each case. Each case was closed. Debtor did not schedule any mineral rights in either case. Both before and after filing the bankruptcy cases, Debtor filed documents asserting title to the Disputed Mineral Rights. She also entered into oil leases purporting to lease the Disputed Mineral Rights to third parties.

In 2014, son and Carla sued debtor and others in state court, in part, to quiet title to the Disputed Mineral Rights. No bankruptcy trustee was named in the action. In March 2016, Carla filed a motion for summary judgment on the quiet title count.

In April 2016, Carla’s attorney sent an email to Debtor’s attorney informing him of the 2013 bankruptcy case, and pointing out that the Disputed Mineral Rights had not been scheduled and threatening that Debtor’s chapter 7 discharge could be revoked if she pursued her claim to the Disputed Mineral Rights. In May 2016, Debtor responded to the summary judgment motion, stating in essence that she would not assert an interest in the Disputed Mineral Rights.

Also in May 2016, Carla filed a certification in state court, in which she stated that Debtor had filed for bankruptcy and failed to disclose the Disputed Mineral Rights, and therefore lacked standing to respond to the motion for summary judgment.

In June 2016, Debtor moved to reopen the 2013 bankruptcy case in order to amend schedule B and list certain mineral rights. The Court granted the motion and also granted the United States Trustee's motion to reopen the 2003 bankruptcy case. The same chapter 7 trustee was appointed in both cases, which were consolidated. On July 15, 2016, Debtor filed an amended Schedule B.

In November 2016, the state court entered a judgment that Carla and the son own the Disputed Mineral Rights. Carla's counsel submitted the proposed form of judgment after learning of the bankruptcy cases. Later in November 2016, the trustee filed a motion to intervene in the state court action. In December 2016, Carla removed the state court action to bankruptcy court.

Automatic Stay. The automatic stay applied to any interest Debtor had in mineral rights after the initial bankruptcy filing in 2003, and continues to apply. The automatic stay applies to all estate property, including property that is not disclosed on the debtor's bankruptcy schedules.

Property of the estate that is not abandoned under § 554(c) and not administered in the case remains estate property, even after the case has been closed. § 554(d) & (d). That includes unscheduled or "omitted" assets.

The automatic stay does not apply to non-estate property. It applies to disputed property where the estate's ownership of property is in bona fide dispute, pending resolution of the dispute. The Court is not required to decide the dispute before ruling that the stay applies.

The Court held that the trustee "might prevail" on one of the two equitable principles asserted to support the estate's ownership of the Disputed Mineral Rights and concluded that there is a bona fide dispute about who has superior title. Therefore, the automatic stay applies.

State Court Action void *ab initio*. The state court action was an attempt to obtain possession, control, or ownership of the Disputed Mineral Rights, and violated the automatic stay. § 362(a)(3). The claim therefore is void *ab initio* and without effect. The Court rejected Carla's arguments that Rooker-Feldman, claim preclusion, or issue preclusion applied because the judgment was obtained in violation of the automatic stay and is void and has no effect.

Annulment of the stay. The Court rejected also Carla's argument that stay should be annulled. Section 362(d) provides authority to "annul" the automatic stay for cause; thereby validating actions taken in violation of the stay that would otherwise be void.

Stay annulment is extraordinary relief, to be awarded only in rare instances. In the Tenth Circuit, annulment to validate an action in violation of the automatic stay should be limited to instances where the movant was honestly ignorant of the stay. However, a debtor should not be allowed to take advantage of the stay where she remains stealthily silent in face of the creditor's action, raising the stay only after losing in state court.

Factors relevant to whether the Court should annul the stay include:

- 1) whether the creditor had actual or constructive knowledge of the debtor's bankruptcy filing when it acted in violation of the automatic stay;
- 2) whether the debtor filed the bankruptcy case in bad faith or otherwise acted in bad faith;
- 3) whether grounds for relief from the stay existed and a motion, if filed, would likely have been granted prior to the automatic stay violation;
- 4) how quickly the creditor sought annulment of the automatic stay upon learning of the debtor's bankruptcy filing;
- 5) whether the creditor continued to violate the stay after learning of the debtor's bankruptcy filing;
- 6) whether the debtor remained "stealthily silent" in the face of the creditor's unknowing violation of the automatic stay; and
- 7) whether the creditor would be prejudiced if the stay were not annulled.

Court determined that annulment of the automatic stay is not appropriate because it could remove potentially valuable assets from the estate. The Court cited with approval cases that hold that the trustee was the real party in interest and only one who could prosecute claims of the estate and that the judgment not enforceable against trustee or assets of estate where stay was in place and trustee was not named defendant.

SUMMARY NUMBER:  
PMF

12

KEY CODE SECTION(S): § 1983  
KEY TOPIC(S): Automatic Stay

COURT and JUDGE: United States District Court, D. New Mexico, Judge M Christina  
Armijo

CASE NAME and CITE: *Spencer v. State of New Mexico*, 2017 WL 4277713

CASE NUMBER: 16-cv-841 MCA/KK

DATE DECIDED: September 25, 2017

NOTEWORTHY ISSUE: Whether state officials can be held personally liable under § 1983  
for violating the automatic stay.

HOLDING: No

FACTS: Pro se debtor brought suit against state officials for violating the automatic stay.  
Judge Armijo ruled that state officials acting in their official capacity are immune from suit  
under § 1983.

SUMMARY NUMBER:  
PMF

13

KEY CODE SECTION(S): § 1983  
KEY TOPIC(S): Automatic Stay

COURT and JUDGE: United States District Court, D. New Mexico, Judge M Christina  
Armijo

CASE NAME and CITE: *Spencer v. State of New Mexico*, 2017 WL 4179991

CASE NUMBER: 16-cv-841 MCA/KK

DATE DECIDED: September 19, 2017

NOTEWORTHY ISSUE: Liability of private attorney for § 1983 action.

HOLDING: A private lawyer representing a private client is not a state actor, so no § 1983 action lies.

FACTS: Pro se plaintiff brought action against private lawyer for § 1983. The court ruled that even though the lawyer was “an officer of the Court” he was not a state actor acting under color of state law as required for § 1983 liability.

The plaintiff sought leave to amend the complaint, but the court (perhaps under the theory she had enjoyed the case as much as she could stand) denied the request saying he had enough time.



SUMMARY NUMBER:  
PMF

14

KEY CODE SECTION(S):  
KEY TOPIC(S): Automatic Stay

COURT and JUDGE: United States District Court, D. New Mexico, Judge M Christina  
Armijo

CASE NAME and CITE: *Spencer v. State of New Mexico*, 2017 WL 3835939

CASE NUMBER: 16-cv-841 MCA/KK

DATE DECIDED: August 31, 2017

NOTEWORTHY ISSUE: Can a state court judge be held in contempt for incarcerating a debtor for failure to pay a discharged debt.

HOLDING: No. No jurisdiction. Absolute immunity.

FACTS: Pro se debtor sued a state court judge for violating the automatic stay by incarcerating the debtor for failure to pay a debt discharged in his bankruptcy. Judge Armijo ruled that the court did not have jurisdiction because with certain exceptions, a citizen cannot file suit against a state in federal court. In addition, the judge had absolute immunity.

**SUMMARY NUMBER:**  
GRV

**Ch.13**

**KEY CODE SECTION(S):** 11 USC §362  
**KEY TOPIC(S):** Automatic Stay

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Thuma)

**CASE NAME/NUMBER:** In re Hamilton, 2017 WL 1533382 (Bankr. N.M. 2017)

**DATE DECIDED:** April 27, 2017

**NOTEWORTHY ISSUE(S):**

Whether debtor's confirmed chapter 13 Plan modified the total amount owed to the holder of debtor's mortgage.

**HOLDING(S):**

No.

**FACTS:**

The Schedules filed by the debtor listed the amount owed on the bank's mortgage loan as \$35,340. Debtor filed a Chapter 13 Plan using a form that was in substantial compliance with that used in this District. In part, the Plan provided as follows: (1) under the section dealing with secured claims, debtor stated that "Wells Fargo entire loan balance as of 3/13/14 is \$35,340.80"; and (2) debtor to make regular payments directly to the bank and to pay the prepetition arrearage through the Plan. Bank filed a proof of claim in the total amount of \$57,739.14 which included pre-petition arrearages. Debtor did not object to the Bank's proof of claim.

Debtor was making plan payments as set forth in the confirmed plan. Debtor made post-petition direct mortgage payments to the Bank in the amount of \$8,090.95 but then stopped making the payments.

Bank files a motion for relief from stay based on debtor's failure to make post-petition mortgage payments. In response to the motion, debtor asserts that confirmation of the Plan reduced her total debt to the bank to \$35,340.80. The bank maintains that the Plan requires debtor to pay the full amount of the bank's allowed proof of claim.

The court found that the Plan's treatment of the bank's mortgage claim was ambiguous. As a result of the ambiguity, the court examined the parties evidence and traditional canons of construction to interpret the Plan. The court found as follows:

1. The Debtor did not intend to change the standard table (regarding secured claims) set forth in the Plan in any substantive way.
2. Ambiguous plans should be interpreted to comply with the Bankruptcy Code. Section 1322(b)(2) provides that a chapter 13 plan may not modify the rights of home

mortgage lenders. The bank's construction of the asserted loan balance harmonizes the Plan with applicable law and local practice.

3. When possible, courts should construe contracts in a way that avoids creating a conflict between provisions. Debtors proposed interpretation of the bank's loan balance conflicts with a number of other Plan provisions. The bank's interpretation of the loan balance gives effect to the various sections of the plan and harmonizes the Plan.
4. The Plan should be interpreted in light of the circumstances and principal purpose. Chapter 13 practitioners know that a chapter 13 plan cannot be used to modify a home mortgage. In the Plan, the most debtor could achieve is curing a pre-petition default on the mortgage. As a result, it would not be reasonable to interpret the Plan as attempting to achieve a result that violated the Bankruptcy Code.
5. The Plan should be construed against the drafter. Since debtor drafted the Plan, any ambiguity should be construed against the debtor.

SUMMARY NUMBER:  
JAA

15

KEY CODE SECTION(S): None  
KEY TOPIC(S): Barton Doctrine

COURT: USCA 10<sup>th</sup> Cir.  
JUDGE: Carolyn B. McHugh  
CASE NAME: Lankford v. Wagner  
CITE: 853 F.3d 1119  
CASE NUMBER: 16-2221  
DATE DECIDED: April 7, 2017

NOTEWORTHY ISSUE: The *Barton Doctrine* prevents actions against bankruptcy trustees without prior approval of the appointing bankruptcy court. Does *Barton* also shield attorneys employed by the Trustee?

HOLDING: Yes. The 10<sup>th</sup> Circuit has joined other Circuits and extended *Barton Doctrine* to the Trustee's attorneys.

FACTS and DISCUSSION: In the VCR bankruptcy case, the Trustee filed numerous avoidance actions. One set of defendants was unhappy with being sued. They twice sought bankruptcy court permission to file counterclaims against the Trustee and her counsel for extortion, incompetence and fraud. Permission was denied. Later, a summary judgment was entered against the defendants for return of their net winnings. The Lankfords did not appeal the bankruptcy court's refusal to permit them to sue the Trustee. They instead simply filed suit against the Trustee and her attorneys in U.S. District Court. The U.S. District court dismissed the case under the *Barton Doctrine*. The Lankfords appealed and the 10<sup>th</sup> Circuit upheld the dismissal and extended the *Barton Doctrine* to attorneys employed by the Trustee, stating:

"And although we have not previously addressed this issue, we now join our sibling circuits in holding that the protections of the *Barton* doctrine also extend to the trustee's counsel, where counsel acts under the direction of, or as the functional equivalent of, the trustee."

**SUMMARY NUMBER:** Ch.13 **KEY CODE SECTION(S):** 11 USC §1325  
**GRV** **KEY TOPIC(S):** Chapter 13 Confirmation

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Jacobvitz)

**CASE NAME/NUMBER:** In re Novak, 2017 WL 1104052 (Bankr. N.M. 2017)

**DATE DECIDED:** March 23, 2017

**NOTEWORTHY ISSUE(S):**

Whether unemployment compensation benefits received by the debtor must be included in the calculation of current monthly income for determining disposable income which must be paid to holders of administrative claims, priority unsecured claims and unsecured claims in debtors' chapter 13 Plan

**HOLDING(S):**

Yes.

**FACTS:**

Debtor was unemployed and receiving unemployment compensation benefits. The benefits were being paid pursuant to New Mexico's Unemployment Compensation Law. Debtor contended that the unemployment benefits were benefits received under the Social Security Act. As a result, debtor argued, the benefits were excluded from determining current monthly income. (See 11 U.S.C. §101(10A)(B)).

The court noted that a mixture federal and state law exist in the unemployment compensation benefits systems. The court further noted that reasonable minds differ on whether unemployment compensation benefits are received under the Social Security Act. However, the court concluded that New Mexico's unemployment compensation benefits are not benefits received under the Social Security Act and are not excluded from determining current monthly income

**SUMMARY NUMBER:**  
GRV

**Ch. 13**

**KEY CODE SECTION(S):** §§330, 503(b), 507  
**KEY TOPIC(S):** Claims Objections

**COURT/JUDGE:** U.S. Supreme Court (Opinion by Justice Breyer with Justices Roberts, Kennedy, Thomas and Alito joined; Dissenting opinion by Justice Sotomayor with Justices Ginsburg and Kagan joined)

**CASE NAME/NUMBER:**  
Midland Funding, LLC v. Aleida Johnson (In re Aleida Johnson), 137 S.Ct.1407 (2017)

**DATE DECIDED:** May 15, 2017.

**NOTEWORTHY ISSUE(S):**

Whether a creditor who files a proof of claim in a bankruptcy case with the notation that the statute of limitations governing collection of the claim had run, violates the provisions of the Fair Debt Collection Practices Act (the "FDCPA").

**HOLDING(S):**

No, the filing of a proof of claim that on its face indicates that the limitations period has run is not false, deceptive or misleading so as to constitute a violation of the FDCPA.

**FACTS:**

Debtor files for relief under Chapter 13 of the U.S. Bankruptcy Code. Creditor files a proof of claim in the bankruptcy case. On the face of the proof of claim creditor adds the statement that the last time any charge appeared on debtor's account was more than 10 years before debtor filed for bankruptcy. The relevant statute of limitations was 6 years.

Debtor objected to the proof of claim. Creditor did not respond to the objection and an Order was entered disallowing the claim.

Later debtor filed suit against creditor alleging a violation of the FDCPA based on the filing of the proof of claim.

In reaching its decision, the court found that assertion of a claim known to be time barred is not "unfair". Unlike a civil suit (where many courts have found such a claim to be unfair so as to constitute a violation of FDCPA), in the bankruptcy context a knowledgeable trustee is available to consider such claims. The procedural bankruptcy rules process more directly guide the evaluation of claims. These features of a bankruptcy case are found by the court to make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection and disallowance.

SUMMARY NUMBER:  
MKD

16

KEY CODE SECTION(S): None  
KEY TOPIC(S): Confirmation of Ch. 11 plan

COURT and JUDGE: Tenth Circuit; Kelly, Circuit Judge  
CASE NAME and CITE: Sandridge Energy, Inc. v. Ward et al; 875 F.3d 1297  
CASE NUMBER and DOCKET NUMBER: 10<sup>th</sup> Cir. Case No. 16-6014  
DATE DECIDED: November 17, 2017

NOTEWORTHY ISSUE:

1. Are Hefner's claims mooted by the confirmed plan?

HOLDING:

1. The settlement claims are moot; these claims are dismissed. Hefner's claim for attorney fees is not moot; upon review however we affirm the district court.

Mr. Hefner's request for settlement discovery and objection to the settlement are moot. The plan releases all shareholder derivative claims, and also assigns all shareholder derivative claims to reorganized SandRidge. Were we to reverse and set aside the settlement Hefner would lack standing to bring a new shareholder derivative claim. His claim for attorney fees, however, is a backward looking claim for monetary compensation that does not depend on Hefner's future ability to bring a shareholder derivative claim.

FACTS:

Two separate shareholder derivative lawsuits (one in Oklahoma state court filed by Mr. Hefner, one in federal district court filed by other parties) were filed on behalf of SandRidge Energy, Inc. Hefner's state court case was stayed, and in October of 2015 the federal case was settled. Hefner objected to the settlement, requested attorney fees and additional discovery related to the settlement. The US District Court denied his requests, and Hefner appealed. SandRidge then filed a Chapter 11 petition and confirmed a plan; the plan released all existing shareholder derivative claims and limited standing for future shareholder derivative suits to the reorganized Debtor. SandRidge moved to dismiss the Hefner appeal because the Plan rendered the appeal moot.

SUMMARY NUMBER:  
MKD

17

KEY CODE SECTION(S): 11 U.S.C. §327  
KEY TOPIC(S): Conflict of Interest

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: WM Distribution, Inc.; 571 B.R. 866 (2017)  
CASE NUMBER and DOCKET NUMBER: Case No. 11-17-10535 JA; Docket No. 75  
DATE DECIDED: June 21, 2017

NOTEWORTHY ISSUE:

1. May counsel represent two related companies in separate Chapter 11 cases?

HOLDING:

1. Not in this case.

To represent a Chapter 11 Debtor, counsel must (1) not hold or represent an interest adverse to the estate and (2) must be disinterested. §327(a). Counsel is not disqualified solely by his representation of a creditor unless he has an actual conflict. §327(c). Simultaneous representation of two related debtors is a potential conflict. Intercompany transfers may exist, so that the companies have claims against one another. In this case STM would control the unsecured creditor class in the WM case. WM owns STM's most valuable cigarette brand, yet there is no licensing agreement. The adverse interests are so extensive that conflicts counsel is insufficient; each debtor should have independent counsel.

FACTS:

WM Distribution, Inc. is 90% owned by Della Packingham; Sandia Tobacco Manufacturers, Inc. is 90% owned by Donald Packingham, Della's estranged husband. Both companies are managed by the couple's daughter Donna Woody, who owns the remaining 10% of each company. Both companies are involved in the manufacture and distribution of cigarettes. WM purchases cigarettes from STM; STM is WM's largest unsecured creditor. The parties share a facility, a commercial insurance policy and share employees. STM filed its Chapter 11 case in September of 2016, and had its counsel approved soon thereafter. WM filed its Chapter 11 case in March of 2017, and applied for permission to hire the same counsel. WM must be able to openly consider reorganization options that could negatively affect STM. Counsel suggests curing the potential conflict by hiring conflicts counsel as needed in the two cases.



SUMMARY NUMBER:  
PMF

18

KEY CODE SECTION(S):  
KEY TOPIC(S): Contingent Debt

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Lamey (Los Alamos National Bank v. Lamey)*, 2017 WL 3835797

CASE NUMBER: Adv. No. 15-1029

DATE DECIDED: August 31, 2017

NOTEWORTHY ISSUE: Was the debtor's liability under a guaranty contingent or unconditional?

HOLDING: The liability for the debt on the guaranty was unconditional and not contingent. The court analyzed the language of the guaranty executed by the debtor, including waivers in the guaranty agreement which it found were generally enforceable under New Mexico law. In addition, the trustee had settled counterclaims with the lender, so those claims were no longer available to offset the debt, even if they had not been waived.

FACTS: In the adversary between the lender and debtor, lender had put in uncontested evidence regarding the amount of the debt of the debtor's entities to the lender. The debtor had guaranteed the debt, and the lender and trustee both asked the court to rule on the liability of the debtor. The language of the guaranty agreement bound the debtor and the court enforced the language.

**SUMMARY NUMBER:**  
GRV

**Ch. 13**

**KEY CODE SECTION(S):** 11 USC §706(a)

**KEY TOPIC(S):** Conversion

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Thuma)

**CASE NAME/NUMBER:** In re Lamey, 2017 WL 3575845 (Bankr. N.M. 2017)

**DATE DECIDED:** August 16, 2017

**NOTEWORTHY ISSUE(S):**

1. Whether debtor could convert his case from Chapter 7 to Chapter 13
2. Whether a Chapter 7 Trustee's settlement agreement with a creditor should be approved
3. Whether debtor should be compelled to turn over his tax refunds to the Chapter 7 Trustee

**HOLDING(S):**

1. No
2. Yes
3. Yes

**FACTS:**

Debtor filed a Chapter 7 case. Initially, the Chapter 7 Trustee entered a report of no distribution. Later, a new Chapter 7 Trustee was appointed, and a Trustee's Report of assets was filed. Several adversary cases were filed against the debtor concerning discharge and dischargability. Prior to a final hearing on the adversary to determine whether debtor was entitled to a discharge, debtor filed a motion to convert the case to Chapter 13. After a trial in the adversary proceeding, debtor was denied a discharge. Debtor had claims against a Bank which were settled by the new Trustee which formed the basis of Trustee's motion to approve settlement with Bank.

For tax year 2013 debtor was entitled to a refund of \$8,538 which was undisclosed in his Schedules. Debtor received the refund but did not tell the Trustee. Two years later, debtor amended his Schedule B to disclose the refund. Later, as a result of determining that debtor was entitled to net operating losses, amended 2010, 2011 and 2013 returns were filed. As a result, \$130,090 in tax refunds were realized. The refunds were paid to debtor. Debtor did not notify Trustee of the refunds nor turn over the money to the Trustee. The funds were spent by the debtor.

The court denied the Motion to Convert the Chapter 13. Debtor was found to have acted in bad faith and as a result forfeited his right to convert to Chapter 13. *See Marrama v. Citizens Bank*, 549 U.S. 365 (2007). Debtor was over the debt limit to qualify for Chapter 13 relief.

*See* 11 U.S.C. §109(e). Debtor did not demonstrate that he had regular income which is required for relief under Chapter 13. *See* 11 U.S.C. §109(e).

The court approved the Chapter 13 Trustee's proposed settlement with the Bank. The court analyzed the proposed settlement under the four factors established by the court in *C.K. Williams, Inc. v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020 (10<sup>th</sup> Cir. BAP 1997). Those factors are:

- A. The probable success of the underlying litigation on the merits;
- B. The possible difficulty collecting a judgment;
- C. The complexity and expense of the litigation; and
- D. The interest of creditors in deference to their reasonable views.

The court granted the Trustee's Motion for Turnover of Tax Refunds. Debtor had a duty to turnover property of the estate to Trustee. The refunds were property of the estate.

SUMMARY NUMBER:  
MKD

19

KEY CODE SECTION(S): None  
KEY TOPIC(S): Corporations

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: Sandia Tobacco Manufacturers, Inc.; 571 B.R. 449  
CASE NUMBER and DOCKET NUMBER: Case. No. 11-16-12335 JA; Docket No. 145.  
DATE DECIDED: May 4, 2017

NOTEWORTHY ISSUE:

1. Were Mr. Packingham's actions to take over the corporation effective?

HOLDING:

1. Removal of Ms. Woody at the special meeting was effective. None of the actions taken at the annual meeting were effective because they were not approved by the entire board of directors.

The special meeting was validly called; Ms. Woody's removal was agreed by the entire board and was effective. Then the annual meeting began. The only action Mr. Packingham may unilaterally undertake after Ms. Woody's removal is to replace Ms. Woody on the board with another director; otherwise there is no agreement of the board. His other actions at the annual meeting in assuming control of the corporation and firing bankruptcy counsel at the April 20, 2017 meeting were ineffective.

FACTS:

Debtor is a corporation founded in 2003 with the same two directors, Mr. Packingham & Ms. Woody, for its entire existence. The company filed a Chapter 11 bankruptcy in September of 2016. Although Packingham holds 90% of the shares and Woody only 10%, each is a voting director; any act by the Board requires the consent of both. No annual board meetings were held from inception through 2017. On April 10, 2017 Packingham noticed an annual and a special board meeting intended to elect new officers and remove officers and directors. At the special meeting Woody was removed from the board and Packingham became the sole director. Then the annual meeting commenced with a board position unfilled. Packingham then fired STM's bankruptcy counsel and awarded himself sweeping powers over the corporation at the annual meeting despite an unfilled board vacancy. Woody challenged these actions by asking the Bankruptcy Court to intervene.

Judge Jacobvitz undertakes a painstakingly detailed review of the Debtor's corporate bylaws in making this decision. This is a good opinion to read if you have corporate governance issues to consider.

SUMMARY NUMBER:  
PMF

**20**

KEY CODE SECTION(S):  
KEY TOPIC(S): Costs

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Harpole Construction, Inc. (Harpole Construction, Inc. v. Medallion Midstream, LLC)*, 2017 WL 401174

CASE NUMBER: Adv. No. 16-1058 t

DATE DECIDED: January 30, 2017

NOTEWORTHY ISSUE: If neither party prevailed, neither will get costs even if there is a small amount owed by one to the other.

HOLDING: In this adversary brought by the debtor contractor against its customer with a counterclaim by the customer, since neither party prevailed, neither will get costs.

FACTS: The debtor contractor and its customer both asserted million dollar claims against the other. The outcome was a verdict of less than \$29,000 owed to the debtor. The court found that given the claims of each side, neither prevailed so neither would get costs.

SUMMARY NUMBER:  
TDW

**21**

KEY CODE SECTION(S): 542(a) & (e); 521(a)(3) & (4)  
KEY TOPIC(S): Debtor's duties; turnover actions

COURT and JUDGE: 10<sup>th</sup> Cir. BAP

CASE NAME and CITE: *In re Auld (Rupp v. Auld)* 561 B.R. 512 (10<sup>th</sup> Cir. BAP 2017)  
(Judge Nugent, with Judges Somers and Hall)

CASE NUMBER: Bankr. No. 15–25411, BAP No. UT–15–061

DATE DECIDED: January 3, 2017

NOTEWORTHY ISSUES: Debtor's duties to cooperate with trustee require turnover of "information" and "explanations" and of property not presently in debtor's possession. 2. Trustee must seek a stay to preserve appeal of order denying motion to extend deadline for discharge objection. Court offered guidance for effective turnover motions.

FACTS: Debtor filed Chapter 7 case. At the § 341 meeting, the Trustee requested in writing certain documents and information, including tax returns, financial statements, divorce documents, loan documents, etc. The following day the trustee requested by email additional information and explanations. Debtor was not forthcoming. Trustee filed motion for turnover and to extend time to object to discharge. Debtor did not object but, without hearing, the court denied the motion. The BAP reversed the turnover motion for a number of reasons, but found moot the request to extend time to object to discharge because the trustee did not seek a stay on appeal.

- Debtors must cooperate with the trustee's duty to collect property of the estate.
- Anyone who has debtor's property must deliver it to the trustee or account for it.
- Anyone, including the debtor, who has recorded information about estate property or debtor's financial affairs can be ordered to turn it over.
- Debtor who has at any time during the case been in possession of property of the estate or recorded information about it has an affirmative duty to turn it over; prior demand is not required.
- Present possession is not required; possession "during the case" is all that is required.
- Trustee did not have to pursue R. 2004 exam before filing turnover action for property he had previously requested informally.
- Debtor must turnover "other information" required for effective administration of the estate, which includes explanations about the debtor's case and estate. BAP cited cooperation requirements under §521(a)(3) and R.4002(a) and Utah's local rule 4002- 1.
- Most districts have a similar rule. New Mexico's local rule 4002- 1 states, in part: "Within 14 days after service of a written request for information by a trustee pursuant to Code § 521(a)(3) or (a)(4), a debtor shall provide the requested information or file a written objection stating the grounds therefor, attaching a copy of the request."

- The BAP sympathized with the bankruptcy court because the turnover motion was not clear or complete and it offered guidance for turnover motions.
- A motion for turnover should refer to the applicable current statutes and rules.
- It should specify what property or information the trustee seeks.
- It should represent that the debtor or other turnover target has possessed the requested property or recorded information during the case.
- It should allege that what is sought is either property of the estate or recorded information related to it or debtor's financial affairs.
- A trustee should plead why trustee believes the debtor or other target has the property or information, what other means of recovering it have been pursued, and how (or if) the debtor or other turnover target has responded.
- If a local rule applies, the movant should say so.

**OBJECTION TO DISCHARGE.** The BAP found that the motion to extend time to file discharge objection was moot. The time to file the complaint had long expired, including the extra 90 days the trustee sought, and trustee did not seek or get a stay of the bankruptcy court's order denying trustee's motion to extend time.

-The BAP noted that the trustee did not file the motion timely. Rule 4004(a) provides for a sixty-day period running from the date of the first setting of the § 341 meeting to file a complaint to object to a debtor's discharge under § 727(a). Trustee filed the motion on day 62, on the date stated in the notice of bankruptcy as the deadline for filing objections to discharge. The BAP noted that courts routinely allow an out-of-time filing when the court notice gives an incorrect date. That was not the issue here.

SUMMARY NUMBER:  
MKD

22

KEY CODE SECTION(S): §727(a)(4)  
KEY TOPIC(S): Discharge

COURT and JUDGE: NM Bankruptcy Court; Robert H. Jacobvitz  
CASE NAME and CITE: Cronk, Ashcraft & UST v. Bushey; 568 B.R. 821  
CASE NUMBER and DOCKET NUMBER: Adv. Nos. 15-1066 & 1068; Dockets 102, 100.  
DATE DECIDED: March 22, 2017

NOTEWORTHY ISSUE:

1. Should Mr. Bushey's Discharge be denied?

HOLDING:

1. False oaths at Bushey's deposition will cost him his discharge.

Denial of discharge is a particularly harsh penalty; it prevents a debtor from discharging any prepetition debts. A party objecting to discharge bears the burden of proving by a preponderance of the evidence that the discharge should be denied. A false oath must regard a material matter, and must be made willfully and with intent to defraud. Bushey structured two sham transactions to conceal his ownership of his business, and lied about the transactions repeatedly. These statements were false, Bushey knew they were false, and Bushey intended them to defraud.

FACTS:

Mr. Bushey owned and operated tanning salons in Albuquerque through his company "Sun Center". He sold a franchise for one store in 2007 to the Ashcrafts, who financed it with a \$495,000 loan from US Bank. The store underperformed; Bushey took it over and assumed Ashcraft's loan. Bushey friend Vance Dugger set up a company named "Alameda Assets", which paid \$30,000 (the release price for the company assets requested by US Bank) to purchase Sun Center, using funds provided by Bushey. Alameda Assets employed Bushey as manager. Bushey continued to operate the business and treat it as if he owned it. Another Bushey friend, Charles O'Donnell, purchased Dugger's membership interest in Alameda Assets from Dugger using funds (\$1,746) provided by Bushey. Bushey's girlfriend began managing the store for a time, although after the bankruptcy was filed he resumed management.

At the 341 meeting Bushey testified US Bank had repossessed the business assets. At a 2004 examination Bushey testified he hadn't given Dugger the \$30,000 release price and had nothing to do with the transaction. At a second deposition Bushey testified he hadn't sold the business. On his schedules Bushey omitted the SBA loan and the Ashcrafts as creditors. He did not list all of his entities or his filed claim in the Vaughan Company Realtors bankruptcy. Realtors bankruptcy on his Schedule B.



SUMMARY NUMBER:  
TDW

**23**

KEY CODE SECTION(S): 727(a)(3) and (5), 704(a)(4)

KEY TOPIC(S): Denial of Discharge

COURT and JUDGE: Tenth Cir. BAP (CORNISH, MICHAEL, and HALL)

CASE NAME and CITE: *In re Sears (Martinez v. Sears)*, 565 B.R. 184 (10<sup>th</sup> BAP 2017)

CASE NUMBER: BAP No. CO–16–025, Bankr. No. 15–13389 (D.Co), Adv. No. 15–1257

DATE DECIDED: March 24, 2017

NOTEWORTHY ISSUE: Will court deny discharge where debtor can't explain what happened to or provide records for substantial personal draws received from debtor's business?

HOLDING: Yes. As the BAP said, “financial transparency is an integral component of our bankruptcy system. A debtor seeking a discharge in a Chapter 7 bankruptcy case has a duty to fully disclose all of her assets and liabilities, to provide sufficient records to explain her business affairs, and to explain where her money went prior to the filing of the bankruptcy case. If a debtor cannot tell her trustee or creditors what happened to her money, or provide records to show where the money went, and a party in interest objects, she does not get a discharge.”

FACTS: The Debtor leased land to others for hunting and grazing cattle beginning in 1983, ultimately doing this business through five different companies, each with its own checking account. Debtor first opened a personal bank account in 2014 but his income and expenses could not be traced through the account in part because the companies paid the debtor's personal expenses. Debtor suffered unexpected losses and increased operating costs in 2011–2013 and filed a petition under chapter 7 in 2015, listing unsecured debtors totaling \$6,375,996.80. The debtor kept boxes of check copies with written notes and had an accountant who reconstructed the paper records into QuickBooks files. Between 2009 and 2015, the debtor, along with his wife and son, took out of the companies over \$2.2 million in “owner draws” which were, apparently, in addition to the amounts the company paid for debtor's personal expenses. Debtor's practice was to use cashier's checks for draws or intercompany transfers. The Trustee could not determine the ultimate disposition of the owner draws. The debtor offered a “vague explanation that the funds were used for personal or business expenses, for which he offered no documentary support.”

The Trustee filed a complaint for denial of discharge pursuant to Code §§ 727(a)(3) and (a)(5). The court concluded the Trustee met her burden and that the Debtor “failed to provide the court with information to justify the lack of adequate business records under the circumstances of this case” and “failed to offer an adequate explanation of the disposition of

very substantial funds.” Debtor appealed.

The court may deny discharge under § 727(a)(3) if the objecting party shows that the debtor “failed to maintain and preserve adequate records and that the failure made it *impossible* to ascertain his [or her] financial condition and *material* business transactions” and the debtor fails to justify his or her failure to maintain the records. A court may deny a debtor’s discharge under § 727(a)(5) if debtor fails to explain satisfactorily “any loss of assets or deficiency of assets to meet the debtor’s liabilities.” The objecting party has the burden of proving facts establishing that a loss of assets occurred. The burden then shifts to the debtor to explain the loss of assets in a satisfactory manner.

The court rejected debtor’s argument that trustee could not bring a complaint under Code § 727(3) unless she met her duty to “investigate the financial affairs of the debtor” under § 704(a)(4), which required the trustee, debtor argued, to undertake a detailed review of all of the Debtor’s records, depose the Debtor, the Debtor’s bookkeeper, and the Debtor’s accountant, and hire an expert. The court held that the trustee does not have to take these actions to meet the requirements of § 704(a)(4) but does not offer guidance as to what the trustee must do satisfy the duty to investigate.

The BAP upheld the court’s determinations that the duty to maintain adequate records is not mitigated by debtor’s lack of education; court did not commit error by rejecting Debtor’s attempts to justify his poor records because he employed an accountant.

The Debtor was unable to account for over \$2,000,000 in cash received and the court found that to be a loss of assets for purposes of § 727(a)(5). The BAP found sufficient support in the facts that the funds were withdrawn and that the debtor no longer possessed the funds, without a satisfactory explanation. The 10<sup>th</sup> Circuit has not established a standard for determining what constitutes a satisfactory explanation of loss of assets under § 727(a)(5), and so, apparently, leaves it to the discretion of the court. The BAP noted that the 1<sup>st</sup>, 5<sup>th</sup>, and 11<sup>th</sup> circuits require debtor to present evidence corroborating debtor’s testimony as to the loss or disposition of assets which must be sufficient to eliminate any speculation.

SUMMARY NUMBER:  
PMF

24

KEY CODE SECTION(S): § 524  
KEY TOPIC(S): Discharge, Attorneys  
Fees

COURT and JUDGE: United States Bankruptcy Appellate Panel of the Tenth Circuit, Judges  
Nugent, Romero and Sommers

CASE NAME and CITE: *In Re Peyrano, Debtor/ Peyrano v. Sotelo.*, 2017 WL 6616890

CASE NUMBER: Adv. No. 15-08011

DATE DECIDED: June 26, 2017

NOTEWORTHY ISSUE: Whether notice to an attorney who has not withdrawn is notice, whether there is a duty to file a suggestion of bankruptcy, whether it is unreasonable to have multiple attorneys on a matter.

HOLDING: The party had notice of the bankruptcy when his attorney was sent the notice. As a result, the party was liable for violating the discharge injunction. The suggestion of bankruptcy filing is not required. The discharge injunction applies automatically. The court's discretion regarding awarding attorneys' fees for multiple attorneys at a hearing will not be overturned.

FACTS: The litigant claimed that he was not aware of the bankruptcy, despite the fact that his lawyer in the state court litigation was listed on the matrix. Being allegedly unaware of the bankruptcy, the party continued the litigation and then the debtor asserted an action for violating the discharge injunction. The litigant's claim that he was protected because the debtor did not file a suggestion of bankruptcy was found without merit. The discharge injunction applies automatically. The litigant also argued that the bankruptcy court abused its discretion by awarding fees for two lawyers at a hearing, but the discretion of the bankruptcy court was upheld, citing *Anchondo v. Anderson*, 616 F.3d 1098, 1105 (10<sup>th</sup> Cir. 2020) that there is nothing inherently unreasonable about a client having multiple lawyers if they are not compensated for the same work.

SUMMARY NUMBER:

25

KEY CODE SECTION(S): § 524(a)(2),  
727(b), FRCP 56(d)

PMF

KEY TOPIC(S): Discharge

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Van Winkle (Sprague, personal representative of the estate of Van Winkle v Williams, et al.)*, 2017 WL 562430

CASE NUMBER: Adv. No. 15-01047 t

DATE DECIDED: February 10, 2017

NOTEWORTHY ISSUE: The criteria for certifying an issue to the NM Supreme Court, the criteria for a delay in ruling on summary judgment pursuant to FRCP Rule 56(d), the enforcement of a discharged deficiency judgment against a redemption right.

HOLDING: The court declined to exercise his discretion to certify the issues to the NM Supreme Court. The novel issue is whether and how the discharge injunction applied, which the bankruptcy court was in as good a position as the NM Supreme Court to decide. The Rule 56(d) request to delay ruling on summary judgment was denied because the rule requires a showing of the probable facts not available and the steps to obtain them. No such affidavit was offered. The discharge injunction applies to deficiency judgments after a foreclosure action. The debtor was able to redeem the property after the foreclosure sale, and the deficiency did not attach to the redeemed property because that debt had been discharged. The remedy for a violation of the discharge injunction is contempt of court, not a private right of action.

FACTS: Chapter 7 discharge was granted. The secured creditor proceeded to foreclose on its property. At the foreclosure sale, the creditor did not bid its entire debt. Then the debtor redeemed, and the creditor sought to attach the redeemed property. The court reasoned that the redemption was the same as if the debtor had purchased unrelated property. If the creditor should have bid more at the foreclosure sale.

SUMMARY NUMBER:  
PMF

26

KEY CODE SECTION(S): § 524  
KEY TOPIC(S): Discharge

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Van Winkle (Sprague, personal representative of the estate of Van Winkle v. Williams, et al.)*, 2017 WL 562430

CASE NUMBER: Adv. No. 15-01047 t

DATE DECIDED: June 23, 2017

NOTEWORTHY ISSUE: What sanctions should be enforced for a willful violation of the discharge injunction.

HOLDING: The court awarded attorneys' fees involved in litigating the issue of the violation of the discharge injunction as compensatory damages of \$33,000 plus half that amount, about \$16,500 as punitive damages. The court ruled there was no private right of action for a violation of the discharge injunction, but the court could in its discretion award sanctions. He did that.

FACTS: See the other *Van Winkle* decision for the facts.

SUMMARY NUMBER:  
PMF

27

KEY CODE SECTION(S): § 727  
KEY TOPIC(S): Discharge, Notice

COURT and JUDGE: United States Bankruptcy Appellate Panel of the Tenth Circuit,  
Bankruptcy Judges Michael, Hall and Thuma

CASE NAME and CITE: *In Re: McNally, Debtor/ Carns v. McNally*, 2017 WL 4082093

CASE NUMBER: Adv. No. 15-01445

DATE DECIDED: September 15, 2017

NOTEWORTHY ISSUE: Revocation of discharge standard of proof, the “mailbox rule” regarding whether notice was given. Judge Thuma decision.

HOLDING: The claim for revocation of discharge for the failure to disclose assets failed because the bankruptcy court did not find fraudulent intent. The notice of bankruptcy was deemed given since the lawyer representing the claimant was on the matrix so notice was presumed sent. There was no evidence to overcome the presumption.

FACTS: Creditor claimed it did not get notice of the bankruptcy, although its collection lawyer was listed in the matrix. The “mailbox rule” states that if a party is listed then notice is presumed to have been given. Notice to the collection lawyer acting as an agent for the creditor regarding that debt suffices.

Although there were assets that had not been disclosed, the bankruptcy court did not think there had been sufficient proof of indicia of fraud for him to find fraud, so the discharge was not revoked.

SUMMARY NUMBER:  
PMF

28

KEY CODE SECTION(S): §§ 523, 727  
KEY TOPIC(S): Discharge Objection

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Lamey (Los Alamos National Bank v. Lamey)*, 574 B.R. 240

CASE NUMBER: Adv. No. 15-1029

DATE DECIDED: July 21, 2017

NOTEWORTHY ISSUE: (1) Whether the creditor's debt should be discharged for selling the creditor's collateral without permission was "willful and malicious injury." (2) Whether the debtor's discharge should be denied for any of four reasons. (a) A failure to list and then amend schedules to list thousands of dollars of tax refunds received post-petition and then spent supported "fraudulent concealment" and/or "false oath" claims. (b) Whether the debtor's financial records were inadequate. (c) Whether the debtor failed to disclose all his assets. (d) Whether the debtor failed to satisfactorily explain his loss of assets.

HOLDING: (1) The individual debt would not be excepted from discharge if a discharge was granted, so no judgment on the debt would enter. The plaintiff failed to prove a security interest in the assets allegedly sold and the terms of the sale – what was sold, when, for how much, and what happened to the money – were not clear enough for the court to grant the motion. The §523(a)(6) claim did not prevail.

(2) The denial of discharge remedy is harsh and reserved "for a truly pernicious debtor." The provisions regarding discharge are to be liberally construed in favor of the debtor and against the creditor. The standard of proof is a preponderance of evidence.

- (a) Concealment means withholding knowledge of an asset by failing or refusing to divulge information. Omitting information on schedules can be concealment. The fraudulent intent must be actual, not constructive. The § 727(a)(2)(B) claim prevailed so the discharge would be denied.
- (b) The preservation of records claim did not prevail. The court found that records need not be so complete or in such detail that all transactions are recorded, but they must sufficiently identify the transactions. The initial burden is on the plaintiff to show a lack of preservation that makes financial analysis "impossible" and then the burden shifts. The court noted that a more sophisticated debtor will have a higher standard of record keeping required. (This debtor was a CPA who sold his practice for millions.) The court concluded that the plaintiff did not carry its burden on the § 727(a)(3) claim.
- (c) The claim that the debtor made a false oath or account requires materiality. The debtors have a duty to disclose all their assets without deciding on their value. The materiality requirement is not defeated by the fact that the undisclosed property has no value. The debtor must have knowingly signed the disclosures knowing

they were incomplete, and a reckless indifference to the truth is sufficient. Fraudulent intent can be inferred from the facts and circumstances, and the intent is not “wiped clean” by an amendment of the schedules after the discovery by a creditor of the asset. The § 727(a)(4) claim prevailed as an additional reason the debtor’s discharge would be denied.

- (d) The claim that a debtor has failed to satisfactorily explain his loss of assets is left to the sound discretion of the court. The plaintiff did not carry his burden of proof because it was able to reconstruct the debtor’s records. The claim under § 727(a)(5) was denied.

**FACTS:** The debtor, a CPA, sold his accounting practice for millions in 2010. By 2012, he had a net worth of over \$15.4 million. By 2014, he filed Chapter 7 with a negative net worth of \$1.4 million. He lost money day trading. The opinion describes the facts of the various accounts of the debtor in some detail, but the case turned on the evidence presented.

The failure to obtain a denial of the creditor’s debt was through a failure to be able to prove either that the creditor had a valid security interest in the property sold by the debtor or the details of the sale and disposition of the sale proceeds. However, the claims relating to the alleged failure to show a failure to keep accurate records or satisfactorily explain the loss of assets failed because the plaintiff could reconstruct the books.

On the other hand, the debtor’s discharge was denied because the creditor was able to show hard facts regarding cash that the debtor got and didn’t disclose. The concealment of assets was the failure to disclose tax refunds that the debtor got and spent post-petition. The false oath charge was proven by the failure to properly disclose brokerage accounts, a vehicle and the tax refunds.



SUMMARY NUMBER:  
MKD

29

KEY CODE SECTION(S): §523(a)(2) & (4)  
KEY TOPIC(S): Dischargeability

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: Shapiro v. Morrow; 2017 WL 2062859  
CASE NUMBER and DOCKET NUMBER: Adv. No. 16-1015 t; Docket No. 55.  
DATE DECIDED: May 12, 2017

NOTEWORTHY ISSUE:

1. Does Shapiro's claim against Morrow survive discharge?

HOLDING:

1. Shapiro failed to carry his burden of proof of intent to deceive, false representation or loss due to insufficient evidence (Shapiro was pro se). No fraud exception to discharge is proven.
2. There is no partnership agreement, so no express or technical trust existed. No defalcation of fiduciary duty exception to discharge is proven.
3. Despite losing all theories, Shapiro got a \$372.20 judgment excepted from discharge.

As always, false representation claims require (1) false representation (2) intended to deceive (3) creditor reliance (4) justifiable reliance and (5) representation caused a loss.

FACTS:

Debtor is a horse trainer who typically charges a daily rate for his services. Shapiro kept a horse with Debtor, complained that the daily rate was too high, and convinced Debtor to go into partnership with him on the horse. Under the partnership race winnings and sales proceeds would be split between the parties (60% to Shapiro, 40% to Morrow) after the deduction of actual costs. Morrow advanced costs, Shapiro was to reimburse. The partnership lasted about 10 months after which the horse was sold. The partnership lost money on the horse. Morrow withdrew all funds in a partnership winnings fund at one racetrack to pay Shapiro's 60% of expenses. Shapiro presented no documentary evidence of other racetrack earnings but there was some testimony on the topic. Morrow's invoices were crude, always round numbers, and lacked backup receipts. It is clear the horse needed and received medical and other treatment which cost money. Shapiro did not subpoena any medical records or depose the veterinarian. Shapiro alleges Morrow overcharged him.

Judge Thuma was frustrated by the lack of information. He labeled Morrow's record keeping practices "abysmal", but noted Shapiro's were not much better.

SUMMARY NUMBER:  
JAA

**30**

KEY CODE SECTION(S): Sec. 523(a)(3)(B)  
KEY TOPIC(S): Dischargeability, Sufficiency of  
Notice

COURT: USDC-NM  
JUDGE: Martha Vazquez  
CASE NAME: Musacco v. Walden  
CITE: 2017 WL 4512214 and Doc. 85  
CASE NUMBER: 13-cv-1053 MV/KBM  
DATE DECIDED: February 27, 2017

**NOTEWORTHY ISSUE:** Can an admittedly unlisted and unscheduled claim be discharged when the claimant's *former* attorney was aware of the bankruptcy case and all the deadlines and attended the creditor meeting on behalf of other clients?

**HOLDING:** No. Knowledge of the bankruptcy by former counsel will not be imputed to the former client.

**FACTS:** The defendant/debtor filed a Ch. 7 bankruptcy and received a discharge. However, he was left with multiple nondischargeable judgments from various creditors who timely filed Sec. 523 complaints.

The allegations against the defendant/debtor in this U.S. District Court case were clearly of the kind that would result a finding of nondischargeability under Sec. 523(a)(6). It was undisputed that this plaintiff/creditor was not listed, scheduled or notified of the bankruptcy in time to file his own Sec. 523 complaint. Under Sec. 523(a)(3)(B), such a claim is not discharged.

A former attorney for the plaintiff/creditor was aware of the bankruptcy and pursued stay relief and Sec. 523 complaints for other clients. Defendant/debtor sought to impute the knowledge of the former attorney onto the plaintiff/creditor. The U.S. Magistrate Judge found that "Absent any evidence that Plaintiff himself know of Defendant Walden's bankruptcy prior to the deadline for nondischargeability complaints or that Plaintiff's former counsel learned of the bankruptcy in connection with her representation of Plaintiff, as opposed to her other clients, the Court is unwilling to impute any knowledge by Plaintiff's former counsel to Plaintiff."

SUMMARY NUMBER:  
MKD

31

KEY CODE SECTION(S): §523(a)(7)  
KEY TOPIC(S): Dischargeability

COURT and JUDGE: Tenth Circuit BAP; J. Mosier author (Jacobvitz on panel)  
CASE NAME and CITE: Medical Lien Mgt. v. Dampier; 2017 WL 1327634  
CASE NUMBER and DOCKET NUMBER: BAP No. CO 16-020  
DATE DECIDED: April 11, 2017

NOTEWORTHY ISSUE:

1. Is Dampier's restitution debt excepted from discharge under §523(a)(7)?

HOLDING:

1. Yes.

Following *Kelly v. Robinson*, §523(a)(7) does not allow the discharge of a criminal judgment that takes the form of restitution. Restitution is rooted in the responsibility of a state to protect its citizens and rehabilitate an offender. Restitution may result in compensation to victims but are not assessed for that purpose. They are assessed because of the penal and rehabilitative interests of the state.

FACTS:

Dampier stole money from his employer and pled guilty. He was ordered to pay \$108,000 in restitution. After sentencing he filed Chapter 7 and his employer filed a nondischargeability adversary proceeding under §523(a)(2), (a)(4) and (a)(7). Dampier defended, arguing the plain meaning of §523(a)(7), which excepts from discharge debts: "...to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss...".

SUMMARY NUMBER:  
JAA

32

KEY CODE SECTION(S): Sec. 523(a)(2)(A)  
KEY TOPIC(S): Dischargeability

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: Lujan v. Davide (In re: Davide)  
CITE: 2017 WL 6333917  
CASE NUMBER: Adv. Proc. No. 17-1007-t; Bankr. No. 16-12689-t11  
DATE DECIDED: December 11, 2017

**NOTEWORTHY ISSUE:** Can failure to disclose true financial condition be a “false pretense” for purposes of proving fraud under Sec. 523(a)(2)(A)?

**HOLDING:** Yes. A debtor must disclose all facts she knows may justifiably influence the creditor's decision to make the loan.

**FACTS and DISCUSSION:** The creditor loaned the debtor \$250,000 for a new retail location for her business. The Court found the following misrepresentations and omissions were made by the debtor: the financial condition of her businesses, the intended use of loan proceeds, which turned out not to be to expand her business but to make \$150,000 payment on defaulted loan, and misstatements concerning title to and encumbrances on lots that were supposed to be collateral for the loan. The Court found the debtor intended to deceive because she was desperate for money and knew that if she told the truth there would be no loan. The Court further found that the lender justifiably relied on the representations and omissions. This was so even though the court suggested the reliance was foolish. Though perhaps foolish, it was subjectively justifiable, given absence of “red flags” and the lender's lack of commercial sophistication.

Judge Thuma relied on 10<sup>th</sup> Circuit and BAP cases to hold that false pretenses under § 523(a)(2)(A) can be a series of events, which considered together, create a “contrived and misleading understanding of a transaction,” that induces the creditor to make the loan. False pretenses include conduct and omissions that are material. The Judge also noted that the standard for justifiable reliance is fairly low. The debt was found to be nondischargeable.

The creditor was not successful under other theories under Sec. 523(a).

SUMMARY NUMBER:  
MKD

**33**

KEY CODE SECTION(S): §523(a)(1)(C)  
KEY TOPIC(S): Dischargeability

COURT and JUDGE: Tenth Circuit BAP; J. Romero author (Nugent & Mosier)  
CASE NAME and CITE: Terrell v. IRS; 2017 WL 656275  
CASE NUMBER and DOCKET NUMBER: BAP No. WO 16-007  
DATE DECIDED: February 17, 2017

**NOTEWORTHY ISSUE:**

1. May Terrell discharge tax debt he pleaded guilty to falsely filing?

**HOLDING:**

1. No. The 1997 tax debt is nondischargeable; Terrell is precluded from litigating the dischargeability of the tax debt by the doctrine of collateral estoppel.

Collateral estoppel (issue preclusion) requires:

1. The same issue previously decided is presented in the new case.
2. The prior action has been finally adjudicated on the merits.
3. The same party (or party in privity) from the first case is in the new case.
4. The party to be estopped had a full and fair opportunity to litigate the issue.

In this case the elements of the tax crime fairly meet the elements of a nondischargeable tax; the guilty plea was a final adjudication; Terrell and the IRS were the parties in both cases and finally Terrell had the opportunity to litigate the issue.

**FACTS:**

Terrell filed a 1997 federal tax return that claimed he had \$10,000 in income when his actual income was \$130,000. In 2005 he pleaded guilty to willfully filing a false tax return. In 2010 Terrell filed a Chapter 7 bankruptcy. It was a no asset case, so the IRS didn't file a proof of claim. In 2015 Terrell filed an adversary proceeding praying that the taxes, penalties and interest for 1997 are either paid or discharged. The IRS moved for summary judgment; the bankruptcy court held "a debtor who has been criminally convicted for tax related crimes may be collaterally estopped from discharging his tax debt in bankruptcy for the subject years." Terrell appeals.

SUMMARY NUMBER:  
JAA

34

KEY CODE SECTION(S): Secs. 523(a)(3)(B)  
and (a)(2)(A), Sec. 342(a)

KEY TOPIC(S): Dischargeability, Sufficiency  
of Notice

COURT: 10<sup>th</sup> Cir. BAP  
JUDGE: David T. Thuma  
CASE NAME: Carns v. McNally (In re: McNally)  
CITE: 2017 WL 4082093  
CASE NUMBER: BAP No. CO-17-001; Adv. Proc. No. 15-01445; Bankr. No. 14-20844  
DATE DECIDED: September 15, 2017

**NOTEWORTHY ISSUE:** Is notice of a bankruptcy filing sent only to the creditor's lawyer and not the creditor himself, sufficient notice of the bankruptcy filing?

**HOLDING:** Yes, can be. Sec. 342(a) and the due process clause do not requires that the best notice be given, but only notice "appropriate" and "reasonably calculated" to inform creditors of a case. In the Tenth Circuit, notice to a creditor's attorney is sufficient if the attorney received notice of the case while still representing the creditor in enforcing the claim against the debtor. The BAP has held that scheduling a creditor in care of an attorney is sufficient if "the attorney listed was its agent in matters related to" the judgment subject to discharge in the bankruptcy or the attorney assisted in "matters against a debtor prepetition." The BAP requires "some nexus between the creditor's retention of the attorney and the creditor's issues with the debtor."

**FACTS and DISCUSSION:** Based on a newspaper ad seeking investments for a shopping center in Florida, the Creditor decided to invest \$700,000 in the Debtor's real estate business. Not surprisingly, the creditor lost all of his money. Creditor sued and got a \$700,000 judgment in Florida. The Debtor later filed a Ch. 7 case in Colorado. Debtor listed the name of the creditor on the schedules filed with the petition, but no address. Creditor did not receive the original notice of bankruptcy filing. A few days after the original filing and well before the deadline to file discharge or dischargeability complaints, Debtor amended his schedules to add the name of the Creditor, but "c/o" the name and address of the attorney who obtained the judgement. The BAP found that the attorney was still representing the Creditor and had not withdrawn when the notice was sent to the attorney. The attorney claims he never received the notice. But, the Creditor offered no other evidence to rebut the "mailbox" rule. Thus, the creditor received timely notice and could not rely on Sec. 523(a)(3)(B).

The case is fact specific and seems to have been a close call.

SUMMARY NUMBER:  
JAA

**35**

KEY CODE SECTION: Secs. 523(a)(2)(A) and  
(a) (4), Sec. 727

KEY TOPIC(S): Dischargeability, Discharge  
Res Judicata, Collateral Estoppel

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: Monge v. Jayme (In re: Jayme)  
CITE: 2017 WL 2533340  
CASE NUMBER: Adv. Proc. No. 15-1079-t; 15-10504-t17  
DATE DECIDED: June 9, 2017

**NOTEWORTHY ISSUE:** Can a debtor/defendant in a dischargeability action make use of collateral estoppel (issue preclusion) from a prebankruptcy state court case, to bar the Sec. 523 claims? Should Sec. 727 claims pled with no factual specificity be dismissed?

**HOLDING:** Yes. When the state court denied claims based on fraud, breach of duty and damages, the creditor/plaintiffs cannot have a second chance to bring the claims in bankruptcy court in a Sec. 523 complaint. To survive a motion to dismiss under Rule 12(b)(6), a Sec. 727 complaint must allege facts necessary to support elements of the particular subsection of 727.

**FACTS and DISCUSSION:** The plaintiffs in this case were once debtors in their own Ch. 11 case in Texas. In their Texas bankruptcy, they filed and tried an adversary proceeding against the now debtors in this case. While plaintiffs were awarded a money judgment on basic breach of contract claims in Texas, they lost on fraud and breach of fiduciary duty claims.

In New Mexico, a bankruptcy court will use claim preclusion/res judicata to establish the existence and amount of a debt, but not to determine the dischargeable nature of the claim. Dischargeability has to be examined by the bankruptcy court in the first instance, so res judicata will not be the basis for dismissing § 523(a) claims.

On the other hand, issue preclusion/collateral estoppel can be used to defeat Sec. 523 claims. In New Mexico, the elements of issue preclusion are (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. In this case, the elements are met. The Texas court held that there was no fiduciary duty and that no fraud occurred. Thus, the Plaintiffs do not get a second chance.

SUMMARY NUMBER:  
JAA

36

KEY CODE SECTION(S): Secs. 523(a)(4) and(6)

KEY TOPIC(S): Dischargeability

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: Davis v. Arellano (In re: Arellano)  
CITE: 574 B.R. 251  
CASE NUMBER: Adv. Proc. No. 17-1006-t; Bankr. No. 16-12720-ta7  
DATE DECIDED: September 19, 2017

**NOTEWORTHY ISSUE:** What are the standards for nondischargeability under Sec. 523(a)(4) (fraud or defalcation by fiduciary, embezzlement and larceny) and Sec. 523(a)(6) (willful and malicious injury)?

**HOLDING:** To prove nondischargeability by fraud or defalcation while acting as a fiduciary, the debtor must have been a fiduciary by an express or technical trust, and must have acted with intentional wrongful conduct, bad faith, moral turpitude, or other immoral conduct. In New Mexico, shareholders in closely held corporations owe one another fiduciary duties similar to those owed among partners. However, the duties are not enough to trigger nondischargeable liability under Sec. 523(a)(4). The statutory duty of good faith owed by a corporate director to shareholders is too general to create a technical trust.

A creditor can prove embezzlement by showing: his property was entrusted to the debtor; the debtor took the property for a use other than for which it was entrusted; and the circumstances show fraud. Larceny, on the other hand, according to Judge Thuma, is “the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker’s use without the consent of the owner.” The creditor could not prove either.

To prove a debt to be nondischargeable under Sec. 523(a)(6), the creditor must show it arose from a “willful and malicious injury.” The creditor has to prove: (1) either he or his property sustained an injury; (2) the injury was caused by the debtor; (3) the debtor’s actions were willful; and (4) the debtor’s actions were “malicious.” To be willful, the debtor must have intended both the act and the resulting harm. This means a deliberate or intentional injury, not just a deliberate or intentional act that caused the injury. The Tenth Circuit uses a subjective standard in determining the debtor’s intent.

**FACTS and DISCUSSION:** The creditor had invested \$20,000 in the debtor’s business. The business failed and the creditor lost his money. The creditor alleged that the debtor had misused corporate funds and diverted the money to his own use.



SUMMARY NUMBER:  
JAA

**37**

KEY CODE SECTION(S): Sec. 523(a)(6)  
KEY TOPIC(S): Dischargeability  
Res Judicata (Claim Preclusion)  
Collateral Estoppel (Issue Preclusion)

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: Shirley v. Lopez (In re: Lopez)  
CITE: 566 B.R. 255  
CASE NUMBER: Adv. Proc. No. 16-1025-t; Bankr. No. 16-10117-ta7  
DATE DECIDED: February 2, 2017

**NOTEWORTHY ISSUE:** What is the standard for nondischargeability for a willful and malicious act? Can nondischargeability be established by collateral estoppel?

**HOLDING:** Sec. 523(a)(6) requires proof of both a “willful act” and “malicious injury.” The “willful” means an intentional act and an intended harm. An intentional act that leads to an unintended harm is not sufficient. To be malicious, the actions have to be intentional, wrongful, and done without justification or excuse. The Tenth Circuit applies a subjective standard in determining intent. Intent turns on the state of mind of the debtor, who must have wanted to cause injury or at least believed it would occur. Evidence of the debtor’s state of mind may be inferred from the surrounding circumstances.

The Plaintiff had a default judgement from state court. Under New Mexico law, default judgments cannot form the basis for collateral estoppel (issue preclusion) because nothing was actually tried. Res judicata (claim preclusion) can be used to establish the existence and amount of a debt, but not whether it was its dischargeable. In either event, a plaintiff always has to prove the nondischargeable willful and malicious elements of the offense. In this case, the plaintiff could not prove malicious intent.

**FACTS and DISCUSSION:** The debtor and creditor involved themselves in a late night road rage incident on Albuquerque’s west side. After a car chase, the debtor allegedly rammed the creditor’s car so he could get away. The creditor flagged down a police car to complain. The officer smelled alcohol and the creditor was arrested. Undeterred, he filed suit against the debtor in state court and got a large default judgment.

SUMMARY NUMBER:  
PMF

**38**

KEY CODE SECTION(S):  
KEY TOPIC(S): Discovery

COURT and JUDGE: United States Bankruptcy Appellate Panel of the Tenth Circuit, Chief Judge Jacobvitz and Bankruptcy Judge Mosier

CASE NAME and CITE: *In Re: Milholland, Debtor/ Colby v. Milholland*, 2017 WL 895752

CASE NUMBER: Adv. No. 14-01589

DATE DECIDED: March 7, 2017

NOTEWORTHY ISSUE: Can the bankruptcy court impose reasonable limits on discovery?

HOLDING: Yes. The bankruptcy court can impose reasonable limits on discovery to achieve a just, speedy, and inexpensive resolution.

FACTS: Two family members acting pro se were fighting and had been fighting each other for years engaging in what the bankruptcy court called “scorched earth litigation.” They set up websites to publically humiliate and defame each other, served 15 subpoenas on witnesses, etc. Imagine the worst and most bitter fight between pro se parties and that is what you have. The limitations imposed by the bankruptcy court were affirmed.

SUMMARY NUMBER:  
MKD

39

KEY CODE SECTION(S): §349, §108  
KEY TOPIC(S): Dismissal

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: In re Spoverlook, LLC; 2017 WL 3084898  
CASE NUMBER and DOCKET NUMBER: Case No. 11-15-13018 TA; Docket No. \_\_\_\_  
DATE DECIDED: January 4, 2017

NOTEWORTHY ISSUE:

1. What is the effect of dismissal on a lease rejection decision?

HOLDING:

1. The HOA will have a specific performance remedy available upon dismissal. Only treatment in a plan of reorganization could have eliminated that remedy.
2. State court deadlines (including appellate deadlines) were tolled by §108 during the bankruptcy.

Lease rejection orders are not vacated by §349 upon dismissal. The rejection of the agreement did not terminate it; it merely constitutes a breach of the agreement. The HOA sought specific performance as a remedy for the breach; Spoverlook sought to pay damages instead. Treated in a plan of reorganization, specific performance would be unavailable.

FACTS:

Spoverlook is the developer of a 260 acre residential development northeast of Albuquerque. The HOA sued Spoverlook in 2014 over common areas. The dispute was settled; Spoverlook agreed to convey certain common areas to the HOA. The parties agreed on much of the conveyance, but differed on whether Tract D should be conveyed. The state court ordered Spoverlook to convey Tract D; Spoverlook filed Chapter 11 before the ruling could be memorialized in a written order. Spoverlook moved to reject the settlement agreement as an executory contract; the bankruptcy court held a trial, determined the agreement was an executory contract and approved the proposed rejection. Debtor did not file a plan within the required 300 days, there is no prospect of reorganization, so dismissal is appropriate.

SUMMARY NUMBER:  
TDW

40

KEY CODE SECTION(S): §327(e)  
KEY TOPIC(S): Employment of Professionals;  
Special counsel for debtor

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In re: Lightning Dock Geothermal HI-01, LLC. et al.*, 2017 WL 2484826 (Bankr.D.N.M., 2017)

CASE NUMBER: Case No. 17-10567

DATE DECIDED: June 8, 2017

NOTEWORTHY ISSUE: Court permitted debtors to employ as special counsel attorneys that represent debtors' parent entity.

FACTS: Debtor LDG operates a geothermal electricity plant. Cyrq Energy, Inc. was LDG's parent and DIP lender. Prepetition, debtors and entities referred to as the Kaishan entities were engaged in litigation regarding payment for and problems with equipment provided by Kaishan. The Modrall firm represented debtors and/or Cyrq in some prepetition litigation but not in the Kaishan litigation.

Debtors filed bankruptcy and applied to employ Modrall as special counsel under §327(e). The proposed scope of services included corporate or transactional services, certain prepetition and pending litigation, water rights, administrative proceedings, and other litigation, including "claims objections, that may arise, litigation and/or claims objections involving entities referred to as the Kaishan Group ..." Modrall's services would not include general bankruptcy advice. Kaishan objected because of Modrall's representation of Cyrq.

The Court found that Modrall did not represent any interest adverse to the debtors nor would simultaneous representation of Cyrq and debtors violate state law rules of professional conduct. Cyrq and Kaishan are adverse and debtors and Kaishan are adverse, but debtors and Cyrq are not adverse.

Code §327(e) authorizes employment of special counsel and includes four requirements: 1) the proposed special counsel represented the debtor previously; 2) the proposed special counsel must be employed by the trustee only for a limited, special purpose; 3) the proposed representation must be in the best interest of the estate; and 4) there must be no conflict with the debtor or the estate arising from the matters for which the trustee seeks to engage special counsel.

Also, employment under 327(e) should not be approved if it would create a prohibited conflict of interest. Under the New Mexico Rules of Professional Conduct a lawyer cannot represent two clients whose interests are materially adverse.

SUMMARY NUMBER:  
MKD

41

KEY CODE SECTION(S): Rules 1009, 9006  
KEY TOPIC(S): Exemptions

COURT and JUDGE: NM Bankruptcy Court; Robert H. Jacobvitz  
CASE NAME and CITE: In re Steven & Debra Dollman; 2017 WL 4404242  
CASE NUMBER and DOCKET NUMBER: Case No. 7-13-13057 JA; Docket No. 94.  
DATE DECIDED: September 29, 2017

NOTEWORTHY ISSUE:

1. May the Debtors exempt a personal injury claim they failed to schedule upon reopening their bankruptcy two years later?

HOLDING:

1. Yes, if they demonstrate the lack of disclosure was due to excusable neglect.

Debtors may freely amend their schedules at any time prior to case closure. Three lines of cases have emerged regarding amendments after a case is closed and later reopened. The broad approach allows debtors to freely amend their schedules at any time; this ignores the plain language of Rule 1009(a). The narrow approach bars any amendments in a reopened case. This approach is too restrictive; it ignores Rule 9006's allowance of extended time limits in certain situations. This Court adopts the middle approach, which permits amendments in a reopened case upon a showing that the original non-disclosure was the result of excusable neglect.

FACTS:

Mrs. Dollman was injured in December of 2012. The Dollmans filed bankruptcy in September of 2013 without disclosing a personal injury cause of action in their Schedule B or orally at their 341 meeting (they report disclosing the cause of action to their original bankruptcy attorney). Trustee filed a Report of No Distribution. Two years later Debtors filed suit on the personal injury case. Defendant moved for summary judgment for lack of standing (ie the cause of action was owned by the Trustee, not the Debtors). Debtors reopened the bankruptcy and amended Schedule B to disclose the cause of action and Schedule C to exempt it. The Trustee objected to the amendments.

Both judges have adopted this procedure. If you have an undisclosed cause of action in a closed bankruptcy, file a motion to reopen, then file a motion to extend deadline for amending schedules. If the Trustee objects and you can't settle, a hearing will be held on whether the neglect was excusable, which is a pretty low bar under *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership* 507 US 380 (1993).

SUMMARY NUMBER:  
JAA

42

KEY CODE SECTION(S): Sec. 328 and 330  
KEY TOPIC(S): Fee Applications  
Employment of Professionals

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: In re: Hungry Horse, LLC  
CITE: 574 B.R. 740  
CASE NUMBER: 16-11222-t11  
DATE DECIDED: September 20, 2017

**NOTEWORTHY ISSUE:** Can a Bankruptcy Judge approve fees for defending a fee application after *Baker Botts v. Asarco*? Will a Bankruptcy Judge approve an increase in hourly rates during a case?

**HOLDING:** The Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, does not prevent approval of a fee-defense provision. Fee defense can be a "reasonable term and condition" of employment under Sec. 328. Thus, a properly drafted fee-defense provision can be approved as a "reasonable term."

Billing rates of attorneys should remain constant during the case absent a change in circumstances or a particularly long case. Changing firms in mid-case is not a sufficient change of circumstances.

Hourly rates charged in a bankruptcy case may be the same as those charged outside of bankruptcy. In this case, a tax lawyer at the new firm can charge his usual higher rate for handling the Debtor's tax matters.

**FACTS and DISCUSSION:** In this case, the Debtors attorney changed firms in the middle of the case. The attorney sought to raise his rates and attempted (ultimately successfully) to draft around the holding of *Asarco*.

Judge Thuma points out that if employment terms are approved under Sec. 328(a), then the attorney's compensation is governed by those terms and conditions, rather than the general "reasonable compensation for services rendered" language of Sec. 330(a)(1)(A). Sec. 330(a)(1) says "After notice to the parties in interest and the United States Trustee and a hearing, and subject to section 326, 328, and 329, the court may award ...." Judge Thuma says that the "subject to" qualification in §330(a)(1) means that the previously approved § 328(a) terms and conditions control the attorney's compensation. The Judge points out that *ASARCO* does not hold that a fee defense provision can never be a "reasonable term" under § 328(a).

Judge Thuma then goes on to tell us exactly how a properly drafted fee defense provision can be a “reasonable term”:

- Be agreed to by the bankruptcy estate
- Allows the bankruptcy court to review and approve the reasonableness of any fee defense fees sought;
- Provide that the estate will also agree to a similar provision for committee counsel; and
- Provide that no fees will be allowed for unsuccessful fee defense work.

He even drafted it for us:

Fee Defense. The Client agrees to pay all reasonable legal fees and expenses incurred by the Firm, and also by any counsel retained by the unsecured creditors’ committee (if one is formed in the Client’s bankruptcy case) for successfully defending their respective fee applications. The bankruptcy court must approve all of such fees as reasonable. The Client will have no obligation to pay for any fees or expenses the Firm incurs defending fees that are not allowed.

SUMMARY NUMBER:  
JAA

43

KEY CODE SECTION(S): Sec. 330  
KEY TOPIC(S): Fee Applications

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: In re: ABQ Manufacturing, Inc.  
CITE: 2017 WL 2304226  
CASE NUMBER: 14-13366-t11  
DATE DECIDED: May 25, 2017

**NOTEWORTHY ISSUE:** What are the standards for approval of an attorney fee application?

**HOLDING:** Attorney compensation in Chapter 11 cases is covered by Sec. 330. To be approved, the fees must be for services that were “actual” and “necessary.” Next, the fees must be “reasonable.” The potential benefit is measured when the services are provided, not when the fee application is heard. Work that had a reasonable chance of succeeding when it was performed can be necessary and beneficial, even if it is not successful in the end.

In this case, the Court reduced the requested fee amount by 33%.

**FACTS and DISCUSSION:** The facts are not good. The Debtor disputed ever seeing or approving the schedules and statements that were filed. The principal of the Debtor, who had guaranteed the Debtor’s lease, claimed that the Debtor’s counsel told him not to attend a state court hearing on personal liability on the lease, as he was protected by the Debtor’s automatic stay. The Debtor missed deadlines for filing a plan and the Debtor’s principal claims he never saw or approved the plan that was late filed.

Judge Thuma said that in evaluating the reasonableness of a proposed fee, “the adjusted lodestar approach is used, “taking into account each of the factors specifically mentioned in § 330(a)(3) plus additional ... factors.”

Section 330(a)(3) requires the court to consider the nature, extent, and value of the services, taking into account all relevant factors, including:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;



- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Judge Thuma also considers the *Johnson* factors, which can be found in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and *In re Market Center East Retail Property, Inc.*, 730 F.3d 1239, 1249 (10th Cir. 2013):

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or the circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The “undesirability” of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.

SUMMARY NUMBER:  
JAA

44

KEY CODE SECTION(S): Sec. 329  
Rules 2016, 2017

KEY TOPIC(S): Fee Applications

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: In re: Wallace  
CITE: 2017 WL 4773106  
CASE NUMBER: 16-10312-t11  
DATE DECIDED: October 19, 2017

**NOTEWORTHY ISSUE:** After voluntary dismissal of a Ch. 11 case, can the Court determine the reasonableness of fees charged by the Debtor's attorney? What jurisdiction does the Court have after dismissal?

**HOLDING:** Yes, the Court has jurisdiction to determine reasonableness of fees after the case is voluntarily dismissed. Unless fees have been allowed by the court, they are not an enforceable obligation of the debtor, before or after dismissal. Even though a case is dismissed, the Court has 'cleanup' or ancillary jurisdiction to rule on fee applications. The Court has an obligation to review professional fees charged to Debtor's estate in a dismissed case. The court can compel debtor's counsel to file a fee application in a dismissed Ch. 11 case.

**FACTS and DISCUSSION:** After litigation and discovery, the debtor and her major creditor reached a settlement of their disputes. The court approved the settlement. The debtor filed a motion to dismiss her case, no objections were filed and the case was dismissed.

Debtor's counsel did not file any interim fee applications. The Debtor paid her counsel \$233,000 during the case, including the retainer.

After dismissal, the U.S. Trustee filed a motion to reopen the bankruptcy case, so debtor's counsel could file, and the U.S. Trustee could review, a fee application. Debtor's counsel objected and filed a separate motion for a determination whether the Court had jurisdiction to compel the filing of a fee application.

SUMMARY NUMBER:  
PMF

45

KEY CODE SECTION(S): 1141  
KEY TOPIC(S): Fraud

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Jacobvitz

CASE NAME and CITE: *In Re: Otero County Hospital Association, Inc.*, 2017 WL 5591399

CASE NUMBER: 11-13686 JL

DATE DECIDED: November 17, 2017

NOTEWORTHY ISSUE: Whether a settlement that had been incorporated in a plan of reorganization was fraudulently induced so that it should be reversed.

HOLDING: The claimants were not fraudulently induced to enter into the settlement. The representations made were specifically limited to those in the settlement agreement. The evidence did not support a finding that other oral statements were made on which the claimants relied. The plan and settlement limitations on recovery would be sustained.

To prove fraud in the inducement, the claimant must show:

1. A misrepresentation or failure to disclose a material fact.
2. The falsity was known to the maker or the representation or concealment was reckless.
3. The maker acted with an intent to deceive and induce the other party to act in reliance.
4. The other party actually relied on the representation or concealment.

To prove fraud and fraudulent misrepresentation, the claimant must show:

1. A misrepresentation of fact.
2. Knowledge of the falsity or recklessness on the part of the party making the misrepresentation.
3. Intent to deceive and to induce reliance on the misrepresentation.
4. Detrimental reliance.

Judge Jacobvitz held that the representation made was not false. Further, the claimants represented they were not relying on any representations other than as set forth in the settlement agreement. The settlement was upheld.

FACTS: A hospital filed Chapter 11 after being subjected to over a hundred medical malpractice lawsuits. A settlement was reached and a plan of reorganization was confirmed resolving the liability of the hospital. The remaining issues surrounded the liability of the management company for the hospital. The settlement and plan provided that any future recovery against the management company would be limited to insurance proceeds. The plan and settlement agreement provided that the management company represented that the insurance policies of the management company "have not been eroded by any other claim as of this date." The settlement provided that there were no representations made other than

those specified. In fact, there was another existing claim, but at that time no payments had been made on that claim. A few months later, that claim was settled and a significant amount was paid which reduced the insurance available for the claimants in this case.

The specific representation that the policies “have not been eroded by any other claim as of this date” together with the denial of any other representations limited the representation to actual payments as of the specific date of the settlement. The term “eroded” referred to an actual payment of money reducing the remaining insurance. The claimants could have, for example, sought a representation regarding existing claims or future events, but no such representation was made.

10/10/00

SUMMARY NUMBER:  
PMF

46

KEY CODE SECTION(S):  
KEY TOPIC(S): Judicial Estoppel

COURT and JUDGE: United States Court of Appeals, Tenth Circuit, Kelly, Circuit Judge

CASE NAME and CITE: *ASARCO, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201 (2017)

CASE NUMBER: 16-4045

DATE DECIDED: January 3, 2017

NOTEWORTHY ISSUE: Although the decision mostly dealt with CERCLA and environmental liability, the decision reaffirms the doctrine in *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151(10<sup>th</sup> Cir. 2007) that judicial estoppel will prevent a debtor from failing to disclose a claim and then bringing it for personal benefit later.

HOLDING: The claim Asarco was pursuing was not barred by judicial estoppel. The fact that Asarco would possibly pursue other potentially responsible parties for the environmental cleanup costs was not hidden from the bankruptcy court. The grounds for judicial estoppel are:

1. The party takes a position "clearly inconsistent" with its earlier position.
2. Adopting the later position would create the impression that either the first or the second court was misled.
3. Allowing the party to change its position would give it an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

The 10<sup>th</sup> Circuit held that ASARCO was not judicially estopped from pursuing contribution for the environmental cleanup costs.

FACTS: Asarco confirmed a Chapter 11 plan which provided for payment of estimated environmental costs. The subsequent defendant claimed that Asarco was judicially estopped from now contending that the estimate was high and that the defendant should share in the costs. The district court found that Asarco had represented that its fair share of the cleanup costs was \$7.4 million, but the 10<sup>th</sup> Circuit found that the concept of Asarco pursuing other parties was open and that the settlement was known to be merely an estimate. The second requirement was not met because the bankruptcy court specifically knew and approved of Asarco's preservation of contribution claims. There was no unfair advantage. In fact, the 10<sup>th</sup> Circuit reasoned that it would be unfair to prevent Asarco from pursuing claims which the bankruptcy court specifically allowed.

SUMMARY NUMBER:  
PMF

47

KEY CODE SECTION(S):  
KEY TOPIC(S): Judicial Estoppel

COURT and JUDGE: United States Court of Appeals, Tenth Circuit, Mary Beck Briscoe, Circuit Judge

CASE NAME and CITE: *Anderson, et al. v. Seven Falls Company*, 696 Fed.Appx. 341 (2017)

CASE NUMBER: 16-1377

DATE DECIDED: June 12, 2017

NOTEWORTHY ISSUE: Whether judicial estoppel would limit the recovery in an undisclosed personal injury claim to the maximum amount the substituted in trustee would have to pay in expenses and claims.

HOLDING: Yes. The failure of the debtor to disclose the personal injury claim in the bankruptcy would limit the recovery to payment of the trustee expenses and claims. The 10<sup>th</sup> Circuit declined to follow the 9<sup>th</sup> Circuit that found that if the debtor-plaintiff reopens the bankruptcy case and fully reports the previously undisclosed asset that cures the judicial estoppel.

FACTS: Davies was injured and hired lawyer for personal injury lawsuit. Then she filed Chapter 7. The Trustee reported it as a no asset case. 8 months after the discharge, she filed a \$5 million personal injury lawsuit. A year and a half after the discharge, the bankruptcy court reopened the case and on \$17,000 of claims were filed out of the originally scheduled \$316,000. The trustee substituted in as a plaintiff. The defendant moved for summary judgment arguing judicial estoppel at least to anything over the claims and expenses in the bankruptcy. Summary judgment was granted limiting the recover to \$45,000, the maximum potential liability. Judgment entered on that amount.

SUMMARY NUMBER:  
PMF

48

KEY CODE SECTION(S):  
KEY TOPIC(S): Judicial Estoppel

COURT and JUDGE: United States Court of Appeals, Tenth Circuit, Jerome A. Holmes,  
Circuit Judge

CASE NAME and CITE: *Hermann v. Hartford Casualty Insurance Company*, 675  
Fed.Appx. 856 (2017)

CASE NUMBER: 16-1145

DATE DECIDED: January 12, 2017

NOTEWORTHY ISSUE: Whether the worker's comp claim of the debtor was barred by  
judicial estoppel because it had not been disclosed to the Chapter 7 trustee, even if the debtor  
moves to reopen and list the claim.

HOLDING: Yes, it is barred, reaffirming *Eastman v. Union Pac. R.R.*, 493 F.3d 1151 (10<sup>th</sup>  
Cir. 2005), and moving to reopen once the facts are discovered doesn't solve the problem.  
Judicial estoppel is:

1. A party's subsequent position must be clearly inconsistent with its prior position.
2. The party succeeded in persuading a court to accept the prior position, so there is a  
perception that either the first or the second court is misled.
3. Was the party trying to get an unfair advantage.

Inadvertence was not given much credence. The prompt reopening of the bankruptcy to  
amend the schedules once caught also failed as an argument against judicial estoppel.

It is clear the Tenth Circuit has no patience with debtors who try to keep their personal injury  
awards from their creditors.

FACTS: Debtor failed to candidly disclose his pending workers comp claim, and defendant  
found out about the bankruptcy. Debtor sought to reopen the bankruptcy, but that was denied.  
The district court granted summary judgment to the insurance company based on judicial  
estoppel.

SUMMARY NUMBER:  
MKD

49

KEY CODE SECTION(S): None  
KEY TOPIC(S): Jurisdiction

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: Estate of Coleman v. Mladek; 2017 WL 5198152  
CASE NUMBER and DOCKET NUMBER: Adv. No. 17-01047 t; Docket No. 12  
DATE DECIDED: November 9, 2017

NOTEWORTHY ISSUE:

1. Does the Court have jurisdiction over an exception to discharge case?

HOLDING:

1. Yes.

*Stern* asks two questions. (1) Is this a core proceeding and (2) does the action either stem from the bankruptcy itself, or must it necessarily be resolved in the claims allowance process? The *Stern* test should be applied narrowly. *Stern* notwithstanding, bankruptcy courts have jurisdiction to decide nondischargeability cases.

FACTS:

Mladek (through an entity) filed a "lien" against property owned by the Coleman Estate in Alamogordo, purportedly based upon purchasing Otero County tax liens. In a state court quiet title lawsuit the state court ruled in favor of Coleman, including a finding that Mladek's entity had not purchased any liens. Before the ruling could be memorialized in a written order, Mladek filed bankruptcy. Coleman Estate filed an adversary proceeding to except its claim from discharge. Mladek challenged the Bankruptcy Court's jurisdiction under *Stern v. Marshall*.

The Court also denied Mladek's motion to dismiss for failure to state a claim under F.R.Civ.P. 12(b)(6), and for lack of sufficient particularity in pleading fraud pursuant to F.R.Civ.P. 9(b).



SUMMARY NUMBER:  
JAA

50

KEY CODE SECTION(S): Sec. 349  
KEY TOPIC(S): Jurisdiction

COURT: USBC-NM  
JUDGE: Robert H. Jacobvitz  
CASE NAME: Viper Services, LLC v. Fora Financial Business Loans, LLC  
(In re: Viper Services, LLC)  
CITE: 2017 WL 5499155  
CASE NUMBER: Adv. Proc. No. 17-1010-j; Bankr. No. 15-11259-j11  
DATE DECIDED: November 15, 2017

**NOTEWORTHY ISSUE:** What jurisdiction does the bankruptcy court have over a preferential transfer action after dismissal of the main Ch. 11 case?

**HOLDING:** In this case, there is jurisdiction, but the adversary proceeding will be dismissed as moot. Dismissal of the related chapter 11 bankruptcy case, absent a finding of "cause," moots the preference action.

**FACTS and DISCUSSION:** The Ch. 11 case was dismissed, after a plan was confirmed, because the Reorganized Debtor did not file its missing Monthly Operating Reports or pay its U.S. Trustee fees. There was left pending a preference action.

Judge Thuma noted that earlier 10th Circuit precedent held that a debtor's adversary proceeding seeking damages for violation of the automatic stay survives dismissal of the bankruptcy case, since the purpose of the adversary proceeding is not negated by dismissal of the main case. That is, the adversary proceeding existed to vindicate the bankruptcy code and the automatic stay. Even though the pending preference case here does not serve that lofty purpose, Judge Thuma felt bound by 10<sup>th</sup> Circuit precedent and could not find that main case dismissal automatically divested jurisdiction.

What he did was look to Sec. 349(b), which would reinstate any avoided transfer upon dismissal of the main case, absent a finding of cause not to do so. That being the case, the preference action was moot.

SUMMARY NUMBER:  
TDW

51

KEY CODE SECTION(S): 549/550 and 305

KEY TOPIC(S):

Jurisdiction; Preclusion; Abstention (Suspension);

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.)*, 2017 WL 1067754 (Bankr., D.N.M., 2017)

CASE NUMBER: Case No. 13-10742; Adv. No. 16-01007

DATE DECIDED: March 21, 2017

NOTEWORTHY ISSUES: In a ruling on parts of cross motions for summary judgment, the Court ruled:

(1) It has exclusive jurisdiction over all the trustee's claims under Code §§542 and 549 because those claims arise under the Code;

(2) Administrative adjudications are entitled to preclusive effect if they are rendered under conditions that permit them to be litigated fully and fairly.

(3) Code §305 suspension divests the Bankruptcy Court of jurisdiction during the period of suspension.

(4) Neither the defendant (the "Development Co.") nor the Debtor was required to seek Bankruptcy Court approval for actions taken during the § 305(a) suspension period, therefore the "unauthorized" element of §549 (unauthorized post-petition transfers) was not met.

FACTS: In 1993, the New Mexico Public Utility Commission (the "Commission") ordered Development Co. to transfer ownership of certain water utility assets to Debtor, a public water utility. Fifteen years later, in October 2008, the Commission investigated Debtor's operations and found that Development Co. had never transferred to Debtor a parcel of land that was supposed to have been transferred (the "Former Water Tank Parcel"). Instead, it had been transferred to a third party who sold it for \$168,000. At the time the land was sold it should have been Debtor's property. The Commission ordered Development Co. to pay Debtor \$168,000 within 90 days. Development Co. never made the payment.

In September 2010, Bank sued Debtor in state court. A receiver was appointed who negotiated a sale of Debtor's assets, including a parcel of land that was used in the Debtor's then operations (the "Current Water Tank Parcel"). Debtor filed bankruptcy before the sale closed. The Bankruptcy Court abstained and suspending proceedings,<sup>1</sup> allowing the parties to return to state court so the Receiver could complete the asset sale.

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<sup>1</sup> 11 U.S.C. § 305(a) provides in part: (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if-- (1) the interests of creditors and the debtor would be better served by such dismissal or suspension....

The parties discovered that the Debtor did not have title to the “Current Water Tank Parcel,” one of the assets Buyer was supposed to get.<sup>2</sup> Buyer agreed to pay Development Co. \$100,000 and other consideration for Development Co.’s interest in the Current Water Tank Parcel (the “Side Deal”). At the same time, the Receiver reduced the purchase price for the utility assets by \$100,000. The state court approved the sale, including the price reduction. The Debtor and the Receiver were not parties to the Side Deal and therefore it was not necessary for the state court to approve the Side Deal.

In January 2014, the Bankruptcy Court reactivated the bankruptcy case. Months later, the case was converted to chapter 7 and the Trustee was appointed. In February 2016, the Trustee sued Development Co. for turnover of the \$168,000 ordered by the Commission Order (plus any other consideration the Development Co. received for the Former Water Tank Parcel) and to recover, pursuant to Code §§549 & 550, as an unauthorized post-petition transfer,<sup>3</sup> the \$100,000 paid to the Development Co. for the Current Water Tank Parcel (plus any other consideration).

**Jurisdiction.** The Court decided it had jurisdiction over the Trustee’s claims under §§ 542 and 549, which both arise exclusively under the Bankruptcy Code.

**Preclusion Principles.** Development Co. argued that it is not bound by the Commission’s decisions and that no preclusive effect should be given to the Commission’s findings that the sale proceeds from the Former Water Tank Parcel should have belonged to Debtor, and therefore must be paid to Debtor. The Court held that “administrative adjudicative determinations may be given preclusive effect if rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing” quoting, *Shovelin v. Central New Mexico Elec. Co-op, Inc.*, 850 P.2d 996, 1001 (N.M. 1993). The Court denied Development Co.’s motion because the evidence before it was insufficient to rule and therefore the issue would be determined at trial.

**The Suspension Period and Code §549.**

Development Co. argued that occurrences during the suspension period are not subject to later action by the Trustee. Specifically, Code §549 could not be used to recover the proceeds from the transfer of the Current Water Tank Parcel because Bankruptcy Court approval was not required for the transfer.

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<sup>2</sup> The Court in a later decision in the same adversary proceeding agreed with the Trustee that, in fact, Debtor did own the parcel because the purported transfer of the parcel in 2000 from Debtor to Development Co. was void because it was done without Commission approval, as required for a public utility. Relying upon N.M.S.A. § 62-6-12.

<sup>3</sup> 11 U.S.C. §549: (a) ... the trustee may avoid a transfer of property of the estate— (1) that occurs after the commencement of the case; and (2) ... (B) that is not authorized under this title or by the court.

11 U.S.C. §550: (a) ... to the extent that a transfer is avoided under section ... 549 ... the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from— (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

Suspension under § 305(a) divests the bankruptcy court of jurisdiction over the entire case during the suspension period. Suspension typically is invoked to allow the state court to continue exercising jurisdiction over a pending state law matter. There is little law addressing how the Bankruptcy Code applies during a suspension period. The Court concluded that “the contours of suspension may be fashioned by a bankruptcy court to fit the needs of the case.” Here, the Court suspended the bankruptcy case to permit the Receiver to pursue asset sales. The Suspension Order made clear that none of the Code sections or Bankruptcy Rules applied during the suspension period.

Further, the Suspension Order stated that “approval by this Court of any Receiver asset sale shall not be required.” The transfer of the Current Water Tank Parcel was clearly part of the asset sale transaction. Neither Debtor nor Development Co. had to obtain court approval for the Side Agreement. The “unauthorized” element of § 549(a)(2)(B) therefore is not met. For this and other reasons, the Trustee could not use §§549 to recover the value the Development Co. received for the Current Water Tank Parcel.

NOTE: Later, in December 2017, on consideration of new cross motions for summary judgment, the Court, applying §542, granted judgment in favor of the Trustee for the \$168,000 owed to the Debtor by Development Co. for the Former Water Tank Parcel and for \$100,000 paid to Development Co. for the Current Water Tank Parcel.

SUMMARY NUMBER:  
PMF

52

KEY CODE SECTION(S): §§ 365, 109  
KEY TOPIC(S): Jurisdiction, Executory  
Contracts

COURT and JUDGE: United States Bankruptcy Appellate Panel of the Tenth Circuit, Judges  
Michael, Romero and Hall

CASE NAME and CITE: *In Re: John Q. Hammons Fall 2006, LLC et al. Debtors/JD Holdings, LLC v. John Q. Hammons Fall 2006 Fall 2006, LLC et al.*, 2017 WL 6616890

CASE NUMBER: BK No. 16-21142

DATE DECIDED: December 28, 2017

NOTEWORTHY ISSUE: Whether the bankruptcy court could determine whether it could approve rejection of an executory contract before determining whether the Trust that filed was eligible to be a debtor.

HOLDING: The provisions of § 109 regarding who may be a debtor are not jurisdictional. The BAP ruled that the bankruptcy court had jurisdiction to decide whether to approve the rejection of an executory contract even though it had not determined whether the filing party (a trust) was authorized to be a debtor under § 109(a). Eligibility to file is not a jurisdictional issue. Citing *In re Hamilton Creek Metropolitan District*, 143 F.3d 1381 (10<sup>th</sup> Cir. 1998), the BAP noted that § 109 addressed “eligibility” rather than jurisdiction in its discussion of the right of an entity to seek bankruptcy relief. The issue did not affect the subject-matter jurisdiction of the bankruptcy court.

FACTS: A trust filed Chapter 11 and immediately moved to reject an executory contract. The other party to that contract moved to dismiss claiming that the trust was not qualified under § 109(a) to be a debtor. The bankruptcy court ruled that it could consider the motion to reject the executory contract without first resolving the issue of qualification because the issue of qualification was not “jurisdictional.”

Because the right of the entity to file was not a jurisdictional issue, the bankruptcy court could consider the rejection issue prior to ruling on the eligibility to file. The ruling approving the rejection of the executory contract was not contested, so the bankruptcy court’s ruling was affirmed.

SUMMARY NUMBER:  
PMF

53

KEY CODE SECTION(S): B.R. 7015(a)  
KEY TOPIC(S): Jury, Claims

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Harpole Construction, Inc. (Harpole Construction, Inc. v. Medallion Midstream, LLC)*, 565 B.R. 1993

CASE NUMBER: Adv. No. 16-1058 t

DATE DECIDED: January 10, 2017

NOTEWORTHY ISSUE: Whether a creditor loses its right to a jury trial if it files a compulsory counterclaim.

HOLDING: Even if a party is required to file a counterclaim because under Bankruptcy Rule 7015(a) it is compulsory, the party has waived its right to a jury by triggering the allowance and disallowance of claim procedure. In addition, there is no time requirement for filing a motion to strike a jury demand.

FACTS: Post-petition, the debtor as a contractor entered into a contract to perform installation work on oil and gas pipelines. Apparently the other party was not aware of the bankruptcy. Disputes arose, and the debtor filed an adversary proceeding to collect money allegedly owed. The other party counterclaimed and demanded a jury. The jury demand was stricken.

SUMMARY NUMBER:  
PMF

54

KEY CODE SECTION(S):  
KEY TOPIC(S): Lien Perfection,  
Res Judicata

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Lamey (Los Alamos National Bank v. Lamey)*, 2017 WL 1839154

CASE NUMBER: Adv. No. 15-1029

DATE DECIDED: May 5, 2017

NOTEWORTHY ISSUE: What are the tests for actual and constructive knowledge of a mortgage pre-bankruptcy

HOLDING: Although the court could not grant summary judgment on whether the defendant had actual knowledge of a mortgage, it would grant summary judgment that there was constructive notice of a recorded mortgage. A prior denial of summary judgment does not result in res judicata or claims preclusion because the following must be established and were not:

1. There is a final judgment in the prior action.
2. The earlier judgment was on the merits.
3. The parties in the two suits are the same.
4. The cause of action is the same in the two suits.

The *Rooker-Feldman* doctrine precludes a losing party in state court from complaining in federal court about the judgment only applies to actions filed in federal court after the state court proceedings are final. It did not apply to a denial of a summary judgment motion.

FACTS: Prior to bankruptcy, the plaintiff bank loaned money to debtor who did not disclose the existence of a mortgage. The title company at the loan closing insured over the mortgage which apparently got lost in the shuffle and was not paid at closing. After the closing, the other mortgage holder refused to release and was eventually paid off by the title company. The issue before the court was whether the defendant – now debtor – had actual or constructive knowledge of the undisclosed mortgage.

The court held that there were issues of fact regarding whether there was actual knowledge of the mortgage, but the sophisticated defendant clearly had constructive knowledge of the mortgage. A prior state court refusal to grant summary judgment on the issue was not res judicata or claims preclusion and the suit in bankruptcy court that was part of denial of discharge action did not violate the *Rooker-Feldman* doctrine because no state court final judgment had been entered.

SUMMARY NUMBER:  
MKD

55

KEY CODE SECTION(S): §523(a)(2)  
KEY TOPIC(S): Nondischargeability

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: O'Brien v. Montoya; 2017 WL 6561089  
CASE NUMBER and DOCKET NUMBER: Adv. No. 17-1080 t; Docket No. 14.  
DATE DECIDED: December 22, 2017

NOTEWORTHY ISSUE:

1. Does a fraud exception to discharge action require personal gain by defendant from plaintiff?

HOLDING:

1. Yes. The debtor must have obtained something from the creditor to state a claim for fraud under §523(a)(2).

To prevail in an actual fraud adversary proceeding a plaintiff must show:

1. A valid debt.
2. Actual fraud (a scheme to deprive or cheat another of property or a legal right).
3. The debtor obtained a benefit from the creditor by the fraud.
4. The balance of creditor's debt arose from the fraud (ie possible claims for punitive damages, costs or attorney fees).

FACTS:

Debtor (a suspended attorney) filed a police brutality suit in US District Court on behalf of a client. Mislabeling defendants, failing to serve defendants and eliciting false testimony he got a large default judgment against O'Brien, a former Santa Fe County sheriff who had shot Montoya's client in an armed confrontation. Years later O'Brien learned of the judgment, got it set aside and the County settled with the estate of Montoya's client. O'Brien sued for malicious process, won a six figure summary judgment which Montoya appealed; the Court of Appeals reversed and remanded to consider Montoya's statute of limitations defense. After remand Montoya filed bankruptcy on the eve of trial in state court. O'Brien filed an adversary proceeding to except his claims from Montoya's discharge under §523(a)(2) and §523(a)(6). Montoya moved to dismiss the §523(a)(2) fraud claim on grounds Montoya had not taken anything from O'Brien.



SUMMARY NUMBER:  
TDW

56

KEY CODE SECTION(S): §523(a)(2)(A)  
KEY TOPIC(S): Non-dischargeability

COURT and JUDGE: USBC DNM (Jacobvitz)

CASE NAME and CITE: *In re Smith (Boyer Insurance Group LLC v. Smith)*, 2017 WL 5198149 (Bankr.D.N.M., 2017)

CASE NUMBER: Case NO. 16-12493; Adv. No. 16-01075

DATE DECIDED: November 9, 2017

**NOTEWORTHY ISSUE:** Debt on unsecured promissory note was held non-dischargeable where creditor entered into transaction under false pretenses created by debtor's false representations that he would grant creditor a security interest and provide for automatic note payments. Of note are Judge Jacobvitz's discussions of "false pretenses" for purposes of §523(a)(2)(A), justifiable reliance, and causation of creditor's loss under New Mexico law.

**FACTS:** Boyer sold his Allstate "book of business" to Rockovitz. Boyer provided owner financing using Allstate forms granting Boyer a security interest in the book of business and automatic payments to Boyer from insurance commissions. Rockovitz agreed to sell to Smith. Rockovitz still owed money to Boyer. Smith agreed to sign a note to Boyer in the amount Rockovitz still owed Boyer. Smith agreed to execute new Allstate Agreements to replace the agreements Rockovitz signed with Boyer whereby Smith would grant Boyer a lien in the book of business and Allstate would make Smith's payments to Boyer on the new promissory note deducted from Smith's commissions.

Boyer closed the deal based on Smith's representations that he would sign and return the Allstate agreements. Boyer's reliance on Smith's representations was justifiable. Smith signed the note and started making payments (directly, not through Allstate, as was supposed to happen) but did not sign the Allstate Agreements. Boyer learned this and wrote to Allstate and Smith. Smith again assured Boyer that he intended to sign the agreements. Boyer believed Smith.

Smith later sold the book of business and used the sale proceeds to pay a creditor other than Boyer. Smith never signed the agreements. Without the Allstate agreements, the book of business did not secure the promissory note. Boyer learned that Smith never signed the agreements after Smith stopped making note payments. Boyer sued Smith for the note balance. Smith filed bankruptcy. Boyer brought an action under §523(a)(2)(A) to except the note balance from discharge.

Non-dischargeability requires a valid debt. Here, debtor signed the note using his trade name ("Chip Smith" instead of Harrison Smith) and argued that's not his legal name. Smith did not deny signing the note. The court held it didn't matter how he signed it. NMSA 55-03-401(b) (can sign using any name, trade name, assumed name, word, mark, or symbol "executed or adopted by a person with present intention to authenticate a writing").

The court found that all the elements of Code §523(a)(2)(A) were met: 1) the debtor made a false representation; 2) with intent to deceive the creditor; 3) the creditor relied on the false representation; 4) the creditor's reliance was [justifiable]; and 5) the creditor was damaged as a result.

"False pretenses under Section 523(a)(2)(A) are implied misrepresentations intended to create and foster a false impression. Unlike false representations, which are express misrepresentations, false pretenses include conduct and material omissions." Here, Smith knowingly and with the intent to deceive created the false impression that he would execute and return the new Allstate Agreements.

Boyer's reliance was "justifiable." Reliance does not have to be reasonable, which is a higher standard. Justifiable reliance requires the plaintiff to "use his senses and at least make a cursory examination or investigation of the facts of the transaction before entering into it." Courts consider whether there were any "red flags" in the transaction that would have put the creditor on notice. See Judge Thuma's decision in *Osborne*, 520 B.R. 861 (Bankr.D.N.M., 2014). Courts use a subjective inquiry to determine justifiable reliance to "examine the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case."

Plaintiff suffered a loss. Excepting a debt from discharge requires the plaintiff prove that the false pretenses were proximate cause of the loss. Proximate cause has "two elements, causation in fact and legal causation." First, the debtor's misrepresentations must be a substantial factor in determining the course of conduct that results in the loss. Second, the creditor's loss must reasonably be expected to result from the reliance.

Smith's false pretenses led Boyer to believe that Smith would execute and promptly return the new Allstate Agreements. This was a substantial factor in Boyer's decision to agree to the transaction whereby Boyer became a lender to Smith. The court found the loss was reasonably foreseeable because without a security interest in the book of business and without automatic note payments from Allstate there was a greater risk of nonpayment and loss.

SUMMARY NUMBER:  
TDW

57

KEY CODE SECTION(S): 727(a)(4)  
KEY TOPIC(S): Non-dischargeability

COURT and JUDGE: USBC DNM (Jacobvitz)

CASE NAME and CITE: *In re Whitaker (Peplinski v. Whitaker)*, 2017 WL 354314  
(Bankr.D.N.M., 2017)

CASE NUMBER: Case No. 7-13-11395; Adv. No. 13-1068

DATE DECIDED: January 24, 2017

NOTEWORTHY ISSUE: Was the omission of two inoperable vehicles from debtor's schedules sufficient to deny discharge under Code §727(a)(4) (false oath)?

HOLDING: Yes.

FACTS: Plaintiff got a Metro Court judgment against debtors for \$8,401.70 for unpaid residential rent. After an exhaustive recitation of facts and circumstances and rejection of several other grounds to deny discharge (including failure to list aliases, failure to list prior addresses, failure to maintain records, concealment of assets), the court focused on failure to list assets. There, the plaintiff struck pay dirt.

A debtor's discharge may be denied upon a finding that "the debtor knowingly and fraudulently, in or in connection with the case ... made a false oath or account." 11 U.S.C. § 727(a)(4). A false oath within the meaning of 11 U.S.C. § 727(a)(4) may include omissions from the debtor's petition, schedules, or statement of financial affairs. Denial of discharge under this section requires that the false oath: 1) relate to a material matter; 2) be made knowingly; and 3) be made with intent to defraud.

The debtors had two inoperable trucks in their possession on the petition date that they failed to list in their schedules. Materiality does not depend upon value. Even "assets of little or no value may give rise to a denial of discharge if the omission prevents the trustee or a creditor from fully examining the debtor's pre-bankruptcy financial dealings."

By failing to list the 1998 GMC Truck and the 1988 Chevy Truck on their bankruptcy schedules signed under penalty of perjury as being true and correct, Defendants made a false oath. The 1988 truck had belonged to debtor's father, who died many years prepetition. The court was particularly irritated that debtor insisted that the truck still belonged to his deceased father.

After plaintiff raised the issue of failure to list the trucks, debtors amended their schedules to list the 1998 truck. The court stated that a "debtor cannot excise a false oath by making subsequent corrections." This rule appears not to apply, however, where the debtor corrects an omission promptly on his own accord.

SUMMARY NUMBER:  
PMF

58

KEY CODE SECTION(S): § 1129  
KEY TOPIC(S): Plan Terms

COURT and JUDGE: Supreme Court of the United States, Kelly, Justice Breyer

CASE NAME and CITE: *Czyzewski, et al. v. Jevic Holding Corp., et al*, 137 S.Ct 973 (2017)

CASE NUMBER: 15-649

DATE DECIDED: December 7, 2016

NOTEWORTHY ISSUE: Can the bankruptcy court approve a dismissal of the case that provides for a distribution of estate assets in contravention of the absolute priority rule?

HOLDING: No. The bankruptcy court cannot lend its assistance to a distribution of estate assets that violates the absolute priority rule even though arguably there was good cause.

FACTS: In a complicated large Delaware bankruptcy case, a settlement in litigation was reached and involved the payment of several millions of dollars, but the defendant paying the money did not want it distributed to wage claimants that were suing it because that would merely fund the litigation against it. The agreement was that the other parties would distribute the proceeds, skipping both priority and unsecured claims of the wage claimants.

Naturally, the Delaware bankruptcy court thought that was just fine, as did the Delaware district court and the 3<sup>rd</sup> Circuit Court of Appeals but not the Supreme Court. The vote was 7-2, but that was just because the 2 thought the issue decided was not the one on which cert was granted so would have dismissed the appeal.

The Supreme Court ruled with strong language that the bankruptcy court simply could not be a party to a violation of the absolute priority rule over a party's objection. The importance in our jurisdiction is probably that language.

SUMMARY NUMBER:  
JAA

59

KEY CODE SECTION(S): Rule 9024  
Rule 60(b)(4) and (d)(3)

KEY TOPIC(S): Post-Judgment Motions  
Law of the Case

COURT: USBC-NM  
JUDGE: Robert H. Jacobvitz  
CASE NAME: Wagner v. Lankford (In re: Vaughn Company Realtors)  
CITE: 2017 WL 2470858 and 2017 WL 6372463  
CASE NUMBER: Adv. Proc. No. 12-1139-j; Bankr. 10-10759-j11  
DATE DECIDED: June 7, 2017 and December 12, 2017

**NOTEWORTHY ISSUE:** Defendants filed sequential motions under Rule 60 to vacate a fraudulent transfer judgment against them. They alleged the Trustee committed fraud and fraud on the Bankruptcy Court and that the Bankruptcy Judge is biased against them and part of a conspiracy against them.

**HOLDING:** Relief from a judgment under Rule 60 is extraordinary and may only be granted in exceptional circumstances. Defendants failed to make the requisite showing. Judge Jacobvitz held that a judgment is not void because it is erroneous. It is void only if the court lacked jurisdiction or if it acted in a manner inconsistent with due process of law. Judge Jacobvitz also applied the law of the case doctrine. Once a court decides an issue, the same issue cannot be re-litigated in later proceedings in the same case

**FACTS and DISCUSSION:** In the VCR bankruptcy case, the Trustee filed numerous avoidance actions. One set of defendants was unhappy with being sued. They sought bankruptcy court permission to file counterclaims against the Trustee and her counsel for extortion, incompetence and fraud. Permission was denied. Later, a summary judgment was entered against the defendants for return of their net winnings. They did not appeal entry of the summary judgment. Instead, months later, they sought to have the judgment set aside under Rule 60(b)(3) and Rule 60(d)(3). The motion was denied. The defendants appealed to U.S District Court and lost. In 2017, they filed two new Rule 60 motions, alleging the same grounds.

SUMMARY NUMBER:  
JAA

60

KEY CODE SECTION(S): Sec. 547  
KEY TOPIC(S): Preferences

COURT: USBC-NM  
JUDGE: David T. Thuma  
CASE NAME: Garcia v. P2 Properties (In re: Garcia)  
CITE: 570 B.R. 635  
CASE NUMBER: Adv. Proc. No. 16-1067-t; Bankr. No. 16-11442-t13  
DATE DECIDED: April 14, 2017

**NOTEWORTHY ISSUE:** When does a garnishment lien attach to a Debtor's wages? Does a Ch. 13 Debtor have standing to bring a preference action to recover wages garnished prepetition?

**HOLDING:** Under New Mexico state law, a garnishment lien does not attach to a debtor's wages until the wages are actually earned. No matter how long ago the writ of garnishment was served, it cannot attach to wages earned and paid during the 90 day preference period.

A Debtor has standing under Sec. 522(h) to bring the preference when the wages in question are claimed as exempt.

**FACTS and DISCUSSION:** In the case, the garnishment was ordered prior to the 90 day period but the wages were earned and paid during the 90 days.

Here is Judge Thuma's precise ruling:

"The Court rules that in the garnishment cases involving with wages earned and paid during the preference period, both the creation of the garnishment lien and the payment of the garnished funds to the creditor are subject to avoidance. First, the creation of the garnishment lien is avoidable because it arises during the preference period; it is only then that the debtor earns the wages and acquires rights to them. Allowing the garnishment lien to "relate back" to the original, pre-petition garnishment date would ignore § 547(e)(3). The "relation back" rule is from state law, which *Barnhill* made clear must give way to § 547(e)(3)...Second, the payment to the garnishing creditor of wages earned during the preference period also is avoidable, as the payments allowed the creditor to receive more than it would have received if the payments had not been made and the creditor had been paid the same as other general unsecured creditors."

SUMMARY NUMBER:  
TDW

61

KEY CODE SECTION(S):  
KEY TOPIC(S): Proofs of Claims, Fair  
Collection Practices Act

COURT and JUDGE: Supreme Court of the United States (5-3, J. Breyer for the majority)

CASE NAME and CITE: *Midland Funding, LLC v. Johnson*. 137 S.Ct. 1407 (2017)

CASE NUMBER: No. 16-348

DATE DECIDED: May 15, 2017

NOTEWORTHY ISSUE: Will court grant objection to proof of claim for a time-barred debt? Does filing a proof of claim for a time-barred debt violate the Fair Debt Collection Practices Act?

HOLDING: Yes. No. "Claims" include stale claims that are subject to affirmative defenses.

FACTS: Creditor filed a proof of claim in debtor's Chapter 13 case based on credit-card debt more than 10 years ago, enforcement of which was beyond the applicable state 6-year statute of limitations. Debtor objected to the claim, and the Bankruptcy Court disallowed it. Debtor then sued creditor under the Fair Debt Collection Practices Act, claiming that the filing a proof of claim on a time-barred debt was "false," "deceptive," "misleading," "unconscionable," and "unfair." 15 U.S.C. §§ 1692e, 1692f. The District Court held that the Act did not apply and dismissed the suit. The Eleventh Circuit reversed. The Supreme Court held that the filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the FDCPA.

- Ruling is consistent with the majority of Courts of Appeals that have considered the matter.
- A claim is a "right to payment." 11 U.S.C. § 101(5)(A); Under Bankruptcy law, "claim" does not mean "enforceable claim."
- Expiration of limitations period is an affirmative defense.
- Practical arguments, such as "consumers are unsophisticated," "are unaware of SOL's," and don't have old records, failed also; the Court found that bankruptcy context provides protections for consumers, including the Chapter 13 trustee and, the debtor-friendly claims resolution process.
- Rule 9011, which requires a prefiling inquiry that claim is warranted by existing law, specifically left out a proposed certification of no SOL defense.
- Chapter 13 trustee must examine proofs of claim and, where appropriate, object, including on "timeliness" grounds.
- State law usually determines whether a person has such a right.
- Many states provide that a creditor has the right to payment of a debt even after the limitations period has expired.
- A few states provide that expiration of the limitations period extinguishes the remedy and the right.

SUMMARY NUMBER:  
JAA

62

KEY CODE SECTION(S): Secs. 541, 542  
KEY TOPIC(S): Property of the Estate,  
Turnover

COURT: 10<sup>th</sup> Cir. BAP

JUDGE: Robert H. Jacobvitz

CASE NAME: Sender v. Werth

CITE: 2017 WL 1832210

CASE NUMBER: BAP No. CO-16-022; Bankr. No. 13-30926; Adv. No. 14-01528;

DATE DECIDED: May 8, 2017

NOTEWORTHY ISSUE: Was beachfront property in Mexico property of the Debtor's bankruptcy estate? Must the sale proceeds be turned over to the Trustee?

HOLDING: The property was property of the estate and the proceeds of sale, of \$156,000, belonged to the Trustee.

FACTS: Prepetition, the Debtor ended up owning an interest in the Mexican property through an Intestacy Proceeding in Mexico for her deceased husband. She thought that, prepetition, she had transferred the interest to other trusts, but it turns out she did not complete the transfers. Thus, the interest was property of her estate and the proceeds of the postpetition sale belonged to the Trustee. If you are interested in Mexican trust and probate law, this case will be informative.



SUMMARY NUMBER:  
TDW

63

KEY CODE SECTION(S): 542(b)  
KEY TOPIC(S): Property of the Estate; Turnover

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In re: Picacho Hills Utility Company, Inc. (Coll v. Picacho Hills Development Company, Inc.)*, 2017 WL 5989169 (Bankr., D.N.M., 2017)

CASE NUMBER: Case No. 13-10742; Adv. No. 16-01007

DATE DECIDED: December 1, 2017

NOTEWORTHY ISSUE: In a ruling on parts of cross motions for summary judgment, the Court ruled:

- 1) Trustee of estate of public utility debtor had standing to assert turnover action to enforce a Public Utility Commission order which establishes a debt to the Debtor;
- 2) The statute of limitations on enforcement of the Commission Order had not expired because there may well be no limitation period on Commission orders and, alternatively, the Commission Order is analogous to a final judgment whose limitation period is 14 years; and
- 3) The Trustee was entitled to recover funds paid to third party for an asset that was not titled in the name of the Debtor but was property of the estate under applicable state law.

FACTS: In 1993, the New Mexico Public Utility Commission (the "Commission")<sup>1</sup> ordered Development Co. to transfer ownership of certain water utility assets to Debtor, a public water utility. Fifteen years later, in October 2008, the Commission investigated Debtor's operations and found that Development Co. had never transferred to Debtor a parcel of land that was supposed to have been transferred. Instead, it had been transferred to a third party who sold it for \$168,000. At the time the land was sold it should have been Debtor's property. The Commission ordered Development Co. to pay Debtor \$168,000 within 90 days (the "Commission Order"). Development Co. never made the payment.

Prior to 2000, the Debtor owned a parcel of land that was used in the Debtor's then operations as a "substantial part" of the utility system (the "Current Water Tank Parcel"). In 2000 the Debtor conveyed the Current Water Tank Parcel to Development Co. The conveyance of the Current Water Tank Parcel was not approved by the Commission.

In September 2010, Bank sued Debtor in state court. A receiver was appointed who negotiated a sale of Debtor's assets, including the "Current Water Tank Parcel. Debtor filed bankruptcy before the sale closed. The bankruptcy court abstained and suspended proceedings pursuant to Code §305, allowing the parties to return to state court so the Receiver could complete the asset sale.

The parties "discovered" and believed that Debtor did not have title to the "Current Water Tank Parcel," one of the assets Buyer was supposed to get. Buyer agreed to pay Development Co. \$100,000 and other consideration for Development Co.'s interest in the Current Water Tank Parcel (the "Side Deal"). At the same time, the Receiver reduced the purchase price for

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<sup>1</sup> The Commission later became the New Mexico Public Regulation Commission.

the utility assets by \$100,000. The state court approved the sale, including the reduction in the sales price. The Debtor and the Receiver were not parties to the Side Deal and therefore it was not necessary for the state court to approve the Side Deal.

In January 2014, the Court reactivated the bankruptcy case. Months later, the case was converted to chapter 7 and a trustee was appointed. In February 2016, the Trustee sued Development Co. for turnover of the \$168,000 ordered by the Commission Order, and the \$100,000 buyer paid to Development Co. Another claim was asserted that is not the subject of this opinion.

Standing. Development Co. argued that Trustee did not have standing to enforce the 2010 Commission Order that ordered Development Co. to pay Debtor \$168,000. The Court reviewed the statute by which Commission decisions are enforced and found that it did not expressly grant a right of action in favor of the utility, here, the Debtor. The Court concluded that, in the narrow context of Commission orders specially benefiting New Mexico utilities, such utilities have standing to enforce the orders. The Court held also that the Bankruptcy Code's turnover provisions provide the Trustee the necessary standing in this case.

Statute of Limitations. Development Co. argued also that the statute of limitations to enforce the Commission's order had expired. The Court examined this argument and concluded that enforcement of Commission orders might not have a limitations period or, if they do, they are similar to judgments, which may be enforced for 14 years. Either way, the Trustee's action was timely.

Current Water Tank Parcel proceeds. The Court agreed with Trustee's §542 claim that the \$100,000 Development Co. received from the buyer for the Current Water Tank Parcel should be turned over to the estate because the Court found the conveyance of Current Water Tank Parcel by the Debtor to the Development Co. was void and of no effect pursuant to N.M.S.A. § 62-6-12<sup>2</sup>. As a result, the Development Co. had nothing to sell in exchange for the \$100,000 and the money should have been paid to the estate<sup>3</sup>.

NOTE: Previously, in March 2017, the Court ruled that the Development Co. was not liable to the estate under §549 for the post-petition transfer of the Current Water Tank Parcel because the transfer did not have to be approved and therefore the "unauthorized" element of §549 was not satisfied.

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<sup>2</sup> N.M.S.A. § 62-6-12 provides: A. With the prior express authorization of the commission, but not otherwise: . . . (4) any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof; provided, however, that this paragraph shall not be construed to require authorization for transactions in the ordinary course of business.

B. Any consolidation, merger, acquisition, transaction resulting in control or exercise of control, or other transaction in contravention of this section without prior authorization of the commission shall be void and of no effect.

<sup>3</sup> The Court found also that to the extent that Development Co. received additional consideration under the Side Agreement, such consideration should be turned over to the estate.

SUMMARY NUMBER:  
JAA

64

KEY CODE SECTION(S): Sec. 524(c)  
KEY TOPIC(S): Reaffirmation

COURT: USCA 10<sup>th</sup> Cir.  
JUDGE: Carlos F. Lucero  
CASE NAME: SMS Financial v. Cope  
CITE: 685 Fed.Appx. 648  
CASE NUMBER: 16-6063  
DATE DECIDED: April 13, 2017

**NOTEWORTHY ISSUE and HOLDING:** A promissory note, based in part on a discharged debt, is an unlawful reaffirmation agreement and is void.

**FACTS and DISCUSSION:** This case involves a loan for a \$125,000 yacht, made to a former debtor. Through a complicated set of facts, this debtor was liable to the bank, on other large defaulted loans, taken out by other entities. This liability was discharged in his bankruptcy. In order to get the yacht loan, the Debtor agreed to sign another note, for about \$76,000, and then later, even more notes, all somehow connected to the discharged debt. The bank failed and was taken over by the FDIC.

The FDIC sold all the notes to a debt buyer. The debt buyer sued to collect. The debtor defended by claiming the notes were void as unenforceable reaffirmation agreements. The debt buyer countered by arguing that 12 U.S.C 1823(e) and the *D'Oench* doctrine (a sort of federal holder in due course status for the FDIC and buyers of debt from the FDIC) protected the holder of the notes from the unenforceable reaffirmation defense. In denying summary judgment for the debt buyer, the 10<sup>th</sup> Circuit held that the discharge in bankruptcy and the protections of Sec. 524(c) are paramount and could bar collection of the debt.

SUMMARY NUMBER:  
MKD

65

KEY CODE SECTION(S): None  
KEY TOPIC(S): Reconsideration

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: In re Sandia Resorts, Inc.; 2017 WL 1067749  
CASE NUMBER and DOCKET NUMBER: Case No. 11-15-11532 TA  
DATE DECIDED: March 21, 2017

NOTEWORTHY ISSUE:

1. Should the Court reconsider the sales order?

HOLDING:

1. No. The sale is final; Sandia shows no grounds justifying reconsideration.

Sandia's motion was filed within 14 days of the order; the Court construes it as a motion to alter or amend pursuant to R. 59(e). Grounds include (1) an intervening change in controlling law, (2) new evidence previously unattainable and (3) the need to correct clear error or prevent manifest injustice. Sandia argues issues previously decided without raising any of these grounds for relief; R. 59(e) is not designed to allow litigants to rehash old arguments.

FACTS:

Sandia Resorts filed Chapter 11 in 2011 and confirmed a plan reorganizing the claims of Bank of Santa Fe. It filed another case in 2015, Bank of Santa Fe moved to dismiss on grounds Sandia could not reorganize the same debt twice. Judge Jacobvitz dismissed the case. Debtor moved to reconsider and raised a standing issue; Bank of Santa Fe had sold its claim to a third party, but nonetheless pursued a motion to dismiss after the sale. The Court set aside the dismissal. Sandia was unable to confirm a plan, the case was converted to Chapter 7, and the Trustee moved to sell the hotel property to Bank of Santa Fe's successor in interest for \$550,000 plus forgiveness of the \$1.9 million mortgage. The Court granted the motion over Sandia's objection. Sandia moved to reconsider the sales order and stay its enforcement pending appeal to the BAP; now taking the position that Bank of Santa Fe and not its successor in interest holds the mortgage. Sandia is judicially estopped from taking this position.

SUMMARY NUMBER:  
MKD

66

KEY CODE SECTION(S): 11 U.S.C. §362  
KEY TOPIC(S): Relief from Stay

COURT and JUDGE: NM Bankruptcy Court; David T. Thuma  
CASE NAME and CITE: Jean & Dennis Montoya; 2017 WL 5713198  
CASE NUMBER and DOCKET NUMBER: Case. No. 7-17-11823 TA; Docket No. 53.  
DATE DECIDED: November 21, 2017

NOTEWORTHY ISSUE:

1. Is stay relief appropriate to liquidate a claim in state district court?

HOLDING:

1. Not in this case.

Courts generally rely on the *Curtiss* factors:

1. Whether the relief will provide partial or complete resolution of the issues;
2. The lack of any connection with or interference with the bankruptcy case;
3. Whether the foreign proceeding involves the debtor as a fiduciary;
4. Whether a specialized tribunal has been established to hear such cases;
5. Whether the debtor's insurance carrier has assumed the defense;
6. Whether the action involves third parties and debtor is merely a conduit;
7. Whether litigation in another forum would prejudice other creditors;
8. Whether the foreign judgment would be subject to subordination under §510;
9. Whether movant's success in the foreign case would result in an avoidable lien;
10. The interest of judicial economy; expeditious and economical resolution;
11. Whether the parties are ready for trial in the foreign proceeding;
12. The impact of the stay on the parties, and the "balance of the hurt".

In an asset case to determine distribution, the stay would be lifted. Since this is a no asset case and a §523 nondischargeability suit is pending, the motion will be denied.

FACTS:

Debtor (formerly an attorney) filed a police brutality suit in US District Court on behalf of a client. Mislabeling defendants and failing to serve defendants he got a large default judgment against a former Santa Fe County sheriff who had shot his client in an armed confrontation. Years later the sheriff learned of the judgment, got it set aside and the County settled with the estate of Montoya's client. The sheriff sued for malicious process and Montoya filed bankruptcy. The sheriff moved for stay relief to have the state district court liquidate the claim. The state court had previously granted the sheriff summary judgment, but been reversed on appeal and remanded for consideration of a limitations defense.

SUMMARY NUMBER:  
TDW

67

KEY CODE SECTION(S): Fed.R.Civ.P. 60(b) and Bankr. Rule 9024, Code §727(a)(2), (a)(3), (a)(4), & (a)(5)

KEY TOPIC(S): Relief from Judgment under Rule 60(b) and Denial of Discharge

COURT and JUDGE: 10<sup>th</sup> Cir. BAP (Cornish)

CASE NAME and CITE: *In re Shifren (Sender v. Shifren)* 2017 WL 4161897 (10th Cir. BAP 2017 (Unpublished))

CASE NUMBER: Bankr. No. 12-22722, Adv. No. 14-01169, BAP No. CO-17-012

DATE DECIDED: Filed September 20, 2017

NOTEWORTHY ISSUE: Standard for relief from judgment under Rule 60(b).

HOLDING: Very fact specific but includes good discussions of Rule 60(b) and grounds for denial of discharge under Code §727(a).

FACTS: A state court judgment was entered against Debtor. Debtor violated terms of the judgment. State Court sanctioned debtor and found that assets of certain companies were debtor's assets. Debtor filed chapter 7. Trustee requested documents. Debtor failed to respond to requests. Trustee filed complaint to deny discharge under §727(a), which court granted in summary judgment. Debtor did not appeal judgment denying discharge.

Later, in a related state court proceeding, state court granted partial relief from the previously entered sanctions order. Debtor used that ruling to support a Rule 60(b) (Bankr. R. 9024) motion to set aside the summary judgement denying discharge. Bankruptcy court denied Rule 60(b) motion finding that the state court proceedings had no bearing on the denial of discharge. Debtor appealed. BAP refused to reconsider the denial of discharge because debtor failed to timely appeal that judgment.

BAP considered only the order denying the Rule 60(b) motion, for which the standard on appeal is very tough. Relief from final order or judgment under Rule 60(b) is "extraordinary and may only be granted in exceptional circumstances." The decision should only be reversed if the Court finds "a complete absence of a reasonable basis and [is] certain that the [bankruptcy court's] decision is wrong."

Of interest is that in support of denying discharge, the bankruptcy court found that debtor "knowingly and fraudulently made false oaths in the form of false statements in his schedules and statement of financial affairs, executed under oath, and gave false testimony, including (a) scheduling jewelry as having a value of less than \$36,000 that he insured for over \$200,000; (b) failing to disclose in his statement of financial affairs income from rental properties, which

he was required to disclose regardless of the ownership of the properties; (c) failing to disclose his withdrawal, within ninety days of the bankruptcy petition date, of over \$125,000 from an account in which Appellant held an interest; (d) failing to disclose prepetition litigation; and (e) Appellant's misleading testimony at the § 341(a) meeting of creditors that his schedules and statements were accurate and his false testimony at a Rule 2004 examination."

SUMMARY NUMBER:  
JAA

68

KEY CODE SECTION(S): Sec. 363(b)

KEY TOPIC(S): Sale out of ordinary course

COURT: USBC-NM  
JUDGE: Robert H. Jacobvitz  
CASE NAME: In re: Sasso  
CITE: 572 B.R. 331  
CASE NUMBER: 12-14564-j7  
DATE DECIDED: June 27, 2017

**NOTEWORTHY ISSUE:** What standard must a Ch. 7 Trustee meet to sell a debtor's life estate in real property?

**HOLDING:** A Trustee must show a sound business reason for the sale. The Trustee must show that he provided adequate and reasonable notice of proposed sale, that the proposed sale price is fair and reasonable, and the buyer's good faith in purchasing the asset.

Factors for the Court to consider are (1) whether there was any improper or bad motive involved, (2) whether the transaction occurred at arm's length, and 3) whether there were adequate sales procedures, including proper exposure to the market.

**FACTS and DISCUSSION:** The debtor held a life estate in a condominium in Chicago. The Debtor did not occupy the condominium and there was no available exemption. The condominium association had recently passed rules limiting the number of units that could be used as rentals at any one time. Because of this limitation, the condo could not be cannot be rented. The rental limitation reduced the condo's value. Using the IRS guidelines for valuing remainder interests in life estates, for gift tax purposes, the Court determined that the sale price was fair. They buyer also agreed to waive his claims in the bankruptcy case, resulting in a larger recovery to other unsecured creditors.



SUMMARY NUMBER:  
TDW

69

KEY CODE SECTION(S): 363(b)  
KEY TOPIC(S): Sales

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In Re: Railyard Company, LLC*, 572 B.R. 766 (Bankr. D.N.M., 2017)

CASE NUMBER: Case No. 15-12386

DATE DECIDED: June 14, 2017

**NOTEWORTHY ISSUES:** Chapter 11 trustee was allowed to sell property of the estate outside the ordinary course of business over the objections of persons who claimed an interest in the property where those interests were in “bona fide dispute.” Validity of claimed interests in proceeds of estate property sale would be decided in an adversary proceeding and not in the motion to sell property. Trustee’s “business judgment” is entitled to deference if certain criteria are satisfied.

**HOLDING:**

**FACTS:** Debtor owned a two-story, retail building in Santa Fe. In October 2012, debtor entered into a lease with Ringside, LLC, for space in the building where Ringside intended to operate a restaurant, bar, and bowling center. Some of the principal members of debtor were among the principal members of Ringside. In October 2012, Ringside signed a contract with US Bowling to purchase bowling equipment for \$320,000. In 2012, 2013, and 2015, debtor made five payments to US Bowling totaling \$320,763. At some point Ringside abandoned the project. Railyard Brewing Company LLC (RBC) signed a lease with debtor in January 2014 for the bowling center space and continued the project. The principal members of debtor were the principal members of RBC. Despite considerable effort, the bowling center never opened. There was no evidence that anyone other than debtor paid for the bowling equipment.

In September 2015, Debtor filed chapter 11. Debtor’s schedule B shows that debtor owns the bowling equipment. In March 2015, a chapter 11 trustee was appointed. In December 2016, the Court entered an order granting the trustee’s rejection of the lease with RBC.

REI, the Estate’s anchor tenant, and the City of Santa Fe, which owns a condo adjacent to the bowling center space, both expressed concern about the noise and vibration from the bowling center. Relying upon a qualified sound and vibration attenuation expert, the trustee concluded that it would be better for the estate to abandon the bowling concept and relet the bowling center space for other uses.

In February 2017, Trustee filed a motion under code §363(b) to approve the sale of the bowling equipment back to US Bowling free and clear of interests for \$44,000. US Bowling was responsible for the costs of removing the bowling equipment at an estimated cost of

\$20,000. Two of the principals of debtor (who are also principals of RBC) objected to the proposed sale.

The “business judgment” test applies Sales under § 363(b) sale. If the trustee can articulate “sound business reasons for the terms of the proposed sale” then the trustee’s business decision is entitled to deference from the court. The Court applies 5 factors to determine if the business judgment rule applies: 1. Does the proposed sale involve any improper or bad motive? 2. Is the price fair and reasonable? 3. Did the negotiations occur at arm’s length? 4. Was the property adequately exposed to the market? 5. Was the notice of the sale motion adequate and accurate? The Court evaluated the trustee’s reasons for the motion to sell and concluded that his business judgment was sound.

Code §363(f)(4) allows the trustee to sell property free and clear of any interest if that interest is in bona fide dispute. An alleged interest in estate property is “in bona fide dispute” when there is objective basis for legal dispute as to validity of the interest.

The Objectors argued that the bowling equipment belonged to them and not to the estate. The Court found that debtor paid for the bowling equipment and owned the bowling equipment. The Court concluded that the objectors’ claim to own the bowling equipment was doubtful and was at minimum “in bona fide dispute.” Therefore, the trustee could sell the equipment free and clear of all interests including the interest claimed by the principal members of the debtor.

RBC did not object to the motion to sell and did not participate in the trial on the motion. A limited liability company may only appear in court through its attorneys. Therefore, the trustee could sell the equipment free and clear of any interest claimed by RBC.

Any valid interests in property sold by the trustee attach to the proceeds of a sale of the property under §363(f). An order for distribution of sale proceeds where there are interests in bona fide dispute cannot issue on a motion to sell. An adversary proceeding is required to determine validity, amount, and priority of liens and interests. So here, the Court ruled, the validity of claimed interests would not be decided on the motion to sell but would be decided later in an adversary proceeding.

The Court ruled also that US Bowling is a faith good purchaser pursuant to § 363(m), finding that the sale was negotiated at arms-length, US Bowling is not related to, or holds an interest in, the Debtor, and there was no evidence of fraud or collusion between the trustee and US Bowling. Code §363(m) protects the sale and the purchaser in the event of an appeal without a stay.

SUMMARY NUMBER:  
PMF

70

KEY CODE SECTION(S): § 544  
KEY TOPIC(S): Secured Claims

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Chacon (Chacon v. The Greenbriar Townhouses, Inc.)*

CASE NUMBER: Adv. No. 16-01027 t

DATE DECIDED: August 8, 2017

NOTEWORTHY ISSUE: Whether an unperfected security interest survives bankruptcy. Whether an interest in a housing cooperative is a landlord-tenant relationship or a security or something else.

HOLDING: The interest in a housing cooperative is personal property. Unperfected security interests “ride through” bankruptcy as an *in rem* claim if not affirmatively set aside. An interest in a housing cooperative has attributes of a landlord tenant relationship or perhaps a security. However, those issues did not need to be resolved. The housing cooperative was allowed to enforce its claim in accordance with Article 9 of the UCC.

FACTS: The housing cooperative of a debtor who had received a discharge sought to assert the debt as a lien on the housing cooperative interest of the debtor. The debtor asserted that any lien right was not in accordance with the Landlord Tenant Act, but the court noted that the cooperative relationship was more than merely a tenancy agreement. The court finally concluded that the membership interest is personal property, but it did not decide whether the security interest was perfected because it did not need to do so.

SUMMARY NUMBER:  
MKD

71

KEY CODE SECTION(S): None  
KEY TOPIC(S): Security Interests  
(Kansas law)

COURT and JUDGE: Tenth Circuit; J. Holmes, author (Briscoe & Phillips)  
CASE NAME and CITE: In re Gracy; Morris v. AVCU; 689 Fed.Appx. 590  
CASE NUMBER and DOCKET NUMBER: 10<sup>th</sup> Cir No. 16-3281  
DATE DECIDED: May 24, 2017

NOTEWORTHY ISSUE:

1. Does the Kansas Mobile Home Act provide the exclusive means of changing a manufactured home from personal property into a fixture?

HOLDING:

1. No. The statute does not exclude common law as a means of converting a manufactured home into a fixture; it merely provides one way of doing so.

Under Kansas common law a mobile home is a fixture if (1) annexed to realty; (2) adapted to the use of that part of the realty; and (3) intended by the owner to be a fixture. Gracy having lived in the house for 20 years, surrounding it with skirting, built a porch and patio adjacent to it and erecting a large garage nearby certainly shows an intent to annex and that the home has been successfully adapted to the use of the realty. The home is a fixture.

The Bankruptcy Court is affirmed.

FACTS:

During the 1990's Gracy bought land in Caldwell Kansas and placed a manufactured home on it (the mobile home is set on piers resting on concrete slabs, and anchored with straps to the piers and slabs). He has lived there ever since. Gracy borrowed money from Ark Valley Credit Union ("AVCU"), secured by a mortgage on the property; the mortgage did not mention the mobile home.

Debtor filed a Chapter 7 bankruptcy in 2013, claimed the Caldwell property as his homestead without separately mentioning the manufactured home as personal property.

Gracy's Trustee moved to avoid AVCU's alleged lien in the manufactured home as unperfected, because the lien was not noted on the mobile home's certificate of title. The Bankruptcy Court concluded the mobile home was a fixture, AVCU hadn't perfected a security interest in it, and allowed the Trustee to avoid the mortgage liens. AVCU appealed, the US District Court affirmed; this appeal followed.

SUMMARY NUMBER:  
TDW

72

KEY CODE SECTION(S): 553; 524(a)(2)  
KEY TOPIC(S): Setoff; Doctrine of Recoupment;  
Discharge Injunction

COURT and JUDGE: USBC DNM (J. Thuma)

CASE NAME and CITE: *In Re: Alliance Well Service, LLC (Alliance Well Service, LLC v. J.S. Ward & Son, Inc.)* 577 B.R. 389 (Bankr.,D.N.M., 2017)

CASE NUMBER: Case No. 16–10078 t11; Adv. No. 17–1008 t

DATE DECIDED: October 27, 2017

**NOTEWORTHY ISSUE:** The equitable doctrine of recoupment did not permit insurance agent to retain insurance premium refund owed to Debtor from Insurer and apply it to agent's non-priority, unsecured claim representing balance of loan to Debtor; the transactions were related but not a "single, integrated transaction" as required for recoupment doctrine.

**FACTS:** Insurer issued a one-year liability insurance policy to debtor effective August 1, 2015.<sup>1</sup> The premium was \$134,042 and was due in full, up front. Defendant was the insurance agent and was responsible for collecting the premium. Part of the premium was an estimate; the ultimate amount was to be determined by an audit conducted after the policy term. If the audit revealed an overpayment, Insurer would refund the overpayment to Debtor.

Debtor borrowed the premium amount from Defendant and signed an Insurance Premium Finance Agreement, in which Debtor granted Defendant a security interest in Debtor's right to a refund of any unearned premium. Later, Debtor entered into a new premium finance agreement with Defendant that replaced the existing agreement, and included the premium for an auto policy plus the unpaid balance of the previous agreement. The total on the new agreement was \$122,480.06. Defendant sold the premium finance agreement to Bank on a full recourse basis.

Debtor filed Chapter 11 on January 19, 2016. Bank immediately demanded that Defendant repurchase the premium finance agreement, which Defendant did. Thereafter, the Court ordered Debtor to pay adequate protection payments to Defendant on account of the premium finance agreement.

In October 2016 Debtor confirmed its reorganization plan that provided, in part, that Debtor would continue adequate protection payments to Defendant until the secured portion of Defendant's claim is paid in full. The remaining balance would be classified as a "general unsecured claim." Upon completion of the Plan payments on Defendant's secured claim, Defendant properly filed notice of the remaining loan balance in the amount of \$46,269.12. Shortly thereafter, Insurer notified Defendant that it had completed its audit, and that Debtor had overpaid by \$48,032.00. Insurer sent the Refund to Defendant. Defendant notified Debtor that it was keeping the Refund, asserting a security interest in it, and would apply it to

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<sup>1</sup> The published opinion states that the effective date was "August 1, 2016."

Defendant's claim for the loan balance. Debtor demanded that Defendant turn over the Refund. Defendant refused.

The Plan included a "Confirmation Injunction" that permanently enjoins claim holders from ... "from creating, perfecting, or enforcing any encumbrance of any kind against the Debtor or the Reorganized Debtor or against the property of the Debtor, the Estate, or the Reorganized Debtor with respect of any such Claim; ... from asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due from the Debtor or the Reorganized Debtor, or against the property of the Debtor, the Estate, or the Reorganized Debtor with respect to any such Claim."

The Plan provided also that all Property of the Estate and Debtor ... "shall be free and clear of all Claims and interests of creditors, Interest holders, and other parties in interest, except as specifically provided for in the Plan or the Confirmation Order."

No security interest. It was undisputed that the premium refund belonged to Debtor. After confirmation of the plan and after Debtor paid Defendant's secured claim in full, Defendant's security interest in any unearned premium, and in particular in the Refund, did not survive.

No Setoff. Section 553 provides that the Code does not affect any right of a creditor to offset a "mutual debt owing by such creditor to the debtor that arose before the [bankruptcy] against a claim of such creditor against the debtor that arose before the [bankruptcy]." Defendant claims a right to offset its remaining claim against the Refund. For a number of reasons, setoff was not available to Defendant here. (1) The Insurer had no obligation to pay the refund under after the audit which happened after the commencement of the case. (2) Defendant bought the claim post-petition, when Bank enforced the repurchase requirement post-petition. (3) The Plan's confirmation injunction and the Code's discharge injunction prevent Defendant from exercising any setoff against the Debtor or its property, the Refund.

No Recoupment. Defendant argues that equitable doctrine of recoupment to justify keeping the Refund. Recoupment is an equitable doctrine that, in bankruptcy, permits a creditor to withhold funds owed to the debtor if the debtor owes money to the creditor arising from the same transaction.

Recoupment remains a distinct doctrine in bankruptcy cases, that appears to avoid the requirements of setoff under § 553, by acting as a defense to the debtor's claim. Recoupment is "narrowly construed" because it violates the basic bankruptcy principle of equal distribution to creditors. Thus, "both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations." The claims must be "so closely intertwined that allowing the debtor to escape its obligation would be inequitable ...." In re Beaumont, 586 F.3d 776, 781 (10th Cir. 2009).

The Court examined the doctrine carefully and concluded that it was not available to Defendant here. (1) The claims are not part of the same "single integrated transaction." The Refund is owed to Debtor under the terms of an insurance policy. Defendant was not a party

to the insurance contract. Defendant is owed money on the loan to Debtor. Insurer was not a party to that loan transaction. The transactions are related but are not a "single, integrated transaction." The result might have been different if the Insurer were also the lender. (2) The equities do not favor recoupment. Insurer should have sent the Refund to Plaintiff, not Defendant. Defendant should not have kept it. The Plan made that clear. Defendant should have sent it to Plaintiff, or deposited it in the Court registry.

SUMMARY NUMBER:  
PMF

73

KEY CODE SECTION(S): B.R. 9019  
KEY TOPIC(S): Settlement

COURT and JUDGE: United States Court of Appeals, Tenth Circuit, Carolyn B. McHugh,  
Circuit Judge

CASE NAME and CITE: *Liberty Bank, F.S.B. v. Christie, Inc.; Christie; Glenn; Meyer; Pratt*, 681 Fed.Appx. 664 (2017)

CASE NUMBER: 16-3230

DATE DECIDED: March 7, 2017

NOTEWORTHY ISSUE: Whether a creditor could object to a settlement as prejudicial to its interests.

HOLDING: Since the settlement did not prejudice the creditor, the settlement was approved.

FACTS: Party A obtained a judgment against Party B. Party B then purchased debts owed by Party A to others. Then Bank garnished Party B for the judgment in favor of Party A. Party A and B then settled with offsets that wiped out the claims and sought bankruptcy court approval since one of them was in Chapter 11. Court held that the debts could be offset without prejudicing the Bank since the offset right arose prior to the garnishment.



SUMMARY NUMBER:  
JAA 15

74

KEY CODE SECTION(S): None  
KEY TOPIC(S): Sovereign Immunity  
Judicial Immunity

COURT: USDC-NM  
JUDGE: William P. Johnson  
CASE NAME: Lankford v. U.S. Department of Justice  
CITE: 2017 WL 5564568 and Doc. 24 from case.  
CASE NUMBER: 17-cv-668 WJ/GBW  
DATE DECIDED: November 17, 2017

**NOTEWORTHY ISSUE:** May an unhappy litigant from bankruptcy court sue the U.S. Department of Justice for not properly supervising the Bankruptcy Court and U.S. District Court?

**HOLDING:** No. Sovereign immunity and judicial immunity protect the Department of Justice and the Judges of the District and Bankruptcy Courts.

**FACTS and DISCUSSION:** In the VCR bankruptcy case, the Trustee filed numerous avoidance actions. One set of defendants was unhappy with being sued. After unsuccessfully seeking permission to sue the Trustee and her counsel and after unsuccessful appeals and motions to set aside the judgment for net winnings against them, the Lankfords filed suit against the U.S. Department of Justice. While the complaint blames the Department of Justice, it also seeks to set aside the original judgment against the Lankfords and makes claims against all of the Judges that have ruled against them. Judge Johnson dismissed the complaint on grounds of sovereign immunity and judicial immunity.

Judge Johnson also entered an injunction against the Lankfords, barring them for filing any pleadings in Bankruptcy Court or U.S. District Court unless they meet a strict set of guidelines.

SUMMARY NUMBER:  
PMF

75

KEY CODE SECTION(S): Rule 12(b)(1)  
KEY TOPIC(S): Standing

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Thuma

CASE NAME and CITE: *In Re: Flying Star Cafes, Inc. (NM Enterprises, Inc. d/b/a NM Bakery Service Company v. Harrington, et al.)*, 568 B.R. 129

CASE NUMBER: Adv. No. 16-1060 t

DATE DECIDED: May 5, 2017

NOTEWORTHY ISSUE: Standing of a creditor to seek to subordinate the claim of another creditor post plan confirmation, the meanings of prudential standing and statutory standing.

HOLDING: The creditor did not have standing to attempt to subordinate the other creditor's claim. Prudential standing prohibits one party from raising another party's legal rights. The plaintiff must assert his own legal rights and not the legal rights of third parties. Statutory standing is standing conferred by statute. The analysis is whether there is Article III standing, whether a statute confers or denies standing and if there is no statute giving guidance, whether prudential standing concepts be employed to dismiss the case.

In general, a creditor seeking to subordinate a claim under § 510(c) can only do so if the object is to subordinate that creditor's claim to his own, not to all creditors generally. If there is no particularized injury, the creditor does not have standing. The right is reserved for the estate representative. In this case, the estate representative settled the claim, and the creditor did not have standing to bring the action.

FACTS: Creditor settled with the debtor pre-confirmation on the amount and priority of its claim, with the court approving the settlement after appropriate notice. The plan provided that claims objections must be brought by the debtor. Another creditor then objected to the claim and sought subordination. A side issue was that the creditor sought to settle by a payment to it in return for dropping the action.

SUMMARY NUMBER:  
MKD

76

KEY CODE SECTION(S): None  
KEY TOPIC(S): Standing

COURT and JUDGE: Tenth Circuit BAP; J. Romero author (Michael & Hall)  
CASE NAME and CITE: In re Eurogas, Inc., Slovakia v. Loveridge et al; 576 B.R. 648  
CASE NUMBER and DOCKET NUMBER: BAP No. UT 16-033  
DATE DECIDED: November 21, 2017

NOTEWORTHY ISSUE:

1. Does the Slovak Republic have standing to appeal?

HOLDING:

1. No.

The Agreement (sale of rights for \$250k plus withdrawal of \$113 million judgment) benefits creditors, including Slovakia. Only a "...person aggrieved..." by a bankruptcy order has standing to appeal. A person aggrieved is one whose rights or interests are directly and adversely affected pecuniarily by the bankruptcy court order. Since the Agreement increases the distribution to creditors, Slovakia is not a person aggrieved; logically Slovakia opposes the Agreement only to gain arbitration advantage.

Even if Slovakia had standing, it was clearly wise for the Trustee to sell a claim rather than engage in expensive international arbitration with no money to fund it.

FACTS:

A Texas bankruptcy judge entered judgment against Eurogas for \$113 million. The Texas Trustee filed an involuntary Chapter 7 against Eurogas in Utah; Debtor did not file schedules. Texas EuroGas Corp. (an unrelated entity) purchased the judgment from the Texas Trustee. The Utah Trustee distributed \$700k to creditors (mostly Texas Eurogas) and closed the case. Debtor's principals formed a new corporation also named Eurogas, which asserts it merged with the Debtor post bankruptcy, assuming Debtor's assets and liabilities.

Debtor owned an Austrian company, which owned an interest in Slovakian talc mining rights; this was not administered by the Utah Trustee. Eurogas pursued the talc rights in international arbitration; the US Trustee reopened the Utah bankruptcy to administer the asset. Eurogas purchased the bankruptcy estate's interest for \$250,000; Texas Eurogas withdrew its \$113 million claim (together "the Agreement"). The Slovak Republic purchased two unsecured claims and objected, in an apparent attempt to gain arbitration advantage. Slovakia appealed the bankruptcy court's approval of the Agreement; EuroGas moved to dismiss the appeal for lack of standing.

SUMMARY NUMBER:

77

KEY CODE SECTION(S): § 544, 26 U.S.C.A.  
§6321

PMF

KEY TOPIC(S): Tax Liens

COURT and JUDGE: United States Bankruptcy Court, D. New Mexico, Judge Jacobvitz

CASE NAME and CITE: *In Re: Aquatic Pools, Inc.*, 567 B.R. 376

CASE NUMBER: 15-11406 t11

DATE DECIDED: February 8, 2017

NOTEWORTHY ISSUE: Whether prepetition penalties accruing after the IRS's Notice of Federal Tax Liens against debtor's personal property were perfected or could be avoided.

HOLDING: The court held that the entire federal tax lien, including accruing penalties and interest, is perfected when the Notice of Federal Tax Lien is filed and need not be updated with continuously accruing penalties and interest. 26 U.S.C. § 6321.

FACTS: IRS filed tax lien, and then debtor filed Chapter 11 and sought to avoid the penalties that accrued prepetition using § 544. Since the tax lien perfected the interest for future penalties, the lien was not avoidable.

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# Discussion from the Bench

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Presentation by the Office of  
the United States Trustee



## STRUCTURED DISMISSALS-WHAT ARE THEY AND WHAT ARE THE PROBLEMS

A “structured dismissal” is one in which dismissal of the case includes granting relief beyond that provided in Section 349. Proposed structured dismissals may include third party releases, exculpations, final distributions (including those in violation of statutory priorities), or other conditions.

Proponents of structured dismissal often cite as authority Sections 105(a) (the Court’s equitable powers), Section 305 (a)(abstention), Section 349, or Section 1112(b). Section 105(a), however, does not “override explicit mandates “of the Code. *Law v. Siegel*, 134 S.Ct. 1188 (2014). Section 305(a), while providing authority for dismissal of cases “if the interests of creditors and the debtor would be better served by such dismissal” and empowering the court to decline to exercise jurisdiction over a case, does not provide authorization for releases, exculpations, claims allowance and distributions, retention of jurisdiction, or any other plan-like provisions as part of the dismissal. Similarly, Section 1112(b) provides authority for dismissal of a Chapter 11 case for “cause” as defined in Section 1112(b)(4), but does not provide authorization for releases, exculpations, claims allowance and distributions, retention of jurisdiction, or any other plan-like provisions as part of the dismissal. Section 349 provides as follows:

**(b)** Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--

**(1)** reinstates--

**(A)** any proceeding or custodianship superseded under section 543 of this title;

**(B)** any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

**(C)** any lien voided under section 506(d) of this title;

**(2)** vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

**(3)** reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. §349(b). Section 349’s provisions on the effect of dismissal restore the prepetition financial status quo and undo the bankruptcy case, as far as practicable, restoring property rights to the position they were in prior to commencement of the case. *Czyzewski v. Jevic Holding*

*Corp.*, 580 U.S. \_\_\_, 137 S.Ct. 973 (2017). Because Section 349(b) specifies what can be varied in a dismissal order, Section 105 may not be used to achieve a contrary result.

Structured dismissals may not be used to contravene the protections of Chapter 11 for creditors. Chapter 11 of the Bankruptcy Code includes many protections for creditors and equity holders. Primary among those protections is the right of creditors and equity holders to vote for or against the proposed plan, along with the prohibition against soliciting acceptances or rejections of a proposed plan prior to transmitting “a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.” 11 U.S.C. § 1125(b). “Adequate information” is defined as “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgement about the plan.” Chapter 11 contains numerous other protections to ensure that the plan is fair. See, e.g., 11 U.S.C. §§ 1123 (contents of a plan); 1126 (right to vote on a plan); 1129 (confirmation requirements, including that plan be proposed in good faith and be fair and equitable to any rejecting class).

A proposed structured dismissal that would make final distributions contrary to statutory priorities<sup>1</sup> without the affected creditors’ consent may not be approved. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017). In *Czyzewski v. Jevic Holding Corp.*, the Supreme Court recently rejected a non-plan priority-skipping distribution of estate assets in a chapter 11 case that the three lower courts had approved. Although *Jevic* presented the Supreme Court with an

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<sup>1</sup> The statutory priorities are established by 11 U.S.C. § 507, which is made applicable to chapter 11 cases by 11 U.S.C. § 103(a).

end-of-case, “structured dismissal” scenario, the Supreme Court’s reasoning is not limited to either structured dismissals or case-ending distributions. Rather, the *Jevic* reasoning applies whenever a bankruptcy court is presented with distributions of estate assets in a chapter 11 case “that would be flatly impermissible” even if they were proposed in a plan “because they violate priority without the impaired creditors’ consent.” *Id.* at 985. *See In re Fryar*, 570 B.R. 602, 610 (Bankr. E.D. Tenn. 2017)(Court denied requested sale of stock and distribution of proceeds in a manner contrary to the Code’s priority scheme).

The Supreme Court’s recent decision in *Jevic* did not approve end-of-case distributions through a dismissal order in a Chapter 11 case. Rather, it left unresolved whether structured dismissals that do not violate priority are permissible. *Id.*, at 985 (“We express no view about the legality of structured dismissals in general.”). So what is the effect of the *Jevic* decision on dismissals that do not seek to violate statutory priorities?

The U.S. Trustee objected to structured dismissal motions in several cases after the *Jevic* opinion was issued. In *M Space Holdings*, Case No. 16-24384 (Bankr. D. Utah), the U.S. Trustee’s objection resulted in the elimination of broad exculpation provisions in the final dismissal order. In *Sunco Liquidation, Inc.*, Case No. 17-10561 (Bankr. D. Del), the U.S. Trustee’s objection again resulted in elimination of broad exculpation provisions, discharge provisions, and third party releases and injunctions in the final dismissal order. In another case in which the U.S. Trustee objected to a structured dismissal order, *Constellation Enterprises LLC*, Case No. 16-11213 (Bankr. D. Del), the Official Committee of Unsecured Creditors appealed the Bankruptcy Court’s denial of a settlement motion that proposed to distribute cash and litigation proceeds in a manner violating the Code’s priority scheme. The appeal has been briefed and argued and is awaiting a decision by the U.S. District Court.

# AMERICAN BANKRUPTCY INSTITUTE JOURNAL

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## Structured Dismissals, or Cases Dismissed Outside of Code's Structure?

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A recent *ABI Journal* article discussed structured dismissals as an option for debtors who sell substantially all of their assets pre-confirmation, leaving them "with no unsecured assets to administer or with insufficient unsecured assets to fund a confirmable plan."<sup>1</sup> The authors describe a structured dismissal as:

a dismissal coupled with some or all of the following additional provisions in the dismissal order: releases (some more limited than others), protocols for reconciling and paying claims, "gifting" of funds to unsecured creditors and provisions providing for the bankruptcy court's continued retention of jurisdiction over certain post-dismissal matters.<sup>2</sup>

They concluded that structured dismissals could be "the quickest and most cost-effective way to conclude your chapter 11 case."<sup>3</sup> No one disputes that dismissal is appropriate in the right circumstances, including cases where insufficient assets exist to justify continued administration,<sup>4</sup> but the structured dismissals described in the article seem to fall outside the three paths for concluding a chapter 11 case under the Bankruptcy Code—confirming a plan, converting to chapter 7 or dismissing without "bells and whistles"—and may sacrifice criti-

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cal bankruptcy safeguards included in the traditional statutory options.<sup>5</sup> Thus, properly evaluating structured dismissals requires comparison and contrast with the statutory options.

First, compared to plan confirmation, structured dismissals "end run...the protection granted creditors in chapter 11" and strongly resemble impermis-

of reorganization and not an evasion of the plan confirmation process."<sup>8</sup> Courts generally disapprove asset sales or settlements that "short circuit...the Code's carefully crafted scheme for creditor enfranchisement,"<sup>9</sup> including "the safeguards of disclosure, voting, acceptance and confirmation."<sup>10</sup> *Braniff* is the seminal case rejecting an asset sale that predetermined future plan terms, calling it a "sub rosa plan."<sup>11</sup> Since *Braniff*, courts have widely adopted the *sub rosa* plan language and analysis, but many now require objecting parties to identify the specific rights or protections denied by the sale or settlement.<sup>12</sup>

Structured dismissals are a new permutation of the *sub rosa* plan. Because structured dismissals are sought separately from the earlier sale or settlement,

## On Our Watch

sible *sub rosa* plans.<sup>6</sup> Second, unlike chapter 7 liquidation, structured dismissals distribute assets without enforcing priorities, addressing litigation or ensuring accountability for distributing assets. Third, unlike traditional dismissals, structured dismissals fail to reinstate state law creditor remedies.

### Plan Confirmation Updated Sub Rosa Plan?

Structured dismissals are typically sought after court approval of asset sales or settlements.<sup>7</sup> Courts treat a proper asset sale or settlement as "a step towards possible confirmation of a plan

the sale or settlement itself does not present *sub rosa* plan issues because nothing therein limits disclosure or voting or predetermines plan terms. It is the subsequent structured dismissal that defines or restricts what would otherwise have been in a plan, such as distribution of sale or settlement proceeds, or disenfranchises other creditor rights normally attendant to plan confirmation. This process effectively bifurcates a single *sub rosa* plan. Structured dismissals should be similarly evaluated and disapproved where confirmation safeguards are circumvented.

Alternatively, a well-crafted sale order can avoid *sub rosa* plan bifurcation

<sup>1</sup> Norman L. Pernick and G. David Dean, "Structured Chapter 11 Dismissals: A Viable and Growing Alternative after Asset Sales," 29 *Am. Bankr. Inst. J.* June 2010, at 1, 58-59 (2010).

<sup>2</sup> *Id.* at 58.

<sup>3</sup> *Id.*

<sup>4</sup> 11 U.S.C. § 1112(b).

<sup>5</sup> *Id.* at 58 (three options are "traditionally chosen").

<sup>6</sup> See *Institutional Creditors of Continental Air Lines Inc. v. Continental Air Lines Inc.* (In re Continental Air Lines Inc.), 780 F.2d 1223, 1224 (5th Cir. 1986).

<sup>7</sup> See, e.g., *Committee of Equity Sec. Holders v. Lionel Corp.* (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); *Trailer Ferry Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson*, 390 U.S. 414 (1968).

<sup>8</sup> See *Motorola Inc. v. Official Comm. of Unsecured Creditors* (In re Iridium Operating LLC), 478 F.3d 452, 467 (2d Cir. 2007).

<sup>9</sup> *PBGC v. Braniff Airways Inc.* (In re Braniff Airways Inc.), 700 F.2d 935, 940 (5th Cir. 1983).

<sup>10</sup> *Lionel*, 722 F.2d at 1071.

<sup>11</sup> *Braniff*, 700 F.2d at 949.

<sup>12</sup> *Continental Air Lines*, 780 F.2d at 1228; *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 422 (S.D. Tex. 2009).

by precluding a subsequent structured dismissal. The estate does not generally benefit from a debtor in possession (DIP) selling over-encumbered property, and the DIP can abandon it under § 554 as burdensome or of inconsequential value. However, most lenders prefer that the DIP liquidate the collateral in a § 363 sale so that the creditor can reap its attendant benefits. The DIP can and should negotiate for some benefit to the estate for selling over-encumbered property under § 363, including that secured creditors set aside sale proceeds to pay administrative expenses so the case can be administered in accordance with the Code.<sup>13</sup> A sale order can also require the parties to either confirm a plan or convert to chapter 7.

### Omitted Confirmation Safeguards

Structured chapter 11 dismissals ignore important chapter 11 safeguards that structured dismissals omit, including voting, acceptance, disclosure and the “fair and equitable” standards, including the absolute-priority rule.<sup>14</sup> Three provisions discussed in the article illustrate the point.

**Releases and Exculpations.** The article suggested including releases and exculpations in a structured dismissal.<sup>15</sup> However, § 1141(d)(3) bars “non-individual” debtor discharges in liquidating plans, just as § 727(a) bars equivalent discharges in chapter 7 liquidation. Thus, any release of a debtor entity in a structured dismissal contravenes the Code.

With respect to nondebtors, even with the procedural and substantive protections afforded by the disclosure statement and plan-confirmation process, courts disagree about the permissibility of nonconsensual releases.<sup>16</sup> Courts consider the released party’s contribution to reorganization and the litigation’s impact on the ability to reorganize.<sup>17</sup> In a structured dismissal, such justifications are absent because there is no reorganization.

Even in jurisdictions where nonconsensual releases are permitted at confirmation, they should not be permitted in a structured dismissal. A structured dismissal forecloses a creditor’s ability to assess and negotiate releases because the creditor has neither the information typically provided through the disclosure

statement nor the leverage afforded by plan voting. Disclosure statements must address litigation and release issues.<sup>18</sup> Plan voting and acceptance requirements then provide an opportunity for creditors and shareholders to obtain improved treatment, such as additional contributions from nondebtors seeking releases or the elimination of nondebtor releases as unnecessary or excessive. The Code’s protections against improper releases and indemnification are absent in a structured dismissal, and a court should generally deny nonconsensual releases as inconsistent with chapter 11.

*Although parties may...look for the “quickest and most cost-effective” exit from chapter 11, the supposed expediency of a structured dismissal should not trump the statutory protections it alters or ignores.*

**Modified Claims-Objection Procedure.** The article further recommended including an “expedited, cost-effective way to reconcile claims and distribute funds.”<sup>19</sup> The suggested approaches include debtors’ unilaterally defining claim amounts in the dismissal motion and requiring creditors to object, requiring creditors to pay costs if they object and filing an omnibus claims objection that binds creditors who do not object.<sup>20</sup> These scenarios impermissibly alter the claim objection process defined in the Code and Federal Rules of Bankruptcy Procedure. “[T]he need for expedition...is not a justification for abandoning proper standards.”<sup>21</sup>

Bankruptcy Rule 3003(b) generally defines the schedule of liabilities as “prima facie evidence of the validity and amount” of a creditor’s claim, and § 502(a) presumes the validity of a filed claim absent objection.<sup>22</sup> If a party objects to a proof of claim, the issue becomes a contested matter for hearing.<sup>23</sup> Prima facie validity for claims and mandatory hearings on claim objections “guard against abuse of the objection

process.”<sup>24</sup> Although the article posits that modified claim procedures are “cost-effective,” in reality, each imposes extra burdens and costs on the creditor and impermissibly undermines protections afforded by the Code and Rules.

**“Gifting.”** The third structured-dismissal provision discussed is the “carve-out or ‘gift’ trust.”<sup>25</sup> When a debtor files for chapter 11 with substantially all assets encumbered, the secured creditor often seeks to monetize its collateral and reap the benefits of a sale under § 363. Such sales are not unusual, but the deals negotiated to secure sale or settlement approval are often problematic. Although funds allocated for distribution to junior creditors in a structured dismissal may be funded from the proceeds of a lender’s collateral, they should rarely be viewed as a “gift.”

To have the sale or settlement approved without objection, either the secured creditor or the purchaser sets aside funds for the sole benefit of a particular group, usually general unsecured creditors, from proceeds otherwise payable to the secured lender. Because there will be insufficient estate funds after the sale to pay administrative expenses or priority creditors in full, the lender makes a class-skipping “gift” to junior creditors who otherwise would receive no distribution under the Code’s priority rules.

“Gifting” in structured dismissals contravenes the Code in several ways. First, the “gift” is typically provided in exchange for consideration, such as a release of claims or settlement of an objection. Because secured creditors do not typically make charitable contributions to their borrowers’ junior creditors, the “gift” may actually resolve avoidance, liability or other litigation issues. Thus, the structured dismissal should be adjudicated under the rules governing settlement or plan confirmation.

Second, funds from the sale of a lender’s collateral are estate property.<sup>26</sup> Accordingly, whether a senior creditor can “gift” directly to junior creditors—bypassing creditors in the middle—

<sup>24</sup> See 9 Alan S. Resnick and Henry J. Sommer, *Collier on Bankruptcy*, ¶ 3007.01[1] (15th ed. rev. 2009).

<sup>25</sup> *Id.*

<sup>26</sup> *U.S. v. Whiting Pools Inc.*, 462 U.S. 198, 203-4 (1983).

<sup>27</sup> The Second and Third Circuits have each held that in chapter 11 cases, “gifting” plans violate the absolute priority rule of 11 U.S.C. § 1129(b)(2), without regard to whether the bypassed class would have received a distribution absent the gift. See *in re DBSD North America Inc.*, \_\_\_ F.3d \_\_\_, No. 10-1175, 2011 WL 350480 (2d Cir. Feb. 7, 2011); *in re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005). However, *DBSD* and *Armstrong* leave open the question of whether gifting distributions would also be impermissible in a chapter 7 liquidation. Cf. *Official Unsecured Creditor’s Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1307, 1312 (1st Cir. 1993) (upholding undisputed lienholder’s “gift” to unsecured creditors in chapter 7 liquidation).

<sup>13</sup> See 11 U.S.C. § 506(c).

<sup>14</sup> See “Structured Chapter 11 Dismissals,” *supra*, n.1 at 57-58.

<sup>15</sup> *Id.* at 57. The scope of the releases may be rather broad and include those “traditional releases seen in a chapter 11 plan.” *Id.*

<sup>16</sup> *Airadigm Commc’ns v. FCC (In re Airadigm Commc’ns)*, 519 F.3d 640, 655-56 (7th Cir. 2008); see also *In re Continental Airlines*, 228 F.3d 203, 212-13 (3d Cir. 2000); *Bank of New York v. Official Unsecured Creditors’ Comm. (In re Pacific Lumber)*, 584 F.3d 229, 252-53 (5th Cir. 2009).

<sup>17</sup> See, e.g., *Airadigm*, 519 F.3d at 656.

<sup>18</sup> *In re U.S. Brass Corp.*, 194 B.R. 420, 429 (Bankr. E.D. Tex. 1996); *In re Metrocraft Pub. Servs. Inc.*, 39 B.R. 567, 571 (Bankr. S.D. Ga. 1984).

<sup>19</sup> “Structured Chapter 11 Dismissals,” *supra*, n.1 at 58.

<sup>20</sup> *Id.* (omitting citations to unpublished case examples).

<sup>21</sup> *TMT Trailer Ferry*, 390 U.S. at 450.

<sup>22</sup> A creditor that does not comply with the requirements of Rule 3001 does not enjoy prima facie validity. *In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993) (Posner, J.J.) (“the creditor cannot rest on the proof of claim” if it failed to attach documentation required under Rule).

<sup>23</sup> Fed. R. Bankr. P. 3007(a); Fed. R. Bankr. P. 9014.

without violating the “absolute-priority rule” is unsettled.<sup>27</sup> When a structured dismissal alters the Code’s priorities of distribution, it should be reviewed under the standards for settlement approval or plan confirmation.<sup>28</sup>

Third, “gifts” in structured dismissals pose disclosure problems. Without the disclosure required for plan confirmation, creditors and shareholders can neither assess whether the lender is resolving potential litigation claims nor determine whether the settlement amount is proper.

### **Conversion to Chapter 7**

Chapter 7 incorporates checks and balances that structured dismissals lack, which make liquidation after a sale of substantially all estate assets preferable to a structured dismissal. Because chapter 7 trustees must account for all estate assets,<sup>29</sup> the chapter 7 trustee makes a “final report” addressing the assets liquidated, the claims quantified and the distribution proposed.<sup>30</sup> The trustee then distributes funds in accordance with the “final report” and files a “final account.”<sup>31</sup> Structured dismissals may include a post-dismissal distribution, but they lack oversight by a disinterested chapter 7 trustee and the chapter 7 safeguards against error or abuse.

Moreover, when a case converts to chapter 7 from chapter 11, chapter 7 administrative expenses have priority over chapter 11 administrative claims.<sup>32</sup> This enables chapter 7 trustees to investigate preference, fraudulent transfer and litigation claims, as well as other possible assets. It also means that chapter 11 professionals will likely receive less and must wait for payment. A structured dismissal may avoid this result, giving the appearance that the chapter 11 professionals may be serving their own interests.

### **Dismissal and § 349 Unwinding**

The article also detailed various statutory grounds supporting dismissal of administratively insolvent cases.<sup>33</sup> However, no one disputes that “cause” exists to convert or dismiss under § 1112; rather, the dispute is whether the cases should be converted, dismissed or dismissed with “bells and whistles” in a structured dismissal.

If a case should be terminated, it can be dismissed, returning parties to

the *status quo ante* and preserving their rights under state law in accordance with § 349. Section 349’s purpose is “to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.”<sup>34</sup> Traditional dismissal typically reinstates receiverships, avoided transfers and avoided liens, and revests property in the debtors.<sup>35</sup> Structured dismissals distribute assets and limit or foreclose a creditor’s state law property rights.

Although courts can alter the presumptive effect of § 349(b) for “cause,” the “power to override” § 349(b)’s requirements “is used sparingly.”<sup>36</sup> “‘Cause’ under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason... It is not part of the judicial office to seek out creative ways to defeat statutes.”<sup>37</sup>

### **Conclusion**

Chapter 11 is designed to administer estates and allocate rights and obligations through court-approved disclosure statements and plans. Alternatively, the Code provides for liquidation and distribution after conversion to chapter 7 or dismissal in accordance with § 349’s reinstatement of state law rights.

The purported need for a structured dismissal is often foreseeable—and thus avoidable—when estates arrive in chapter 11 over-encumbered by liens with a sale of substantially all estate assets the obvious strategy. Although parties may thereafter look for the “quickest and most cost-effective” exit from chapter 11, the supposed expediency of a structured dismissal should not trump the statutory protections it alters or ignores. Cases should be administered according to the structure set forth in the Code and not concluded in a summary manner that is “structured,” but flawed. ■

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<sup>28</sup> See *Iridium*, 478 F.3d at 467; see also *United States v. AWECO Inc.* (In re AWECO Inc.), 725 F.2d 293, 298 (5th Cir. 1984).

<sup>29</sup> 11 U.S.C. § 704(a)(2).

<sup>30</sup> 11 U.S.C. § 704(a)(9).

<sup>31</sup> *Id.*

<sup>32</sup> In re *Rittenhouse*, 76 B.R. 610, 611 (Bankr. S.D. Ohio 1987).

<sup>33</sup> “Structured Chapter 11 Dismissals,” *supra*, n.1 at 56.

<sup>34</sup> H.R. Rep. No. 95-595, at 336 (1977); S. Rep. 95-89, at 48-49 (1978).

<sup>35</sup> See 11 U.S.C. § 349(b) (referencing reinstatement of these transactions).

<sup>36</sup> See 3 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 349.03[2] (16th ed. rev. 2010).

<sup>37</sup> In re *Sadler*, 935 F.2d 918, 921 (7th Cir. 1991).

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

CZYZEWSKI ET AL. *v.* JEVIC HOLDING CORP. ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT

No. 15–649. Argued December 7, 2016—Decided March 22, 2017

There are three possible conclusions to a Chapter 11 bankruptcy. First, debtor and creditors may negotiate a plan to govern the distribution of the estate's value. See, *e.g.*, 11 U. S. C. §§1121, 1123, 1129, 1141. Second, the bankruptcy court may convert the case to Chapter 7 for liquidation of the business and distribution of its assets to creditors. §§1112(a), (b), 726. Finally, the bankruptcy court may dismiss the case. §1112(b). A court ordering a dismissal ordinarily attempts to restore the prepetition financial status quo. §349(b)(3). Yet if perfect restoration proves difficult or impossible, the court may, “for cause,” alter the dismissal’s normal restorative consequences, §349(b)—*i.e.*, it may order a “structured dismissal.” The Bankruptcy Code also establishes basic priority rules for determining the order in which the court will distribute an estate’s assets. The Code makes clear that distributions in a Chapter 7 liquidation must follow this prescribed order. §§725, 726. Chapter 11 permits some flexibility, but a court still cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. §§1129(a)(7), (b)(2). The Code does not explicitly state what priority rules—if any—apply to the distribution of assets in a structured dismissal.

Respondent Jevic Transportation filed for Chapter 11 bankruptcy after being purchased in a leveraged buyout. The bankruptcy prompted two lawsuits. In the first, a group of former Jevic truck-drivers, petitioners here, was awarded a judgment against Jevic for Jevic’s failure to provide proper notice of termination in violation of state and federal Worker Adjustment and Retraining Notification (WARN) Acts. Part of that judgment counted as a priority wage claim under §507(a)(4), entitling the workers to payment ahead of general unsecured claims against the Jevic estate. In the second

## Syllabus

suit, a court-authorized committee representing Jevic's unsecured creditors sued Sun Capital and CIT Group, respondents here, for fraudulent conveyance in connection with the leveraged buyout of Jevic. These parties negotiated a settlement agreement that called for a structured dismissal of Jevic's Chapter 11 bankruptcy. Under the proposed structured dismissal, petitioners would receive nothing on their WARN claims, but lower-priority general unsecured creditors would be paid. Petitioners argued that the distribution scheme accordingly violated the Code's priority rules by paying general unsecured claims ahead of their own. The Bankruptcy Court nevertheless approved the settlement agreement and dismissed the case, reasoning that because the proposed payouts would occur pursuant to a structured dismissal rather than an approved plan, the failure to follow ordinary priority rules did not bar approval. The District Court and the Third Circuit affirmed.

*Held:*

1. Petitioners have Article III standing. Respondents argue that petitioners have not "suffered an injury in fact," or at least one "likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 578 U. S. \_\_\_, \_\_\_, because petitioners would have gotten nothing even if the Bankruptcy Court had never approved the structured dismissal and will still get nothing if the structured dismissal is undone now. That argument rests upon the assumptions that (1) without a violation of ordinary priority rules, there will be no settlement, and (2) without a settlement, the fraudulent-conveyance lawsuit has no value. The record, however, indicates both that a settlement that respects ordinary priorities remains a reasonable possibility and that the fraudulent-conveyance claim could have litigation value. Therefore, as a consequence of the Bankruptcy Court's approval of the structured dismissal, petitioners lost a chance to obtain a settlement that respected their priorities or, if not that, the power to assert the fraudulent-conveyance claim themselves. A decision in their favor is likely to redress that loss. Pp. 9–11.

2. Bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors. Pp. 11–18.

(a) Given the importance of the priority system, this Court looks for an affirmative indication of intent before concluding that Congress means to make a major departure. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468. Nothing in the statute evinces such intent. Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. Read in context, §349(b), which permits a bankruptcy judge, "for cause, [to] orde[r] otherwise," seems designed



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to give courts the flexibility to protect reliance interests acquired in the bankruptcy, not to make general end-of-case distributions that would be flatly impermissible in a Chapter 11 plan or Chapter 7 liquidation. Precedent does not support a contrary position. *E.g.*, *In re Iridium Operating LLC*, 478 F. 3d 452 (CA2), distinguished. Cases in which courts have approved deviations from ordinary priority rules generally involve interim distributions serving significant Code-related objectives. That is not the case here, where, *e.g.*, the priority-violating distribution is attached to a final disposition, does not preserve the debtor as a going concern, does not make the disfavored creditors better off, does not promote the possibility of a confirmable plan, does not help to restore the *status quo ante*, and does not protect reliance interests. Pp. 11–16.

(b) Congress did not authorize a “rare case” exception that permits courts to disregard priority in structured dismissals for “sufficient reasons.” The fact that it is difficult to give precise content to the concept of “sufficient reasons” threatens to turn the court below’s exception into a more general rule, resulting in uncertainty that has potentially serious consequences—*e.g.*, departure from the protections granted particular classes of creditors, changes in the bargaining power of different classes of creditors even in bankruptcies that do not end in structured dismissals, risks of collusion, and increased difficulty in achieving settlements. Courts cannot deviate from the strictures of the Code, even in “rare cases.” Pp. 16–18.

787 F. 3d 173, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

## Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

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No. 15–649

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CASIMIR CZYZEWSKI, ET AL., PETITIONERS *v.*  
JEVIC HOLDING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[March 22, 2017]

JUSTICE BREYER delivered the opinion of the Court.

Bankruptcy Code Chapter 11 allows debtors and their creditors to negotiate a plan for dividing an estate’s value. See 11 U. S. C. §§1123, 1129, 1141. But sometimes the parties cannot agree on a plan. If so, the bankruptcy court may decide to dismiss the case. §1112(b). The Code then ordinarily provides for what is, in effect, a restoration of the prepetition financial status quo. §349(b).

In the case before us, a Bankruptcy Court dismissed a Chapter 11 bankruptcy. But the court did not simply restore the prepetition status quo. Instead, the court ordered a distribution of estate assets that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors. The skipped creditors would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 *plan* (or in a Chapter 7 liquidation). See §§507, 725, 726, 1129. The question before us is whether a bankruptcy court has the legal power to order this priority-skipping kind of distribution scheme in connection with a Chapter 11 *dismissal*.

## Opinion of the Court

In our view, a bankruptcy court does not have such a power. A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.

I

A

1

We begin with a few fundamentals: A business may file for bankruptcy under either Chapter 7 or Chapter 11. In Chapter 7, a trustee liquidates the debtor's assets and distributes them to creditors. See §701 *et seq.* In Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern. See, *e.g.*, §§1121, 1123, 1129, 1141 (setting out the framework in which the parties negotiate).

Filing for Chapter 11 bankruptcy has several relevant legal consequences. First, an estate is created comprising all property of the debtor. §541(a)(1). Second, a fiduciary is installed to manage the estate in the interest of the creditors. §§1106, 1107(a). This fiduciary, often the debtor's existing management team, acts as "debtor in possession." §§1101(1), 1104. It may operate the business, §§363(c)(1), 1108, and perform certain bankruptcy-related functions, such as seeking to recover for the estate preferential or fraudulent transfers made to other persons, §547 (transfers made before bankruptcy that unfairly preferred particular creditors); §548 (fraudulent transfers, including transfers made before bankruptcy for which the debtor did not receive fair value). Third, an "automatic stay" of all collection proceedings against the debtor takes effect. §362(a).

## Opinion of the Court

It is important to keep in mind that Chapter 11 foresees three possible outcomes. The first is a bankruptcy-court-confirmed plan. Such a plan may keep the business operating but, at the same time, help creditors by providing for payments, perhaps over time. See §§1123, 1129, 1141. The second possible outcome is conversion of the case to a Chapter 7 proceeding for liquidation of the business and a distribution of its remaining assets. §§1112(a), (b), 726. That conversion in effect confesses an inability to find a plan. The third possible outcome is dismissal of the Chapter 11 case. §1112(b). A dismissal typically “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case”—in other words, it aims to return to the prepetition financial status quo. §349(b)(3).

Nonetheless, recognizing that conditions may have changed in ways that make a perfect restoration of the status quo difficult or impossible, the Code permits the bankruptcy court, “for cause,” to alter a Chapter 11 dismissal’s ordinary restorative consequences. §349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a “structured dismissal,” defined by the American Bankruptcy Institute as a

“hybrid dismissal and confirmation order . . . that . . . typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case.” American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Although the Code does not expressly mention structured dismissals, they “appear to be increasingly common.” *Ibid.*, n. 973.

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## 2

The Code also sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate. Secured creditors are highest on the priority list, for they must receive the proceeds of the collateral that secures their debts. 11 U. S. C. §725. Special classes of creditors, such as those who hold certain claims for taxes or wages, come next in a listed order. §§507, 726(a)(1). Then come low-priority creditors, including general unsecured creditors. §726(a)(2). The Code places equity holders at the bottom of the priority list. They receive nothing until all previously listed creditors have been paid in full. §726(a)(6).

The Code makes clear that distributions of assets in a Chapter 7 liquidation must follow this prescribed order. §§725, 726. It provides somewhat more flexibility for distributions pursuant to Chapter 11 plans, which may impose a different ordering with the consent of the affected parties. But a bankruptcy court cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. §§1129(a)(7), 1129(b)(2).

The question here concerns the interplay between the Code's priority rules and a Chapter 11 dismissal. Here, the Bankruptcy Court neither liquidated the debtor under Chapter 7 nor confirmed a Chapter 11 plan. But the court, instead of reverting to the prebankruptcy status quo, ordered a distribution of the estate assets to creditors by attaching conditions to the dismissal (*i.e.*, it ordered a structured dismissal). The Code does not explicitly state what priority rules—if any—apply to a distribution in these circumstances. May a court consequently provide for distributions that deviate from the ordinary priority rules that would apply to a Chapter 7 liquidation or a Chapter 11 plan? Can it approve conditions that give estate assets to members of a lower priority class while

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skipping objecting members of a higher priority class?

## B

In 2006, Sun Capital Partners, a private equity firm, acquired Jevic Transportation Corporation with money borrowed from CIT Group in a “leveraged buyout.” In a leveraged buyout, the buyer (B) typically borrows from a third party (T) a large share of the funds needed to purchase a company (C). B then pays the money to C’s shareholders. Having bought the stock, B owns C. B then pledges C’s assets to T so that T will have security for its loan. Thus, if the selling price for C is \$50 million, B might use \$10 million of its own money, borrow \$40 million from T, pay \$50 million to C’s shareholders, and then pledge C assets worth \$40 million (or more) to T as security for T’s \$40 million loan. If B manages C well, it might make enough money to pay T back the \$40 million and earn a handsome profit on its own \$10 million investment. But, if the deal sours and C descends into bankruptcy, beware of what might happen: Instead of C’s \$40 million in assets being distributed to its existing creditors, the money will go to T to pay back T’s loan—the loan that allowed B to buy C. (T will receive what remains of C’s assets because T is now a secured creditor, putting it at the top of the priority list). Since C’s shareholders receive money while C’s creditors lose their claim to C’s remaining assets, unsuccessful leveraged buyouts often lead to fraudulent conveyance suits alleging that the purchaser (B) transferred the company’s assets without receiving fair value in return. See Lipson & Vandermeuse, *Stern*, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts, 2013 Wis. L. Rev. 1161, 1220–1221.

This is precisely what happened here. Just two years after Sun’s buyout, Jevic (C in our leveraged buyout example) filed for Chapter 11 bankruptcy. At the time of

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filing, it owed \$53 million to senior secured creditors Sun and CIT (B and T in our example), and over \$20 million to tax and general unsecured creditors.

The circumstances surrounding Jevic's bankruptcy led to two lawsuits. First, petitioners, a group of former Jevic truckdrivers, filed suit in bankruptcy court against Jevic and Sun. Petitioners pointed out that, just before entering bankruptcy, Jevic had halted almost all its operations and had told petitioners that they would be fired. Petitioners claimed that Jevic and Sun had thereby violated state and federal Worker Adjustment and Retraining Notification (WARN) Acts—laws that require a company to give workers at least 60 days' notice before their termination. See 29 U. S. C. §2102; N. J. Stat. Ann. §34:21–2 (West 2011). The Bankruptcy Court granted summary judgment for petitioners against Jevic, leaving them (and *this* is the point to remember) with a judgment that petitioners say is worth \$12.4 million. See *In re Jevic Holding Corp.*, 496 B. R. 151 (Bkrcty. Ct. Del. 2013). Some \$8.3 million of that judgment counts as a priority wage claim under 11 U. S. C. §507(a)(4), and is therefore entitled to payment ahead of general unsecured claims against the Jevic estate.

Petitioners' WARN suit against Sun continued throughout most of the litigation now before us. But eventually Sun prevailed on the ground that Sun was not the workers' employer at the relevant times. See *In re Jevic Holding Corp.*, 656 Fed. Appx. 617 (CA3 2016).

Second, the Bankruptcy Court authorized a committee representing Jevic's unsecured creditors to sue Sun and CIT. The Bankruptcy Court and the parties were aware that any proceeds from such a suit would belong not to the unsecured creditors, but to the bankruptcy estate. See §§541(a)(1), (6); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F. 3d 548, 552–553 (CA3 2003) (en banc) (holding that a creditor's committee can

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bring a derivative action on behalf of the estate). The committee alleged that Sun and CIT, in the course of their leveraged buyout, had “hastened Jevic’s bankruptcy by saddling it with debts that it couldn’t service.” *In re Jevic Holding Corp.*, 787 F.3d 173, 176 (CA3 2015). In 2011, the Bankruptcy Court held that the committee had adequately pleaded claims of preferential transfer under §547 and of fraudulent transfer under §548. *In re Jevic Holding Corp.*, 2011 WL 4345204 (Bkrtcy. Ct. Del., Sept. 15, 2011).

Sun, CIT, Jevic, and the committee then tried to negotiate a settlement of this “fraudulent-conveyance” lawsuit. By that point, the depleted Jevic estate’s only remaining assets were the fraudulent-conveyance claim itself and \$1.7 million in cash, which was subject to a lien held by Sun.

The parties reached a settlement agreement. It provided (1) that the Bankruptcy Court would dismiss the fraudulent-conveyance action with prejudice; (2) that CIT would deposit \$2 million into an account earmarked to pay the committee’s legal fees and administrative expenses; (3) that Sun would assign its lien on Jevic’s remaining \$1.7 million to a trust, which would pay taxes and administrative expenses and distribute the remainder on a pro rata basis to the low-priority general unsecured creditors, *but which would not distribute anything to petitioners* (who, by virtue of their WARN judgment, held an \$8.3 million mid-level-priority wage claim against the estate); and (4) that Jevic’s Chapter 11 bankruptcy would be dismissed.

Apparently Sun insisted on a distribution that would skip petitioners because petitioners’ WARN suit against Sun was still pending and Sun did not want to help finance that litigation. See 787 F.3d, at 177–178, n. 4 (Sun’s counsel acknowledging before the Bankruptcy Court that “‘Sun probably does care where the money goes because you can take judicial notice that there’s a pending



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WARN action against Sun by the WARN plaintiffs. And if the money goes to the WARN plaintiffs, then you're funding someone who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis"). The essential point is that, regardless of the reason, the proposed settlement called for a structured dismissal that provided for distributions that did not follow ordinary priority rules.

Sun, CIT, Jevic, and the committee asked the Bankruptcy Court to approve the settlement and dismiss the case. Petitioners and the U. S. Trustee objected, arguing that the settlement's distribution plan violated the Code's priority scheme because it skipped petitioners—who, by virtue of their WARN judgment, had mid-level priority claims against estate assets—and distributed estate money to low-priority general unsecured creditors.

The Bankruptcy Court agreed with petitioners that the settlement's distribution scheme failed to follow ordinary priority rules. App. to Pet. for Cert. 58a. But it held that this did not bar approval. *Ibid.* That, in the Bankruptcy Court's view, was because the proposed payouts would occur pursuant to a structured dismissal of a Chapter 11 petition rather than an approval of a Chapter 11 plan. *Ibid.* The court accordingly decided to grant the motion in light of the "dire circumstances" facing the estate and its creditors. *Id.*, at 57a. Specifically, the court predicted that without the settlement and dismissal, there was "no realistic prospect" of a meaningful distribution for anyone other than the secured creditors. *Id.*, at 58a. A confirmable Chapter 11 plan was unattainable. And there would be no funds to operate, investigate, or litigate were the case converted to a proceeding in Chapter 7. *Ibid.*

The District Court affirmed the Bankruptcy Court. It recognized that the settlement distribution violated ordinary priority rules. But those rules, it wrote, were "not a bar to the approval of the settlement as [the settlement] is

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not a reorganization plan.” *In re Jevic Holding Corp.*, 2014 WL 268613, \*3 (D Del., Jan. 24, 2014).

The Third Circuit affirmed the District Court by a vote of 2 to 1. 787 F. 3d, at 175; *id.*, at 186 (Scirica, J., concurring in part and dissenting in part). The majority held that structured dismissals need not always respect priority. Congress, the court explained, had only “codified the absolute priority rule . . . in the specific context of plan confirmation.” *Id.*, at 183. As a result, courts could, “in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code’s priority scheme.” *Id.*, at 180.

Petitioners (the workers with the WARN judgment) sought certiorari. We granted their petition.

## II

Respondents initially argue that petitioners lack standing because they have suffered no injury, or at least no injury that will be remedied by a decision in their favor. See *Spokeo, Inc. v. Robins*, 578 U. S. \_\_\_, \_\_\_ (2016) (slip op., at 6) (explaining that, for Article III standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision”). Respondents concede that the structured dismissal approved by the Bankruptcy Court contained distribution conditions that skipped over petitioners, ensuring that petitioners received nothing on their multimillion-dollar WARN claim against the Jevic estate. But respondents still assert that petitioners suffered no loss.

The reason, respondents say, is that petitioners would have gotten nothing even if the Bankruptcy Court had never approved the structured dismissal in the first place, and will still get nothing if the structured dismissal is undone now. Reversal will eliminate the settlement of the committee’s fraudulent-conveyance lawsuit, which was

## Opinion of the Court

conditioned on the Bankruptcy Court's approval of the priority-violating structured dismissal. If the Bankruptcy Court cannot approve that dismissal, respondents contend, Sun and CIT will no longer agree to settle. Nor will petitioners ever be able to obtain a litigation recovery. Hence there will be no lawsuit money to distribute. And in the absence of lawsuit money, Jevic's assets amount to about \$1.7 million, all pledged to Sun, leaving nothing for anyone else, let alone petitioners. Thus, even if petitioners are right that the structured dismissal was impermissible, it cost them nothing. And a judicial decision in their favor will gain them nothing. No loss. No redress.

This argument, however, rests upon respondents' claims (1) that, without a violation of ordinary priority rules, there will be no settlement, and (2) that, without a settlement, the fraudulent-conveyance lawsuit has no value. In our view, the record does not support either of these propositions.

As to the first, the record indicates that a settlement that respects ordinary priorities remains a reasonable possibility. It makes clear (as counsel made clear before our Court, see Tr. of Oral Arg. 58) that Sun insisted upon a settlement that gave petitioners nothing only because it did not want to help fund petitioners' WARN lawsuit against it. See 787 F.3d, at 177–178, n. 4. But, Sun has now won that lawsuit. See 656 Fed. Appx. 617. If Sun's given reason for opposing distributions to petitioners has disappeared, why would Sun not settle while permitting some of the settlement money to go to petitioners?

As to the second, the record indicates that the fraudulent-conveyance claim could have litigation value. CIT and Sun, after all, settled the lawsuit for \$3.7 million, which would make little sense if the action truly had no chance of success. The Bankruptcy Court could convert the case to Chapter 7, allowing a Chapter 7 trustee to pursue the suit against Sun and CIT. Or the court could

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simply dismiss the Chapter 11 bankruptcy, thereby allowing petitioners to assert the fraudulent-conveyance claim themselves. Given these possibilities, there is no reason to believe that the claim could not be pursued with counsel obtained on a contingency basis. Of course, the lawsuit—like any lawsuit—*might* prove fruitless, but the mere *possibility* of failure does not eliminate the value of the claim or petitioners’ injury in being unable to bring it.

Consequently, the Bankruptcy Court’s approval of the structured dismissal cost petitioners something. They lost a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of \$3.7 million. For standing purposes, a loss of even a small amount of money is ordinarily an “injury.” See, e.g., *McGowan v. Maryland*, 366 U. S. 420, 430–431 (1961) (finding that appellants fined \$5 plus costs had standing to assert an Establishment Clause challenge). And the ruling before us could well have cost petitioners considerably more. See *Clinton v. City of New York*, 524 U. S. 417, 430–431 (1998) (imposition of a “substantial contingent liability” qualifies as an injury). A decision in petitioners’ favor is likely to redress that loss. We accordingly conclude that petitioners have standing.

## III

We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors’ consent? Our simple answer to this complicated question is “no.”

The Code’s priority system constitutes a basic underpinning of business bankruptcy law. Distributions of estate assets at the termination of a business bankruptcy normally take place through a Chapter 7 liquidation or a Chapter 11 plan, and both are governed by priority. In

## Opinion of the Court

Chapter 7 liquidations, priority is an absolute command—lower priority creditors cannot receive anything until higher priority creditors have been paid in full. See 11 U.S.C. §§725, 726. Chapter 11 plans provide somewhat more flexibility, but a priority-violating plan still cannot be confirmed over the objection of an impaired class of creditors. See §1129(b).

The priority system applicable to those distributions has long been considered fundamental to the Bankruptcy Code’s operation. See H. R. Rep. No. 103–835, p. 33 (1994) (explaining that the Code is “designed to enforce a distribution of the debtor’s assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor”); Roe & Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends The Creditors’ Bargain*, 99 Va. L. Rev. 1235, 1243, 1236 (2013) (arguing that the first principle of bankruptcy is that “distribution conforms to predetermined statutory and contractual priorities,” and that priority is, “quite appropriately, bankruptcy’s most important and famous rule”); Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 123 (1991) (stating that a fixed priority scheme is recognized as “the cornerstone of reorganization practice and theory”).

The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes”). Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans.

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We can find nothing in the statute that evinces this intent. The Code gives a bankruptcy court the power to “dismiss” a Chapter 11 case. §1112(b). But the word “dismiss” itself says nothing about the power to make nonconsensual priority-violating distributions of estate value. Neither the word “structured,” nor the word “conditions,” nor anything else about distributing estate value to creditors pursuant to a dismissal appears in any relevant part of the Code.

Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. See §349(b)(1) (dismissal ordinarily reinstates a variety of avoided transfers and voided liens); §349(b)(2) (dismissal ordinarily vacates certain types of bankruptcy orders); §349(b)(3) (dismissal ordinarily “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case”); see also H. R. Rep. No. 95–595, p. 338 (1977) (dismissal’s “basic purpose . . . is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case”).

Section 349(b), we concede, also says that a bankruptcy judge may, “for cause, orde[r] otherwise.” But, read in context, this provision appears designed to give courts the flexibility to “make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.” H. R. Rep. No. 95–595, at 338; cf., e.g., *Wiese v. Community Bank of Central Wis.*, 552 F.3d 584, 590 (CA7 2009) (upholding, under §349(b), a Bankruptcy Court’s decision not to reinstate a debtor’s claim against a bank that gave up a lien in reliance on the claim being released in the debtor’s reorganization plan). Nothing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter

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11 plan—let alone final distributions that do not help to restore the *status quo ante* or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a Chapter 7 liquidation or a Chapter 11 plan because they violate priority without the impaired creditors’ consent. That being so, the word “cause” is too weak a reed upon which to rest so weighty a power. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (noting that “[s]tatutory construction . . . is a holistic endeavor” and that a court should select a “meanin[g that] produces a substantive effect that is compatible with the rest of the law”); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (in interpreting a statute, a court “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy” (internal quotation marks omitted)); cf. *In re Sadler*, 935 F.2d 918, 921 (CA7 1991) (“‘Cause’ under §349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason”).

We have found no contrary precedent, either from this Court, or, for that matter, from lower court decisions reflecting common bankruptcy practice. The Third Circuit referred briefly to *In re Buffet Partners, L. P.*, 2014 WL 3735804 (Bkrtcy. Ct. ND Tex., July 28, 2014). The court in that case approved a structured dismissal. (We express no view about the legality of structured dismissals in general.) But at the same time it pointed out “that not one party with an economic stake in the case has objected to the dismissal in this manner.” *Id.*, at \*4.

The Third Circuit also relied upon *In re Iridium Operating LLC*, 478 F.3d 452 (CA2 2007). But *Iridium* did not involve a structured dismissal. It addressed an *interim* distribution of settlement proceeds to fund a litigation trust that would press claims on the estate’s behalf. See *id.*, at 459–460. The *Iridium* court observed that, when

## Opinion of the Court

evaluating this type of preplan settlement, “[i]t is difficult to employ the rule of priorities” because “the nature and extent of the Estate and the claims against it are *not yet fully resolved*.” *Id.*, at 464 (emphasis added). The decision does not state or suggest that the Code authorizes nonconsensual departures from ordinary priority rules in the context of a dismissal—which is a *final* distribution of estate value—and in the absence of any further unresolved bankruptcy issues.

We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example, have approved “first-day” wage orders that allow payment of employees’ prepetition wages, “critical vendor” orders that allow payment of essential suppliers’ prepetition invoices, and “roll-ups” that allow lenders who continue financing the debtor to be paid first on their prepetition claims. See *Cybergenics*, 330 F. 3d, at 574, n. 8; D. Baird, *Elements of Bankruptcy* 232–234 (6th ed. 2014); *Roe*, 99 Va. L. Rev., at 1250–1264. In doing so, these courts have usually found that the distributions at issue would “enable a successful reorganization and make even the disfavored creditors better off.” *In re Kmart Corp.*, 359 F. 3d 866, 872 (CA7 2004) (discussing the justifications for critical-vendor orders); see also *Toibb v. Radloff*, 501 U. S. 157, 163–164 (1991) (recognizing “permitting business debtors to reorganize and restructure their debts in order to revive the debtors’ businesses” and “maximizing the value of the bankruptcy estate” as purposes of the Code). By way of contrast, in a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable



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plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests. In short, we cannot find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.

Rather, the distributions at issue here more closely resemble proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. See, e.g., *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (CA5 1983) (prohibiting an attempt to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets"); *In re Lionel Corp.*, 722 F.2d 1063, 1069 (CA2 1983) (reversing a Bankruptcy Court's approval of an asset sale after holding that §363 does not "gran[t] the bankruptcy judge *carte blanche*" or "swallo[w] up Chapter 11's safeguards"); *In re Biolitec, Inc.*, 528 B. R. 261, 269 (Bkrtcy. Ct. NJ 2014) (rejecting a structured dismissal because it "seeks to alter parties' rights without their consent and lacks many of the Code's most important safeguards"); cf. *In re Chrysler LLC*, 576 F.3d 108, 118 (CA2 2009) (approving a §363 asset sale because the bankruptcy court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), vacated as moot, 592 F.3d 370 (CA2 2010) (*per curiam*).

## IV

We recognize that the Third Circuit did not approve nonconsensual priority-violating structured dismissals in general. To the contrary, the court held that they were permissible only in those "rare case[s]" in which courts could find "sufficient reasons" to disregard priority. 787 F.3d, at 175, 186. Despite the "rare case" limitation, we still cannot agree.

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For one thing, it is difficult to give precise content to the concept “sufficient reasons.” That fact threatens to turn a “rare case” exception into a more general rule. Consider the present case. The Bankruptcy Court feared that (1) without the worker-skipping distribution, there would be no settlement, (2) without a settlement, all the unsecured creditors would receive nothing, and consequently (3) its distributions would make some creditors (high- and low-priority creditors) better off without making other (mid-priority) creditors worse off (for they would receive nothing regardless). But, as we have pointed out, the record provides equivocal support for the first two propositions. See *supra*, at 9–11. And, one can readily imagine other cases that turn on comparably dubious predictions. The result is uncertainty. And uncertainty will lead to similar claims being made in many, not just a few, cases. See Rudzik, A Priority Is a Priority Is a Priority—Except When It Isn’t, 34 Am. Bankr. Inst. J. 16, 79 (2015) (“[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that ‘rare case’”).

The consequences are potentially serious. They include departure from the protections Congress granted particular classes of creditors. See, e.g., *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, 32 (1959) (Congress established employee wage priority “to alleviate in some degree the hardship that unemployment usually brings to workers and their families” when an employer files for bankruptcy); H. R. Rep. No. 95–595, at 187 (explaining the importance of ensuring that employees do not “abandon a failing business for fear of not being paid”). They include changes in the bargaining power of different classes of creditors even in bankruptcies that do not end in structured dismissals. See Warren, A Theory of Absolute Priority, 1991 Ann. Survey Am. L. 9, 30. They include risks of collusion, *i.e.*, senior secured creditors and general unsecured creditors teaming up to squeeze out priority unse-

## Opinion of the Court

cured creditors. See *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U. S. 434, 444 (1999) (discussing how the absolute priority rule was developed in response to “concern with ‘the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage’” (quoting H. R. Doc. No. 93–137, pt. I, p. 255 (1973))). And they include making settlement more difficult to achieve. See Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. Law & Econ. 249, 271 (1976) (arguing that “the ratio of lawsuits to settlements is mainly a function of the amount of uncertainty, which leads to divergent estimates by the parties of the probable outcome”); see also *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U. S. 639, 649 (2012) (noting the importance of clarity and predictability in light of the fact that the “Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law”).

For these reasons, as well as those set forth in Part III, we conclude that Congress did not authorize a “rare case” exception. We cannot “alter the balance struck by the statute,” *Law v. Siegel*, 571 U. S. \_\_\_, \_\_\_ (2014) (slip op., at 11), not even in “rare cases.” Cf. *Norwest Bank Worthington v. Ahlers*, 485 U. S. 197, 207 (1988) (explaining that courts cannot deviate from the procedures “specified by the Code,” even when they sincerely “believ[e] that . . . creditors would be better off”). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

THOMAS, J., dissenting

## SUPREME COURT OF THE UNITED STATES

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No. 15–649

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CASIMIR CZYZEWSKI, ET AL., PETITIONERS v.  
JEVIC HOLDING CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

[March 22, 2017]

JUSTICE THOMAS, with whom JUSTICE ALITO joins,  
dissenting.

Today, the Court answers a novel and important question of bankruptcy law. Unfortunately, it does so without the benefit of any reasoned opinions on the dispositive issue from the courts of appeals (apart from the Court of Appeals’ opinion in this case) and with briefing on that issue from only one of the parties. That is because, having persuaded us to grant certiorari on one question, petitioners chose to argue a different question on the merits. In light of that switch, I would dismiss the writ of certiorari as improvidently granted.

We granted certiorari to decide “[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.” Pet. for Cert. i. According to petitioners, the decision below “deepened an existing . . . split” among the Courts of Appeals on this question. *Id.*, at 8; see *id.*, at 15–16 (citing *In re AWECO, Inc.*, 725 F. 2d 293, 298 (CA5 1984), and *In re Iridium Operating LLC*, 478 F. 3d 452, 464 (CA2 2007)). After we granted certiorari, however, petitioners recast the question presented to ask “[w]hether a Chapter 11 case may be terminated by a ‘structured dismissal’ that distributes estate property in violation of the Bankruptcy Code’s priority scheme.” Brief for Peti-

THOMAS, J., dissenting

tioners i. Although both questions involve priority-skipping distributions of estate assets, the recast question is narrower—and different—than the one on which we granted certiorari. It is also not the subject of a circuit conflict.

I think it is unwise for the Court to decide the reformulated question today, for two reasons. First, it is a “novel question of bankruptcy law” arising in the rapidly developing field of structured dismissals. *In re Jevic Holding Corp.*, 787 F. 3d 173, 175 (CA3 2015). Experience shows that we would greatly benefit from the views of additional courts of appeals on this question. We also would have benefited from full, adversarial briefing. In reliance on this Court’s Rules prohibiting parties from changing the substance of the question presented, see Rule 24.1(a); see also Rule 14.1(a), respondents declined to brief the question that the majority now decides, see Brief for Respondents 52. Second, deciding this question may invite future petitioners to seek review of a circuit conflict only then to change the question to one that seems more favorable. “I would not reward such bait-and-switch tactics.” *City and County of San Francisco v. Sheehan*, 575 U. S. \_\_\_, \_\_\_ (2015) (Scalia, J., concurring in part and dissenting in part) (slip op., at 3); see also *Visa, Inc. v. Osborn*, post, p. \_\_\_.

Accordingly, I would dismiss the writ as improvidently granted. I respectfully dissent.

**In the Supreme Court of the United States**

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CASIMIR CZYZEWSKI, ET AL., PETITIONERS

*v.*

JEVIC HOLDING CORP., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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#### QUESTION PRESENTED

Whether a bankruptcy court may authorize a distribution of settlement proceeds that violates the priority scheme established by the Bankruptcy Code, over the objection of priority creditors whose rights are impaired by the proposed distribution.

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# In the Supreme Court of the United States

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No. 15-649

CASIMIR CZYZEWSKI, ET AL., PETITIONERS

*v.*

JEVIC HOLDING CORP., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

### STATEMENT

1. a. A company may file a bankruptcy petition pursuant to either Chapter 7 or Chapter 11 of the Bankruptcy Code. In a Chapter 7 bankruptcy, the company's pre-petition assets are liquidated and distributed to creditors. 11 U.S.C. 701 *et seq.* A Chapter 11 bankruptcy, in contrast, is implemented through a "plan" that assigns to "classes" the various allowed claims and specifies the treatment each class of claims shall receive, in exchange for a discharge of debts as provided by the Code. 11 U.S.C. 1122, 1123, 1141.

In a Chapter 11 plan, each secured creditor typically is designated as a class unto itself. See 7 *Collier on Bankruptcy* ¶ 1122.03[3][c] at 1122-15 (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2011) (*Collier*). Among unsecured claims, the Code assigns “priority” to certain claims because of their “special social importance.” S. Rep. No. 1106, 95th Cong., 2d Sess. 4 (1978). Section 507—which applies to bankruptcies filed under Chapters 7 and 11, see 11 U.S.C. 103(a)—identifies claims entitled to priority and specifies the order in which they must be paid. 11 U.S.C. 507. Unsecured claims with priority include certain administrative expenses incurred during the bankruptcy proceeding; employee wages and benefits that were earned but not paid in the six months before the bankruptcy petition was filed; consumer deposits; and taxes. *Ibid.*

Under Section 507, wage claims have fourth priority, and contributions to employee benefit plans have fifth priority. 11 U.S.C. 507(a)(4) and (5). A bankruptcy court generally may confirm a proposed Chapter 11 plan only if each holder of a priority claim under Section 507 receives cash or deferred cash payments (depending on the circumstances) equal to the value of the claim as of the effective date of the plan, unless a particular claimholder “agree[s] to a different treatment of [its] claim.” 11 U.S.C. 1129(a)(9). In addition to requiring that priority claimants be paid in full (unless they consent to different treatment), the Code establishes further prerequisites to plan confirmation with respect to non-priority unsecured creditors. But full payment of Section 507 priority claims is mandatory and independent of how other unsecured creditors may be treated under a plan. In a Chapter 7

liquidation, unsecured creditors with Section 507 priority claims are paid “in the order specified” in Section 507, 11 U.S.C. 726(a)(1), and other unsecured claimants may not receive any payments unless the priority claims are paid in full, 11 U.S.C. 726(a)(2).

While a bankruptcy case is pending, any legal claims the estate has against its creditors and others may be litigated or settled, usually by the debtor in possession or a trustee. In some circumstances, a bankruptcy court may authorize a committee of creditors to pursue claims on behalf of the estate. 11 U.S.C. 1103. Any proceeds from litigation or from settlement become estate property subject to distribution under the normal rules of priority. 11 U.S.C. 541(a)(3) and (6). A bankruptcy court may approve settlement of an estate claim if, after notice and a hearing, the court determines that the settlement is fair and equitable. Bankr. R. 9019; see *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

If the estate of a Chapter 11 debtor lacks sufficient funds to pay the priority claimholders in full in accordance with Section 1129(a)(9)(A)-(D) (typically cash or deferred payments), and the priority claimants do not agree to different treatment in the plan, the case can either be converted to a Chapter 7 liquidation or dismissed. 11 U.S.C. 1112. An order of dismissal in a bankruptcy case ordinarily has the effect of vacating the orders entered during the proceedings, and it “revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case” (usually the debtor). 11 U.S.C. 349(b)(2) and (3). The “objective” of a dismissal “is to undo the title 11 case, insofar as is practi-

cable, and to restore all property rights to the position they occupied at the beginning of such case.” 3 *Collier* ¶ 349.01[2]. The bankruptcy court has discretion to leave its orders in force “for cause,” 11 U.S.C. 349, such as to protect the reliance interest of a good-faith purchaser, 3 *Collier* ¶ 349.01[2]. If a Chapter 11 case is dismissed, creditors retain their pre-petition claims against the debtor and can pursue them outside bankruptcy. 11 U.S.C. 349(b).

2. This case arises out of the bankruptcy of respondent Jevic, a trucking company, following its acquisition by respondent Sun Capital Partners (Sun) in a leveraged buyout. Pet. App. 2a. Sun financed the transaction by borrowing against Jevic’s assets. C.A. J.A. 733-734 (July 28, 2014, bankruptcy court opinion). When Jevic subsequently refinanced the loan, respondent CIT Group/Business Credit, Inc. (CIT) became the primary lender and obtained a lien on all of Jevic’s assets. Pet. App. 36a; C.A. J.A. 734. When Jevic’s financial condition continued to deteriorate, Sun agreed to guarantee \$2 million of Jevic’s debt in exchange for CIT’s agreement not to foreclose on Jevic’s assets for a period of time. Pet. App. 2a; C.A. J.A. 735, 1161. Shortly before that agreement expired, Jevic’s board of directors authorized a bankruptcy filing. Pet. App. 2a. Jevic then ceased substantially all of its operations, notified its employees that they would be fired, and filed a Chapter 11 bankruptcy petition. *Id.* at 2a-3a. When that petition was filed, Jevic owed approximately \$53 million to CIT and Sun, who were first-priority secured creditors. *Id.* at 3a, 36a n.2.

As relevant here, two suits were filed in the bankruptcy court, one seeking to establish the estate’s

liabilities and the other asserting claims of the estate. First, petitioners—a group of Jevic’s employee truck drivers—alleged violations of state and federal laws known as Worker Adjustment and Retraining Notification (WARN) Acts, which require in some circumstances that an employer give written notice to employees at least 60 days before laying them off. Pet. App. 3a (citing 29 U.S.C. 2102; N.J. Stat. Ann. § 34:21-2 (West 2011)). The bankruptcy court granted summary judgment to petitioners on their claims against Jevic. *Id.* at 5a & n.2. An estimated \$8.3 million dollars of petitioners’ WARN Act claim is a priority wage claim under 11 U.S.C. 507(a)(4). Pet. App. 6a.

Second, after an Official Committee of Unsecured Creditors (Committee) was appointed to represent the interests of Jevic’s unsecured creditors, the bankruptcy court authorized the Committee to pursue a fraudulent-conveyance action against Sun and CIT on behalf of the estate. Pet. App. 3a. The Committee alleged that Sun, with CIT’s assistance, had “acquired Jevic with virtually none of its own money” and “hastened Jevic’s bankruptcy by saddling it with debts that it couldn’t service.” *Ibid.* The Committee’s complaint alleged, *inter alia*, that Sun’s and CIT’s liens were avoidable and that certain assets with significant value must be disgorged to the estate. See C.A. J.A. 679-854.

The bankruptcy court ultimately denied in part and granted in part Sun’s and CIT’s motion to dismiss the fraudulent-conveyance action, concluding that the Committee had adequately pleaded claims of fraudulent transfer and preferential transfer under 11 U.S.C. 547 and 548. Pet. App. 3a-4a. The court explained that “[a]n overly leveraged buyout that leaves



the target company with unreasonably small capital—where it is reasonably foreseeable that the target will soon thereafter become insolvent—may provide the requisite factual predicate for an avoidance action grounded in fraudulent transfer law.” C.A. J.A. 751. The court concluded that the Committee’s complaint sufficiently alleged that CIT had played a critical role in facilitating a series of transactions that recklessly reduced Jevic’s equity, increased its debt, and shifted the risk of loss to its other creditors. Pet. App. 4a.<sup>1</sup>

The Committee, Jevic, CIT, and Sun then sought to negotiate a settlement of the Committee’s fraudulent-conveyance action. Pet. App. 4a. By that point, Jevic’s only assets were the fraudulent-conveyance claim against CIT and Sun, and \$1.7 million in cash, which was subject to Sun’s lien. *Ibid.* The parties to the negotiations ultimately reached an agreement that would accomplish four things: (1) those parties would exchange releases of their claims against each other, and the bankruptcy court would dismiss the estate’s fraudulent-conveyance action with prejudice; (2) CIT would pay \$2 million into an account earmarked to pay Jevic’s and the Committee’s legal fees and other administrative expenses, but not otherwise available for distribution to creditors; (3) Sun would assign its lien on Jevic’s remaining \$1.7 million to a trust that would pay tax and administrative creditors, with the remain-

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<sup>1</sup> Because the complaint cited the Uniform Fraudulent Transfer Act rather than the relevant provisions of state law, the bankruptcy court dismissed without prejudice the Committee’s claim that the transaction also violated state law. C.A. J.A. 753. The court explained, however, that the Committee’s ultimate success on the state-law claim (once properly pleaded) “will likely mirror its success on” the federal fraudulent-conveyance claim. *Ibid.*

der to be distributed on a pro rata basis to the general unsecured creditors (but not to petitioners, who are higher-priority creditors); and (4) Jevic's Chapter 11 bankruptcy would be dismissed. *Id.* at 5a-6a. The proposed settlement did not provide for any payment to petitioners on their higher-priority WARN Act claims, and it left Jevic with no assets to satisfy those claims outside bankruptcy. *Id.* at 5a-7a.

3. The Committee, Jevic, CIT, and Sun moved in the bankruptcy court for approval of the settlement. See Pet. App. 53a. Petitioners and the United States Trustee opposed that motion, on the grounds that the proposed settlement would distribute estate assets to creditors of lower priority than petitioners, in contravention of the Bankruptcy Code's priority scheme, and that the Code does not contemplate or permit relief other than a confirmed plan, a Chapter 7 liquidation, or an outright dismissal. *Id.* at 7a, 53a, 57a.

In an oral ruling, the bankruptcy court granted the motion to approve the settlement, which it described as a "global resolution" reached by "certain of the parties." Pet. App. 55a; see *id.* at 53a-66a. The court acknowledged that this type of resolution "is neither favored nor commonplace"; that "no express[] provision in the code" authorizes the "distribution and dismissal contemplated by the settlement motion"; and that "the proposed distributions are not in accordance with the" Code's priority scheme. *Id.* at 57a-58a. The court nevertheless approved the proposed disposition, explaining that, "because this is not a plan, and there is no prospect of a confirmable plan being filed, the absolute priority rule is not a bar to approval of this settlement." *Id.* at 58a. Because CIT and Jevic had liens on all of the estate's assets, the

bankruptcy court determined that a disposition that would make money available to the unsecured creditors and some priority creditors was in the interest of the creditors as a group. *Id.* at 58a, 61a.

The bankruptcy court acknowledged that its calculus would change if the Committee's fraudulent-conveyance claim were ultimately successful, but it noted several "independent hurdles the Committee would have to clear before it would actually see a material recovery out of the litigation." Pet. App. 60a. The court also noted that the estate (unlike CIT and Sun) had no available funds and would have a difficult time retaining counsel to pursue the case, notwithstanding the possibility of retaining contingency counsel or a Chapter 7 Trustee to continue the litigation. *Id.* at 61a. The bankruptcy court also concluded that petitioners were not prejudiced by the other parties' agreement. *Ibid.* The court reasoned that petitioners' "claim against the estate [was] presently, effectively worthless given that the estate lack[ed] available unencumbered funds to satisfy it if it were allowed." *Ibid.*

4. The district court affirmed. Pet. App. 33a-44a. While recognizing that "the settlement does not follow the absolute priority rule," the court held that this deviation was "not a bar to the approval of the settlement as [the settlement] is not a reorganization plan." *Id.* at 42a. The court also concluded that "the settlement was in the best interest of the estate." *Id.* at 41a.

5. The court of appeals affirmed. Pet. App. 1a-32a. The court first held that a bankruptcy court has discretion to order a "structured dismissal" of a Chapter 11 bankruptcy, at least when there is "no prospect of a

confirmable plan” and conversion to Chapter 7 would not be “worthwhile.” *Id.* at 14a-15a; see *id.* at 12a-15a. The court further held that a bankruptcy court may order such a “structured dismissal” even when the “settlement[] \* \* \* skip[s] a class of objecting creditors in favor of more junior creditors.” *Id.* at 15a; see *id.* at 15a-21a.

The court of appeals observed that the Second and Fifth Circuits had rendered conflicting decisions regarding the propriety of such structured dismissals Pet. App. 17a-18a. It sided with the Second Circuit, which had held that “the absolute priority rule ‘is not necessarily implicated’ when ‘a settlement is presented for court approval apart from a reorganization plan.’” *Id.* at 18a (quoting *In re Iridium Operating LLC*, 478 F.3d 452, 453 (2d Cir. 2007) (*Iridium*)). The court of appeals rejected the approach adopted by the Fifth Circuit, which had held “that the ‘fair and equitable’ standard applies to settlements, and ‘fair and equitable’ means compliant with the priority system.” *Id.* at 17a (quoting *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir.) (*AWECO*), cert. denied, 469 U.S. 880 (1984)). Instead, the court followed the Second Circuit in holding that, although “‘compli[ance] with the Code’s priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is ‘fair and equitable’ under Rule 9019,’ \* \* \* a noncompliant settlement could be approved when ‘the remaining factors weigh heavily in favor of approving a settlement.’” *Id.* at 18a (quoting *Iridium*, 478 F.3d at 464).

The court of appeals held that the settlement and structured dismissal of Jevic’s bankruptcy case was “the least bad alternative since there was ‘no prospect’

of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in ‘short order.’” Pet. App. 21a (quoting C.A. J.A. 32). While acknowledging that “the exclusion of [petitioners] certainly lends an element of unfairness,” the court considered the critical question to be whether the settlement serves the interests of the “estate and the creditors as a whole,” not “one particular group of creditors.” *Id.* at 22a.

Judge Scirica dissented. Pet. App. 23a-32a. He stated that “the bankruptcy court’s order undermined the Code’s essential priority scheme.” *Id.* at 23a. Although Judge Scirica would have followed the Second Circuit in permitting settlements contrary to the priority scheme in “extraordinary circumstances,” he disagreed with the majority’s conclusion that “this appeal presents an extraordinary case.” *Id.* at 24a. He explained that it is “not unusual” for a debtor to enter Chapter 11 bankruptcy proceedings with liens on all of its assets and with the goal of liquidating. *Id.* at 31a & n.5 (citing study showing that 22% of surveyed companies entered Chapter 11 with secured claims exceeding the value of the estate). He further explained that, “to the extent that the only alternative to the settlement was a Chapter 7 liquidation, that reality was, at least in part, a product of the [settling parties’] own making.” *Id.* at 25a.

#### DISCUSSION

The court of appeals erred in approving the purported settlement agreement in this case. The court’s decision deepens an existing circuit conflict about whether the court in a Chapter 11 bankruptcy case may approve, over the objection of a priority claimant whose rights would be impaired, a proposed “settle-

ment” that distributes estate assets in a manner inconsistent with the Bankruptcy Code’s priority scheme. The question presented is important and recurring, and the three courts of appeals that have addressed the issue govern the vast majority of large bankruptcy cases filed in the United States. Indeed, because any corporate debtor with an affiliate organized under the laws of Delaware can file a bankruptcy in the Third Circuit, the decision in this case can be expected to have a substantial impact on future Chapter 11 cases. Review by this Court is warranted to correct the court of appeals’ erroneous decision.

**A. The Court Of Appeals’ Decision Is Incorrect**

The Bankruptcy Code prescribes a detailed scheme for resolving claims against an insolvent debtor. The Code reflects Congress’s careful balancing of competing interests and provides important protections for both debtors and creditors. See H.R. Rep. No. 996, 102d Cong., 2d Sess. 12-13 (1992) (1992 Report). Debtors are protected by, for example, the automatic stay that generally freezes efforts to collect pre-petition debts, 11 U.S.C. 362; the Code provisions that exempt certain property of individual debtors from liquidation or distribution to pay pre-petition debts, 11 U.S.C. 522; and the discharge of liability on debts that are addressed in a plan of reorganization, 11 U.S.C. 1141(d). See *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913) (noting that the Bankruptcy Code “give[s] the bankrupt a fresh start with such exemptions and rights as the [bankruptcy] statute left untouched”). Creditors, in turn, are protected by, *inter alia*, the detailed priority scheme set forth in the Code, which requires that certain types of creditors be paid in full through a bankruptcy before other types of creditors

may receive any distribution. 11 U.S.C. 507. In this case, the court of appeals held that a bankruptcy court may upend that carefully balanced system by abrogating the rights of nonconsenting priority creditors in order to benefit the debtor and lower-priority creditors. The Bankruptcy Code does not allow such a disposition.

1. The “uniform national bankruptcy system \* \* \* is designed to achieve two equally important objectives”: “to provide honest debtors who have fallen on hard times the opportunity for a fresh start in life,” and “to protect creditors in general by preventing an insolvent debtor from selectively paying off the claims of certain favored creditors at the expense of others.” 1992 Report 12-13; H.R. Rep. No. 835, 103d Cong., 2d Sess. 32-33 (1994) (1994 Report) (same). Recognizing the “inevitable temptation among creditors to fiercely compete over the debtor’s limited funds,” Congress designed a system “in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor.” 1992 Report 13; 1994 Report 33.

To achieve fair and orderly disposition of competing creditors’ claims, Congress created a priority system that gives special protection to a “narrow[] set of specified claims, including certain tax obligations and limited past due wages to a debtor’s employees,” by requiring that such claims “be paid in full” before non-priority (or lower-priority) creditors receive “any distribution.” 1992 Report 13; 1994 Report 33; see S. Rep. No. 1106, 95th Cong., 2d Sess. 4 (1978) (1978 Report) (noting that the Code “giv[es] priority in the distribution of assets of the debtor’s estate to certain

claims with special social importance”). The priority system is codified at 11 U.S.C. 507, which applies to most bankruptcy proceedings, including cases filed under Chapters 7 and 11, see 11 U.S.C. 103(a), and generally “affect[s] claims of unsecured creditors,” 1978 Report 4.

Section 507 provides that enumerated “expenses and claims have priority in the \* \* \* order” specified. 11 U.S.C. 507(a). Because that provision “appl[ies] in a case under chapter 7, 11, 12, or 13,” 11 U.S.C. 103(a), it governs Jevic’s Chapter 11 bankruptcy. In the bankruptcy context, the term “priority” has long been used to refer to claims that are entitled to be paid before other claims. See *United States v. Bryan*, 13 U.S. (9 Cranch) 374, 387 (1815). A bankruptcy court cannot confirm a Chapter 11 plan that impairs the rights of a priority creditor unless the creditor consents. 11 U.S.C. 1129(a)(8) and (9). If a bankruptcy estate lacks sufficient funds to pay priority creditors in full and the priority creditors do not consent to less favorable treatment, the Code provides for conversion to Chapter 7, where priority creditors still must be paid first. 11 U.S.C. 726(a). In the alternative, such a case may be dismissed, leaving creditors free to pursue their claims outside bankruptcy. 11 U.S.C. 349(b).

The court below held that a bankruptcy judge may dispose of a Chapter 11 case in a manner that is not provided for in the Code and that violates the priority scheme set forth in Section 507. The court thus approved a bankruptcy disposition that furthered the interests of the debtor and non-priority creditors at the expense of objecting priority creditors. Nothing in the Code permits such a disposition, which contra-



venes the carefully balanced scheme Congress has created.

Although the priority scheme set forth in Section 507 is not inviolable, Congress has specified the circumstances in which a court may deviate from that scheme, and none of those circumstances was present here. See, *e.g.*, 11 U.S.C. 726(a) (incorporating “equitable subordination” exception in 11 U.S.C. 510, which permits a bankruptcy court to reorder particular priority claims in a Chapter 7 liquidation); 11 U.S.C. 1129(a)(9), 1222(a)(2)(B), 1332(a) (authorizing plan confirmation when a priority creditor consents to abrogation of its rights). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)). No such contrary legislative intent exists here.

The court below appeared to recognize that a plan of reorganization must provide full payment to Section 507 priority creditors unless such creditors consent to impairment of their rights. Pet. App. 16a-17a.<sup>2</sup> The court concluded, however, that the same principle

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<sup>2</sup> In discussing the governing legal principles, the court below referred repeatedly to the “absolute priority rule.” See Pet. App. 16a-17a. The term “absolute priority rule” is most accurately used to refer to the requirement in 11 U.S.C. 1129(b) that junior classes of creditors may not be paid through a plan of reorganization unless senior classes of creditors either are paid in full or consent to an impairment of their rights. The court of appeals used the phrase to encompass the additional rule that, absent consent, creditors with claims entitled to priority under Section 507 must be paid in full through a plan before any other creditor is paid.

does not apply when the disposition of a bankruptcy case does not involve a plan of reorganization or a liquidation under Chapter 7. *Id.* at 17a. Nothing in the Code supports the court of appeals' conclusion. On the contrary, as noted, the Code specifies that the provisions of Chapter 5 (which includes Section 507) apply to all "case[s] under," *inter alia*, Chapters 7 and 11. 11 U.S.C. 103(a). Regardless of the disposition of Jevic's bankruptcy, it is a "case under" Chapter 11 and is therefore subject to the priority scheme set forth in Section 507.

Bankruptcy is not a free-for-all in which parties or bankruptcy courts may dispose of claims and distribute assets as they see fit. "[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014). The Code provides for three possible dispositions of a Chapter 11 case: (1) a plan of reorganization; (2) conversion to Chapter 7; or (3) dismissal. Nothing in the Code authorizes a court to approve a disposition that is essentially a substitute for a plan but does not comply with the priority scheme set forth in Section 507.

2. The court of appeals erred in upholding the bankruptcy court's disposition of the case on the ground that the Code's priority rules do not apply "to settlements in bankruptcy." Pet. App. 17a. Although *other* parties to the case agreed to the bankruptcy court's disposition, those parties had no authority to settle petitioners' own priority claims. Their agreement consequently provided no sound basis for the court to deviate from the Code's priority scheme at petitioners' expense.

Bankruptcy Rule 9019 authorizes a bankruptcy court to approve a “compromise or settlement.” Bankr. R. 9019. That rule typically governs the settlement of a claim of the estate against a third party (including a creditor). A bankruptcy court may not approve a settlement over the objection of a creditor unless the proposed settlement is “fair and equitable.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). The “settlement” that the courts below approved disposed of the entire bankruptcy case in a manner that was not fair and equitable because it did not comply with the Code’s prescribed treatment of priority claims.

The agreement and the order implementing the purported settlement did not simply convert the estate’s fraudulent-conveyance action to assets that would become part of the estate pursuant to 11 U.S.C. 541(a)(6). Rather, the agreement and order took the further step of directing the distribution of those assets in a manner inconsistent with Section 507, over the objection of petitioners, whose rights were impaired by the agreement. Even assuming that the bankruptcy court could have approved that disposition with the consent of all affected parties, it had no authority to abrogate the rights of nonconsenting creditors in a manner not provided for in the Code. The consent of *other* parties who benefitted from the proposed disposition is not a substitute for the consent of the impaired party. Cf. *Martin v. Wilks*, 490 U.S. 755, 768 (1989) (“A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly ‘settle,’ voluntarily or

otherwise, the conflicting claims of another group of employees who do not join in the agreement.”).

The court of appeals purported to limit its approval of this type of disposition to cases in which a bankruptcy court has “specific and credible grounds to justify [the] deviation.” Pet. App. 21a (brackets in original) (citation omitted). But the grounds on which the court relied—that “there was ‘no prospect’ of a plan being confirmed and that conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in ‘short order,’” *ibid.*—are not permissible reasons to deviate from the Code’s priority scheme. If a plan cannot be confirmed and conversion to Chapter 7 is not feasible, the Code provides a third option: dismissal of the bankruptcy.

The court of appeals is correct that, “[a]s in other areas of the law, settlements are favored in bankruptcy.” Pet. App. 19a. Both in bankruptcy and in other legal contexts, however, the legal rules that establish parties’ rights and obligations provide the background against which parties negotiate towards a settlement. In this context, the priority scheme in Section 507 provides the default rule that will govern if the parties fail to reach a global agreement. The public policy favoring settlement of litigation may justify deviations from the Code’s priority scheme when a priority creditor consents to a diminution of his rights. But that policy provides no basis for the disposition that occurred here, in which the bankruptcy court approved the distribution of estate assets in a manner inconsistent with the Code’s priority scheme *without* the agreement of the creditors whose rights were impaired.

The bankruptcy court stated that petitioners would not be prejudiced by approval of the settlement because petitioners' "claim against the estate is presently, effectively worthless given that the estate lacks available unencumbered funds to satisfy it if it were allowed." Pet. App. 61a. But the court's view that petitioners' WARN Act claims were worthless rested on its belief that the estate's fraudulent-conveyance claim was too contingent and uncertain to merit pursuit. *Id.* at 60a-61a. If the bankruptcy case had simply been dismissed, petitioners could have pursued a fraudulent-conveyance action against Sun and CIT on their own behalf as creditors of Jevic.

Within the bankruptcy case, Jevic (as debtor in possession) had the exclusive right to pursue (on behalf of all of its creditors) any claim that Jevic's assets were depleted by a fraudulent conveyance. 11 U.S.C. 544(b) (assigning such claims to trustee), 1107 (Chapter 11 debtor in possession has rights of trustee); see 11 U.S.C. 548(a) (trustee has exclusive right to pursue fraudulent-conveyance action in bankruptcy); see also *In re Cybergenics Corp.*, 226 F.3d 237, 241-245 (3d Cir. 2000). When the bankruptcy court approved the purported settlement, the fraudulent-conveyance claim against Sun and CIT (which belonged to Jevic's creditors) was dismissed with prejudice, precluding petitioners from pursuing it outside bankruptcy. See *In re PWS Holding Corp.*, 303 F.3d 308, 313-315 (3d Cir. 2002). The effect of the "settlement" thus was to deprive petitioners, without their consent and without complying with the Code's priority scheme, of a cause of action they could have asserted if the bankruptcy case had simply been dismissed.

**B. The Courts Of Appeals Are Divided On The Question Presented**

The courts of appeals are divided on the question whether a court presiding over a Chapter 11 bankruptcy can order the distribution of assets in a manner contrary to the Bankruptcy Code's priority scheme without the consent of the priority claimants whose rights are impaired. Of the three circuits to have considered the question, the Second and Third Circuits permit such a result and the Fifth Circuit does not. Particularly because the vast majority of Chapter 11 bankruptcies are filed in those circuits, this Court's review is warranted to resolve that conflict.

In *In re AWECO, Inc.*, 725 F.2d 293, cert. denied, 469 U.S. 880 (1984), the Fifth Circuit held that "a bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." *Id.* at 298. In that case, the Fifth Circuit overturned the lower courts' approval of a pre-plan settlement of claims between the estate and a junior creditor that would have distributed assets to the junior creditor without first satisfying the claims of objecting creditors with higher-priority claims. *Id.* at 295-297. The court specifically rejected the view that the Code's priority scheme applied only to plans, not to pre-plan settlement agreements. The court explained that, "[a]s soon as a debtor files a petition for relief, fair and equitable settlement of creditors' claims becomes a goal of the proceedings." *Id.* at 298.

In contrast, the Second Circuit in *In re Iridium Operating LLC*, 478 F.3d 452 (2007), rejected as "too rigid" the rule adopted by the Fifth Circuit. *Id.* at

464. The Second Circuit stated that compliance with the Code's priority scheme "will often be the dispositive factor" in a court's decision whether to approve a proposed settlement. *Ibid.* The court held, however, that "where the remaining factors weigh heavily in favor of approving a settlement, the bankruptcy court, in its discretion, could endorse a settlement that does not comply in some minor respects with the priority rule if the parties to the settlement justify, and the reviewing court clearly articulates the reasons for approving, a settlement that deviates from the priority rule." *Id.* at 464-465.

In this case, the Third Circuit acknowledged the circuit split, Pet. App. 17a-19a, and stated that it "agree[d] with the Second Circuit's approach in *Iridium*," *id.* at 19a. The court held "that bankruptcy courts may approve settlements that deviate from the priority scheme of § 507 of the Bankruptcy Code only if they have 'specific and credible grounds to justify [the] deviation.'" *Id.* at 21a (quoting *Iridium*, 478 F.3d at 466). Respondents assert (Br. in Opp. 15) that "this case presents a different issue than either *AWECO* or *Iridium*, because the settlement here is not a prelude to the eventual confirmation of a reorganization plan." But nothing in those decisions suggests that their holdings are limited to pre-plan settlements that are reached in contemplation of a later confirmable plan. No such plan could be confirmed unless priority creditors either are paid in full or agree to a diminution of their rights, 11 U.S.C. 1129(a)(9), neither of which had happened in *Iridium*.

Respondents are also wrong in asserting (Br. in Opp. 24) that this case is an unsuitable vehicle for addressing the question presented because petitioners

“accepted the legal standard set forth in *Iridium*” and “invit[ed]” the Third Circuit to follow it. Petitioners consistently argued that “[n]o provision of the Code authorizes a bankruptcy court to depart from the § 507 priority scheme when approving a settlement,” and that petitioners “were therefore entitled to payment of their priority claims in full before any estate assets could be distributed to lower priority claimants.” Supp. App. 9a. Although petitioners also argued in the alternative that they would prevail even under the *Iridium* standard, *id.* at 15a, that does not amount to waiver of their primary argument.

This Court’s review is particularly appropriate because the vast majority of large bankruptcy cases are brought within the Second, Third, and Fifth Circuits.<sup>3</sup> Going forward, moreover, any corporate debtor with an affiliate organized under the laws of Delaware can file for bankruptcy in a jurisdiction that is bound by the debtor-friendly rule adopted by the court below. 28 U.S.C. 1408.

### C. The Question Presented Is Important and Recurring

The possibility of a settlement can be expected to arise in every Chapter 11 case in which the debtor is administratively insolvent. The approach to settlement approved by the court below permits debtors in such cases to collude with sophisticated creditors to reach an agreement about the distribution of estate assets that skips less-favored creditors with priority claims over the objection of those impaired creditors. The Third Circuit’s decision may also create undue

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<sup>3</sup> See GAO, *Corporate Bankruptcy: Report to the Chairman, Committee on the Judiciary, U.S. Senate*, Appx. III at 42 (Sept. 2015), <http://www.gao.gov/assets/680/672696.pdf>.



pressure for priority creditors to agree to settlements that they would otherwise find unacceptable, for fear of being cut out of the distribution completely with the blessing of the bankruptcy court.

Government creditors like the United States have a particularly strong interest in correcting the court of appeals' erroneous decision. Recognizing that "taxes are the lifeblood of government," *Bull v. United States*, 295 U.S. 247, 259 (1935), Congress has provided that certain tax claims have priority status. Taxes incurred after the filing of a bankruptcy petition, for example, are administrative expenses to be paid as a second priority, 11 U.S.C. 503(b)(1)(B), 507(a)(2), and failure timely to pay such taxes is a ground for converting a Chapter 11 case to a Chapter 7 case, 11 U.S.C. 1112(b)(1) and (4)(I). The Code also requires that pre-petition taxes be paid as an eighth priority, 11 U.S.C. 507(a)(8), and makes full payment of such claims a condition of plan confirmation unless the government creditor consents to different treatment, 11 U.S.C. 1129(a)(9)(C) and (D). The Third Circuit's decision creates a significant risk that debtors will collude with junior creditors to squeeze out government tax claims with higher priority. This Court's review is warranted to correct the Third Circuit's erroneous decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2016

her case dismissed if the case is an abuse of the provisions of Chapter 7. *See In re Paret*, 347 B.R. 12, 15 (Bankr. D. Del. 2006) (citation omitted) (“When no presumption of abuse arises under paragraph (b)(2), the Court concludes that the Code mandates consideration of a debtor’s ability to pay his creditors within the test articulated in paragraph (b)(3).”).

[9–11] Prior to 2005, the standard for dismissal under this provision required the United States Trustee to carry the burden of proving “substantial abuse” by a debtor rather than the current “abuse.” *In re Goble*, 401 B.R. 261, 275 (Bankr. S.D. Ohio 2009) (citations omitted). Although the standard has been lowered, pre-BAPCPA Sixth Circuit case law remains instructive to the determination of abuse. *Id.* at 276. In two such cases, *In re Krohn*, 886 F.2d 123 (6th Cir. 1989), and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir. 2004), the Sixth Circuit held that a case should be dismissed under 11 U.S.C. § 707(b)(3) when the totality of a debtor’s circumstances demonstrated a lack of need. Although Courts also consider a debtor’s source of income, eligibility for Chapter 13 discharge, the degree of relief obtainable through private negotiations and the ability to reduce expenses, the most critical element in determining neediness is whether a debtor has the ability to repay debts out of future earnings. *Krohn*, 886 F.2d at 126 (noting that this “factor alone may be sufficient to warrant dismissal”); *Behlke*, 358 F.3d at 434 (citing *Krohn*). A debtor’s ability to pay can be measured by whether there is sufficient disposable income to fund a Chapter 13 plan. *Behlke* at 437–38 (finding “substantial” abuse when debtor had ability to repay a 14% dividend over three years or 23% over five years); *In re Mestemaker*, 359 B.R. 849, 857 (Bankr. N.D. Ohio 2007) (finding abuse when debtor could pay 10%

to 15% of all unsecured debt in a Chapter 13 case).

As acknowledged by the Supreme Court, “[p]roceedings under Chapter 13 can benefit debtors and creditors alike. Debtors are allowed to retain their assets, commonly their home or car. And creditors . . . usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation.” *Harris v. Viegelahn*, — U.S. —, 135 S.Ct. 1829, 1835, 191 L.Ed.2d 783 (2015).

[12] In the present case, the UST has shown that whether considering Debtor’s monthly disposable income alone or in combination with his wife’s income, Debtor is capable, without hardship, to pay Debtor’s unsecured creditors in full in less than three years. Consequently, the totality of Debtor’s financial condition warrants a dismissal of the case pursuant to 11 U.S.C. § 707(b)(3).

### III. CONCLUSION

For the foregoing reasons, the Court finds that the UST met his burden under 11 U.S.C. § 707(b)(2) and (b)(3) in showing that the granting of a Chapter 7 discharge in this case would be an abuse.

An appropriate order will enter.



IN RE: William Harry FRYAR, Debtor

No. 1:16-bk-13559-SDR

United States Bankruptcy Court,  
E.D. Tennessee, Southern Division.

Signed 04/25/2017

**Background:** Individual Chapter 11 debtor moved for approval of proposed sale of

his 50% interest in companies, as well as for approval of proposed settlement.

**Holdings:** The Bankruptcy Court, Shelley D. Rucker, J., held that:

- (1) debtor's desire to obtain "business divorce" from his "business associate," while at same time avoiding tax liability and realizing value for creditors from his 50% stock interest in two companies, provided sufficient business purpose for sale, outside the ordinary course of business, of debtor's 50% interest in companies, but
- (2) bankruptcy court could not approve, over objection of creditors that would be harmed by reordering of the Bankruptcy Code's priority scheme, a settlement that provided for sale of individual Chapter 11 debtor's 50% interest in companies to his business associate and a distribution of settlement proceeds, not to creditor with security interest in debtor's stock or to priority claimants, but to undersecured lender that funded business associate's purchase of debtor's stock in companies.

Motion denied.

### 1. Bankruptcy $\S$ 3069

Bankruptcy court can authorize sale of estate assets outside the ordinary course of debtor's business when there is sound business purpose for such a sale. 11 U.S.C.A.  $\S$  363(b).

### 2. Bankruptcy $\S$ 3069

Individual Chapter 11 debtor's desire to obtain "business divorce" from his "business associate," while at same time avoiding tax liability and realizing value for creditors from his 50% stock interest in two companies, provided sufficient business purpose for sale, outside the ordinary course of business, of debtor's 50% interest in these two companies to business associate. 11 U.S.C.A.  $\S$  363(b).

### 3. Bankruptcy $\S$ 3033

In bankruptcy proceedings, any compromise between debtor and his creditors must be approved by bankruptcy court as being fair and equitable. Fed. R. Bankr. P. 9019.

### 4. Bankruptcy $\S$ 3033

In deciding whether to approve a proposed compromise, bankruptcy court must make independent judgment as to whether compromise is fair and equitable, and may not act as mere rubber stamp or rely on trustee's word that proposed compromise is reasonable. Fed. R. Bankr. P. 9019.

### 5. Bankruptcy $\S$ 3033

To determine whether a proposed compromise is fair and equitable, bankruptcy court considers such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Fed. R. Bankr. P. 9019.

### 6. Bankruptcy $\S$ 3033

Individual Chapter 11 debtor bore burden of persuading court that his proposed compromise with creditor was in estate's best interest. Fed. R. Bankr. P. 9019.

### 7. Bankruptcy $\S$ 3033

Whether the distribution scheme underlying a proposed settlement complies with the Code's priority scheme is the most important factor for bankruptcy court to consider in determining whether settlement is fair and equitable, and should be approved; court must be certain that parties to settlement have not employed settlement as means to avoid the priority strictures of the Bankruptcy Code. 11 U.S.C.A.  $\S$  101 et seq.; Fed. R. Bankr. P. 9019.

**8. Bankruptcy ⇌ 3033**

Bankruptcy court could not approve, over objection of creditors that would be harmed by reordering of the Bankruptcy Code's priority scheme, a settlement that provided for sale of individual Chapter 11 debtor's 50% interest in companies to his business associate and a distribution of settlement proceeds, not to creditor with security interest in debtor's stock or to priority claimants, but to undersecured lender that funded business associate's purchase of debtor's stock in companies, where settlement was not part of a "first day" order to ensure debtor's survival to get to a plan, and where debtor did not sufficiently explain what Code-related objectives were served by settlement or how the objecting creditors benefited from settlement. Fed. R. Bankr. P. 9019.

**9. Bankruptcy ⇌ 3033**

Parties who seek approval of settlement that provides for distribution of settlement proceeds in manner contrary to the Bankruptcy Code's priority scheme should be prepared to prove that settlement is not only fair and equitable based on factors generally considered by courts in deciding whether to approve settlements, but that any deviation from priority scheme for a portion of estate assets is justified because it serves a significant Code-related objective; proposed settlement should state that objective, and should also state how it furthers that objective and should demonstrate that it makes even disfavored creditors better off. Fed. R. Bankr. P. 9019.

1. The court delivered this opinion orally on April 13, 2017. Due to its applicability to settlements proposed in a Chapter 11 case after the Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, — U.S. —, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017), the court

David J. Fulton, Scarborough & Fulton, Chattanooga, TN, for Debtor.

David Holesinger, Kimberly C. Swafford, Office of the United States Trustee, Chattanooga, TN, for U.S. Trustee.

**MEMORANDUM <sup>1</sup>**

Shelley D. Rucker, UNITED STATES  
BANKRUPTCY JUDGE

The Debtor filed a Notice of Proposed Use, Sale or Lease of Property Outside of the Normal Course of Business combined with a Motion to Sell Property Free and Clear and Motion for Settlement and Compromise on February 24, 2017. The property to be sold was the Debtor's stock interests in two corporations whose value the Debtor listed as \$900,000 on Schedule A/B, Question 19. The buyer of these interests is the other shareholder of the companies. The purchase price for these interests is \$350,000 plus the conveyance by one of the companies of a piece of property which it owns. The interests are to be sold free and clear of the tax lien filed by the Internal Revenue Service and any other claim or interest. However, the settlement does not propose for the IRS lien to attach to the proceeds of the sale. Rather the lien will attach to two other properties which the Debtor owns individually on Highway 58, Chattanooga, Tennessee, and the property being conveyed to the Debtor in the settlement. Those Highway 58 properties are currently encumbered by a \$531,000 mortgage in favor of Pinnacle Bank, the successor in interest to Cornerstone Bank. The settlement piece of the motion requires

is filing a written opinion. Modifications and edits for citation, style and grammar have been made to enhance readability. To the extent that this memorandum differs from the opinion read in court, this memorandum shall control.

Pinnacle's lien to be satisfied by the payment to Pinnacle of the \$350,000 in sales proceeds. This would be less controversial if Pinnacle's collateral were worth \$350,000, but the Debtor contends that the property is worth only \$200,000. The U.S. Trustee and creditors Sammie and Robert Gammenthaler, BBCO, LLC, and SmartBank appeared in opposition to the motion. The Gammenthalers, BBCO and SmartBank have filed unsecured claims totaling \$436,000 (after deducting the secured portion of SmartBank's claim). The basis of their objections is that Pinnacle is being preferred and the priorities set for distribution under the bankruptcy code are being reordered to Pinnacle's benefit. As such, the court should not find the settlement to be fair and equitable.

The parties made oral arguments regarding the appropriateness of the settlement at the hearing but put on no evidence. Following the hearing, the parties filed Stipulations of Fact on which the court will rely for making its findings. (Doc. No. 73.) Those stipulations were supplemented with testimony from the Debtor at the hearing on April 13th before the court issued its opinion.

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (N). These are the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 as made applicable to contested matters by Fed. R. Bankr. P. 9014.

#### A. Findings of Facts

The Debtor owns a 50% interest in two businesses: WLF Properties, Inc. and LF Properties, Inc. Stephen Long owns the other 50% of both businesses.

WLF owns a storage operation in Oak Ridge, Tennessee, and four rental houses in Murfreesboro, Tennessee. The storage operation has a value of approximately

\$2.4 million, and the rental houses have a value of approximately \$325,000. WLF has debts of approximately \$1.8 million. Based on these stipulations, the court calculates the Debtor's 50% interest to be worth approximately \$467,500.

LF owns property located at Belgrade Road, Oak Ridge, Tennessee, and 219 Yearwood Avenue, Murfreesboro, Tennessee. Those properties are worth approximately \$265,000. LF has debts of \$220,000. Based on these stipulations, the court calculates that the Debtor's equity in LF is worth approximately \$22,500.

The value of the Debtor's interest in the two businesses, after debt, is approximately \$490,000.

In addition to these business interests, the Debtor individually owns properties at 6308 and 6310 Highway 58, Harrison, Tennessee. In his schedules, the Debtor valued these properties at \$100,000 each. The Debtor owes Hamilton County and the City of Chattanooga property taxes on the Highway 58 properties totaling approximately \$48,000 based on proofs of claim nos. 5–9 & 14–17. Pinnacle Bank has a mortgage of approximately \$531,000 on these two properties based on the documents filed with claim 3. Its deeds of trust were recorded on October 20 and 31, 2008.

The IRS has a claim of approximately \$90,000 based on proof of claim no. 4. Approximately \$74,000 of this claim was asserted as secured. Notice of the federal tax lien was filed on July 5, 2016. An additional approximately \$15,000 of the claim is asserted as priority. The priority of the liens on 6308 and 6310 Highway 58 appears to be: first, the property taxes owed to the City and County, then the mortgage to Pinnacle Bank, and finally the IRS lien to the extent that its claim is not satisfied by other property of the Debtor.

WLF owes Pinnacle Bank \$1.1 million, secured by the storage operation and the rental houses owned by WLF. This debt was guaranteed by the Debtor and Mr. Long. Pinnacle Bank has assigned the debt to Mr. Long's company, S.J. Long, Inc. which is now the holder of that debt.

Excluding the claims of Pinnacle Bank and S.J. Long, Inc., there is approximately \$700,000 of unsecured debt reflected in the claims filed in this case. No objection to any of these claims had been filed at the time of the hearing on the settlement.

As noted above, the settlement involves a series of transactions that breaks down as follows:

1. Mr. Long will pay \$350,000 into the estate. In exchange, the estate will convey all stock interests of the Debtor in WLF Properties and LF Properties to Mr. Long. This is all subject to Mr. Long's obtaining financing from Pinnacle Bank for \$350,000.

2. LF Properties will convey one of its properties, 219 Yearwood Ave., to the estate free and clear of liens. Debtor estimates the value of that property to be \$150,000. The stipulations state that the property was purchased for \$166,000 in 2004 and that the tax appraisal made by Rutherford County, Tennessee is \$124,800. The Debtor testified that the property is regularly rented and believes that the property will provide value of that amount, although the Debtor also stated that there are repairs he would like to make to the property.

2. The stipulations do not indicate what types of claims are being settled. None of these parties have filed proofs of claim, so the court is relying on the stipulations made in court that these claims exist and are being released. Only Mr. Long was listed as a creditor in the Debtor's schedules. To the extent that Mr. Long and the Debtor are both guarantors of the debt of WLF to S.J. Long, Inc., there might be contribution claims but the parties'

3. Mr. Long, WLF Properties, and LF Properties will release the Debtor from all claims they may have against him. At the hearing, Mr. Long's counsel clarified that there were debts that WLF Properties and LF Properties have asserted against the Debtor individually. Counsel for the Debtor agreed that these were amounts owed by the Debtor.<sup>2</sup>

The settlement also provides that the Debtor will release Mr. Long, WLF Properties, and LF Properties from all claims he may have against them. No claims or causes of action were listed in Schedule B filed by the Debtor. (Schedule A/B, Questions 33-34.)

4. S.J. Long, Inc. will release the Debtor's guaranty on the obligation from the debt it purchased from Pinnacle Bank.

5. The estate will pay the sale proceeds of \$350,000 to Pinnacle Bank on the \$531,000 obligation. Pinnacle Bank will release the mortgage on 6308 and 6310 Highway 58, but will retain a claim for \$181,000 for the deficiency which it will subordinate to the other unsecured creditors.

Pinnacle Bank acknowledges that if the \$350,000 were paid to the estate, that the IRS lien on the stock and the IRS priority lien would be paid before its unsecured claim. It also acknowledges that if it were to foreclose on the two Highway 58 properties that the tax liens of the City and County would have to be paid, and that it is likely to only receive \$140,000 from the sale of its collateral.<sup>3</sup>

stipulations lead the court to believe that the WLF obligation is fully secured.

3. The court calculates that rather than leaving it with a \$391,000 deficiency claim, the current settlement proposal leaves it with only a \$181,000 deficiency claim on which it will not receive any other funds until the other creditors have been paid.

Creditors BBCO, LLC (Claim no. 23 for \$57,191), Robert Gammenthaler (Claim no. 22 for \$34,360) and Smartbank (Claim no. 24 for \$381,843 of which \$37,100 is claimed as secured) have objected to the settlement.

The Debtor testified that he will reduce the claims through objections to filed claims and liquidation from other sources to \$100,000. The unsecured claim for his school loans will stay in deferment because he intends to return to school to complete his doctorate degree.

### B. Legal Analysis

[1] The court can authorize the sale of assets when there is a sound business purpose for such action. *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). The stipulations do not specifically state the business purpose of the sale. However, in oral argument, the Debtor argued that this settlement resolves the issues between the two shareholders and provides a means for WLF to continue and avoid a foreclosure which would subject both shareholders to significant individual tax liability.

[2] The Debtor testified at a hearing on a motion to dismiss, brought by Pinnacle Bank early in the case, that his relationship with Mr. Long had deteriorated and that he was not getting information from Mr. Long nor any income from the properties. At the initial hearing on this motion, the court asked the parties if this settlement was to facilitate a business divorce between two business associates. The parties acknowledged that this was the case. Given that situation, the Debtor faced either buying out his partner or selling to him to resolve these disputes. The court finds that the resolution of the claims arising from the two companies, the avoidance of the tax liability, and realization of value for the creditors from the stock in-

terest provide a sufficient business purpose for the sale. However, because the business terms of the sale also involve a settlement and a payment of one unsecured creditor ahead of other prior parties and other unsecured creditors, the court must also review the standards for approval of a settlement.

[3, 4] The involvement of the court in the approval of a settlement is based on Fed. R. Bankr. P. 9019(a) which provides that a court may approve a compromise or settlement on motion by the trustee after notice and a hearing. Notice is required to be given to creditors, the U.S. Trustee, the debtor, and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct. Fed. R. Bankr. P. 9019.

In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable. *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968); *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir.), *cert. denied*, 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986). In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. *In re American Reserve Corp.*, 841 F.2d 159, 162-63 (7th Cir.1987). The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is "reasonable." *Id.* at 162.

The need for this safeguard is obvious. Any settlement between the debtor and one of his individual creditors necessarily affects the rights of other creditors by reducing the assets of the estate



available to satisfy other creditors' claims.

*Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988); see also *In re Anderson*, 377 B.R. 865, 871 (6th Cir. BAP 2007) (abrogated on other grounds) (discussing unpublished opinions by Sixth Circuit and the 6th Cir. B.A.P. adhering to the "fair and equitable standard" for settlement approval).

[5,6] To determine whether a compromise is fair and equitable, the court considers factors such as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988). The debtor has the burden of persuading the court that the compromise is in the estate's best interest. *McGraw v. Yelverton (In re Bell & Beckwith)*, 87 B.R. 476, 478 (N.D. Ohio 1988).

The stipulations are short on exactly what is being compromised. At the hearing, the Debtor was able to clarify that it is a compromise of what he owes Pinnacle and what he owes WLF and LF and a compromise of the value of the stock interest being sold. The stipulations still do not clearly answer the question of why all of the cash should be paid to Pinnacle other than that Pinnacle is requiring it to be done that way. They do not offer facts from which the court could determine how this helps the Debtor move forward with a plan or how that plan will ultimately leave the Code's distribution priorities intact.

The issue of reordering the distribution priorities in a settlement has been the subject of controversy. The Fifth Circuit held that it would not approve a settlement that disregarded the priority system required by the Code in sections 726 and 1129. *U.S. v. Aweco, Inc.* 725 F.2d 293, 298 (5th Cir. 1984) ("[A] bankruptcy court abuses its discretion in approving a settle-

ment with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors.").

The Second Circuit found that standard to be "too rigid a test." *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 464 (2nd Cir. 2007). It opted for a more flexible test where the facts of the case indicated that approval of a settlement reordering distribution from some assets was necessary to allow the estate to pursue its most significant assets and where the nature and extent of the estate and the priorities were not fully resolved. *Id.*

[7] Nevertheless, it recognized that a more flexible rule created a greater risk that the parties to a settlement might engage in improper collusion. "Thus whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019." *Id.* "The court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code." *Id.*

The United States Supreme Court recently accepted certiorari on this issue, but opined on a more specific question involving the approval of a structured dismissal which did not follow the Code's priority distribution. *Czyzewski v. Jevic Holding Corp.*, — U.S. —, 137 S.Ct. 973, 985, 197 L.Ed.2d 398 (2017). The Supreme Court held that bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors. *Id.* at 983.

In dicta, the Supreme Court acknowledged that there are instances where in-

terim distributions that violate the ordinary priority rules have been approved.

We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example, have approved “first-day” wage orders that allow payment of employees’ prepetition wages, “critical vendor” orders that allow payment of essential suppliers’ prepetition invoices, and “roll-ups” that allow lenders who continue financing the debtor to be paid first on their prepetition claims. See [Official Committee of Unsecured Creditors of] *Cybergenics* [Corp. ex rel. *Cybergenics Corp. v. Chinery*], 330 F.3d [548] at 574, n. 8 [(3d Cir. 2003)]; D. Baird, Elements of Bankruptcy 232–234 (6th ed. 2014); Roe, 99 Va. L. Rev., at 1250–1264. In doing so, these courts have usually found that the distributions at issue would “enable a successful reorganization and make even the disfavored creditors better off.” *In re Kmart Corp.*, 359 F.3d 866, 872 (C.A.7 2004) (discussing the justifications for critical-vendor orders); see also *Toibb v. Radloff*, 501 U.S. 157, 163–164, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991) (recognizing “permitting business debtors to reorganize and restructure their debts in order to revive the debtors’ businesses” and “maximizing the value of the bankruptcy estate” as purposes of the Code).

*Id.*

[8] The court now turns to the settlement before it. It finds that the settlement does in fact provide for a distribution that does not follow the ordinary priority rules. Based on the filed claims which are deemed allowed until objected to under 11 U.S.C. § 502(a), the proceeds from the sale of the stock should go first to the lien

of the IRS. 26 U.S.C. §§ 6321, 6323(a). Then the proceeds would be paid into the estate for distribution to priority creditors and then to unsecured creditors on a pro rata basis. The amount of claims might be reduced and liens might be avoided or further negotiated, but, as the claims currently stand, Pinnacle Bank is moving to the head of the line.

This might be acceptable if all of the creditors were consenting; however, three creditors and the U.S. Trustee have objected, so the court must consider whether there are Code-related objectives being served that are so significant that deviation is justified.

This settlement is not part of a “first day” order to ensure the Debtor’s survival to get to a plan. This case has been here for eight months and was filed on the heels of prior chapter 11 which was dismissed for failure to propose a plan. At the initial hearing on the motion, the court asked counsel whether there were other properties which would provide an income stream to fund a plan and pay unsecured creditors, but the Debtor and the U.S. Trustee both contended there was very little income in the case and that funding would have to come from the liquidation of assets. The court is hard pressed to determine what business remains to be revived or reorganized. This is an individual chapter 11 in which the Debtor sought settlement approval on the basis that he believes he can provide the same 53% dividend to all unsecured creditors. Under the law in the Sixth Circuit, an individual may not retain anything in a chapter 11 unless each class of creditors consent or are paid 100%. *Ice House Am., LLC v. Cardin*, 751 F.3d 734, 739 (6th Cir. 2014). The Debtor has not provided any proof that the objecting creditors would support a plan if they were paid 53%.

The court’s review of the facts in this case leads it to conclude that this settle-

ment is more of a preamble to a conversion or structured dismissal than it is to the situation in *Iridium*, where there was a reorganization anticipated. The Debtor has failed to prove that disregard of the priority scheme will promote "a significant Code-related objective." *Jevic*, 137 S.Ct. at 985. As with the situation in *Jevic*, this case more closely resembles the proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. *Id.* at 986.

The court does not refuse to authorize the compromise lightly. The court realizes that the parties found themselves caught at a time when the settlement standards may have changed based on the *Jevic* case. The court understands the Debtor's desire to find a way to retain the two properties on Highway 58, one of which is where the Debtor originally testified he lives and leases a business location to a family member for the operation of his business. The court also understands that the Debtor wants to ensure that there will be no new tax liability arising from a foreclosure of WLF's holdings. Failing to approve this settlement may result in the unsecured creditors getting nothing, but that is their decision to make if they want to see if they can find a better deal for the Debtor's stock interests. The fact that this settlement disregards the priority scheme contained in the bankruptcy code entitles them to ask the court for close scrutiny of the proposed compromise and the prospects for reorganization.

[9] In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the factors to be considered by the Sixth Circuit, *Bauer*, 859 F.2d at 441, but also that any deviation

from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective. The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.

The proposed settlement in this case fails to meet this standard. To approve a settlement which is a *sub rosa* plan or a precursor for a conversion or dismissal in which the Code's priority scheme is ignored would be an abuse of the bankruptcy court's discretion.

For these reasons, the Debtor's motion to compromise is denied. Without the compromise the buyer is unwilling to go forward with the sale, therefore the motion to sell is denied as moot.

A separate order has been entered at docket number 79.



**IN RE: Landon Reser HOLMES and  
Shera Marie Holmes, Debtors.**

**Katie McClammer, Plaintiff,**

**v.**

**Landon Reser Holmes, Defendant.**

**Case No. 16-41808**

**Adversary No. 16-4116**

United States Bankruptcy Court,  
W.D. Missouri.

Signed May 4, 2017

**Background:** Debtor's former romantic partner brought adversary proceeding to

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH**

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In re:

M SPACE HOLDINGS, LLC

Debtor.

Case No. 16-24384

Chapter 11

Hon. Joel T. Marker

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**JOINT MOTION OF THE DEBTOR, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND PNC BANK, NATIONAL ASSOCIATION FOR THE ENTRY OF AN ORDER (A) DISMISSING THE DEBTOR'S CHAPTER 11 CASE AND (B) GRANTING RELATED RELIEF**

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M Space Holdings, LLC, the debtor and debtor-in-possession (“Debtor”), and the Official Committee of Unsecured Creditors (“Committee”) appointed in the Debtor’s case, and PNC Bank, N.A. (“PNC”) jointly submit this Motion for entry of an order, substantially in the form attached hereto as **Exhibit A**, (a) dismissing the Debtor’s chapter 11 case (the “Chapter 11 Case”) and (b) granting related relief. In support of the Motion, the parties respectfully state as follows:

**I. PRELIMINARY STATEMENT**

1. Substantially all of the assets of the Debtor’s estate have been liquidated. The Debtor has received all sale proceeds and a majority of distributions to creditors have already occurred. As an effect of the Committee’s Adversary Proceeding, certain assets were established as unencumbered assets of the estate and a pool of sale proceeds attributable to unencumbered assets was created and remains in the estate pending further orders of the Court. Recently, the Court entered an order approving a settlement of the Adversary Proceeding that provides an economic division of the remaining assets of the estate and sets the stage for a consensual resolution of the Chapter 11 Case. More specifically, the settlement provides that allowed administrative claims and professional expenses will be paid in full, and approximately \$610,000 will be utilized to pay unsecured creditors, with allowed prepetition priority unsecured claims paid in full and \$450,000 dedicated to the pro rata payment of allowed prepetition general unsecured claims (excluding any claims of the Lenders<sup>1</sup>). With this backdrop in mind, the Debtor, the Committee and PNC have evaluated the most expedient and cost-effective way to

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<sup>1</sup> As used herein “Lenders” refers to PNC together with HSBC Bank USA, National Association.

conclude the Debtor's Chapter 11 Case. After carefully vetting the alternatives, the parties have concluded that a structured dismissal is the most effective means to minimize administrative costs and ensure that remaining estate funds are distributed as quickly as possible to creditors.

2. In short, conversion of the Chapter 11 Case to chapter 7 will unnecessarily add another layer of administrative expense and delay creditor recovery where substantially all of the assets of the estate have already been sold and where the most substantial litigation in the case, the Adversary Proceeding, has now been resolved. Further, the Debtor is best suited to wind up its case in light of the Debtor's institutional knowledge of its operations and the history of this case. Similarly, there is no benefit to the estate or its creditors in requiring that the Debtor pursue confirmation of a liquidating plan. Given the circumstances of this case, a structured dismissal makes the most practical sense and is supported by precedent where the interests of creditors and the Debtor are better served thereby. Indeed, the Supreme Court has very recently weighed in on the contours of the bankruptcy courts' authority to approve structured dismissals, providing this Court with an opportunity to rule on a structured dismissal request in light of that decision. In particular, the Supreme Court disapproved of structured dismissals that violate the absolute priority rule without consent. Here, no such defect is present.

## **II. JURISDICTION**

3. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief sought herein are sections 105(a), 305(a), or alternatively section 1112(b), and 349 of the Bankruptcy Code and Bankruptcy Rule 1017(a).

### **III. BACKGROUND**

#### **A. General Background**

5. On May 19, 2016 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and operated and managed its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. The Official Committee of Unsecured Creditors was appointed on June 1, 2016.

7. A detailed factual background of the Debtor’s business and operations, as well as the events precipitating the commencement of this Chapter 11 Case, is fully set forth in the Declaration of Jeffrey D. Deutschendorf in Support of the Chapter 11 Petition and Various First Day Motions filed on the Petition Date and incorporated herein by reference. [Doc. 6.]

#### **B. Debtor’s Liquidation**

8. The Debtor pursued an orderly liquidation of the estate’s assets through the bankruptcy process. From the inception of the case, it was anticipated that the Debtor would not likely be seeking to reorganize and at the first day hearing, structured dismissal was noted as a potential avenue to exit from chapter 11. During the course of the case, the Debtor sold assets pursuant to the *de minimis* and other sale procedures orders entered by the Court. [See, e.g., Docs. 48, 144.] This resulted in a number of sales of portions of the Debtor’s assets,<sup>2</sup> the proceeds of which were distributed pursuant to the terms of the Final Cash Collateral Order.<sup>3</sup>

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<sup>2</sup> See Docs. 49-55, 57, 79, 93, 101, 200, 202, 224, 226, 227, 264, 304, 305, 320, 377.

<sup>3</sup> “Final Cash Collateral Order” means and refers to the order entered at Docket 192, as amended by the order entered at Docket 353.

9. In November 2016 as part of extending the consensual use of cash collateral, the Debtor agreed with the Lenders to pursue a sale of substantially all of its remaining assets. The Debtor's sale culminated in an auction held February 8, 2017 and subsequently, approval of a sale to the stalking horse bidder (the "Sale"), Vesta Housing Solutions, LLC ("Vesta"). [See Doc. 468, the "Sale Order"].] The sale resulted in a gross purchase price of \$15,120,000. [See Doc. 455.] Of that amount, \$2,751,000 was set aside on account of the unencumbered assets of the estate that were sold (the "Excluded Asset Reserve"). [See Doc. 468, ¶24(e).]

10. After purchase price adjustments and certain hold backs and other payments, PNC, as Agent, received approximately \$10,940,000 at the closing of the sale, representing the net sale proceeds exclusive of the Excluded Asset Reserve. [See, e.g., Doc. 455, Doc. 468, ¶24.] Also, as part of the closing, the following amounts were paid or separately escrowed from the Excluded Asset Reserve: (1) \$319,442.82 relating to the settlement with Camp Creek Development (*see* Doc. 468, ¶24(e)(1)(i)); (2) \$27,510 paid to Gordon Brothers Commercial & Industrial, LLC on account of their 1% sale fee (*see* Doc. 361, ¶13); (3) \$44,641.19 being held in escrow dependent upon release of a lien on the North Dakota real property by Aster Electric, LLC; (4) \$119,000 paid to an account of the Debtor for its expenses in March 2017 (*see* Doc. 468, ¶24); and (5) \$56,881 paid to Wells Fargo Bank, N.A. relating to certain liens on motor vehicles. The net amount of the Excluded Asset Reserve, approximately \$2,183,525, is currently being held in an account of the estate pending further order of the Court. [See *id.*]

11. By virtue of the Sale, the Debtor has liquidated substantially all of its assets. Moreover, the Debtor terminated all of its regular employees, except for participants in a key employee incentive program and certain other critical employees, and currently is operating for



the limited purpose of winding down its operations. The Debtor's remaining employees have been charged with effectuating the wind down process. Indeed, because the Debtor has liquidated or disposed of substantially all of its assets, and has no ongoing business operations, there is no reasonable likelihood of its rehabilitation.

**C. Adversary Proceeding Settlement**

12. In connection with the use of cash collateral, the Debtor waived the ability to challenge the validity, priority, extent, perfection and non-avoidability of the Lenders' claims and liens, which the Debtor agreed encumbered substantially all of the assets of the estate. [*See, e.g.,* Doc. 45, 2, 21-24.] As such, under the Final Cash Collateral Order, the Committee was granted standing to bring, on behalf of the estate, any "Challenges" (as that term is defined in the Final Cash Collateral Order) against the Lenders. [*See* Doc. 192, ¶19.] On October 31, 2016, the Committee filed its Complaint for Declaratory Judgment, Avoidance of Liens and Recovery, Avoidance of Preferential Transfer and Recovery, Disgorgement, Accounting and Disallowance of Claim, thereby commencing Adversary Proceeding Case No. 16-02156 (the "Adversary Proceeding"). As detailed further in the Committee's motion to approve settlement (Doc. 488, "Settlement Motion"), after continued extensive negotiations and case evaluation, and following the Debtor's sale, the Committee and Lenders reached a resolution of the Adversary Proceeding.

13. The terms of the settlement are set forth in the Settlement Agreement attached as Exhibit A to the declaration in support of the Settlement Motion.<sup>4</sup> [Doc. 488-1.] A summary of the key terms is as follows:

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<sup>4</sup> Any summary or reference to the terms of the Settlement Agreement is qualified by the Settlement Agreement itself. To the extent there are any conflicts between this Motion and the Settlement Agreement, the terms of the Settlement Agreement shall govern.

- Allowed priority unsecured claims will be paid in full out of the Excluded Asset Reserve;
- A sum of \$450,000 (the “Settlement Amount”) out of the Excluded Asset Reserve will be dedicated solely to the pro rata payment of allowed prepetition nonpriority unsecured claims, excluding the Lenders’ deficiency claims and any and all other claims of any kind by the Lenders;
- Allowed administrative expenses not provided for in the budget under the Final Cash Collateral Order will be paid in full out of the Excluded Asset Reserve, with the Committee’s professionals having agreed to an aggregate cap on the fees and costs for which they will seek allowance and payment;
- After payment of all of the foregoing, any amount remaining in the Excluded Asset Reserve that would otherwise be paid to holders of pre-petition non-priority general unsecured claims, will be paid to PNC (as Agent);
- The Settlement Agreement includes mutual releases, such that, among other things, the Adversary Proceeding will be dismissed with prejudice as soon as reasonably practicable after the Effective Date under the Settlement Agreement, the Parties will release any dispute to the sales proceeds the Lenders have received throughout the case, and all remaining assets of the estate (other than the Excluded Asset Reserve) will be deemed the Lenders’ collateral.

14. There were no objections to the Settlement Motion and the settlement was approved by order entered on March 22, 2017. [Doc. 514, “Settlement Order.”] The settlement resolves the largest piece of litigation relating to the Chapter 11 Case and sets up a structure for the disposition of the remaining assets of the estate, including the Excluded Asset Reserve.

15. Prior to the Settlement Motion, the Debtor filed a motion seeking to convert the Chapter 11 Case to a case under Chapter 7 (“Motion to Convert”). [Doc. 473.] But, in light of the global resolution of the Adversary Proceeding, the Debtor, the Committee and PNC engaged in discussions about the potential for an alternative exit from the case. Specifically, the parties evaluated whether structured dismissal may provide a more expedient and less costly mechanism for winding up the case that would be to the benefit of the creditors of the estate. [See Doc. 491.] Considering the entirety of the circumstances of the case, the parties believe that a structured dismissal will better serve the interests of creditors and the Debtor as set out herein. If the Court

grants the present Motion, the Debtor will withdraw the Motion to Convert as moot. If the Court denies the present Motion, then the Motion to Convert, which is set for a continued hearing concurrently with this Motion, should be granted.

**D. Claims Reconciliation**

16. On May 26, 2016, the Court entered its Notice of Chapter 11 Bankruptcy Case (the “Bar Date Notice”). [Doc. 56.] Pursuant to the Bar Date Notice, the Court set September 19, 2016 as the deadline for any person or entity, other than governmental units, holding a claim or interest against the Debtor that arose or was deemed to have arisen prior to the Petition Date to file proof of such claim or interest. In addition, the Court established November 15, 2016 as the deadline for governmental entities to file proofs of claim.

17. On April 3, 2017, the Debtor filed its motion to establish a bar date for filing requests for the allowance of administrative expenses against the Debtor under sections 503(b)(1) through (8) and 507(a)(2) of the Bankruptcy Code incurred from and after the Petition Date, other than Excluded Claims (as defined in the motion). [Doc. 531.] The Court entered an order on April 3, 2017 approving the motion and setting an administrative claims bar date. [Doc. 533.]

18. The Debtor has conducted an extensive review of its books and records, statements and schedules, and the proofs of claims filed. The Debtor anticipates resolving any claim disputes through claim objections and/or settlement discussions. As part of its claim reconciliation process, on April 3, 2017, the Debtor filed an objection to the claim asserted by Stearns Bank (Doc. 528)<sup>5</sup> and on April 4, 2017, filed an omnibus claim objection as to certain

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<sup>5</sup> Pursuant to the Debtor’s settlement with Camp Creek Development Corp. (“Camp Creek”), \$111,196.73 was held a part of the Excluded Asset Reserve in connection with the Stearns Bank claim. [Doc. 471, ¶16.] As provided by the settlement, if it is established that Stearns Bank is a

duplicative, satisfied and/or misclassified claims (Doc. 539). The Debtor anticipates filing additional claims objections. Attached hereto as Exhibits C-E are schedules detailing the amount of and the anticipated distribution proposed for secured creditors, priority unsecured creditors, and general unsecured creditors.<sup>6</sup> Please note that the anticipated distributions to general unsecured creditors are estimates only. The amount to be distributed to all unsecured creditors totals \$450,000. The amount to be distributed to an individual unsecured creditor will depend on certain objections to claims and the amount of claims allowed.

19. On February 17, 2017, Hanover Insurance Company filed an adversary proceeding against the Debtor and the United States Trustee as Chapter 11 Trustee, Adversary Proceeding Number 17-02026 (the “Hanover Action”). In the Hanover Action, Hanover asserts an ownership interest in accounts receivable owed to the Debtor on the Wilson Elementary School project. The accounts receivable owed, however, were sold to Vesta without objection by Hanover. The Debtor anticipates resolving the Hanover Action through a Motion to Dismiss and/or settlement.

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secured creditor, then these funds will be paid to Stearns Bank and any amount in excess owing to Stearns Bank as a secured creditor will be paid equally by the Debtor and Camp Creek. [*Id.*] If it is established that Stearns Bank is not a secured creditor, then 50% of the withheld amount will be paid to Camp Creek and 50% will be paid to the Debtor’s estate as part of the Excluded Asset Reserve. [*Id.*] For the sake of clarity, neither payment to Stearns Bank as a secured creditor (if such is the case) nor the potential payment to Camp Creek (in the event Stearns Bank is not a secured creditor) will be paid from the general unsecured Settlement Amount.

<sup>6</sup> As reflected on Exhibit C relating to general unsecured creditors, among other things, the Debtor is continuing to review Proofs of Claim 47, 56, and 68-69, which may be adjusted prior to the hearing on the Motion.

#### IV. RELIEF REQUESTED

20. By this Motion, the moving parties request entry of an order approving the dismissal of the Chapter 11 Case upon certification (the “Certification”)<sup>7</sup> that (a) the Debtor has completed its claims reconciliation process; (b) all U.S. Trustee fees attributable to the Debtor have been paid in full; (c) the Debtor has addressed the disposition of the few assets remaining in the estate (other than the Excluded Asset Reserve), which are subject to the liens and security interests of the Lenders; (d) as part of this Motion, the Debtor has given notice to all parties listed on the creditor matrix in the Chapter 11 Case of its estimated distribution of funds pursuant to the terms of the Settlement Agreement, subject to claims objections and other matters as reflected in Exhibits C-E hereto, and any objections to the estimated distribution of funds have been withdrawn, waived, settled or overruled; and (e) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and the Settlement Agreement.<sup>8</sup> The Certification also will attach a summary of distributions to creditors. The distribution summary attached to the Certification may vary from the schedules of estimated distributions (Exhibits C-E) being served on all parties

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<sup>7</sup> A proposed form of Certification is attached hereto as **Exhibit B**.

<sup>8</sup> On July 17, 2016, the Court entered an order establishing interim compensation procedures (Doc. 180, “Compensation Procedures Order”). Under the Compensation Procedures Order, professionals cannot receive *interim* payments until they have filed the requisite monthly fee application(s) and/or interim fee application(s). [*Id.*, ¶2.e.] However, the order provides that “[t]here will be no other penalties for filing to file a Monthly Fee Application or an Interim Fee Application in a timely manner.” [*Id.*] As such, retained professionals are not required to file monthly applications or interim applications as a prerequisite to filing their final fee applications. Further, given the structure of the settlement, the Lenders are the only creditors with an economic interest in payment of administrative expenses. Under these circumstances, requiring additional monthly or interim applications, “would only unnecessarily increase administrative claims” and it is in the best interests of the estate to not to require filings in addition to final fee applications. *In re Olympic 1401 Elm Assocs., LLC*, 2016 WL 4530602, at \*2 (Bankr. N.D. Tex. Aug. 29, 2016).

with this Motion because of the pendency of claim objections and the continuing claims reconciliation process. To be sure, all creditors are being given an opportunity to object to the estimated distribution of funds reflected in Exhibits C-E as part of this Motion. This is separate and apart from the claim objections that have been or will be brought by the Debtor. In other words, lack of an objection to the estimated distribution in this Motion does not replace or prevent a creditor from responding to a claim objection as provided for under the Bankruptcy Code. The inverse is also true that opposition to the estimated distribution in this Motion does not necessarily constitute a response to a claim objection.

21. In addition, the Debtor and the Committee request approval of the following customary release provision in the Dismissal Order, in addition to the mutual releases already approved pursuant to the Settlement Order:

The Debtor, the Committee, the members of the Committee (solely in their capacities as such) and their staff, shareholders, legal representatives, attorneys, accountants, financial advisors, administrators, partners, guarantors, investors, trustees, parents, successors, assigns, managers, affiliates, employees, members, contractors, consultants, agents, officers and directors (collectively, the "Case Participants"), shall neither have nor incur any liability to any person or party for any act taken or omitted to be taken on and after the Petition Date in connection with or directly or indirectly related to the Debtor, the Chapter 11 Case, the Motion, any assets, and any appeals of judgments or orders of the Bankruptcy Court during the Chapter 11 Case, except only for actions or omissions to act to the extent determined by a final nonappealable order of the Bankruptcy Court to be due to such Case Participant's own respective fraud, gross negligence or willful misconduct. Nothing herein shall be construed as a release of or waiver of any claim that arose or is deemed to have arisen prior to the Petition Date against the Debtor by any party.

22. The moving parties further request that all prior orders of this Court entered in the Chapter 11 Case shall remain in effect and will survive the dismissal.

23. The Debtor has conferred with counsel for the U.S. Trustee about the relief requested herein prior to the filing of this Joint Motion.

#### **V. BASIS FOR RELIEF**

24. “A case under Chapter 11 may be dismissed pursuant to §§ 305(a)(1) or 1112(b) if cause is shown.” *In re Naartjie Custom Kids, Inc.*, 534 B.R. 416, 422 (Bankr. D. Utah 2015). In turn, the Court has statutory authority to grant a structured dismissal pursuant to section 349(b) of the Bankruptcy Code. That is, “if cause is shown, such as when a structured dismissal will better serve the interests of the creditors and the debtor, the bankruptcy court may. . . alter the effect of dismissal” from that which is otherwise provided for under section 349. *Id.* at 423.

25. Dismissal pursuant to section 305(a) is warranted where the court finds that both creditors and the debtor would be better served by dismissal.<sup>9</sup> In making this evaluation, a “bankruptcy court is not bound by a prescriptive template; it may consider any factors it deems relevant to the determination of whether it is in the best interests of the parties to the suit to seek dismissal. Reasoned judgment based on articulated facts is the only test which the statute itself requires.” *Id.* at 425 (quoting *In re First Assured Warranty Corp.*, 383 B.R. 502, 530 (Bankr. D. Colo. 2008)). Factors that courts may generally consider are (i) the economy and efficiency of administration, (ii) whether another forum is available to protect the interests of the parties; (iii) whether federal proceedings are necessary to reach a just and equitable solution, (iv) whether

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<sup>9</sup> Dismissal pursuant to section 305(a) has been described as “a narrower provision for dismissing a Chapter 11 case than § 1112(b).” *Id.* at 424. However, similar to section 305(a), section 1112(b) requires the Court to examine the best interests of the estate and the creditors in determining whether to convert or dismiss a case. *See, e.g., In re Buffet Partners, L.P.*, 2014 WL 3735804, at \*2 (Bankr. N.D. Tex. July 28, 2014). As set out in this Motion, dismissal is appropriate pursuant to section 305(a), but in the alternative, is warranted under section 1112(b) as well.

there is an alternative means of achieving an equitable distribution of assets; (v) whether the debtor and creditors can do an out-of-court work out; (vi) whether a non-federal insolvency proceeding is far advanced; and (vii) the purpose for which bankruptcy jurisdiction has been sought. *See id.*

26. The relevant factors weigh heavily in favor of dismissal here.<sup>10</sup> First, there can be no genuine dispute that the economy and efficiency of administration would be best served through a structured dismissal. The Debtor has sold substantially all of its assets, and the Court has approved the Settlement Agreement which resolves the most significant litigation in this case and sets up a structure of distribution for the remaining assets of the estate. In light of these circumstances, the remaining assets can most efficiently be distributed through a dismissal as opposed to a plan, which would only serve to materially increase the administrative expenses to the detriment of the Lenders and delay recoveries to the detriment of all creditors. Similarly, with few remaining assets to administer, conversion to chapter 7 would impose additional administrative costs and delay with no corresponding benefit to the Debtor's creditors. The Debtor itself is a fiduciary under the Bankruptcy Code and as a practical matter, is best positioned to expeditiously wind down this case given its existing depth of knowledge on matters such as the company's past operations, the history of this case and the claims against the estate.

27. Second, as explained in *Naartjie*, "[t]he parties' rights will be protected and preserved with a structured dismissal as this Court's orders will remain in full force and effect. The parties can enforce those orders in this Court or another, just as they would if a Chapter 11

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<sup>10</sup> The sixth and seventh factors are largely irrelevant because there is no non-federal insolvency proceeding, and the Debtor filed its bankruptcy, in good faith, to accomplish an orderly liquidation. *See id.* at 425.



plan was confirmed.” *Id.* at 426. As to the third factor, the Committee and the Lenders have reached a fair and equitable settlement that has been found to be in the best interests of the estate and creditors. As such, there is no need for a federal proceeding to reach a just and equitable resolution. Finally, “[t]o the fourth and fifth factors, the Settlement Agreement is the out-of-court work out and the alternative means for an equitable distribution of estate assets. By dismissing the case, the creditors will be better served because they will receive a larger return faster, and the Debtor will be better served because it will be able to wind down its affairs more quickly.” *Id.* at 426.

28. All of the above additionally support the relief requested herein for a structured dismissal pursuant to section 349(b). The Supreme Court of the United States very recently issued an opinion involving a bankruptcy case in which a structured dismissal was granted and subsequently affirmed by the Third Circuit Court of Appeals. *See Czyzewski v. Jevic Holding Corp.*, No. 15-649, 580 U.S. \_\_\_\_\_, 2017 WL 1066259, at \*7 (U.S. Mar. 22, 2017) (referred to herein as *Jevic*). In *Jevic*, the Supreme Court decided the narrow question of whether “a bankruptcy court [can] approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors’ consent?” *Id.* at \*10. In reversing the Third Circuit, the court found that a structured dismissal cannot provide for distributions that pay lower priority creditors without paying those of a higher priority, where the “skipped over” creditors have objected. *See id.* at \*10-\*13. Here, there is no “priority-violating distribution” sought to be effectuated by the requested structured dismissal, let alone a contested priority violation. To the contrary, the distribution structure embodied in the settlement approved by the Settlement Order provides for payment in full of allowed administrative priority claims, allowed

prepetition priority unsecured claims and the allowed claims of third party secured creditors (that is secured creditors, other than the Lenders). The largest creditors in the case, the Lenders, were a party to the Settlement Agreement and have consented to its terms. Further, the Lenders support this Motion.

29. The *Jevic* opinion made clear that the Supreme Court was “express[ing] no view about the legality of structured dismissals in general.” *Id.* at \*12. In doing so, the court cited to the decision in *In re Buffet Partners, LP*, 2014 WL 3735804 (Bankr. N.D. Tex., July 28, 2014) where the bankruptcy court approved a structured dismissal, noting among other things, that no party with an economic stake in this case objected to the dismissal. *Id.* (quoting *In re Buffet Partners*, 2014 WL 3735804 at \*4). In *Buffet Partners*, like this case, the estate sold substantially all of its assets and the Debtor and Committee jointly sought to bring the case to a close through a structured dismissal that effectuated the payment of “allowed administrative claims and allowed priority claims, and provide[d] a meaningful recovery for the allowed general unsecured creditors.” *Buffet Partners*, 2014 WL 3735804, at \*1. The court explained that a structured dismissal should be approved where parties are given notice and an opportunity to object, there are not dissenting creditors and the structured dismissal does not violate the absolute priority rule. *Id.* at \*3. Further the court in *Buffet Partners* noted that structured dismissal is a proper alternative to conversion where “[t]he parties with the skin in the game do not wish to prolong the distribution of funds to creditors by a conversion to chapter 7, which undoubtedly will do just that.” *Id.* at \*3.

30. In *Naartjie*, Judge Thurman, similarly explained that structured dismissal is appropriate where parties in interest are provided with notice, no economic stakeholders object

and the parties are not “attempting to work around the protections of the Bankruptcy Code.” *Naartjie*, 534 B.R. at 426. Here, similar to *Naartjie*, the Committee gave notice to all parties in interest when it sought approval of the Settlement Agreement, which incorporates the distribution structure the Debtor and the Committee are now seeking to implement. There were no objections. Moreover, notice of this Motion will be provided to all parties in interest and parties will be given notice and an opportunity to object to the estimated distribution of funds. In addition, this Motion is supported by the Committee and the Lenders, who are the largest creditors in the case. Further, as in *Naartjie*, the Debtor will be required to provide the certification described above before the case is dismissed, such that “there will be little left for the Debtor to do than distribute the assets upon dismissal.” *Id.* at 426-427. And, importantly, the settlement and the structured dismissal do not violate the absolute priority rule.

31. By way of comparison, in *Jevic*, the Supreme Court pointed out that the distributions at issue in the case before them “more closely resemble[d] proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code’s procedural safeguards.” *Id.* at \*13. In this respect, the court cited to the decision in *In re Biolitec, Inc.*, 528 B.R. 261 (Bankr. D.N.J. 2014). In *Biolitec*, a Chapter 11 trustee sought a structured dismissal “in which the case is dismissed and a liquidating trust. . . is formed to collect and distribute the Debtor’s remaining assets, assume and control actions commenced by the Trustee, and wind down the Debtor’s bankruptcy case.” *Id.* at 265. Among other things, the liquidating trust was subject to significant control by one creditor of the estate and through the structured dismissal, the claims of certain other creditors, who objected to the dismissal, would be subordinated without a determination by the court that such subordination was warranted. *See id.* at 270. The

court found under these facts that the proposed structured dismissal sought to bypass fundamental code provisions and could not be approved over the objection of affected creditors. *See id.* at 271 (explaining that “the interests of the creditor body as a whole are likely better served by the bankruptcy process, where claims are entitled to prima facie validity and the resolution of disputed claims is overseen by a disinterested chapter 7 trustee and the court.”).

32. Here, no such issues exist. The parties are not seeking to replace an estate fiduciary with a trust structure, controlled by a creditor, which is divorced from the duties and requirements of the Bankruptcy Code. Rather, the parties are seeking simply to keep in place the Debtor, who as a debtor in possession owes fiduciary duties to all creditors of estate. Further, to the extent there are unresolved claims objections, as noted above, they will be determined by the Court prior to dismissal. There are no code provisions that are being circumvented and the economics of the settlement have already been found to be in the best interests of the estate, without any objection from any creditor. In this respect, the requested structured dismissal is consistent with protecting reliance interests acquired in the Chapter 11 Case.

33. Indeed, bankruptcy courts around the country have granted similar requests for structured dismissals. *See e.g., In re Dawahare's of Lexington, LLC*, Case No. 08-51381 (JMS) (Bankr. E.D. Ky. Dec. 30, 2008) [Docket No. 316]; *In re Easy Life Furniture Inc.*, Case No. 14-12713 (CB) (Bankr. C.D. Cal Mar. 23, 2015) [Docket No. 347]; *In re Buffet Partners, L.P. et al.*, Case No. 14-30699 (HH) (Bankr. N.D. Tex. July 24, 2014) [Docket No. 486]; *In re Coach Am Group Holdings Corp.*, Case No. 12-10010 (KG) (Bankr. D. Del. May 31, 2013) [Docket No. 1568]; *In re Gas City, Ltd., et al.*, Case No. 10-47879 (ERW) (Bankr. N.D. Ill. Apr. 26, 2012) [Docket No. 1307]. The result should be no different here and is not affected by the *Jevic*

decision where there is no violation of the absolute priority rule, yet alone a contested violation of the absolute priority rule.

## **VI. NOTICE**

34. Notice of this Motion will be provided to: (i) the U.S. Trustee; (ii) counsel to the secured lenders; (iii) counsel to the Committee; (iv) counsel to Vesta; (v) parties requesting notice pursuant to Bankruptcy Rule 2002; and (vi) all other creditors and interest holders in this chapter 11 case. In light of the nature of the relief requested herein, the parties submit that no other or further notice is necessary.

## **VII. CONCLUSION**

Accordingly, based on the foregoing, the moving parties respectfully request entry of the order granting the relief requested herein and such other relief as the Court deems necessary and appropriate.

Respectfully submitted,

Dated: April 10, 2017

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By: /s/ Sherilyn A. Olsen

Sherilyn A. Olsen

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Dated: April 10, 2017

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By: /s/ Ali M. M. Mojdehi

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH**

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In re:

M SPACE HOLDINGS, LLC

Debtor.

Case No. 16-24384

Chapter 11

Hon. Joel T. Marker

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**CERTIFICATION OF COUNSEL AND REQUEST FOR ENTRY OF AN ORDER  
DISMISSING CHAPTER 11 CASE**

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Pursuant to the *Order Granting the Joint Motion of the Debtor, the Official Committee of  
Unsecured Creditors and PNC Bank, National Association for the Entry of an Order (a)*



*Dismissing the Debtor's Chapter 11 Case and (B) Granting Related Relief* [Doc. \_\_\_\_, the "Joint Motion"), entered on \_\_\_\_\_ [Doc. No. \_\_\_\_, the "Approval Order"], the undersigned counsel for the above-captioned debtor and debtor-in-possession hereby certifies as follows:

1. The Approval Order, among other things, authorizes the dismissal of the Debtor's Chapter 11 Case<sup>1</sup> upon certification that (a) the Debtor has completed its claims reconciliation process; (b) all U.S. Trustee fees attributable to the Debtor have been paid in full; (c) the Debtor has addressed the disposition of the few assets remaining in the estate (other than the Excluded Asset Reserve), which are subject to the liens and security interests of the Lenders; (d) as part of the Joint Motion, the Debtor gave notice to all parties listed on the creditor matrix in the Chapter 11 Case of its estimated distribution of funds pursuant to the terms of the Settlement Agreement, subject to claims objections and other matters as reflected in Exhibits C-E to the Joint Motion, and any objections to the estimated distribution of funds have been withdrawn, waived, settled or overruled; and (e) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and Settlement Agreement.

2. The Debtor hereby certifies that (a) the Debtor has completed the claims reconciliation process, including the disposition of all claim objections; (b) to the best of the Debtor's knowledge, all U.S. Trustee fees attributable to the Debtor have been paid in full; (c) the Debtor has completed the sale or has made available to the Lenders the few assets remaining in the estate (other than the Excluded Asset Reserve), which are subject to the liens and security interests of the Lenders; (d) as part of the Joint Motion, the Debtor gave notice to all parties listed on the creditor matrix in the Chapter 11 Case of the estimated distribution of funds

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings used in the Joint Motion.



pursuant to the terms of the Settlement Agreement, and any objections to the estimated distribution of funds have been withdrawn, waived, settled or were overruled; and (e) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and Settlement Agreement.

3. The Approval Order also provides for this Certification to include a summary of the distributions to creditors. Attached hereto as Exhibits 1-4 are schedules summarizing the distributions to secured creditors, post-petition administrative claims subject to the bar date order entered by the Court (Doc. 533), priority unsecured creditors, and general unsecured creditors (collectively, the “Distribution Schedule”). The Debtor has made distributions to holders of allowed claims in the form of checks and wire transfers in accordance with the Distribution Schedule.

4. Accordingly, pursuant to the terms of the Approval Order, it is respectfully requested that the Court enter the Order dismissing the Chapter 11 Case at its earliest convenience.

Respectfully submitted,

Dated: \_\_\_\_\_, 2017

HOLLAND & HART LLP

By: \_\_\_\_\_  
Sherilyn A. Olsen

*Attorneys for Debtor-in-Possession*

**APPROVED:**

Dated: \_\_\_\_\_, 2017

**COOLEY LLP**

By: \_\_\_\_\_  
Ali M.M. Mojdehi

*Attorneys for the Official Committee of  
Unsecured Creditors*

Dated: \_\_\_\_\_, 2017

**HAHN & HESSEN LLP**

By: \_\_\_\_\_  
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*Prepared and submitted by:*

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH**

|                       |                     |
|-----------------------|---------------------|
| In re:                | Case No. 16-24384   |
| M SPACE HOLDINGS, LLC | Chapter 11          |
| Debtor.               | Hon. Joel T. Marker |



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**ORDER GRANTING JOINT MOTION OF THE DEBTOR, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND PNC BANK, NATIONAL ASSOCIATION FOR THE ENTRY OF AN ORDER (A) DISMISSING THE DEBTOR'S CHAPTER 11 CASE AND (B) GRANTING RELATED RELIEF**

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Upon consideration of the *Joint Motion of the Debtor, the Official Committee of Unsecured Creditors and PNC Bank, National Association for the Entry of an Order (a) Dismissing the Debtor's Chapter 11 Case and (B) Granting Related Relief* [Doc. \_\_\_, the "Joint Motion"]<sup>1</sup>, filed by M Space Holdings, LLC, the debtor-in-possession (the "Debtor") in the above-entitled case, the Official Committee of Unsecured Creditors (the "Committee") appointed in the Chapter 11 Case, and PNC Bank, N.A. ("PNC") seeking entry of an order, pursuant to sections 105(a), 305(a), or alternatively s1112(b), and 349 of title 11 of the United States Code (the "Bankruptcy Code") and rule 1017(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), dismissing the Debtor's Chapter 11 Case and granting related relief; and the Court having jurisdiction to consider the Joint Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Joint Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Joint Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and the Court having considered the Joint Motion, and the arguments of counsel made, the entire record in the case and related proceedings, and the evidence adduced, at the hearing on the Joint Motion; and it appearing that the legal and factual bases set forth in the Joint Motion constitute just cause for the relief granted herein; and it

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings used in the Joint Motion.

appearing that the relief requested by the Joint Motion is in the best interests of the Debtor, its estate, its creditors, and other parties in interest; and based on the findings of fact and conclusions of law set forth in the record; and good and sufficient cause appearing therefor, it is hereby,

**ORDERED, ADJUDGED AND DECREED** that:

1. The Joint Motion is GRANTED as set forth herein.
2. All objections to the Joint Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.
3. The Chapter 11 Case shall be dismissed upon a Certification that (a) the Debtor has completed its claims reconciliation process; (b) all U.S. Trustee fees attributable to the Debtor have been paid in full; (c) the Debtor has addressed the disposition of the few assets remaining in the estate (other than the Excluded Asset Reserve), which are subject to the liens and security interests of the Lenders; (d) as part of the Joint Motion, the Debtor gave notice to all parties listed on the creditor matrix in the Chapter 11 Case of its estimated distribution of funds pursuant to the terms of the Settlement Agreement and any objections to the estimated distribution of funds have been withdrawn, waived, settled or overruled; and (e) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and Settlement Agreement.
4. The Certification will attach a summary of distributions to creditors (other than the claims of professionals retained pursuant to sections 327, 328 and 1103 of the Bankruptcy Code which will be paid pursuant to the final fee application process).

5. Final fee applications shall be filed by no later than \_\_\_\_\_, 2017.

6. The Debtor, the Committee, the members of the Committee (solely in their capacities as such) and their staff, shareholders, legal representatives, attorneys, accountants, financial advisors, administrators, partners, guarantors, investors, trustees, parents, successors, assigns, managers, affiliates, employees, members, contractors, consultants, agents, officers and directors (collectively, the "Case Participants"), shall neither have nor incur any liability to any person or party for any act taken or omitted to be taken on and after the Petition Date in connection with or directly or indirectly related to the Debtor, the Chapter 11 Case, the Motion, any assets, and any appeals of judgments or orders of the Bankruptcy Court during the Chapter 11 Case, except only for actions or omissions to act to the extent determined by a final nonappealable order of the Bankruptcy Court to be due to such Case Participant's own respective fraud, gross negligence or willful misconduct. Nothing herein shall be construed as a release of or waiver of any claim that arose or is deemed to have arisen prior to the Petition Date against the Debtor by any party.

7. Notwithstanding section 349 of the Bankruptcy Code, all prior orders of this Court entered in the Chapter 11 Case and any adversary proceeding related to the Chapter 11 Case, and all terms of this Order, shall remain in full force and effect and shall survive the dismissal of the Chapter 11 Case.

8. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of the Order shall be immediately effective and enforceable upon its entry, and the Debtor shall be, and hereby is, authorized to make distributions consistent with the terms

contained in the Settlement Agreement and take such other actions as are necessary and appropriate to effectuate the terms of this Order.

9. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or relating to the interpretation or implementation of this Order and any other order of the Court entered in the Chapter 11 Case and any adversary proceeding related to the Chapter 11 Case.

**--- END OF ORDER ---**

M Space, Case No. 16-24384  
Unsecured Creditors

| Creditor                                            | Account No.        | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                 |
|-----------------------------------------------------|--------------------|------|--------------|---------|--------------|----------------|----------------|------------------------|--------------------------------------------------------------------------|
| A E Latapie Plumbing & Heating                      |                    | U    | \$1,306.00   |         |              | \$1,306.00     | 15%            | \$197.25               |                                                                          |
| A Plus Modular Services, Inc.                       |                    | U    | \$75,393.00  | 11      | \$85,546.00  | \$75,393.00    | 15%            | \$11,386.99            | Objection, claim overstated. \$75,393 owed.                              |
| A&C Cronin, LLC                                     |                    | U    | \$15,000.00  | 9       | \$15,000.00  | \$15,000.00    | 15%            | \$2,265.53             |                                                                          |
| A.B.C. Distributors                                 |                    | U    | \$17,875.00  |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                    |
| ABC Supply Co., Inc.                                | 10736800           | U    | \$23,002.61  |         |              | \$23,002.61    | 15%            | \$3,474.20             |                                                                          |
| ABCO Recycling, LLC                                 |                    | U    | \$8,524.25   | 34      | \$6,922.50   | \$6,922.50     | 15%            | \$1,045.54             |                                                                          |
| Access Outdoor Storage, LLC                         |                    | U    | \$26,500.00  |         |              | \$26,500.00    | 15%            | \$4,002.43             |                                                                          |
| ACE American Insurance Company                      |                    | U    | \$1,245.09   |         |              | \$1,245.09     | 15%            | \$188.05               |                                                                          |
| Ace Technologies, Inc.                              |                    | U    | \$11,448.26  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order) |
| Ahern Rentals, Inc.                                 | 265305             | U    | \$7,509.03   | 6       | \$17,536.31  | \$641.25       | 15%            | \$96.85                | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)    |
| AJ Investment Ventures, Inc.                        |                    | U    | \$217,023.40 |         |              | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                               |
| Alan Clayton Enterprises, Inc.                      |                    | U    |              |         |              | \$101,078.00   | 15%            | \$15,266.33            | Unsecured portion of previously scheduled secured claim.                 |
| Alexandra Orlovsky                                  |                    | U    |              |         |              | \$2,150.00     | 15%            | \$324.73               | Remaining balance of severance owed.                                     |
| Alkemi Alternative Investment Funds Statutory Trust |                    | U    |              | 27      | \$774,950.00 | \$0.00         | 15%            | \$0.00                 | Objection, claim is for equity                                           |
| All Modular Service, Inc.                           |                    | U    | \$31,020.63  | 43      | \$31,820.63  | \$31,820.63    | 15%            | \$4,806.03             |                                                                          |
| All West Communications                             | 1701400            | U    | \$405.94     | 77      | \$352.62     | \$352.62       | 15%            | \$53.26                |                                                                          |
| Allan Schreier                                      |                    | U    | \$163.03     |         |              | \$163.03       | 15%            | \$24.62                |                                                                          |
| Allgood Services, Inc.                              | 7033526            | U    | \$70.00      |         |              | \$70.00        | 15%            | \$10.57                |                                                                          |
| AmCo Structures, Inc.                               |                    | U    | \$163,304.49 |         |              | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                               |
| American Express                                    | 3782-999159-61004  | U    | \$105,748.47 | 29      | \$102,732.45 | \$102,732.45   | 15%            | \$15,516.21            |                                                                          |
| Ameri-Fab, LLC                                      |                    | U    | \$11,681.00  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                               |
| Arthur J. Gallagher & Co.                           | MSPACEH-01         | U    | \$5,435.07   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                    |
| Astro-Chem Lab, Inc.                                |                    | U    | \$50.00      |         |              | \$50.00        | 15%            | \$7.55                 |                                                                          |
| AT&T                                                | 904 731-9670 944 0 | U    | \$296.42     |         |              | \$296.42       | 15%            | \$44.77                |                                                                          |
| AT&T                                                | 121787864          | U    | \$127.60     |         |              | \$127.60       | 15%            | \$19.27                |                                                                          |
| AT&T U-Verse                                        | 144957443          | U    | \$250.99     |         |              | \$250.99       | 15%            | \$37.91                |                                                                          |
| Atex Distributing, Inc.                             | 102918             | U    | \$5,386.36   | 2       | \$5,386.36   | \$5,386.36     | 15%            | \$813.53               |                                                                          |



| Creditor                                 | Account No.  | Type | Sched. Claim | POC No. | POC Amount     | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                                                               |
|------------------------------------------|--------------|------|--------------|---------|----------------|----------------|----------------|------------------------|------------------------------------------------------------------------------------------------------------------------|
| Authemants Ornamental Iron Works         | 70062        | U    | \$3,000.00   | 7       | \$3,000.00     | \$3,000.00     | 15%            | \$453.11               |                                                                                                                        |
| Auto Property Solutions, LLC             |              | U    | \$612.88     |         |                | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                               |
| Automated Business Products              | MSH010       | U    | \$2,114.91   |         |                | \$2,114.91     | 15%            | \$319.43               |                                                                                                                        |
| Bakken Wirelless, LLC                    |              | U    | \$3,686.75   |         |                | \$3,686.75     | 15%            | \$556.83               |                                                                                                                        |
| BBi International Inc.                   |              | U    | \$297.00     |         |                | \$297.00       | 15%            | \$44.86                |                                                                                                                        |
| Beach Kids Academy                       | RO13036      | U    | \$1,380.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta.                                                                                 |
| Belt Construction Corp. of Tampa         |              | U    | \$5,436.50   | 44      | \$4,829.32     | \$4,829.32     | 15%            | \$729.40               |                                                                                                                        |
| Bennett Truck Transport, LLC             | 93343        | U    | \$146,170.20 | 31      | \$160,784.00   | \$119,007.00   | 15%            | \$17,974.24            | Objection, remaining amount owed resolved per Bison Run settlement, Doc Nos. 367, 368, 417 (Order); amounts unsecured. |
| Bennett Truck Transport, LLC             |              | U    | \$6,000.00   |         |                | \$6,000.00     | 15%            | \$906.21               |                                                                                                                        |
| Bison Run Land Holdings, LLC             |              | U    | Unk          | 38      | \$5,228,727.00 | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                               |
| Black Stag Services                      |              | U    | \$1,733.83   |         |                | \$1,733.83     | 15%            | \$261.87               |                                                                                                                        |
| Bladerunner Services                     |              | U    | \$4,445.00   |         |                | \$4,445.00     | 15%            | \$671.35               |                                                                                                                        |
| Blanchard's Refrigeration                |              | U    | \$1,787.45   |         |                | \$1,787.45     | 15%            | \$269.97               |                                                                                                                        |
| Byron Utter Contracting                  |              | U    | \$8,311.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                               |
| C & B Mobile Service Inc/Century Finance |              | U    | \$17,235.00  | 32      | \$17,325.00    | \$17,325.00    | 15%            | \$2,616.68             |                                                                                                                        |
| CanAm Steel Building Corp.               |              | U    | \$1,111.00   |         |                | \$1,111.00     | 15%            | \$167.80               |                                                                                                                        |
| Carolyn Jay LLC dba Ponderosa RV Camp    |              | U    | \$7,200.00   |         |                | \$7,200.00     | 15%            | \$1,087.45             |                                                                                                                        |
| Cassone Leasing, Inc.                    | 3658         | U    | \$3,750.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, paid as warehousemen lien from sale, Doc. No. 222                                                           |
| Cassone Leasing, Inc.                    |              | U    | \$6,250.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, paid as warehousemen lien from sale, Doc. No. 222                                                           |
| Century Laundry Distributing             |              | U    | \$89.64      |         |                | \$89.64        | 15%            | \$13.54                |                                                                                                                        |
| Century Link                             | 435,649,3540 | U    | \$146.97     |         |                | \$146.97       | 15%            | \$22.20                |                                                                                                                        |
| CG 7600LP                                |              | U    | \$2,000.00   |         |                | \$2,500.00     | 15%            | \$377.59               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition      |
| Chad Day                                 |              | U    |              |         |                | \$4,750.00     | 15%            | \$717.42               | Remaining balance of severance owed.                                                                                   |
| Charlene Brewster                        |              |      |              | 47      | \$7,804.63     | \$7,804.63     | 15%            | \$1,178.77             | Joint liability on business credit card                                                                                |
| Christopher Orlovsky                     |              |      |              | 56      | \$6,241.10     | \$6,241.10     | 15%            | \$942.63               | Joint liability on business credit card                                                                                |

| Creditor                                | Account No.       | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                                                             |
|-----------------------------------------|-------------------|------|--------------|---------|--------------|----------------|----------------|------------------------|----------------------------------------------------------------------------------------------------------------------|
| Citrix Systems                          | 6000644308        | U    | \$219.63     |         |              | \$219.63       | 15%            | \$33.17                |                                                                                                                      |
| City of Douglas                         | 102-19794-04      | U    | \$201.60     |         |              | \$201.60       | 15%            | \$30.45                |                                                                                                                      |
| Clayton D. Davenport Trucking           |                   | U    | \$4,530.00   |         |              | \$4,530.00     | 15%            | \$684.19               |                                                                                                                      |
| Coastal Empire Montessori Comm          | RO00307           | U    | \$19,560.00  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta.                                                                               |
| Colt Kennedy                            |                   | U    | \$453.20     |         |              | \$453.20       | 15%            | \$68.45                |                                                                                                                      |
| Commercial Realty & Res.                | 51512             | U    | \$6,154.00   |         |              | \$6,154.00     | 15%            | \$929.47               |                                                                                                                      |
| Conway MacKenzie Management Services    |                   | U    | \$104,428.61 |         |              | \$104,428.61   | 15%            | \$15,772.39            |                                                                                                                      |
| CoreLogic SafeRent                      | 1D584-1D587; 103  | U    | \$311.55     |         |              | \$685.41       | 15%            | \$103.52               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition    |
| Country Media, Inc.                     | 32291             | U    | \$29.90      |         |              | \$29.90        | 15%            | \$4.52                 |                                                                                                                      |
| Cox Communications                      | 001 5110 13558720 | U    | \$323.82     |         |              | \$511.93       | 15%            | \$77.32                | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition    |
| Cripe Mobile Home Transporters          |                   | U    | \$31,950.00  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                                                                           |
| CT Corporation                          | 6595486           | U    | \$16,719.69  | 16      | \$18,070.01  | \$18,070.01    | 15%            | \$2,729.21             |                                                                                                                      |
| CT Lien Solutions                       | E00338            | U    | \$810.00     | 20      | \$810.00     | \$810.00       | 15%            | \$122.34               |                                                                                                                      |
| Curtis M. Gurley                        |                   | U    | \$13,550.00  |         |              | \$13,550.00    | 15%            | \$2,046.53             |                                                                                                                      |
| Customer Magnetism, Inc.                |                   | U    | \$2,085.00   |         |              | \$2,085.00     | 15%            | \$314.91               |                                                                                                                      |
| Damon N. & Patricia A. Jones            |                   | U    | \$19,800.00  |         |              | \$19,800.00    | 15%            | \$2,990.50             | Schedule recently amended to show amount owed is not secured.                                                        |
| David Loyens                            |                   |      |              | 83      | \$368,720.00 | \$0.00         | 15%            | \$0.00                 | Objection, claim overstated. In addition, Debtor holds claims against Loyens that exceed any amounts owed to Loyens. |
| David Pernal                            |                   |      |              |         |              | \$12,534.62    | 15%            | \$1,893.17             | Remaining balance of PTO owed.                                                                                       |
| David Smith                             | 1/1/2016          | U    | \$1,500.00   |         |              | \$0.00         | 15%            | \$0.00                 | Objection, paid as warehousemen lien from sale                                                                       |
| Davidson Electric Company Inc.          |                   | U    | \$176,225.00 | 33      | \$116,585.00 | \$116,585.00   | 15%            | \$17,608.43            | Objection, claim paid by Hanover Insurance                                                                           |
| Dawson Van Orden, Inc.                  |                   | U    | \$56,234.88  |         |              | \$56,234.88    | 15%            | \$8,493.44             |                                                                                                                      |
| Design Space Modular Buildings          | 08-MSPACE         | U    | \$1,985.96   |         |              | \$1,985.96     | 15%            | \$299.95               |                                                                                                                      |
| Diversified Services, LLC               |                   | U    | \$31,741.45  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                                                                           |
| Drury HVAC Inc. dba Bowman Heating & AC |                   | U    | \$568.90     |         |              | \$568.90       | 15%            | \$85.92                |                                                                                                                      |
| Eastlake Storage, LLC                   |                   |      |              |         |              | \$5,136.00     | 15%            | \$775.72               | Remaining balance of previously scheduled secured claim.                                                             |
| Eddie Lumpkin / Lumpkin Development     | 10CAL-500-CU      | U    | \$3,600.00   |         |              | \$3,600.00     | 15%            | \$543.73               |                                                                                                                      |
| Efax - c/o j2 Cloud Services, Inc.      |                   | U    | \$168.35     |         |              | \$168.35       | 15%            | \$25.43                |                                                                                                                      |

| Creditor                                  | Account No.       | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                                                                                                                                           |
|-------------------------------------------|-------------------|------|--------------|---------|--------------|----------------|----------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Eclipse Resources LLC                     |                   | U    | \$91,500.00  |         |              | \$91,500.00    | 15%            | \$13,819.71            |                                                                                                                                                                                                    |
| Elite Modular Services, Inc.              |                   | U    | \$49,500.00  | 17      | \$29,700.00  | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                                                                                                                                                         |
| Eversource                                | -4028             | U    | \$135.03     |         |              | \$135.03       | 15%            | \$20.39                |                                                                                                                                                                                                    |
| Ezra Lyon                                 |                   | U    |              |         |              | \$5,611.54     | 15%            | \$847.54               | Remaining balance of severance owed.                                                                                                                                                               |
| Fab Tec, Inc.                             |                   | U    | \$2,315.60   |         |              | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                                                                                                           |
| Federal Express                           | 2818-9246-0       | U    | \$2,579.42   | 21      | \$1,426.09   | \$1,426.09     | 15%            | \$215.39               |                                                                                                                                                                                                    |
| Ferrellgas                                | 94941006          | U    | \$3,806.41   | 14      | \$3,120.93   | \$3,120.93     | 15%            | \$471.37               |                                                                                                                                                                                                    |
| First String Space, Inc.                  |                   | U    | \$94,775.00  |         |              | \$94,775.00    | 15%            | \$14,314.35            |                                                                                                                                                                                                    |
| Forsythe Fence Co. LLP                    |                   | U    | \$5,000.00   | 24      | \$5,000.00   | \$5,000.00     | 15%            | \$755.18               |                                                                                                                                                                                                    |
| Frontier Communications                   | 360-387-6695-0616 | U    | \$335.39     | 76      | \$252.73     | \$252.73       | 15%            | \$38.17                |                                                                                                                                                                                                    |
| Gardiner's Express Inc.                   |                   | U    | \$11,500.00  |         |              | \$11,500.00    | 15%            | \$1,736.90             |                                                                                                                                                                                                    |
| Gardner Manufactured Housing              |                   | U    | \$3,300.00   |         |              | \$3,300.00     | 15%            | \$498.42               |                                                                                                                                                                                                    |
| Garver Real Estate Investments            |                   | U    | \$2,500.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                                                                                                              |
| Geary Pacific Supply                      |                   | U    | \$267.70     |         |              | \$267.70       | 15%            | \$40.43                |                                                                                                                                                                                                    |
| Global Warehouse                          |                   | U    | \$4,200.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                                                                                                              |
| Good Earth Recycling                      |                   | U    | \$300.00     | 8       | \$300.00     | \$300.00       | 15%            | \$45.31                |                                                                                                                                                                                                    |
| Grand Rapids Ellington Academy            | RO13027           | U    | \$6,860.00   |         |              | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta.                                                                                                                                                             |
| Grant Thornton LLP                        | 191691            | U    | \$173,035.43 |         |              | \$0.00         | 15%            | \$0.00                 | \$55,000 paid for pre-petition claim pursuant to Doc. No. 232; remaining balance waived.                                                                                                           |
| Growers Farmers Warehouse                 |                   | U    | \$5,600.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                                                                                                              |
| Guardian Pest Solutions, Inc.             | 38264             | U    | \$5,355.00   |         |              | \$6,982.50     | 15%            | \$1,054.60             | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition                                                                                  |
| H2 Enterprises LLC                        |                   | U    | \$9,108.75   | 22      | \$9,108.75   | \$9,108.75     | 15%            | \$1,375.74             |                                                                                                                                                                                                    |
| Hallettsville Independent School District |                   |      |              | 72      | \$111,887.50 | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta                                                                                                                                                              |
| Hanover Insurance Company                 |                   | U    | Unk          | 35      | \$542,555.24 | \$542,555.24   | 15%            | \$81,944.89            | Objection. Liquidated claim will be paid on distribution date. Unliquidated claim will be paid directly to subcontractor creditors. Hanover will only be paid on claims paid by distribution date. |
| Hardee County IDA                         |                   | U    | \$2,140.00   |         |              | \$2,140.00     | 15%            | \$323.22               |                                                                                                                                                                                                    |
| Hartwell Realty, Inc.                     |                   | U    | \$1,220.06   |         |              | \$1,830.09     | 15%            | \$276.41               | Schedule recently amended to reflect amount increased from additional pre-petition invoice                                                                                                         |

| Creditor                    | Account No.       | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                            |
|-----------------------------|-------------------|------|--------------|---------|--------------|----------------|----------------|------------------------|---------------------------------------------------------------------|
| Hedge Trackers              |                   | U    | \$2,400.00   |         |              | \$2,400.00     | 15%            | \$362.48               |                                                                     |
| HGAC Houston Galveston Area | ILV0352           | U    | \$13,219.51  |         |              | \$13,219.51    | 15%            | \$1,996.61             |                                                                     |
| High Voltage, Inc.          |                   | U    | \$2,036.88   |         |              | \$2,036.88     | 15%            | \$307.64               |                                                                     |
| Hiland Partners             | HL 14056          | U    | \$2,340.00   |         |              | \$2,018.17     | 15%            | \$304.81               | Schedule recently amended to reflect correct amount owed.           |
| Hiland Partners             | HL 14177          | U    | \$3,060.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect correct amount owed.           |
| Hiland Partners             | HL 14022          | U    | \$2,310.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect correct amount owed.           |
| Hilarie Byrne               |                   | U    | \$800.00     |         |              | \$800.00       | 15%            | \$120.83               |                                                                     |
| Hi-Tek Sound & Signal, Inc. |                   | U    | \$217,480.83 | 51      | \$221,899.43 | \$0.00         | 15%            | \$0.00                 | Objection, claim paid by Hanover Insurance                          |
| Home Depo Credit Service    | 6781              | U    | \$140.37     |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| HSBC Bank USA, NA           | 5405 8067 2603 79 | U    | \$82,062.00  |         |              | \$0.00         | 15%            | \$0.00                 | Claim satisfied and resolved through Adversary Proceeding No. 2156. |
| Invenio                     |                   | U    | \$770.00     | 15      | Unknown      | \$770.00       | 15%            | \$116.30               |                                                                     |
| Iron Mountain               | UT276             | U    | \$157.97     |         |              | \$157.97       | 15%            | \$23.86                |                                                                     |
| Jeffrey Deutschendorf       |                   |      |              | 68      | \$26,000.00  | \$26,000.00    | 15%            | \$3,976.91             | Joint liability on business credit card                             |
| Jeffrey Deutschendorf       |                   |      |              | 69      | \$51,500.00  | \$51,500.00    | 15%            | \$7,778.31             | Joint liability on business credit card                             |
| Jersey Coast Fire Equipment |                   | U    | \$81.32      |         |              | \$12,524.04    | 15%            | \$1,891.57             | Remaining balance of PTO owed.                                      |
| Jive Communications, Inc.   | CN-102373-1402    | U    | \$765.09     |         |              | \$81.32        | 15%            | \$12.28                |                                                                     |
| Jody L. Barrows             |                   | U    | \$2,325.00   |         |              | \$765.09       | 15%            | \$115.56               |                                                                     |
| Johnny Haskins              |                   | U    | \$12,500.00  |         |              | \$2,325.00     | 15%            | \$351.16               |                                                                     |
| J-W Admin Company           | RO14035           | U    | \$33,800.00  |         |              | \$0.00         | 15%            | \$0.00                 | Objection, paid warehousemen lien from sale, Doc. No. 169           |
| J-W Admin Company           | HL 13140          | U    | \$2,500.00   |         |              | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta                               |
| J-W Admin Company           | HL 13137          | U    | \$840.00     |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 13105          | U    | \$1,720.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 15104          | U    | \$1,000.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 14144          | U    | \$1,455.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 14136          | U    | \$780.00     |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 14135          | U    | \$780.00     |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |
| J-W Admin Company           | HL 14099          |      | \$1,020.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.               |

| Creditor                                | Account No.                   | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                   |
|-----------------------------------------|-------------------------------|------|--------------|---------|--------------|----------------|----------------|------------------------|----------------------------------------------------------------------------|
| J-W Admin Company                       | HL 14086                      |      | \$1,455.00   |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                      |
| Kieth Huff & Company                    |                               | U    | \$3,360.00   |         |              | \$3,360.00     | 15%            | \$507.48               |                                                                            |
| KKAT Oilfield Services                  |                               | U    | \$897.82     |         |              | \$897.82       | 15%            | \$135.60               |                                                                            |
| Komfort Keepers                         | 1514453                       | U    | \$150.00     |         |              | \$150.00       | 15%            | \$22.66                |                                                                            |
| Lawrence Mobile Home Service            |                               | U    | \$55,805.00  |         |              | \$55,805.00    | 15%            | \$8,428.51             |                                                                            |
| Lowry Engineering                       |                               | U    | \$6,725.00   |         |              | \$6,725.00     | 15%            | \$1,015.71             |                                                                            |
| Loys Mobile Home Repair                 |                               | U    | \$3,000.00   |         |              | \$3,000.00     | 15%            | \$453.11               |                                                                            |
| Madison Property Management             |                               | U    | \$2,100.00   |         |              | \$2,100.00     | 15%            | \$317.17               |                                                                            |
| Mars Manufactured Homes, Inc.           |                               | U    | \$6,300.00   |         |              | \$6,300.00     | 15%            | \$951.52               |                                                                            |
| Marsh & McClennan Agency                |                               | U    | \$22,061.00  |         |              | \$22,061.00    | 15%            | \$3,331.99             |                                                                            |
| Mass Marketing, Inc.                    | ND0308000140                  | U    | \$385.00     |         |              | \$385.00       | 15%            | \$58.15                |                                                                            |
| Matheny Motor Truck Company             |                               | U    | \$1,000.00   |         |              | \$1,000.00     | 15%            | \$151.04               |                                                                            |
| McKenzie Building Center                |                               | U    | \$105,132.65 | 45      | \$105,132.65 | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)   |
| McKenzie County Water 796-04            | 796-04-00                     | U    | \$135.00     |         |              | \$135.00       | 15%            | \$20.39                |                                                                            |
| McKenzie County Water 977-04            | 977-04-00                     | U    | \$1,747.94   |         |              | \$1,747.94     | 15%            | \$264.00               |                                                                            |
| Mechanical 360 Air Conditioning         |                               | U    | \$1,818.98   |         |              | \$1,818.98     | 15%            | \$274.73               |                                                                            |
| Menards Inc. & Capital Commercial       | 6004-3002-0146-5496 (various) | U    | \$190,401.47 |         |              | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)   |
| Meridian Pacific, Ltd. and MP Financial |                               | U    | \$113,680.00 |         |              | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                      |
| Metro Media / NDoiljobs.com             |                               | U    | \$316.00     |         |              | \$316.00       | 15%            | \$47.73                |                                                                            |
| Mid-Rivers Communication                | 7707400                       | U    | \$6.08       |         |              | \$6.08         | 15%            | \$0.92                 |                                                                            |
| Miller's Garbage Service                |                               | U    | \$40.00      |         |              | \$40.00        | 15%            | \$6.04                 |                                                                            |
| Modular Dimensions, Inc.                |                               | U    | \$3,510.00   |         |              | \$3,510.00     | 15%            | \$530.13               |                                                                            |
| Modular Home Builder Association        |                               | U    | \$500.00     |         |              | \$500.00       | 15%            | \$75.52                |                                                                            |
| Mortenson Electric                      |                               | U    | \$300.00     |         |              | \$300.00       | 15%            | \$45.31                |                                                                            |
| Nadler Mobile Offices                   |                               | U    | \$2,241.28   |         |              | \$2,241.28     | 15%            | \$338.51               |                                                                            |
| Neset Land Surveys Inc.                 |                               | U    | \$2,590.00   |         |              | \$2,590.00     | 15%            | \$391.18               |                                                                            |
| Newalta Environmental Services          | HL 14192                      | U    | \$2,100.00   |         |              | \$750.00       | 15%            | \$113.28               | Objection, partial security deposit returned and partial setoff by tenant. |

| Creditor                                | Account No.  | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                                                          |
|-----------------------------------------|--------------|------|--------------|---------|-------------|----------------|----------------|------------------------|-------------------------------------------------------------------------------------------------------------------|
| NewVision Energy LLC                    |              | U    | \$5,400.00   |         |             | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                          |
| Norden United LLC                       |              | U    | \$74,630.00  | 53      | \$74,630.00 | \$1,200.00     | 15%            | \$181.24               | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                             |
| Norris Fallen Humphries                 |              | U    | \$6,475.00   |         |             | \$6,475.00     | 15%            | \$977.95               |                                                                                                                   |
| North Dakota Manufactured               |              | U    | \$165.00     |         |             | \$165.00       | 15%            | \$24.92                |                                                                                                                   |
| Northern Tier Oil Transport             |              | U    | \$18,256.25  |         |             | \$18,256.25    | 15%            | \$2,757.33             |                                                                                                                   |
| Northwest Building Systems              |              | U    | \$15,000.00  |         |             | \$15,000.00    | 15%            | \$2,265.53             |                                                                                                                   |
| Norton Rose Fulbright US LLP            | 75284-4284   | U    | \$5,795.65   |         |             | \$5,795.65     | 15%            | \$875.35               |                                                                                                                   |
| Omar Hammond                            |              |      | \$20,769.23  | 65      | \$20,769.23 | \$7,919.23     | 15%            | \$1,196.08             | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim.                            |
| Onvia                                   | 17882        | U    | \$7,400.00   |         |             | \$7,400.00     | 15%            | \$1,117.66             |                                                                                                                   |
| Oppenheimer & Co., Inc.                 |              | U    | \$55,656.80  |         |             | \$55,656.80    | 15%            | \$8,406.13             |                                                                                                                   |
| Orleans Parish School Board             |              | U    | \$442,850.87 |         |             | \$0.00         | 15%            | \$0.00                 | Claim satisfied through sale of buildings to Orleans Parish School, no amounts owed.                              |
| Pacific Continental Modular Enterprises |              | U    | \$6,956.00   |         |             | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                             |
| Pacific Continental Modular Enterprises |              | U    | \$5,956.00   |         |             | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                             |
| Pac-Van, Inc.                           |              | U    | \$51,338.00  |         |             | \$51,338.00    | 15%            | \$7,753.84             |                                                                                                                   |
| Pair Networks, Inc.                     | 102593       | U    | \$76.85      |         |             | \$91.85        | 15%            | \$13.87                | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition |
| PD Benson Investment, LLC               |              | U    | \$950.00     |         |             | \$1,425.00     | 15%            | \$215.23               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition |
| Perfect Installers Cleanup              |              | U    | \$500.00     |         |             | \$500.00       | 15%            | \$75.52                |                                                                                                                   |
| Perry Walchshauser                      |              | U    | \$13,673.00  |         |             | \$13,673.00    | 15%            | \$2,065.10             |                                                                                                                   |
| PFP Abatement Group, LLC                |              | U    | \$9,762.50   |         |             | \$9,762.50     | 15%            | \$1,474.48             |                                                                                                                   |
| Phoenix Modular Acquisition Corp.       |              | U    | \$2,340.00   |         |             | \$0.00         | 15%            | \$0.00                 | Paid warehousemen lien from sale, Doc. No. 342                                                                    |
| Pitney Bowes - xxxx-1090                | 0293-1090    | U    | \$935.73     |         |             | \$935.73       | 15%            | \$141.33               |                                                                                                                   |
| Pitney Bowes Global Financial Services  | 1312422-JA16 | U    | \$402.00     |         |             | \$402.00       | 15%            | \$60.72                |                                                                                                                   |
| Planet Shred, LLC                       |              | U    | \$615.25     | 5       | \$615.25    | \$615.25       | 15%            | \$92.92                |                                                                                                                   |
| PNC Bank N.A.                           |              | U    | \$236,525.58 |         |             | \$0.00         | 15%            | \$0.00                 | Will be paid remaining funds                                                                                      |
| Pot O Gold Rentals, Inc.                | 52291-017    | U    | \$572.94     |         |             | \$572.94       | 15%            | \$86.53                |                                                                                                                   |
| Progressive Waste Solutions             |              | U    | \$1,477.79   |         |             | \$1,477.79     | 15%            | \$223.20               |                                                                                                                   |
| Questar Gas                             | -5284        | U    | \$961.69     | 1       | \$1,094.40  | \$1,094.40     | 15%            | \$165.29               |                                                                                                                   |
| Quick Buildings LLC                     |              | U    | \$4,013.80   |         |             | \$4,013.80     | 15%            | \$606.22               |                                                                                                                   |

| Creditor                                | Account No.    | Type | Sched. Claim | POC No. | POC Amount     | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                         |
|-----------------------------------------|----------------|------|--------------|---------|----------------|----------------|----------------|------------------------|----------------------------------------------------------------------------------|
| Rackspace - 1902351                     | 1902351        | U    | \$13,432.72  | 3       | \$6,716.36     | \$6,716.36     | 15%            | \$1,014.41             |                                                                                  |
| RAI Electric, LLC                       |                | U    | \$4,744.18   |         |                | \$4,744.18     | 15%            | \$716.54               |                                                                                  |
| Randisi & Associates, Inc.              | RAND 141       | U    | \$99.00      |         |                | \$99.00        | 15%            | \$14.95                |                                                                                  |
| Resurrection Anglican Church            | RO13010        | U    | \$3,000.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta.                                           |
| Richland Co. Valley View Water District |                | U    | \$230.00     |         |                | \$230.00       | 15%            | \$34.74                |                                                                                  |
| Ridgeview Park, LLC                     |                | U    | \$57,222.77  |         |                | \$0.00         | 15%            | \$0.00                 | Objection. Tenant offset rent. No amount owed.                                   |
| Right Way Plumbing and Heating          | HL 16010       | U    | \$1,100.00   |         |                | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                            |
| Road 11 Storage, LLC                    |                |      |              |         |                | \$3,300.00     | 15%            | \$498.42               | Schedule recently amended to show amount owed is not secured.                    |
| Roadmasters Transport Co. LLC           |                | U    | \$25,608.36  |         |                | \$25,608.36    | 15%            | \$3,867.76             |                                                                                  |
| Robert F. McGinley, Sr.                 |                | U    | \$1,100.00   |         |                | \$1,100.00     | 15%            | \$166.14               |                                                                                  |
| Robert J. Guenther Construction         |                | U    | \$32,056.00  |         |                | \$32,056.00    | 15%            | \$4,841.58             |                                                                                  |
| Robin Hood Finance                      |                |      |              | 36      | \$230,000.00   | \$107,681.00   | 15%            | \$16,263.61            | Objection, M Space has offsetting claim for \$122,319.00                         |
| Rocky Mountain Power - 002              | 44956484-002 2 | U    | \$839.58     | 12      | \$1,056.10     | \$1,056.10     | 15%            | \$159.51               |                                                                                  |
| Root Construction, Inc.                 |                | U    | \$1,145.51   |         |                | \$1,145.51     | 15%            | \$173.01               |                                                                                  |
| Rose Office Systems, Inc.               |                | U    | \$780.00     |         |                | \$780.00       | 15%            | \$117.81               |                                                                                  |
| RR Mobile Home Services                 |                | U    | \$25,000.00  |         |                | \$0.00         | 15%            | \$0.00                 | Paid warehousemen lien from sale, Doc. No. 168                                   |
| RTC                                     | 2266000        | U    | \$146.39     |         |                | \$146.39       | 15%            | \$22.11                |                                                                                  |
| Sand Creek Productions, LLC             |                | U    |              |         |                | \$5,000.00     | 15%            | \$755.18               | Schedule recently amended to show amount owed is not secured.                    |
| Sidney Herald                           |                | U    | \$195.86     |         |                | \$195.86       | 15%            | \$29.58                |                                                                                  |
| Site Prep                               |                | U    | \$6,000.00   |         |                | \$6,000.00     | 15%            | \$906.21               |                                                                                  |
| Southeast Modular Manufacturing         |                | U    | \$111,589.24 |         |                | \$111,589.24   | 15%            | \$16,853.89            |                                                                                  |
| Southern Mobile Installers, LLC         |                | U    |              |         |                | \$5,865.00     | 15%            | \$885.82               | Schedule recently amended to show amount owed is not secured.                    |
| Southland Fire Protection               |                | U    | \$31.00      |         |                | \$31.00        | 15%            | \$4.68                 |                                                                                  |
| Specialized Structures, Inc.            |                | U    | \$855,729.22 | 63      | \$1,005,172.72 | \$50,339.68    | 15%            | \$7,603.06             | Objection, balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order) |
| Stahl & DeLaurentis, P.C.               | -555Z          | U    | \$1,605.00   |         |                | \$1,605.00     | 15%            | \$242.41               |                                                                                  |
| Staples Business Advantage              | NYC 1558276    | U    | \$1,792.25   |         |                | \$1,792.25     | 15%            | \$270.69               |                                                                                  |
| Statoil                                 | HL 16017       | U    | \$1,000.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta                                            |
| Statoil                                 | HL 16016       | U    | \$1,000.00   |         |                | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta                                            |
| Stearns Bank, N.A.                      |                | U    | \$139,088.43 | 28      | \$128,389.32   | \$128,389.32   | 15%            | \$19,391.30            | Objection, unsecured claim.                                                      |
| Strategic Value Media                   |                | U    | \$990.00     |         |                | \$990.00       | 15%            | \$149.52               |                                                                                  |

| Creditor                         | Account No.     | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Distribution % | Proposed Distribution* | Comments                                                                                                          |
|----------------------------------|-----------------|------|--------------|---------|-------------|----------------|----------------|------------------------|-------------------------------------------------------------------------------------------------------------------|
| Sunrise Heating & Cooling LLC    |                 | U    | \$4,186.00   |         |             | \$4,036.00     | 15%            | \$609.58               | Objection, balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                  |
| Sunshine Manufactured Structures |                 | U    | \$2,250.00   |         |             | \$2,250.00     | 15%            | \$339.83               |                                                                                                                   |
| Superior Building Supplies LLC   |                 | U    | \$19,179.82  |         |             | \$19,179.82    | 15%            | \$2,896.83             |                                                                                                                   |
| SW Williams & Sun Coast          |                 | U    |              |         |             | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                          |
| TA Bevin, Inc.                   |                 | U    | \$3,950.00   |         |             | \$3,950.00     | 15%            | \$596.59               |                                                                                                                   |
| Teddy Alan Davis Construction    |                 | U    | \$18,913.60  |         |             | \$18,913.60    | 15%            | \$2,856.62             |                                                                                                                   |
| Tell Manufacturing               | 58211           | U    | \$135.54     |         |             | \$135.54       | 15%            | \$20.47                |                                                                                                                   |
| Teton Buildings, LLC             | 1559291         | U    | \$40,758.20  |         |             | \$0.00         | 15%            | \$0.00                 | Paid warehousemen lien from sale, Doc. No. 203                                                                    |
| The Carmel School                | RO15022         | U    | \$8,986.00   |         |             | \$0.00         | 15%            | \$0.00                 | Objection, liability assumed by Vesta                                                                             |
| The Dickinson Press              | 264963          | U    | \$658.31     |         |             | \$658.31       | 15%            | \$99.43                |                                                                                                                   |
| The Hartford                     | 10975427        | U    | \$63.00      | 10      | Unknown     | \$63.00        | 15%            | \$9.52                 |                                                                                                                   |
| Titan Modular Systems, Inc.      |                 | U    | \$269,012.00 |         |             | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                          |
| TM Poly Film, Inc.               | 2151            | U    | \$1,273.50   | 4       | \$1,273.50  | \$1,273.50     | 15%            | \$192.34               |                                                                                                                   |
| Tognarelli Heating and Cooling   |                 | U    | \$1,580.00   |         |             | \$1,580.00     | 15%            | \$238.64               |                                                                                                                   |
| Top to Bottom Cleaning Service   |                 | U    | \$5,950.00   |         |             | \$0.00         | 15%            | \$0.00                 | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                          |
| Touax Modular Buildings          |                 | U    | \$34,299.00  | 52      | \$38,007.00 | \$38,007.00    | 15%            | \$5,740.39             |                                                                                                                   |
| Township of Wall Bureau of FP    |                 | U    | \$110.00     |         |             | \$0.00         | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                             |
| Turnkey Modular LLC              |                 | U    | \$3,500.00   |         |             | \$3,500.00     | 15%            | \$528.62               |                                                                                                                   |
| Tyco Integrated Security         | 01300 108922208 | U    | \$146.18     |         |             | \$146.18       | 15%            | \$22.08                |                                                                                                                   |
| Uncle Bob's Storage              |                 | U    | \$198.36     |         |             | \$198.36       | 15%            | \$29.96                |                                                                                                                   |
| USA Modular Inc.                 |                 | U    | \$13,566.00  |         |             | \$13,566.00    | 15%            | \$2,048.94             |                                                                                                                   |
| Vac-Tec Septic & Water LLC       |                 | U    | \$16,240.00  |         |             | \$12,640.00    | 15%            | \$1,909.08             | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                             |
| Verizon                          | 732-919-0626    | U    | \$553.59     |         |             | \$553.59       | 15%            | \$83.61                |                                                                                                                   |
| Verizon                          | 272435096-00002 | U    | \$196.60     |         |             | \$196.60       | 15%            | \$29.69                |                                                                                                                   |
| Verizon                          | 272435096-00001 | U    | \$2,984.00   | 18      | \$2,244.44  | \$2,244.44     | 15%            | \$338.99               |                                                                                                                   |
| Virginia Albanna                 |                 | U    | \$906.00     |         |             | \$1,334.00     | 15%            | \$201.48               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition |
| Vyve Broadband                   | 951-303322      | U    | \$40.52      |         |             | \$40.52        | 15%            | \$6.12                 |                                                                                                                   |
| Vyve Broadband                   | 950-152416      | U    | \$245.60     |         |             | \$245.60       | 15%            | \$37.09                |                                                                                                                   |



| Creditor                                    | Account No.      | Type | Sched. Claim          | POC No. | POC Amount            | Allowed Amount        | Distribution % | Proposed Distribution* | Comments                                                                                                          |
|---------------------------------------------|------------------|------|-----------------------|---------|-----------------------|-----------------------|----------------|------------------------|-------------------------------------------------------------------------------------------------------------------|
| WA Dept of Labor & Industries               | 343-750-02       | U    | \$172.15              |         |                       | \$172.15              | 15%            | \$26.00                |                                                                                                                   |
| Wanzek Construction                         | HL 13117         | U    | \$19,176.00           |         |                       | \$0.00                | 15%            | \$0.00                 | Objection, withheld rent to satisfy claim                                                                         |
| Wanzek Construction-Office Bldg             | RO14033          | U    | \$95,000.00           |         |                       | \$0.00                | 15%            | \$0.00                 | Objection, withheld rent to satisfy claim                                                                         |
| Waste Management                            | 791-0132706-1791 | U    | \$2,095.55            |         |                       | \$2,119.64            | 15%            | \$320.14               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition |
| Water Science, Inc.                         |                  | U    | \$156.33              |         |                       | \$156.33              | 15%            | \$23.61                |                                                                                                                   |
| Watford City Chamber                        |                  | U    | \$30.00               |         |                       | \$30.00               | 15%            | \$4.53                 |                                                                                                                   |
| WesCo Disposal, Inc. dba ABCO               |                  | U    | \$2,640.00            |         |                       | \$2,640.00            | 15%            | \$398.73               |                                                                                                                   |
| Westchester Surplus Lines Insurance Company | 1459             |      |                       | 30      | \$4,707.39            | \$0.00                | 15%            | \$0.00                 | Schedule recently amended to reflect no amounts owed.                                                             |
| Whitley Evergreen, Inc.                     |                  | U    | \$182,040.00          |         |                       | \$182,040.00          | 15%            | \$27,494.43            |                                                                                                                   |
| Whitley Manufacturing Co., Inc.             |                  | U    | \$96,099.00           |         |                       | \$0.00                | 15%            | \$0.00                 | Objection, claim paid by Hanover                                                                                  |
| XYZ Two Way Radio Service                   | 37170            | U    | \$295.11              |         |                       | \$295.11              | 15%            | \$44.57                |                                                                                                                   |
|                                             |                  |      | <b>\$4,059,798.29</b> |         | <b>\$9,595,701.96</b> | <b>\$2,979,439.56</b> |                | <b>\$450,000.00</b>    |                                                                                                                   |

\*These are estimated distributions only. The amount to be distributed to all unsecured creditors totals \$450,000. The amount to be distributed to an individual unsecured creditor will depend on certain pending objections to claims and the amount of claims allowed.

**M Space, Case No. 16-24384  
Priority Creditors**

| Creditor                                      | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Comments                                                                               |
|-----------------------------------------------|-------------|------|--------------|---------|-------------|----------------|----------------------------------------------------------------------------------------|
| Alex Waltari                                  | HL 16018    | P/U  | \$400.00     |         |             | \$350.00       | Schedule recently amended to reflect correct amount owed.                              |
| Alexandra Orlovsky                            |             | P/U  | \$15,000.00  | 49      | \$15,000.00 | \$12,850.00    | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. |
| Allen Leavitt                                 |             | P/U  | \$825.00     |         |             | \$825.00       |                                                                                        |
| Amanda Brown                                  |             | P/U  | \$1,346.15   |         |             | \$1,346.15     |                                                                                        |
| Andy Harrell                                  |             | P/U  | \$776.50     |         |             | \$725.00       | Schedule recently amended to reflect correct amount owed.                              |
| Austin Hunter                                 | HL 16005    | P/U  | \$500.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Benjamin Burditt                              | HL 15128    | P/U  | \$750.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Brad Denner                                   | HL 15111    | P/U  | \$900.00     |         |             | \$834.75       | Schedule recently amended to reflect correct amount owed.                              |
| Brown Whatley Law                             |             | P/U  | \$11,538.46  |         |             | \$11,538.46    |                                                                                        |
| Bureau of Collections & Taxpayer Service      |             | P/U  | \$0.00       |         |             | \$0.00         |                                                                                        |
| Brian Gimpl                                   |             | P/U  |              | 75      | \$5,499.79  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Byron Barcus                                  |             | P/U  | \$900.00     |         |             | \$900.00       |                                                                                        |
| Cameron Toler                                 | HL 16003    | P/U  | \$750.00     |         |             | \$750.00       |                                                                                        |
| Chad Day                                      |             | P/U  | \$16,346.15  | 61      | \$17,600.00 | \$12,850.00    | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. |
| Charlene Brewster                             |             | P/U  |              | 47      | \$12,996.73 | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Christine Hordeman                            |             | P/U  | \$4,615.38   | 46      | \$4,615.18  | \$4,615.38     |                                                                                        |
| Christopher Orlovsky                          |             | P/U  |              | 57      | \$8,000.39  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Cindy Cheadle                                 | HL 15069    | P/U  | \$450.00     |         |             | \$450.00       |                                                                                        |
| Cody Brooks                                   |             | P/U  | \$690.00     |         |             | \$690.00       |                                                                                        |
| Commonwealth of Kentucky Department of Revnue | 7942        | P/U  |              | 13      | \$4,163.94  | \$4,163.94     |                                                                                        |
| Dan Ricci & Katelyn Hatton                    | HL 15068    | P/U  | \$1,350.00   |         |             | \$1,000.00     | Schedule recently amended to reflect correct amount owed.                              |
| Daniel Christensen                            | HL 15139    | P/U  | \$450.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Daren Walker                                  |             | P/U  | \$3,846.15   |         |             | \$3,846.15     |                                                                                        |
| David & Vashti Schertel                       | HL 16014    | P/U  | \$900.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |



| Creditor                         | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Comments                                                                               |
|----------------------------------|-------------|------|--------------|---------|-------------|----------------|----------------------------------------------------------------------------------------|
| David Christensen                | HL 15067    | P/U  | \$450.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| David Freeman & Debra Young      | HL 16009    | P/U  | \$750.00     |         |             | \$750.00       |                                                                                        |
| David Kittle                     |             | P/U  | \$1,000.00   |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| David Patberg & Andrew Beckfield | HL 15034    | P/U  | \$630.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| David Pernal                     |             | P/U  | \$25,384.62  |         |             | \$12,850.00    | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. |
| Dean J. Pelton                   |             | P/U  | \$2,500.00   | 58      | \$2,500.00  | \$2,500.00     |                                                                                        |
| Deana Louise Harb                |             | P/U  |              | 64      | \$2,854.96  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Deuetrios Hospidales             | HL 15105    | P/U  | \$450.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Elias & Jessica Perez            | HL 16006    | P/U  | \$1,000.00   |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Elizabeth Hill                   | HL 15108    | P/U  | \$900.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Erica Wilkey                     |             | P/U  | \$711.54     |         |             | \$711.54       |                                                                                        |
| Ezra Lyon                        |             | P/U  | \$18,461.54  | 73      | \$20,000.00 | \$12,850.00    | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. |
| Habeeb & Jayme Rafiu             | HL 15118    | P/U  | \$450.00     |         |             | \$430.00       | Schedule recently amended to reflect correct amount owed.                              |
| Jamie Castillo                   |             | P/U  | \$1,500.00   |         |             | \$1,500.00     |                                                                                        |
| Jared & Jackie Hersch            | HL 15122    | P/U  | \$2,300.00   |         |             | \$2,058.05     | Schedule recently amended to reflect correct amount owed.                              |
| Jedidiah Headley                 | HL 15021    | P/U  | \$450.00     |         |             | \$450.00       |                                                                                        |
| Jeffrey Deutschendorf            |             | P/U  |              | 71      | \$25,000.00 | \$0.00         | Paid per PTO Order, Doc. No. 436, balance to be treated as unsecured claim.            |
| Joe Vanhale                      |             | P/U  | \$725.00     |         |             | \$725.00       |                                                                                        |
| John Eisert                      | HL 16012    | P/U  | \$750.00     |         |             | \$254.50       | Schedule recently amended to reflect correct amount owed.                              |
| John Noonan                      |             | P/U  | \$900.00     |         |             | \$900.00       |                                                                                        |
| John Sanborn                     | HL 13127    | P/U  | \$900.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| John Slagel                      |             | P/U  | \$690.00     |         |             | \$690.00       |                                                                                        |
| Jones Estinville                 |             | P/U  | \$800.00     |         |             | \$800.00       |                                                                                        |
| Josh Vanscorder & Justin Crotts  | HL 15107    | P/U  | \$2,300.00   |         |             | \$903.58       | Schedule recently amended to reflect correct amount owed.                              |
| JW Admin-Mendoza                 |             | P/U  | \$825.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |

| Creditor                         | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Comments                                                                               |
|----------------------------------|-------------|------|--------------|---------|-------------|----------------|----------------------------------------------------------------------------------------|
| Kenneth Bridgham                 |             | P/U  | \$1,000.00   |         |             | \$1,000.00     |                                                                                        |
| Kenneth Kalsch                   |             | P/U  | \$12,692.31  | 60      | \$13,750.02 | \$12,692.31    | Objection, claim is overstated. \$12,692.31 owed.                                      |
| Lance Chisum                     |             | P/U  | \$1,061.87   |         |             | \$1,041.87     | Schedule recently amended to reflect correct amount owed.                              |
| Lane Shumway                     |             | P/U  | \$3,461.54   |         |             | \$3,461.54     |                                                                                        |
| Leah Maretzky                    |             | P/U  | \$5,769.23   | 62      | \$4,800.00  | \$4,800.00     |                                                                                        |
| Leeann Larose                    | HL 15083    | P/U  | \$450.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Lisa vonHolt                     |             | P/U  | \$1,600.00   |         |             | \$1,600.00     |                                                                                        |
| Louisiana Department of Revenue  |             | P/U  | \$141.88     |         |             | \$141.88       |                                                                                        |
| Lynette Reilly                   |             | P/U  |              | 54      | \$1,778.85  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Lynn Reynolds                    | HL 13032    | P/U  | \$840.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Meloney Deutschendorf            |             | P/U  |              | 70      | \$11,000.00 | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Merlyn Counsell                  | HL 15033    | P/U  | \$630.00     |         |             | \$630.00       |                                                                                        |
| Michael Kennedy                  |             | P/U  | \$4,807.69   |         |             | \$4,807.69     |                                                                                        |
| Michael Light                    | HL 16005    | P/U  | \$500.00     |         |             | \$900.00       | Scheduled incorrectly, amount corrected.                                               |
| Michael Little & Gail Rutherford | HL 15101    | P/U  | \$900.00     |         |             | \$544.60       | Schedule recently amended to reflect correct amount owed.                              |
| Michael Mees                     | HL 15070    | P/U  | \$850.00     |         |             | \$0.00         | Schedule recently amended to reflect no amounts owed.                                  |
| Myria Thomas                     |             | P/U  | \$7,605.77   | 59      | \$8,239.60  | \$7,605.77     | Objection, \$7,605.77 owed                                                             |
| Nathan Kemp                      | 12/15/2015  | P/U  | \$900.00     |         |             | \$538.72       | Schedule recently amended to reflect correct amount owed.                              |
| Nicklas Paul Buroker             | 7416        | P/U  |              | 50      | \$3,859.81  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Omar Hammond                     |             | P/U  | \$20,769.23  | 65      | \$20,769.23 | \$12,850.00    | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. |
| Patrick Stout                    | HL 15036    | P/U  | \$840.00     |         |             | \$710.00       | Schedule recently amended to reflect correct amount owed.                              |
| Renae Hill                       |             | P/U  | \$2,480.77   | 67      | \$1,653.78  | \$1,653.78     |                                                                                        |
| Ryan Burch                       | HL 15128    | P/U  | \$750.00     |         |             | \$0.00         | Schedule recently amended to reflect correct amount owed.                              |
| Samantha Ann Cipriano            |             | P/U  |              | 48      | \$3,732.53  | \$0.00         | Paid per PTO Order, Doc. No. 436                                                       |
| Scott Bridgham                   |             | P/U  | \$1,000.00   |         |             | \$1,000.00     |                                                                                        |
| Scott Houge                      |             | P/U  | \$1,375.00   |         |             | \$900.00       | Schedule recently amended to reflect correct amount owed.                              |
| Seth Murphy                      | HL 16018    | P/U  | \$400.00     |         |             | \$350.00       | Schedule recently amended to reflect correct amount owed.                              |

| Creditor         | Account No. | Type | Sched. Claim        | POC No. | POC Amount | Allowed Amount      | Comments                                                  |
|------------------|-------------|------|---------------------|---------|------------|---------------------|-----------------------------------------------------------|
| Steven Contreras |             | P/U  | \$1,000.00          |         |            | \$0.00              | Schedule recently amended to reflect no amounts owed.     |
| Tara Rouse       | HL 15116    | P/U  | \$900.00            |         |            | \$900.00            |                                                           |
| Taylor Arceneaux |             | P/U  | \$800.00            |         |            | \$0.00              | Schedule recently amended to reflect no amounts owed.     |
| Taylor Behrmann  |             | P/U  | \$849.36            |         |            | \$849.36            |                                                           |
| Taylor Terpstra  | HL 16015    | P/U  | \$800.00            |         |            | \$800.00            |                                                           |
| Terry Floyd      |             | P/U  | \$690.00            |         |            | \$690.00            |                                                           |
| Tim Ross         | HL 16001    | P/U  | \$1,000.00          |         |            | \$1,000.00          |                                                           |
| Todd Wright      |             | P/U  | \$1,061.88          |         |            | \$1,041.88          | Schedule recently amended to reflect correct amount owed. |
| Vontez Williams  |             | P/U  | \$1,000.00          |         |            | \$0.00              | Schedule recently amended to reflect no amounts owed.     |
| Wade A. Bowser   | HL 16004    | P/U  |                     | 66      | \$9,615.01 | \$0.00              | Paid per PTO Order, Doc. No. 436                          |
| Walter Kim       | 0622        | P/U  |                     | 55      | \$1,163.41 | \$0.00              | Paid per PTO Order, Doc. No. 436                          |
| Wayne White      |             | P/U  | \$900.00            |         |            | \$900.00            |                                                           |
| David Zarate     |             | P/U  |                     |         |            | \$600.00            | Moved from unsecured schedule.                            |
|                  |             |      | <b>\$206,988.02</b> |         |            | <b>\$160,116.90</b> |                                                           |

**M Space, Case No. 16-24384**  
**Secured Creditors**

| <b>Creditor</b>                 | <b>Account No.</b>           | <b>Type</b> | <b>Sched. Claim</b> | <b>POC No.</b> | <b>POC Amount</b>             | <b>Allowed Amount</b> | <b>Comments</b>                                                                                                |
|---------------------------------|------------------------------|-------------|---------------------|----------------|-------------------------------|-----------------------|----------------------------------------------------------------------------------------------------------------|
| Alan Clayton Enterprises, Inc.  |                              | S           | \$157,778.00        |                |                               | \$0.00                | \$56,700 paid as warehousemen lien from sale, Doc. No. 106; balance paid as unsecured                          |
| AMJ Leasing                     | 9501                         | S           | \$2,470.59          |                |                               | \$0.00                | Objection, collateral returned.                                                                                |
| Bennett Truck Transport, LLC    | 93343                        | U           | \$146,170.20        | 31             | \$160,784.00                  | \$0.00                | Objection, remaining amount owed resolved per Bison Run settlement, Doc Nos. 367, 368, 417 (Order); unsecured. |
| Camp Creek Development Corp.    |                              | S           | \$30,420.00         | 40/41          | \$200,045.34/<br>\$202,316.35 | \$0.00                | Paid pursuant to settlement, Doc No. 497                                                                       |
| Carter Leasing Company, LLC     |                              | S           | \$3,738,974.22      |                |                               | \$0.00                | Objection, property transferred pre-petition                                                                   |
| Damon N. & Patricia A. Jones    |                              | S           | \$19,800.00         |                |                               | \$0.00                | Schedule recently amended to reflect claim is unsecured.                                                       |
| Eastlake Storage, LLC           |                              | S           | \$15,408.00         | 42             | \$5,136.00                    | \$0.00                | Objection, paid as warehousemen lien from sale, Doc. No. 169                                                   |
| HSBC Bank USA, NA               |                              | S           | \$0.00              |                |                               | \$0.00                | Paid from remaining funds through PNC                                                                          |
| Maricopa County Treasurer       | 983-53-043;-51-881, 933, 942 | S           | \$4,433.42          | 82             | \$11,605.11                   | \$0.00                | Objection, paid                                                                                                |
| McKenzie County North Dakota    | Taxpayer # 5607              | S           | \$32,212.16         | 25             | \$47,505.02                   | \$0.00                | Objection, paid from Vesta sale                                                                                |
| Michael Dwyer                   |                              | S           | \$105,977.92        | 39             | \$103,050.23                  | \$0.00                | Paid pursuant to settlement, Doc. No. 498                                                                      |
| PNC Bank, N.A.                  | -4241, -4284                 | S           | \$60,000,000.00     | 26             | \$60,000,000.00               | \$0.00                | Paid remaining funds                                                                                           |
| Road 11 Storage LLC             |                              | S           | \$3,300.00          | 37/74          | \$3,300.00                    | \$0.00                | Objection, unsecured claim.                                                                                    |
| Sand Creek Productions, LLC     |                              | S           | \$5,000.00          |                |                               | \$0.00                | Schedule recently amended to reflect claim is unsecured.                                                       |
| Southern Mobile Installers, LLC |                              | S           | \$5,865.00          |                |                               | \$0.00                | Schedule recently amended to reflect claim is unsecured.                                                       |
| Stearns Bank, N.A.              | 6800                         | S           | \$139,088.43        | 28             | \$128,389.32                  | \$0.00                | Objection, unsecured claim.                                                                                    |
| US Bank Equipment Finance       | 312014                       | S           | \$27,751.00         | 23             | \$25,459.81                   | \$0.00                | Collateral returned and/or made available for pickup                                                           |
| Wells Fargo Equipment Finance   | 001015446 8408               | S           | \$21,969.30         | 80             | \$21,970.30                   | \$0.00                | Objection, paid from Vesta sale                                                                                |
| Wells Fargo Equipment Finance   | 001015446 8407               | S           | \$21,238.75         | 81             | \$19,687.63                   | \$0.00                | Objection, paid from Vesta sale                                                                                |
| Wells Fargo Equipment Finance   | 001015446 8406               | S           | \$14,606.72         | 79             | \$18,285.16                   | \$0.00                | Objection, paid from Vesta sale                                                                                |
| Wells Fargo Equipment Finance   | 001015446 8405               | S           | \$10,667.50         | 78             | \$8,535.00                    | \$0.00                | Objection, paid from Vesta sale                                                                                |
| <b>\$64,503,131.21</b>          |                              |             |                     |                |                               | <b>\$0.00</b>         |                                                                                                                |

**EXHIBIT**

**E**

Peter J. Kuhn (USB #3820)  
J. Vincent Cameron (USB #10006)  
**UNITED STATES DEPARTMENT OF JUSTICE**  
Office of the United States Trustee  
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Attorneys for Patrick S. Layng, United States Trustee

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

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|------------------------------------------------------------|---------------------------------------------------------------------------------|
| In re:<br><br><b>M SPACE HOLDINGS, LLC,</b><br><br>Debtor. | <b>Bankruptcy Case No. 16-24384 JTM</b><br>(Chapter 11)<br>Judge Joel T. Marker |
|------------------------------------------------------------|---------------------------------------------------------------------------------|

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**UNITED STATES TRUSTEE'S OBJECTION TO JOINT MOTION OF THE DEBTOR,  
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND PNC BANK,  
NATIONAL ASSOCIATION FOR THE ENTRY OF AN ORDER (A) DISMISSING THE  
DEBTOR'S CHAPTER 11 CASE AND (B) GRANTING RELATED RELIEF**

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The United States Trustee for Region 19, through Counsel, objects to the Joint Motion of the Debtor, the Official Committee of Unsecured Creditors, and PNC Bank National Association, (hereinafter "Joint Movants") for the Entry of an Order (A) Dismissing the Debtor's Chapter 11 Case and (B) Granting Related Relief [Docket no. 542] (hereinafter "Motion"). The Motion should be denied for the reasons set forth below.

**I. SUMMARY STATEMENT**

Over the last 11 months the Debtor has engaged in a directed liquidation of substantially all of its assets. The Joint Movants now propose a “structured dismissal” of the case instead of proceeding with a standard dismissal of the case or a conversion of the case to chapter 7. The Motion, in part, seeks to grant broad exculpation protections which will, effectively release a wide range of non-debtor third parties from any liability for post-petition actions except for liability due to fraud, gross negligence or willful misconduct. Established case law in the 10th Circuit prohibits such third party release and exculpation protections. The Bankruptcy Code provides no specific statutory authority for exculpation protections in an order of dismissal. The claim that 11 U.S.C. §105 grants such authority is misplaced. Finally, even if such non-debtor releases and exculpations were permitted in the Tenth Circuit under applicable law, the relief is not appropriate in this case.

**II. BACKGROUND**

1. Debtor, M Space Holdings, LLC ("Debtor") filed for voluntary chapter 11 relief in the United States Bankruptcy court for the District of Utah on May 19, 2016. [Docket no. 1]
2. The United States Trustee appointed the official committee of unsecured creditors ("Committee") on June 1, 2016. [Docket no. 62]
3. Very shortly after filing of the petition, the Debtor with the direct support of PNC Bank, National Association ("PNC"), the primary secured creditor, obtained an order providing for expeditious "*de minimis*" sales. [Docket no. 48, 144]
4. Thereafter, the Debtor obtained approval for the sale of substantially all of its remaining assets through a sale and auction process conducted on February 8, 2017. The court



approved the resulting auction sale to the stalking horse bidder, Vests Housing Solutions, LLC. [Doc. 468]

5. The Committee filed an adversary proceeding against PNC challenging the perfection and position of PNC's liens. The court approved a settlement of the adversary proceeding on March 22, 2017. [Doc. 514]
6. In the meantime, the Debtor had filed a motion to convert this chapter 11 to chapter 7 on February 21, 2017 [Doc. 473], but has not pursued this relief. Instead, on April 10, 2017, in another change of course, the Debtor, the Committee and PNC Bank Jointly filed the present motion to dismiss. As explained further below, the Motion seeks some benefits that would generally only possibly be available, if at all, if the Debtor confirmed a plan of reorganization or converted to Chapter 7.
7. The Motion requests entry of an order approving the dismissal of the chapter 11 case upon the certification that:
  - a. the Debtor has completed the claims reconciliation process;
  - b. all U.S. Trustee fees are satisfied;
  - c. the Debtor has completed liquidation of any remaining assets other than the Excluded Asset Reserve;
  - d. notice has been given as to the distribution of funds pursuant to the Settlement Agreement between the Committee and PNC Bank and any objections have been resolved; and
  - e. orders have been entered with regard to final fee applications.

8. The Motion also requests approval of the following release and exculpation protections for numerous categories of covered parties:

The Debtor, the Committee, the members of the Committee (solely in their capacities as such) and their staff, shareholders, legal representatives, attorneys, accountants, financial advisors, administrators, partners, guarantors, investors, trustees, parents, successors, assigns, managers, affiliates, employees, members, contractors, consultants, agents, officers and directors (collectively, the “Case Participants”), shall neither have nor incur any liability to any person or party for any act taken or omitted to be taken on and after the Petition Date in connection with or directly or indirectly related to the Debtor, the Chapter 11 Case, except only for actions or omissions to act to the extent determined by a final nonappealable order of the Bankruptcy Court to be due to such Case Participant’s own respective fraud, gross negligence or willful misconduct. Nothing herein shall be construed as a release of or waiver of any claim that arose or is deemed to have arisen prior to the Petition Date against the Debtor by any party.

9. The Motion requests that all prior orders of the Bankruptcy Court in the chapter 11 case, and all terms of the dismissal order including the exculpation provisions remain in full force and effect and survive the dismissal of the chapter 11 case.

### **III. OBJECTION**

#### **A. The Case Law in Tenth Circuit Does Not Permit Non-Debtor Releases or Exculpation Clauses**

In *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10<sup>th</sup> Cir.1990), *modified on rehearing sub nom., Abel v. West*, 932 F.2d 898, 899 (10<sup>th</sup> Cir. 1991), the Tenth Circuit prohibited the release or exculpation of non-debtor parties in overturning a bankruptcy court's order to the extent it permanently enjoined a creditor of the debtor from prosecuting an action against the non-debtor co-obligors on the debt. While the court recognized that a temporary injunction may be appropriate during the development and evaluation of reorganization plan, a permanent injunction that effectively relieves a non-debtor from its own liability is improper.

922 F.2d at 600-601; *see* Abel, 932 F.2d at 899 (summarizing the holding of *Western Real Estate Fund* and also citing, *In re American Hardwoods, Inc.*, 885 F.2d 621, 624-25 (9th Cir.1989)). The court determined that such a permanent injunction, which effectively insulated or released third parties from liability, violated the mandate of section 11 U.S.C. § 524(e) that any discharge of a debtor does not affect the liability of any other entity. 922 F.2d 600-601; *see also*, *FB Acquisition Prop. I, LLC v. Gentry (In re Gentry)*, 807 F.3d 1222, 1227-28 (10th Cir. 2015) (confirmation of corporate case in which the company agreed to pay a guaranteed debt, and whose confirmed plan purported to preclude collection efforts against its equity holders, did not affect the individual equity holders' own liability on their guarantees in a subsequent Chapter 11 case). As further stated in *Western Real Estate Fund*, “. . . it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders.” 922 F.2d at 600.

As with the permanent injunction in *Western Real Estate Fund*, the release and exculpation provisions set forth in the motion would permanently preclude the liability of non-debtor entities. As discussed below, this protection would be extended to a broad range of non-debtor entities, including entities and individuals who are not estate fiduciaries. The release or exculpation of such non-debtor individuals and entities is contrary to *Western Real Estate Fund*.

**B. There is no statutory authority for releases or exculpatory provisions under the Bankruptcy Code.**

In justifying the requested relief, the Joint Movants rely on sections 305(a), 349(a) and 105(a) of the Bankruptcy Code.<sup>1</sup> For the reasons set forth below, these authorities do not justify

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<sup>1</sup> Section 1112(b) is also mentioned, but is not relied upon as a statutory basis for relief. While there is no dispute that section 1112(b) provides for dismissal or conversion for cause and that cause exists in this

approval of the release and exculpation provisions.

**1. Section 305(a).**

Section 305(a) provides an alternative ground for dismissal under the abstention doctrine when "the interests of creditors and the debtor would be better served" by dismissal or suspension of all proceedings in a case. This court has relied on section 305(a)(1) to approve a structured dismissal that included exculpation clauses and releases in *In re Naartjie Custom Kids, Inc.*, 534 B.R. 416 (Bankr. D. Utah 2015), the case emphasized by the Joint Movants as the basis for their requested relief. While not disputing that section 305(a)(1) provides a statutory basis for the entry of a simple dismissal order or that the entry of such a simple dismissal order is appropriate here, the U.S. Trustee respectfully submits that the relief provided in conjunction with the dismissal in *Naartjie* is inconsistent with the underlying concept of abstention under section 305.

As stated in its legislative history, section 305(a) "recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction", and when the court does so, it declines to exercise jurisdiction over the entire case. *Senate Report No. 95-989*, 2d Sess. 35-36 (1978) (reprinted in C-4e2 Collier on Bankruptcy App. Pt. 4(e)(i) (16th Ed. 2016)). It follows, therefore, that once a court declines to exercise its jurisdiction, it would be inconsistent to use that same jurisdiction to grant affirmative relief by, for example, approving releases, exculpatory provisions and other terms of a structured dismissal.

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case, that section sets forth a mandatory procedure for the Court once cause is established - the case must be dismissed or converted - and contains no options for dismissal "with strings attached" as the Movants request. There are no provisions in section 1112(b) allowing for further relief in conjunction with a dismissal or conversion order.

Abstention often arises in the context of involuntary cases. In that context, a common issue is whether the court can award attorney fees under 11 U.S.C. § 303(i) when an involuntary case has been dismissed under section 305(a)(1). While authorities diverge on this issue,<sup>2</sup> *Koffman v. Osteoimplant Technology, Inc.*, 182 B.R. 115, 127 (D. Md. 1995) provides some compelling commentary on the nature of abstention under section 305(a)(1):

The essence of section 305(a)(1) is a determination that the "interests of creditors and the debtor would be better served" by dismissing the petition and allowing them to negotiate a "less expensive out-of-court workout." 1977 U.S.C.C.A.N. at 6280; 1978 U.S.C.C.A.N. at 5822. The legislative history makes clear that abstention under section 305 "is of jurisdiction over the entire case." *Id.* It would be paradoxical for the bankruptcy court to refuse to exercise jurisdiction on the grounds that the parties' interests are best served by the court's non-involvement, yet then to entertain a suit for damages stemming from the same bankruptcy proceedings. The parties can either resolve the issues surrounding an involuntary bankruptcy petition in the bankruptcy court or they can resolve them on their own outside the bankruptcy court. They cannot, however, have it both ways. After the bankruptcy court abstains from jurisdiction over an involuntary petition pursuant to section 305(a)(1), the court may not then award damages or impose sanctions for the filing of that petition under section 303(i).

Similarly, in this case, the Joint Movants seek to have it both ways. They seek to have the court abstain from jurisdiction under section 305(a)(1) while the court exercises jurisdiction in granting the requested affirmative relief, including the approval of exculpation and release provisions. The Joint movants improperly rely on authority allowing a court to decline jurisdiction as a justification for granting relief not specifically provided for by the Bankruptcy

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<sup>2</sup> Compare *Koffman v. Osteoimplant Technology, Inc.*, 182 B.R. 115, 127 (D. Md. 1995) ("After the bankruptcy court abstains from jurisdiction over an involuntary petition pursuant to section 305(a)(1), the court may not then award damages or impose sanctions for the filing of that petition under section 303(i).") with *In re Macke Int'l Trade, Inc.*, 370 B.R. 236, 253 (9th Cir. BAP 2007) (the bankruptcy court, based upon the totality of the circumstances, may, in its discretion, award attorney's fees and costs under § 303(i) for a § 305(a)(1) dismissal of an involuntary petition").

Code.

**2. Section 349(b).**

The Joint Movants rely on section 349(b) as authorizing the affirmative relief, including release and exculpation provisions, that is part of the structured dismissal. In section 349, Congress has articulated the statutory effect of case dismissal, which is generally “to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.” *See* H.R. Rep. No 595, 95th Cong., 1st Sess. 338 (1977). Section 349(b), however, permits “the court, for cause, to order otherwise.” Litigants and courts have relied on this section to justify the inclusion of additional provisions as part of a structured dismissal, including provisions for distribution that were inconsistent with the priority structure established by the Bankruptcy Code.

Apart from the fact that the exercise of authority under section 349(b) to grant affirmative relief is, as discussed above, inconsistent with abstention under section 305(a), the exercise of such authority is limited, as discussed in *Czyzewski et al. v. Jevic Holding Corp. et al.*, 580 U.S. \_\_\_, 2017 WL 1066259 (March 22, 2017), by other provisions of the Code. In *Jevic Holding*, the Supreme Court reversed the approval of a structured dismissal providing for distributions that were at odds with the Code's priority rules. As the Joint Movants assert, *Jevic Holding* involved an objection by a creditor with a clear economic stake in the outcome and the Court ruled on the priority skipping aspects of a structured dismissal, but did not rule on the legality of structured dismissal in general. Nevertheless, the Court's discussion of the limits on a bankruptcy court's authority to “for cause, order otherwise” under section 349(b), is critical to the decision. In this regard, the clear message is that a courts ability to order otherwise is limited by

contrary Code provisions, particularly those that govern the priority of distributions by a bankruptcy estate. As discussed above, in the Tenth Circuit, the approval of third party releases and exculpations is contrary to the provisions of section 524(e). Under the reasoning of *Jevic Holding*, therefore, those releases and exculpations cannot be approved under section 349(b).

### **3. Section 105(a)**

The only remaining statutory basis for the relief requested by the Joint Movants is section 105(a), which provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [*i.e.*, title 11].” 11 U.S.C. §105(a). As applied to chapter 11 cases, the bankruptcy courts have equitable authority under section 105(a) “to assure the orderly conduct of the reorganization proceedings.” *In re Baldwin-United Litig.*, 765 F.2d 343, 348 (2d Cir. 1985). However, “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.” *Chambers v NASCO, Inc.*, 501 U.S. 32, 44 (1991). Accordingly, a bankruptcy court’s power to take action under section 105 is limited by the Bankruptcy Code itself. *See New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)* 351 F.3d 86, 92 (2d Cir. 2003) (section 105(a) does not “constitute a roving commission to do equity” and provide relief when no provision of the Bankruptcy Code may be successfully invoked). As the Supreme Court recently reiterated:

It is hornbook law that §105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code . . . We have long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.

*Law v. Siegel*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1188, 1194-95 (2014) (referencing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988)). These fundamental principles regarding the limitation on relief under section 105(a) have been repeated numerous times in numerous courts.<sup>3</sup> Under these principles, section 105(a) cannot be used to justify an exit path from bankruptcy that is not recognized by specific statutory provisions nor the approval of exculpatory provisions that have no statutory support in the Bankruptcy Code.

**C. Even if third party releases and exculpations are permissible, the requested relief is not appropriate in this case.**

The United State Trustee recognizes that, notwithstanding the Tenth Circuit rule set forth in *Western Real Estate Fund*, courts in other circuits have approved release and exculpation provisions through the confirmation of plans in certain limited circumstances. *See, e.g. In re Aradigm Communications, Inc.*, 519 F.3d 640 (7th Cir. 2008); *In re Dow Corning Corp.*, 280 F.3d 648, 656 (6th Cir. 2002). In *Dow Corning Corp.*, the Sixth circuit set forth the following widely applied factors for the approval of releases and exculpations:

- (1) there is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
- (2) the non-debtor has contributed substantial assets to the reorganization;

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<sup>3</sup> *See, e.g., In re Barbieri*, 199 F.3d 616, at 620-621 (2nd Cir. 1999) (section 105(a) “does not authorize the Court to disregard the plain language” of the Bankruptcy Code); *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004) (“the power conferred by §105(a) is one to implement rather than override”); *Resorts Int’l v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995) (“Section 105 does not authorize relief inconsistent with more specific law.”); *Pertuso v Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000) (the words “provisions of this title” in section 105(a) simply denote a set of remedies fixed by Congress; a court cannot legislate to add to them.”); and *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992) (section 105(a) does not bestow the bankruptcy courts with “free-floating discretion to redistribute right in accordance with his [or her] personal views of justice and fairness, however enlightened those views may be.”)



- (3) the injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
- (4) the impacted class, or classes, has overwhelmingly voted to accept the plan;
- (5) the plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
- (6) the plan provides an opportunity for those claimants who choose not to settle to recover in full; and
- (7) the bankruptcy court made a record of specific factual findings that support its conclusions.

While courts in other circuits have applied these or similar factors, in approving releases or exculpations in the context of confirming a plan when necessary to a reorganization, the rationale for this approval is far less compelling, if it exists at all, in a liquidation. *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008). With respect to exculpation clauses, approval must be limited to the fiduciaries who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors' directors and officers because exculpation clauses are intended merely to restate the standard to which estate fiduciaries are held in chapter 11 cases. *In re Washington Mutual, Inc.*, 442 B.R. 314, 350-351 (Bankr. D. Del. 2011).

The Joint Movants have presented no facts or arguments justifying approval of the release and exculpation provisions under the *Dow Corning Corp.* factors. For example, there is no indication how the protection of the various parties listed in the exculpation provisions is

essential to any reorganization, how suits against such parties would deplete the assets available for reorganization through contribution or indemnification claims or how such parties have contributed substantial assets to the reorganization. The exculpation provisions are overly broad and insufficiently specific because they include a wide range of non-estate fiduciaries and non-fiduciaries including: "financial advisors, administrators, partners, guarantors, investors, trustees, parents, successors, assigns, managers, affiliates, employees, members, contractors, consultants, agents, officers and directors." The Joint Movants fail to indicate who the foregoing parties are as they relate to the M Space Case, much less how they are debtor fiduciaries and why their protection is necessary when there is no ongoing reorganization or rehabilitation.

Finally, most cases approving such relief and exculpation provisions have do so in the context of confirming a plan where the impacted class or classes have overwhelmingly voted to accept the plan. In this case, approval is improperly sought through a structured dismissal process where the procedural and substantive protections afforded by the disclosure statement and plan-confirmation process are absent and where there is no consideration of the protected parties' contributions in achieving a successful reorganization.

### **CONCLUSION**

The United States Trustee urges this Court to follow a faithful interpretation of the Bankruptcy Code and disallow the exculpation relief that is being offered to a wide range of parties without providing creditors the rights they would have through a plan of reorganization. The court should deny the approval of the proposed exculpation provisions as an attempt to provide relief beyond existing legal authority.

Wherefore, for the reason set forth above, the United States Trustee respectfully requests that the Court sustain this objection, deny the motion for structured dismissal as proposed, and grant such other and further relief as the Court deems just, fair and equitable.

DATED: May 4, 2017

Respectfully submitted,

\_\_\_\_\_/s/  
Peter J. Kuhn  
Vince Cameron  
Attorneys for Patrick S. Layng,  
United States Trustee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on May 4, 2017, I caused a true and correct copy of the foregoing **UNITED STATES TRUSTEE'S OBJECTION TO JOINT MOTION OF THE DEBTOR, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND PNC BANK, NATIONAL ASSOCIATION FOR THE ENTRY OF AN ORDER (A) DISMISSING THE DEBTOR'S CHAPTER 11 CASE AND (B) GRANTING RELATED RELIEF** to be electronically filed with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system, as noted below:

- Troy J. Aramburu [taramburu@swlaw.com](mailto:taramburu@swlaw.com), [nharward@swlaw.com](mailto:nharward@swlaw.com), [docket\\_slc@swlaw.com](mailto:docket_slc@swlaw.com)
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- Bruce H. White [bwhite@parsonsbehle.com](mailto:bwhite@parsonsbehle.com), [chuston@parsonsbehle.com](mailto:chuston@parsonsbehle.com)

Further, I certify that I caused copies of the **OBJECTION** to be forwarded via U.S. Mail, first class, postage prepaid and properly addressed to the following:

None

\_\_\_\_\_/s/  
Peter J. Kuhn

Mona L. Burton, #5399  
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*Attorneys for Debtor-In-Possession*

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

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|                        |                          |
|------------------------|--------------------------|
| In re:                 | Bankruptcy No. 16-24384  |
| M SPACE HOLDINGS, LLC, | Chapter 11               |
| Debtor-In-Possession.  | Honorable Joel T. Marker |

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**DEBTOR-IN-POSSESSION'S FINAL ACCOUNT AND DISTRIBUTION REPORT  
CERTIFICATION THAT THE ESTATE HAS BEEN FULLY ADMINISTERED**

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M Space Holdings, LLC, the debtor-in-possession in the above captioned case, submits this *Final Account and Distribution Report Certification that the Estate has been Fully Administered*.

1. All funds on hand have been distributed in accordance with the Debtor's Final Report, and if applicable, any order of the Court modifying the Final Report. The case is fully administered and all assets and fund which have come under the Debtor's control in this case have been properly accounted for as provided by law.

2. The case was filed on May 19, 2016 under Chapter 11 of title 11 of the United States Code. The case was pending for approximately 17 months.

3. Pursuant to the Court's Order Granting Joint Motion of the Debtor, the Official Committee of Unsecured Creditors and PNC Bank, National Association for the Entry of An

Order (A) Dismissing the Debtor's Chapter 11 Case and (B) Granting Related Relief [Docket No. 703], the Debtor certifies that (1) it has completed its claims reconciliation process; (2) it gave notice to all parties listed on the creditor matrix in this case of its estimated distribution of funds pursuant to the terms of the Settlement Agreement and any objections to the estimated distribution of funds have been withdrawn, waived, settled or overruled; and (3) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and Settlement Agreement.

4. A summary of assets abandoned, total distribution to claimants, and expenses of administration is as follows:

- A. Assets Abandoned: \$1,086,527.47<sup>1</sup>
- B. Total Distribution: \$27,398,547.19<sup>2</sup>
- C. Total Expenses of Administration: \$2,842,395.09

5. Attached hereto are Exhibits 2 through 4. Exhibit 2 provides the distributions made to secured creditors; Exhibit 3 sets forth the distributions made to general, priority claimants; and Exhibit 4 sets forth the distributions made to general unsecured nonpriority claimants.

6. Any instruments that were not negotiated have been placed in the Court's registry. Attached hereto as Exhibit 5 is a list of the funds that were not claimed.

7. Exhibit 6 attached hereto provides a list of abandoned property.

8. All U.S. Trustee fees attributable to the Debtor have been paid in full (total amount paid \$51,683.72).

9. As of October 31, 2017, the Debtor has \$0 left in its bank accounts. All funds have been distributed to creditors or sent to the court registry, leaving the Debtor's accounts with a zero balance.

10. All estate bank statements, deposit slips, and canceled checks have been submitted to the United States Trustee.

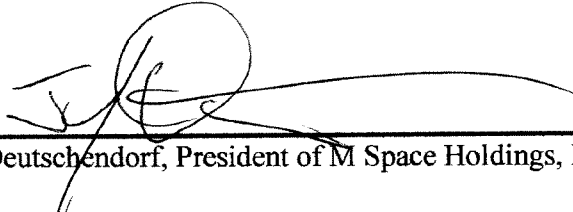
Pursuant to Fed. R. Bank. P. 5009, I hereby certify, under penalty of perjury, that the foregoing report is true and accurate to the best of my knowledge.

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<sup>1</sup> Based on net book value. Assets damaged by storm and claim denied by insurance company. Not saleable.

<sup>2</sup> Cash at 5/20/16 plus receipts 5/20/16-10/31/17, See Exhibit 1. All funds disbursed with final bank bal at \$0.

Dated: October \_\_\_\_, 2017

By:   
Jeffrey Deutschendorf, President of M Space Holdings, LLC



**DEBTOR: M Space Holdings, LLC**

**CASE NO: 16-24384**

**Form 2-B**

**Cash Receipts and Disbursements Statement**

**For Period:**

**5/20/2016 to 10/31/2017**

**Cash Flow Summary**

|                                                                        |                         |
|------------------------------------------------------------------------|-------------------------|
| 1 Beginning Cash Balance                                               | <u>\$ 142,978.01</u>    |
| 2 Cash Receipts                                                        |                         |
| Operations                                                             | \$ 4,238,140.51         |
| Sale of Assets                                                         | \$ 21,959,906.65        |
| Loans/advances                                                         | \$ -                    |
| Other                                                                  | \$ 1,057,522.02         |
| Total Cash Receipts                                                    | <u>\$ 27,255,569.18</u> |
| 3 Cash Disbursements                                                   |                         |
| Operations                                                             | \$ 7,126,385.29         |
| Debt Service/Secured loan payment                                      | \$ 15,332,013.82        |
| Professional fees/ U.S. Trustee fees                                   | \$ 2,842,395.09         |
| Other                                                                  | \$ 2,097,752.99         |
| Total Cash Disbursements                                               | <u>\$ 27,398,547.19</u> |
| 4 Net Cash Flow (Total Cash Receipts less<br>Total Cash Disbursements) | <u>\$ (142,978.01)</u>  |
| 5 Ending Cash Balance (to Form 2-C)                                    | <u><u>\$ 0.00</u></u>   |

**Cash Balance Summary**

|                                                   | <u>Financial Institution</u> | <u>Book Balance</u> |
|---------------------------------------------------|------------------------------|---------------------|
| Petty Cash                                        |                              | \$ -                |
| DIP Operating Account                             | PNC Bank, N.A                | \$ -                |
| DIP State Tax Account                             |                              | \$ -                |
| DIP Payroll Account                               |                              | \$ -                |
| Other Operating Account                           |                              | \$ -                |
| Other Interest-bearing Account                    |                              | \$ -                |
| TOTAL (must agree with Ending Cash Balance above) |                              | <u><u>\$ -</u></u>  |
|                                                   |                              | \$ -                |



M Space, Case No. 16-24384  
Secured Creditors

| Creditor                        | Account No.                  | Type | Sched. Claim    | POC No. | POC Amount                    | Allowed Amount of Secured Claim | Interim Payments to Date | Payment on Secured Claim | Claim Sold/Transferred | Comments                                                                                                                                                                                            |
|---------------------------------|------------------------------|------|-----------------|---------|-------------------------------|---------------------------------|--------------------------|--------------------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ABCO Recycling, LLC             |                              | S    | \$8,524.25      | 34      | \$6,922.50                    | \$6,922.50                      | \$0.00                   | \$6,922.50               |                        | \$56,700 paid as warehousemen lien from sale, Doc. No. 106; balance paid as unsecured                                                                                                               |
| Alan Clayton Enterprises, Inc.  |                              | S    | \$157,778.00    |         |                               | \$56,700.00                     | \$56,700.00              | \$0.00                   |                        | Objection, collateral returned.                                                                                                                                                                     |
| AMJ Leasing                     | 9501                         | S    | \$2,470.59      |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Partial payment pursuant to Bison Run settlement, Doc Nos. 367, 368, 417 (Order); Secured in amount of \$15,500 pursuant to Court Order overruling debtor's objection; remaining balance unsecured. |
| Bennett Truck Transport, LLC    | 93343                        | S/U  | \$152,170.20    | 31      | \$160,784.00                  | \$15,500.00                     | \$0.00                   | \$15,500.00              |                        |                                                                                                                                                                                                     |
| Camp Creek Development Corp.    |                              | S    | \$30,420.00     | 40/41   | \$200,045.34/<br>\$202,316.35 | \$319,425.99                    | \$319,425.99             | \$0.00                   |                        | Paid pursuant to settlement, Doc No. 497. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                                              |
| Carter Leasing Company, LLC     |                              | S    | \$3,738,974.22  |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Objection, property transferred pre-petition. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                                          |
| Damon N. & Patricia A. Jones    |                              | S    | \$19,800.00     |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Schedule recently amended to reflect claim is unsecured.                                                                                                                                            |
| Eastlake Storage, LLC           |                              | S    | \$15,408.00     | 42      | \$5,136.00                    | \$5,136.00                      | \$5,136.00               | \$0.00                   |                        | Objection, paid as warehousemen lien from sale, Doc. No. 169. Balance being paid as unsecured claim.                                                                                                |
| HSBC Bank USA, NA               |                              | S    | \$0.00          |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Paid from remaining funds through PNC                                                                                                                                                               |
| Maricopa County Treasurer       | 983-53-043,-51-881, 933, 942 | S    | \$4,433.42      | 82      | \$11,605.11                   | \$0.00                          | \$0.00                   | \$0.00                   |                        | Objection, paid. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                                                                       |
| McKenzie County North Dakota    | Taxpayer # 5507              | S    | \$32,212.16     | 25      | \$47,505.02                   | \$0.00                          | \$0.00                   | \$0.00                   |                        | Objection, paid from Vesta sale. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                                                       |
| Michael Dwyer                   |                              | S    | \$105,977.92    | 39      | \$103,050.23                  | \$0.00                          | \$0.00                   | \$0.00                   |                        | Paid pursuant to settlement, Doc. No. 498. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                                             |
| PNC Bank, N.A.                  | -4241, -4284                 | S    | \$60,000,000.00 | 26      | \$60,000,000.00               | \$60,000,000.00                 | \$0.00                   | \$0.00                   |                        | Paid remaining funds                                                                                                                                                                                |
| Road 11 Storage LLC             |                              | S    | \$3,300.00      | 37/74   | \$3,300.00                    | \$0.00                          | \$0.00                   | \$0.00                   |                        | Objection, unsecured claim.                                                                                                                                                                         |
| Sand Creek Productions, LLC     |                              | S    | \$5,000.00      |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Schedule recently amended to reflect claim is unsecured.                                                                                                                                            |
| Southern Mobile Installers, LLC |                              | S    | \$5,865.00      |         |                               | \$0.00                          | \$0.00                   | \$0.00                   |                        | Schedule recently amended to reflect claim is unsecured.                                                                                                                                            |
| Stearns Bank, N.A.              | 6800                         | S    | \$139,088.43    | 28      | \$128,389.32                  | \$0.00                          | \$0.00                   | \$0.00                   |                        | Objection, unsecured claim.                                                                                                                                                                         |

|                               |                |   |                        |    |             |        |        |                    |  |                                                                                                                                           |
|-------------------------------|----------------|---|------------------------|----|-------------|--------|--------|--------------------|--|-------------------------------------------------------------------------------------------------------------------------------------------|
| US Bank Equipment Finance     | 312014         | S | \$27,751.00            | 23 | \$25,459.81 | \$0.00 | \$0.00 | \$0.00             |  | Collateral returned and/or made available for pickup. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i> |
| Wells Fargo Equipment Finance | 001015446 8408 | S | \$21,969.30            | 80 | \$21,970.30 | \$0.00 | \$0.00 | \$0.00             |  | Objection, paid from Vesta sale. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i>                      |
| Wells Fargo Equipment Finance | 001015446 8407 | S | \$21,238.75            | 81 | \$19,687.63 | \$0.00 | \$0.00 | \$0.00             |  | Objection, paid from Vesta sale. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i>                      |
| Wells Fargo Equipment Finance | 001015446 8406 | S | \$14,606.72            | 79 | \$18,285.16 | \$0.00 | \$0.00 | \$0.00             |  | Objection, paid from Vesta sale. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i>                      |
| Wells Fargo Equipment Finance | 001015446 8405 | S | \$10,667.50            | 78 | \$8,535.00  | \$0.00 | \$0.00 | \$0.00             |  | Objection, paid from Vesta sale. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i>                      |
|                               |                |   | <b>\$64,509,131.21</b> |    |             |        |        | <b>\$22,422.50</b> |  |                                                                                                                                           |

**M Space, Case No. 16-24384  
Priority Creditors**

| Creditor                                       | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Priority Amount | Interim Payments to Date | Priority Payment | Claim Sold/Transferred | Comments                                                                                                                                                           |
|------------------------------------------------|-------------|------|--------------|---------|-------------|-------------------------|--------------------------|------------------|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Alex Waltari                                   | HL 16018    | P/U  | \$350.00     |         |             | \$350.00                | \$0.00                   | \$350.00         |                        | Schedule recently amended to reflect correct amount owed.                                                                                                          |
| Alexandra Orlovsky                             |             | P/U  | \$15,000.00  | 49      | \$15,000.00 | \$12,850.00             | \$0.00                   | \$12,850.00      |                        | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim.                                                                             |
| Allen Leavitt                                  |             | P/U  | \$825.00     |         |             | \$825.00                | \$0.00                   | \$825.00         |                        |                                                                                                                                                                    |
| Amanda Brown                                   |             | P/U  | \$1,346.15   |         |             | \$1,346.15              | \$0.00                   | \$1,346.15       |                        |                                                                                                                                                                    |
| Andy Harrell                                   |             | P/U  | \$725.00     |         |             | \$725.00                | \$0.00                   | \$725.00         |                        | Schedule recently amended to reflect correct amount owed.                                                                                                          |
| Austin Hunter                                  | HL 16005    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                              |
| Benjamin Burditt                               | HL 15128    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                              |
| Brad Denner                                    | HL 15111    | P/U  | \$834.75     |         |             | \$834.75                | \$0.00                   | \$834.75         |                        | Schedule recently amended to reflect correct amount owed.                                                                                                          |
| Brown Whatley Law                              |             | P/U  | \$11,538.46  |         |             | \$11,538.46             | \$0.00                   | \$11,538.46      |                        |                                                                                                                                                                    |
| Bureau of Collections & Taxpayer Service       |             | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        |                                                                                                                                                                    |
| Brian Gimpl                                    |             | P/U  |              | 75      | \$3,640.00  | a                       | \$3,640.00               | \$0.00           |                        | Paid per PTO Order, Doc. No. 436                                                                                                                                   |
| Byron Barcus                                   |             | P/U  | \$900.00     |         |             | \$900.00                | \$0.00                   | \$900.00         |                        |                                                                                                                                                                    |
| Cameron Toler                                  | HL 16003    | P/U  | \$750.00     |         |             | \$750.00                | \$0.00                   | \$750.00         |                        |                                                                                                                                                                    |
| Chad Day                                       |             | P/U  | \$16,346.15  | 61      | \$17,600.00 | \$12,850.00             | \$0.00                   | \$12,850.00      |                        | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim.                                                                             |
| Charlene Brewster                              |             | P/U  |              | 47      | \$12,996.73 | \$5,192.11              | \$5,192.11               | \$0.00           |                        | Paid per PTO Order, Doc. No. 436. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). Remaining balance to be treated as unsecured claim. |
| Christine Hordeman                             |             | P/U  | \$4,615.38   | 46      | \$4,615.18  | \$4,615.38              | \$0.00                   | \$4,615.38       |                        |                                                                                                                                                                    |
| Christopher Orlovsky                           |             | P/U  |              | 57      | \$8,000.39  | \$7,975.65              | \$7,975.65               | \$0.00           |                        | Paid per PTO Order, Doc. No. 436. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). Remaining balance to be treated as unsecured claim. |
| Cindy Cheadle                                  | HL 15069    | P/U  | \$450.00     |         |             | \$450.00                | \$0.00                   | \$450.00         |                        |                                                                                                                                                                    |
| Cody Brooks                                    |             | P/U  | \$690.00     |         |             | \$690.00                | \$0.00                   | \$690.00         |                        |                                                                                                                                                                    |
| Commonwealth of Kentucky Department of Revenue | 7942        | P/U  |              | 13      | \$4,163.94  | \$4,163.94              | \$0.00                   | \$4,163.94       |                        |                                                                                                                                                                    |
| Dan Ricci & Katelyn Hutton                     | HL 15068    | P/U  | \$1,000.00   |         |             | \$1,000.00              | \$0.00                   | \$1,000.00       |                        | Schedule recently amended to reflect correct amount owed.                                                                                                          |

**EXHIBIT**

**3**

| Creditor                         | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Priority Amount | Interim Payments to Date | Priority Payment | Claim Sold/Transferred | Comments                                                                                                                                                            |
|----------------------------------|-------------|------|--------------|---------|-------------|-------------------------|--------------------------|------------------|------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Daniel Christensen               | HL 15139    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Daren Walker                     |             | P/U  | \$3,846.15   |         |             | \$3,846.15              | \$0.00                   | \$3,846.15       |                        |                                                                                                                                                                     |
| David & Vashti Schertel          | HL 16014    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| David Christensen                | HL 15067    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| David Freeman & Debra Young      | HL 16009    | P/U  | \$750.00     |         |             | \$750.00                | \$0.00                   | \$750.00         |                        |                                                                                                                                                                     |
| David Kittle                     |             | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| David Patberg & Andrew Beckfield | HL 15034    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| David Pernal                     |             | P/U  | \$25,384.62  |         |             | \$12,850.00             | \$0.00                   | \$12,850.00      |                        | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591). |
| Dean J. Pelton                   |             | P/U  | \$2,500.00   | 58      | \$2,708.00  | \$2,708.00              | \$0.00                   | \$2,708.00       | Yes, DACA VI LLC       | DACA VI LLC<br>1565 Hotel Circle South, Suite 310<br>San Diego, CA 92108                                                                                            |
| Deana Louise Harb                |             | P/U  |              | 64      | \$2,854.96  | \$2,842.68              | \$2,842.68               |                  |                        | Paid per PTO Order, Doc. No. 436. Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591).                                                      |
| Deuetrios Hospidales             | 0           | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Elias & Jessica Perez            | HL 16006    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                        |                                                                                                                                                                     |
| Elizabeth Hill                   | HL 15108    | P/U  | \$900.00     |         |             | \$900.00                | \$0.00                   | \$900.00         |                        |                                                                                                                                                                     |
| Erica Wilkey                     |             | P/U  | \$711.54     |         |             | \$711.54                | \$0.00                   | \$711.54         |                        |                                                                                                                                                                     |
| Ezra Lyon                        |             | P/U  | \$18,461.54  | 73      | \$20,000.00 | \$12,850.00             | \$0.00                   | \$12,850.00      |                        | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. Schedule recently amended to reflect correct amount owed.                    |
| Habeeb & Jayme Rafiu             | HL 15118    | P/U  | \$430.00     |         |             | \$430.00                | \$0.00                   | \$430.00         |                        |                                                                                                                                                                     |
| Jamie Castillo                   |             | P/U  | \$1,500.00   |         |             | \$1,500.00              | \$0.00                   | \$1,500.00       |                        | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Jared & Jackie Hersch            | HL 15122    | P/U  | \$2,058.05   |         |             | \$2,058.05              | \$0.00                   | \$2,058.05       |                        |                                                                                                                                                                     |
| Jedidiah Headley                 | HL 15021    | P/U  | \$450.00     |         |             | \$450.00                | \$0.00                   | \$450.00         |                        |                                                                                                                                                                     |
| Jeffrey Deutschendorf            |             | P/U  |              | 71      | \$25,000.00 | \$12,475.00             | \$12,475.00              | \$0.00           |                        | Paid per PTO Order, Doc. No. 436. balance to be treated as unsecured claim. Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591).            |

| Creditor                         | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed<br>Priority Amount | Interim Payments<br>to Date | Priority<br>Payment | Claim<br>Sold/Transferred | Comments                                                                                                                    |
|----------------------------------|-------------|------|--------------|---------|-------------|----------------------------|-----------------------------|---------------------|---------------------------|-----------------------------------------------------------------------------------------------------------------------------|
| Joe Vanhaile                     |             | P/U  | \$725.00     |         |             | \$725.00                   | \$0.00                      | \$725.00            | Yes, DACA VI LLC          | DACA VI LLC<br>1565 Hotel Circle South, Suite 310<br>San Diego, CA 92108                                                    |
| John Eisert                      | HL 16012    | P/U  | \$254.50     |         |             | \$254.50                   | \$0.00                      | \$254.50            |                           | Schedule recently amended to reflect correct amount owed.                                                                   |
| John Noonan                      |             | P/U  | \$900.00     |         |             | \$900.00                   | \$0.00                      | \$900.00            |                           |                                                                                                                             |
| John Sanborn                     | HL 13127    | P/U  | \$0.00       |         |             | \$0.00                     | \$0.00                      | \$0.00              |                           | Schedule recently amended to reflect no amounts owed.                                                                       |
| John Slagel                      |             | P/U  | \$690.00     |         |             | \$690.00                   | \$0.00                      | \$690.00            |                           |                                                                                                                             |
| Jones Estinville                 |             | P/U  | \$800.00     |         |             | \$800.00                   | \$0.00                      | \$800.00            |                           |                                                                                                                             |
| Josh Vanscooder & Justin Crofts  | HL 15107    | P/U  | \$903.58     |         |             | \$903.58                   | \$0.00                      | \$903.58            |                           | Schedule recently amended to reflect correct amount owed.                                                                   |
| JW Admin-Mendoza                 |             | P/U  | \$0.00       |         |             | \$0.00                     | \$0.00                      | \$0.00              |                           | Schedule recently amended to reflect no amounts owed.                                                                       |
| Kenneth Bridgham                 |             | P/U  | \$1,000.00   |         |             | \$1,000.00                 | \$0.00                      | \$1,000.00          |                           |                                                                                                                             |
| Kenneth Kalsch                   |             | P/U  | \$12,692.31  | 60      | \$13,750.02 | \$12,692.31                | \$0.00                      | \$12,692.31         |                           | Objection, claim is overstated. \$12,692.31 owed<br>Objection (Doc. No. 547); Order sustaining<br>Objection (Doc. No. 632). |
| Lance Chisum                     |             | P/U  | \$1,041.87   |         |             | \$1,041.87                 | \$0.00                      | \$1,041.87          |                           | Schedule recently amended to reflect correct amount owed.                                                                   |
| Lane Shumway                     |             | P/U  | \$3,461.54   |         |             | \$3,461.54                 | \$0.00                      | \$3,461.54          |                           |                                                                                                                             |
| Leah Maritzky                    |             | P/U  | \$5,769.23   | 62      | \$4,800.00  | \$4,800.00                 | \$0.00                      | \$4,800.00          |                           | Schedule recently amended to reflect no amounts owed.                                                                       |
| Leeann Larose                    | HL 15083    | P/U  | \$0.00       |         |             | \$0.00                     | \$0.00                      | \$0.00              |                           |                                                                                                                             |
| Lisa vonHolt                     |             | P/U  | \$1,600.00   |         |             | \$1,600.00                 | \$0.00                      | \$1,600.00          |                           |                                                                                                                             |
| Louisiana Department of Revenue  |             | P/U  | \$141.88     |         |             | \$141.88                   | \$0.00                      | \$141.88            |                           |                                                                                                                             |
| Lynette Reilly                   |             | P/U  |              | 54      | \$1,778.85  | \$1,778.78                 | \$1,778.78                  | \$0.00              |                           | Paid per PTO Order, Doc. No. 436. Omnibus<br>Objection (Doc. No. 539), Order sustaining<br>objection (Doc. No. 591).        |
| Lynn Reynolds                    | HL 13032    | P/U  | \$0.00       |         |             | \$0.00                     | \$0.00                      | \$0.00              |                           | Schedule recently amended to reflect no amounts owed.                                                                       |
| Meloney Deuschendorf             |             | P/U  |              | 70      | \$11,000.00 | \$10,153.46                | \$10,153.46                 | \$0.00              |                           | Paid per PTO Order, Doc. No. 435. Omnibus<br>Objection (Doc. No. 539), Order sustaining<br>objection (Doc. No. 591).        |
| Merilyn Counsell                 | HL 15033    | P/U  | \$630.00     |         |             | \$630.00                   | \$0.00                      | \$630.00            |                           |                                                                                                                             |
| Michael Kennedy                  |             | P/U  | \$4,807.69   |         |             | \$4,807.69                 | \$0.00                      | \$4,807.69          |                           |                                                                                                                             |
| Michael Light                    | HL 16005    | P/U  | \$900.00     |         |             | \$900.00                   | \$0.00                      | \$900.00            |                           | Scheduled incorrectly, amount corrected.<br>Schedule recently amended to reflect correct amount owed.                       |
| Michael Little & Gail Rutherford | HL 15101    | P/U  | \$544.60     |         |             | \$544.60                   | \$0.00                      | \$544.60            |                           |                                                                                                                             |

| Creditor              | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Priority Amount | Interim Payments to Date | Priority Payment | Claim Sold/Transferred        | Comments                                                                                                                                                            |
|-----------------------|-------------|------|--------------|---------|-------------|-------------------------|--------------------------|------------------|-------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Michael Mees          | HL 15070    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Myra Thomas           |             | P/U  | \$7,605.77   | 59      | \$8,239.60  | \$7,605.77              | \$0.00                   | \$7,605.77       |                               | Objection, \$7,605.77 owed. Objection (Doc. No. 548), Order sustaining objection (Doc. No. 633).                                                                    |
| Nathan Kemp           | 12/15/2015  | P/U  | \$538.72     |         |             | \$538.72                | \$0.00                   | \$538.72         |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Nicklas Paul Buroker  | 7416        | P/U  |              | 50      | \$3,859.81  | \$3,871.73              | \$3,871.73               | \$0.00           |                               | Paid per PTO Order, Doc. No. 436. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                      |
| Omar Hammond          |             | P/U  | \$20,769.23  | 65      | \$20,769.23 | \$12,850.00             | \$0.00                   | \$12,850.00      |                               | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Patrick Stout         | HL 15036    | P/U  | \$710.00     |         |             | \$710.00                | \$0.00                   | \$710.00         |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Renaie Hill           |             | P/U  | \$2,480.77   | 67      | \$1,653.78  | \$1,653.78              | \$0.00                   | \$1,653.78       |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Ryan Burch            | HL 15128    | P/U  | \$750.00     |         | \$0.00      | \$0.00                  | \$0.00                   | \$0.00           |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Samantha Ann Cipriano |             | P/U  |              | 48      | \$3,732.53  | \$3,736.40              | \$3,736.40               | \$0.00           |                               | Paid per PTO Order, Doc. No. 436. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                                      |
| Scott Bridgham        |             | P/U  | \$1,000.00   |         |             | \$1,000.00              | \$0.00                   | \$1,000.00       |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Scott Houge           |             | P/U  | \$900.00     |         |             | \$900.00                | \$0.00                   | \$900.00         |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Seth Murphy           | HL 16018    | P/U  | \$350.00     |         |             | \$350.00                | \$0.00                   | \$350.00         |                               | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Steven Contreras      |             | P/U  | \$1,000.00   |         |             | \$0.00                  | \$0.00                   | \$0.00           |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Tara Rouse            | HL 15116    | P/U  | \$900.00     |         |             | \$900.00                | \$0.00                   | \$900.00         |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Taylor Arceneaux      |             | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Taylor Behrmann       |             | P/U  | \$849.36     |         |             | \$849.36                | \$0.00                   | \$849.36         | Yes, Fair Harbor Capital, LLC |                                                                                                                                                                     |
| Taylor Terpstra       | HL 16015    | P/U  | \$800.00     |         |             | \$800.00                | \$0.00                   | \$800.00         |                               |                                                                                                                                                                     |
| Terry Floyd           |             | P/U  | \$690.00     |         |             | \$690.00                | \$0.00                   | \$690.00         |                               |                                                                                                                                                                     |
| Tim Ross              | HL 16001    | P/U  | \$1,000.00   |         |             | \$1,000.00              | \$0.00                   | \$1,000.00       |                               |                                                                                                                                                                     |
| Todd Wright           |             | P/U  | \$1,041.88   |         |             | \$1,041.88              | \$0.00                   | \$1,041.88       | Yes, Fair Harbor Capital, LLC | Schedule recently amended to reflect correct amount owed.                                                                                                           |
| Vontez Williams       | HL 16004    | P/U  | \$0.00       |         |             | \$0.00                  | \$0.00                   | \$0.00           |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |

| Creditor       | Account No. | Type | Sched. Claim | POC No. | POC Amount | Allowed<br>Priority Amount | Interim Payments<br>to Date | Priority<br>Payment | Claim<br>Sold/Transferred | Comments                         |
|----------------|-------------|------|--------------|---------|------------|----------------------------|-----------------------------|---------------------|---------------------------|----------------------------------|
| Wade A. Bowser | 0622        | P/U  |              | 66      | \$9,615.01 | \$9,615.01                 | \$9,615.01                  | \$0.00              |                           | Paid per PTO Order, Doc. No. 436 |
| Walter Kim     |             | P/U  |              | 55      | \$1,163.41 | \$1,153.80                 | \$1,153.80                  | \$0.00              |                           | Paid per PTO Order, Doc. No. 436 |
| Wayne White    |             | P/U  | \$900.00     |         |            | \$900.00                   | \$0.00                      | \$900.00            |                           |                                  |
| David Zarate   |             | P/U  |              | 19      | \$600.00   | \$600.00                   | \$0.00                      | \$600.00            |                           | Moved from unsecured schedule.   |
|                |             |      |              |         |            | \$220,019.52               | \$62,434.62                 | \$161,224.90        |                           |                                  |
|                |             |      | \$191,510.72 |         |            |                            |                             |                     |                           |                                  |



**M Space, Case No. 16-24384  
Unsecured Creditors**

| Creditor                                             | Account No. | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                                |
|------------------------------------------------------|-------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| A E Latapie Plumbing & Heating                       |             | U    | \$1,306.00   |         |              | \$1,306.00     | 12.24%         | \$159.80     |                        |                                                                                                                                                         |
| A Plus Modular Services, Inc.                        |             | U    | \$75,393.00  | 11      | \$85,546.00  | \$75,393.00    | 12.24%         | \$9,224.89   |                        | Objection, claim overstated. \$75,393 owed.                                                                                                             |
| A&C Cronin, LLC                                      |             | U    | \$15,000.00  | 9       | \$15,000.00  | \$15,000.00    | 12.24%         | \$1,835.36   |                        |                                                                                                                                                         |
| A.B.C. Distributors                                  |             | U    | \$17,875.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                   |
| ABC Supply Co., Inc.                                 | 10736800    | U    | \$23,002.61  |         |              | \$23,002.61    | 12.24%         | \$2,814.54   |                        |                                                                                                                                                         |
| ABCO Recycling, LLC                                  |             | U    | \$8,524.25   | 34      | \$6,922.50   | \$6,922.50     | 12.24%         | \$847.02     |                        |                                                                                                                                                         |
| Access Outdoor Storage, LLC                          |             | U    | \$26,500.00  |         |              | \$26,500.00    | 12.24%         | \$3,242.47   |                        |                                                                                                                                                         |
| ACE American Insurance Company                       |             | U    | \$1,245.09   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim duplicative, Doc. No. 560. Objection sustained, Doc. No. 641.                                                                          |
| Ace Technologies, Inc.                               |             | U    | \$11,448.26  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc. Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Ahern Rentals, Inc.                                  | 265305      | U    | \$7,509.03   | 6       | \$17,536.31  | \$641.25       | 12.24%         | \$78.46      |                        | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).     |
| AJ Investment Ventures, Inc.                         |             | U    | \$217,023.40 |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                |
| Alan Clayton Enterprises, Inc.                       |             | U    |              |         |              | \$101,078.00   | 12.24%         | \$12,367.64  |                        | Unsecured portion of previously scheduled secured claim. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                   |
| Alexandra Orlovsky                                   |             | U    |              | 49      | \$15,000.00  | \$2,150.00     | 12.24%         | \$263.07     |                        | Remaining balance of severance owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                       |
| Alkermi Alternative Investment Funds Statutory Trust |             | U    |              | 27      | \$774,950.00 | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim is for equity. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                            |
| All Modular Service, Inc.                            |             | U    | \$31,020.63  | 43      | \$31,820.63  | \$31,820.63    | 12.24%         | \$3,853.49   |                        |                                                                                                                                                         |

| Creditor                         | Account No.           | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                                  |
|----------------------------------|-----------------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| All West Communications          | 1701400               | U    | \$405.94     | 77      | \$352.62     | \$352.62       | 12.24%         | \$43.15      |                        |                                                                                                                                                           |
| Allan Schreier                   |                       | U    | \$163.03     |         |              | \$163.03       | 12.24%         | \$19.95      |                        |                                                                                                                                                           |
| Allgood Services, Inc.           | 7033526               | U    | \$70.00      |         |              | \$70.00        | 12.24%         | \$8.57       |                        |                                                                                                                                                           |
| AmCo Structures, Inc.            |                       | U    | \$163,304.49 |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                  |
| American Express                 | 3782-999159-61009     | U    | \$105,748.47 | 29      | \$102,732.45 | \$102,732.45   | 12.24%         | \$12,570.07  |                        |                                                                                                                                                           |
| Ameri-Fab, LLC                   |                       | U    | \$11,681.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                  |
| Arthur J. Gallagher & Co.        | MSPACEH-01            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                     |
| Astro-Chem Lab, Inc.             |                       | U    | \$50.00      |         |              | \$50.00        | 12.24%         | \$6.12       |                        |                                                                                                                                                           |
| AT&T                             | 904 731-9670 944 0563 | U    | \$296.42     |         |              | \$296.42       | 12.24%         | \$36.27      |                        |                                                                                                                                                           |
| AT&T                             | 121787864             | U    | \$127.60     |         |              | \$127.60       | 12.24%         | \$15.61      |                        |                                                                                                                                                           |
| AT&T U-Verse                     | 144957443             | U    | \$250.99     |         |              | \$250.99       | 12.24%         | \$30.71      |                        |                                                                                                                                                           |
| Atex Distributing, Inc.          | 102918                | U    | \$5,386.36   | 2       | \$5,386.36   | \$5,386.36     | 12.24%         | \$659.06     |                        |                                                                                                                                                           |
| Authemets Ornamental Iron Works  | 70062                 | U    | \$3,000.00   | 7       | \$3,000.00   | \$3,000.00     | 12.24%         | \$367.07     |                        |                                                                                                                                                           |
| Auto Property Solutions, LLC     |                       | U    | \$612.88     |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).    |
| Automated Business Products      | MSHD10                | U    | \$2,114.91   |         |              | \$2,114.91     | 12.24%         | \$258.77     |                        |                                                                                                                                                           |
| Bakken Wireless, LLC             |                       | U    | \$3,686.75   |         |              | \$3,686.75     | 12.24%         | \$451.10     |                        |                                                                                                                                                           |
| BBI International Inc.           |                       | U    | \$297.00     |         |              | \$297.00       | 12.24%         | \$36.34      |                        |                                                                                                                                                           |
| Beach Kids Academy               | RO13036               | U    | \$1,380.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                       |
| Belt Construction Corp. of Tampa |                       | U    | \$5,436.50   | 44      | \$4,829.32   | \$4,829.32     | 12.24%         | \$590.90     |                        |                                                                                                                                                           |
| Bennett Truck Transport, LLC     | 93343                 | U    | \$146,170.20 | 31      | \$160,784.00 | \$121,284.15   | 12.24%         | \$14,840.01  |                        | Objection, remaining amount owed resolved per Bison Run settlement, Doc Nos. 367, 368, 417 (Order); amounts unsecured. Objection resolved (Doc. No. 662). |

| Creditor                                 | Account No.  | Type | Sched. Claim | POC No. | POC Amount     | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                               |
|------------------------------------------|--------------|------|--------------|---------|----------------|----------------|----------------|--------------|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| Bennett Truck Transport, LLC             |              | U    | \$6,000.00   |         |                | \$6,000.00     | 12.24%         | \$734.14     |                        | Objection resolved (Doc. No. 662).                                                                                                                     |
| Bison Run Land Holdings, LLC             |              | U    | Unk          | 38      | \$5,228,727.00 | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591). |
| Black Stag Services                      |              | U    | \$1,733.83   |         |                | \$1,733.83     | 12.24%         | \$212.15     |                        |                                                                                                                                                        |
| Bladerunner Services                     |              | U    | \$4,445.00   |         |                | \$4,445.00     | 12.24%         | \$543.88     |                        |                                                                                                                                                        |
| Blanchard's Refrigeration                |              | U    | \$1,787.45   |         |                | \$1,787.45     | 12.24%         | \$218.71     |                        |                                                                                                                                                        |
| Byron Utter Contracting                  |              | U    | \$8,311.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Objection (Doc. No. 566), Order sustaining objection (Doc. No. 626).         |
| C & B Mobile Service Inc/Century Finance |              | U    | \$17,325.00  | 32      | \$17,325.00    | \$17,325.00    | 12.24%         | \$2,119.84   |                        |                                                                                                                                                        |
| CanAm Steel Building Corp                |              | U    | \$1,111.00   |         |                | \$1,111.00     | 12.24%         | \$135.94     |                        |                                                                                                                                                        |
| Carolyn Jay LLC dba Ponderosa RV Camp    |              | U    | \$7,200.00   |         |                | \$7,200.00     | 12.24%         | \$880.97     |                        |                                                                                                                                                        |
| Cassone Leasing, Inc.                    | 3658         | U    | \$3,750.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid as warehousemen lien from sale, Doc. No. 222. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).             |
| Cassone Leasing, Inc.                    |              | U    | \$6,250.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid as warehousemen lien from sale, Doc. No. 222. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).             |
| Century Laundry Distributing             |              | U    | \$89.64      |         |                | \$89.64        | 12.24%         | \$10.97      |                        |                                                                                                                                                        |
| Century Link                             |              | U    | \$146.97     |         |                | \$146.97       | 12.24%         | \$17.98      |                        |                                                                                                                                                        |
| CG 7600LP                                | 435-649-3540 | U    | \$2,500.00   |         |                | \$2,500.00     | 12.24%         | \$305.89     |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition                                      |
| Chad Day                                 |              | U    |              | 61      | \$17,600.00    | \$4,750.00     | 12.24%         | \$581.20     |                        | Remaining balance of severance owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                      |
| Charlene Brewster                        |              |      |              | 47      | \$7,804.63     | \$7,804.63     | 12.24%         | \$954.95     |                        | Joint liability on business credit card                                                                                                                |
| Christopher Orlovsky                     |              |      |              | 56      | \$6,241.10     | \$6,241.10     | 12.24%         | \$763.64     |                        | Joint liability on business credit card                                                                                                                |
| Citrix Systems                           | 6000644308   | U    | \$219.63     |         |                | \$219.63       | 12.24%         | \$26.87      |                        |                                                                                                                                                        |
| City of Douglas                          | 102-19794-04 | U    | \$201.60     |         |                | \$201.60       | 12.24%         | \$24.67      |                        |                                                                                                                                                        |

| Creditor                             | Account No.               | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                 |
|--------------------------------------|---------------------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|--------------------------------------------------------------------------------------------------------------------------|
| Clayton D. Davenport Trucking        |                           | U    | \$4,530.00   |         |              | \$4,530.00     | 12.24%         | \$554.28     |                        |                                                                                                                          |
| Coastal Empire Montessori Comm       | RO00307                   | U    | \$19,560.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).      |
| Colt Kennedy                         |                           | U    | \$453.20     |         |              | \$453.20       | 12.24%         | \$55.45      |                        |                                                                                                                          |
| Commercial Realty & Res.             | 51512                     | U    | \$6,154.00   |         |              | \$6,154.00     | 12.24%         | \$752.99     |                        |                                                                                                                          |
| Conway MacKenzie Management Services |                           | U    | \$104,428.61 |         |              | \$104,428.61   | 12.24%         | \$12,777.61  |                        |                                                                                                                          |
| CoreLogic SafeRent                   | 10584-1D587; 10360; 1D359 | U    | \$685.41     |         |              | \$685.41       | 12.24%         | \$83.86      |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition        |
| Country Media, Inc.                  | 32291                     | U    | \$29.90      |         |              | \$29.90        | 12.24%         | \$3.66       |                        |                                                                                                                          |
| Cox Communications                   | 001 5110 135587201        | U    | \$511.93     |         |              | \$511.93       | 12.24%         | \$62.64      |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition        |
| Cripe Mobile Home Transporters       |                           | U    | \$31,950.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| CT Corporation                       | 6595486                   | U    | \$16,719.69  | 16      | \$18,070.01  | \$18,070.01    | 12.24%         | \$2,211.00   |                        |                                                                                                                          |
| CT Lien Solutions                    | E00338                    | U    | \$810.00     | 20      | \$810.00     | \$810.00       | 12.24%         | \$99.11      |                        |                                                                                                                          |
| Curtis M. Gurley                     |                           | U    | \$13,550.00  |         |              | \$13,550.00    | 12.24%         | \$1,657.94   |                        |                                                                                                                          |
| Customer Magnetism, Inc.             |                           | U    | \$2,085.00   |         |              | \$2,085.00     | 12.24%         | \$255.12     |                        |                                                                                                                          |
| Damon N. & Patricia A. Jones         |                           | U    | \$19,800.00  |         |              | \$19,800.00    | 12.24%         | \$2,422.68   |                        | Schedule recently amended to show amount owed is not secured.                                                            |
| David Lovens                         |                           |      |              | 83      | \$368,720.00 | \$100,000.00   | 12.24%         | \$12,235.74  |                        | Settlement approved by Court (Doc. No. 668).                                                                             |
| David Pernal                         |                           |      |              |         |              | \$12,534.62    | 12.24%         | \$1,533.70   |                        | Remaining balance of PTO owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).              |
| David Smith                          | 1/1/2016                  | U    | \$1,500.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid as warehousemen lien from sale                                                                           |
| Davidson Electric Company Inc.       |                           | U    | \$176,225.00 | 33      | \$116,585.00 | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670). |

| Creditor                                | Account No.           | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                               |
|-----------------------------------------|-----------------------|------|--------------|---------|-------------|----------------|----------------|--------------|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| Dawson Van Orden, Inc.                  |                       | U    | \$56,234.88  |         |             | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670).                               |
| Design Space Modular Buildings          | 08-MSPACE             | U    | \$1,985.96   |         |             | \$1,985.96     | 12.24%         | \$243.00     |                        |                                                                                                                                                        |
| Diversified Services, LLC               |                       | U    | \$31,741.45  |         |             | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                               |
| Drury HVAC Inc. dba Bowman Heating & AC |                       | U    | \$568.90     |         |             | \$568.90       | 12.24%         | \$69.61      |                        |                                                                                                                                                        |
| Eastlake Storage, LLC                   |                       |      | \$15,408.00  | 42      | \$5,136.00  | \$5,136.00     | 12.24%         | \$628.43     |                        | Remaining balance of previously scheduled secured claim. Objection (Doc. No. 544), Order sustaining objection (Doc. No. 627).                          |
| Eddie Lumpkin / Lumpkin                 | 10CAL-500-CU          | U    | \$3,600.00   |         |             | \$3,600.00     | 12.24%         | \$440.49     |                        |                                                                                                                                                        |
| Efax - c/o J2 Cloud Services, Inc.      |                       | U    | \$168.35     |         |             | \$168.35       | 12.24%         | \$20.60      |                        |                                                                                                                                                        |
| Eklipse Resources LLC                   |                       | U    | \$91,500.00  |         |             | \$91,500.00    | 12.24%         | \$11,195.70  |                        |                                                                                                                                                        |
| Elite Modular Services, Inc.            |                       | U    | \$49,500.00  | 17      | \$29,700.00 | \$29,700.00    | 12.24%         | \$3,634.01   |                        | Objection withdrawn.                                                                                                                                   |
| Eversource                              | -4028                 | U    | \$135.03     |         |             | \$135.03       | 12.24%         | \$16.52      |                        |                                                                                                                                                        |
| Ezra Lyon                               |                       | U    |              | 73      | \$20,000.00 | \$5,611.54     | 12.24%         | \$686.61     |                        | Remaining balance of severance owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                      |
| Fab Tec, Inc.                           |                       | U    | \$2,315.60   |         |             | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Federal Express                         | 2818-9746-0           | U    | \$2,579.42   | 21      | \$1,426.09  | \$1,426.09     | 12.24%         | \$174.49     |                        |                                                                                                                                                        |
| Ferrellgas                              | 94941006              | U    | \$3,806.41   | 14      | \$3,120.93  | \$3,120.93     | 12.24%         | \$381.87     |                        |                                                                                                                                                        |
| First String Space, Inc.                |                       | U    | \$94,775.00  |         |             | \$94,775.00    | 12.24%         | \$11,596.42  |                        |                                                                                                                                                        |
| Forsythe Fence Co. LLP                  |                       | U    | \$5,000.00   | 24      | \$5,000.00  | \$5,000.00     | 12.24%         | \$611.79     |                        |                                                                                                                                                        |
| Frontier Communications                 | 360-387-6695-061606-5 | U    | \$335.39     | 76      | \$252.73    | \$252.73       | 12.24%         | \$30.92      |                        |                                                                                                                                                        |
| Gardner's Express Inc.                  |                       | U    | \$11,500.00  |         |             | \$11,500.00    | 12.24%         | \$1,407.11   |                        |                                                                                                                                                        |
| Gardner Manufactured Housing            |                       | U    | \$3,300.00   |         |             | \$3,300.00     | 12.24%         | \$403.78     |                        |                                                                                                                                                        |
| Garver Real Estate Investments          |                       | U    | \$2,500.00   |         |             | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                  |

| Creditor                                  | Account No. | Type | Sched. Claim | POC No. | POC Amount     | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                            |
|-------------------------------------------|-------------|------|--------------|---------|----------------|----------------|----------------|--------------|------------------------|---------------------------------------------------------------------------------------------------------------------|
| Geary Pacific Supply                      |             | U    | \$267.70     |         |                | \$267.70       | 12.24%         | \$32.76      |                        |                                                                                                                     |
| Global Warehouse                          |             | U    | \$4,200.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                               |
| Good Earth Recycling                      |             | U    | \$300.00     | 8       | \$300.00       | \$300.00       | 12.24%         | \$36.71      |                        |                                                                                                                     |
| Grand Rapids Ellington Academy            | RO13027     | U    | \$6,860.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591). |
| Grant Thornton LLP                        | 191691      | U    | \$173,035.43 |         |                | \$0.00         | 12.24%         | \$0.00       |                        | \$55,000 paid for pre-petition claim pursuant to Doc. No. 232; remaining balance waived.                            |
| Growers Farmers Warehouse                 |             | U    | \$0.00       |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                               |
| Guardian Pest Solutions, Inc.             | 38264       | U    | \$6,982.50   |         |                | \$6,982.50     | 12.24%         | \$854.36     |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition   |
| H2 Enterprises LLC                        |             | U    | \$9,108.75   | 22      | \$9,108.75     | \$9,108.75     | 12.24%         | \$1,114.52   |                        |                                                                                                                     |
| Hallettsville Independent School District |             | U    |              | 72      | \$111,887.50   | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 591). |
| Hanover Insurance Company                 |             | U    | Unknown      | 35      | \$1,199,594.78 | \$1,100,000.00 | 12.24%         | \$134,593.09 |                        | Objection (Doc. No. 571). Objection resolved by agreement of parties. Order approving settlement (Doc. No. 669).    |
| Hardee County IDA                         |             | U    | \$2,140.00   |         |                | \$2,140.00     | 12.24%         | \$261.84     |                        |                                                                                                                     |
| Hartwell Realty, Inc.                     |             | U    | \$1,830.09   |         |                | \$1,830.09     | 12.24%         | \$223.92     |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice                          |
| Hedge Trackers                            |             | U    | \$2,400.00   |         |                | \$2,400.00     | 12.24%         | \$293.66     |                        |                                                                                                                     |
| HGAC Houston Galveston Area               | ILV0352     | U    | \$13,219.51  |         |                | \$13,219.51    | 12.24%         | \$1,617.50   |                        |                                                                                                                     |
| High Voltage, Inc.                        |             | U    | \$2,036.88   |         |                | \$2,036.88     | 12.24%         | \$249.23     |                        |                                                                                                                     |
| Hiland Partners                           | HL 14056    | U    | \$2,018.17   |         |                | \$2,018.17     | 12.24%         | \$246.94     |                        | Schedule recently amended to reflect correct amount owed.                                                           |
| Hiland Partners                           | HL 14177    | U    | \$0.00       |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect correct amount owed.                                                           |
| Hiland Partners                           | HL 14022    | U    | \$0.00       |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect correct amount owed.                                                           |
| Hilarie Byrne                             |             | U    | \$800.00     |         |                | \$800.00       | 12.24%         | \$97.89      |                        |                                                                                                                     |

| Creditor                    | Account No.         | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                |
|-----------------------------|---------------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| Hi-Tek Sound & Signal, Inc. |                     | U    | \$217,480.83 | 51      | \$221,899.43 | \$221,899.43   | 12.24%         | \$7,151.03   |                        | Objection withdrawn at hearing held on 5/11/17.                                                                                         |
| Home Depo Credit Service    | 6781                | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| HSBC Bank USA, NA           | 5405 8067 2603 7906 | U    | \$82,062.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Claim satisfied and resolved through Adversary Proceeding No. 2156.                                                                     |
| Invenio                     |                     | U    | \$770.00     | 15      | \$385.00     | \$385.00       | 12.24%         | \$47.11      |                        |                                                                                                                                         |
| Iron Mountain               | U17276              | U    | \$157.97     |         |              | \$157.97       | 12.24%         | \$19.33      |                        |                                                                                                                                         |
| Jeffrey Deuschendorf        |                     |      |              | 68      | \$26,000.00  | \$26,000.00    | 12.24%         | \$3,181.29   |                        | Joint liability on business credit card                                                                                                 |
| Jeffrey Deuschendorf        |                     |      |              | 69      | \$51,500.00  | \$51,500.00    | 12.24%         | \$6,301.40   |                        | Joint liability on business credit card                                                                                                 |
| Jeffrey Deuschendorf        |                     | U    |              |         |              | \$12,524.04    | 12.24%         | \$1,532.41   |                        | Remaining balance of PTO owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                             |
| Jersey Coast Fire Equipment |                     | U    | \$81.32      |         |              | \$81.32        | 12.24%         | \$9.95       |                        |                                                                                                                                         |
| Jive Communications, Inc.   | CN-102373-1402      | U    | \$765.09     |         |              | \$765.09       | 12.24%         | \$93.61      |                        |                                                                                                                                         |
| Jody L. Barrows             |                     | U    | \$2,325.00   |         |              | \$2,325.00     | 12.24%         | \$284.48     |                        |                                                                                                                                         |
| Johnny Haskins              |                     | U    | \$12,500.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid warehousemen lien from sale, Doc. No. 169. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| J-W Admin Company           | RO14035             | U    | \$33,800.00  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                     |
| J-W Admin Company           | HL 13140            | U    | \$2,500.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                     |
| J-W Admin Company           | HL 13137            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| J-W Admin Company           | HL 13105            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| J-W Admin Company           | HL 15104            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| J-W Admin Company           | HL 14144            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| J-W Admin Company           | HL 14136            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |
| J-W Admin Company           | HL 14135            | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                   |

| Creditor                                | Account No.                   | Type | Sched. Claim | PDC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                               |
|-----------------------------------------|-------------------------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| J-W Admin Company                       | HL 14099                      |      | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                  |
| J-W Admin Company                       | HL 14086                      |      | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                  |
| Kieth Huff & Company                    |                               | U    | \$3,360.00   |         |              | \$3,360.00     | 12.24%         | \$411.12     |                        |                                                                                                                                                        |
| KKAT Oilfield Services                  |                               | U    | \$897.82     |         |              | \$897.82       | 12.24%         | \$109.85     |                        |                                                                                                                                                        |
| Komfort Keepers                         | 1514453                       | U    | \$150.00     |         |              | \$150.00       | 12.24%         | \$18.35      |                        |                                                                                                                                                        |
| Lawrence Mobile Home Service            |                               | U    | \$55,805.00  |         |              | \$55,805.00    | 12.24%         | \$6,828.15   |                        |                                                                                                                                                        |
| Lowry Engineering                       |                               | U    | \$6,725.00   |         |              | \$6,725.00     | 12.24%         | \$822.85     |                        |                                                                                                                                                        |
| Loys Mobile Home Repair                 |                               | U    | \$3,000.00   |         |              | \$3,000.00     | 12.24%         | \$367.07     |                        |                                                                                                                                                        |
| Madison Property Management             |                               | U    | \$2,100.00   |         |              | \$2,100.00     | 12.24%         | \$256.95     |                        |                                                                                                                                                        |
| Mars Manufactured Homes, Inc.           |                               | U    | \$6,300.00   |         |              | \$6,300.00     | 12.24%         | \$770.85     |                        |                                                                                                                                                        |
| Marsh & McClennan Agency                |                               | U    | \$22,061.00  |         |              | \$22,061.00    | 12.24%         | \$2,699.33   |                        |                                                                                                                                                        |
| Mass Marketing, Inc.                    | ND0308000140                  | U    | \$385.00     |         |              | \$385.00       | 12.24%         | \$47.11      |                        |                                                                                                                                                        |
| Matheny Motor Truck Company             |                               | U    | \$1,000.00   |         |              | \$1,000.00     | 12.24%         | \$122.36     |                        |                                                                                                                                                        |
| McKenzie Building Center                |                               | U    | \$105,132.65 | 45      | \$105,132.65 | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 539). |
| McKenzie County Water 796-04            | 796-04-00                     | U    | \$135.00     |         |              | \$135.00       | 12.24%         | \$16.52      |                        | Received call from McKenzie County on 7/5/17 - no amounts owed. Not cashing check.                                                                     |
| McKenzie County Water 977-04            | 977-04-00                     | U    | \$1,747.94   |         |              | \$1,747.94     | 12.24%         | \$213.87     |                        | Received call from McKenzie County on 7/5/17 - no amounts owed. Not cashing check.                                                                     |
| Mechanical 360 Air Conditioning         |                               | U    | \$1,818.98   |         |              | \$1,818.98     | 12.24%         | \$222.57     |                        |                                                                                                                                                        |
| Menards Inc. & Capital Commercial       | 6004-3002-0146-5496 (various) | U    | \$190,401.47 |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539). Order sustaining objection (Doc. No. 539). |
| Meridian Pacific, Ltd. and MP Financial |                               | U    | \$0.00       |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                                                  |
| Metro Media / NDoiljobs.com             |                               | U    | \$316.00     |         |              | \$316.00       | 12.24%         | \$38.66      |                        |                                                                                                                                                        |
| Mid-Rivers Communication                | 7707400                       | U    | \$6.08       |         |              | \$6.08         | 12.24%         | \$0.74       |                        |                                                                                                                                                        |
| Miller's Garbage Service                |                               | U    | \$40.00      |         |              | \$40.00        | 12.24%         | \$4.89       |                        |                                                                                                                                                        |



| Creditor                                | Account No. | Type | Sched. Claim | POC No. | POC Amount  | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred        | Comments                                                                                                                                                            |
|-----------------------------------------|-------------|------|--------------|---------|-------------|----------------|----------------|--------------|-------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Modular Dimensions, Inc.                |             | U    | \$3,510.00   |         |             | \$3,510.00     | 12.24%         | \$429.47     |                               |                                                                                                                                                                     |
| Modular Home Builder Association        |             | U    | \$500.00     |         |             | \$500.00       | 12.24%         | \$61.18      |                               |                                                                                                                                                                     |
| Mortenson Electric                      |             | U    | \$300.00     |         |             | \$300.00       | 12.24%         | \$36.71      |                               |                                                                                                                                                                     |
| Nadler Mobile Offices                   |             | U    | \$2,241.28   |         |             | \$2,241.28     | 12.24%         | \$274.24     |                               |                                                                                                                                                                     |
| Neset Land Surveys, Inc.                |             | U    | \$2,590.00   |         |             | \$2,590.00     | 12.24%         | \$316.91     |                               |                                                                                                                                                                     |
| Newalta Environmental Services          | HL 14192    | U    | \$2,100.00   |         |             | \$750.00       | 12.24%         | \$91.77      |                               | Objection, partial security deposit returned and partial setoff by tenant. Objection (Doc. No. 550); Order sustaining Objection (Doc. No. 629).                     |
| NewVision Energy LLC                    |             | U    | \$5,400.00   |         |             | \$0.00         | 12.24%         | \$0.00       |                               | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).              |
| Norden United LLC                       |             | U    | \$74,630.00  | 53      | \$74,630.00 | \$1,200.00     | 12.24%         | \$146.83     |                               | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                 |
| Norris Fallen Humphries                 |             | U    | \$6,475.00   |         |             | \$6,475.00     | 12.24%         | \$792.26     | Yes, Fair Harbor Capital, LLC |                                                                                                                                                                     |
| North Dakota Manufactured               |             | U    | \$165.00     |         |             | \$165.00       | 12.24%         | \$20.19      |                               |                                                                                                                                                                     |
| Northern Tier Oil Transport             |             | U    | \$18,256.25  |         |             | \$18,256.25    | 12.24%         | \$2,233.79   |                               |                                                                                                                                                                     |
| Northwest Building Systems              |             | U    | \$15,000.00  |         |             | \$15,000.00    | 12.24%         | \$1,835.36   |                               |                                                                                                                                                                     |
| Norton Rose Fulbright US LLP            | 75284-4284  | U    | \$5,795.65   |         |             | \$5,795.65     | 12.24%         | \$709.14     |                               |                                                                                                                                                                     |
| Omar Hammond                            |             |      | \$20,769.23  | 65      | \$20,769.23 | \$7,919.23     | 12.24%         | \$968.98     |                               | Objection, claim exceeds Sec. 507 allowance, balance to be treated as unsecured claim. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Onvia                                   | 17882       | U    | \$7,400.00   |         |             | \$7,400.00     | 12.24%         | \$905.44     |                               |                                                                                                                                                                     |
| Oppenheimer & Co., Inc.                 |             | U    | \$55,656.80  |         |             | \$55,656.80    | 12.24%         | \$6,810.02   |                               |                                                                                                                                                                     |
| Orleans Parish School Board             |             | U    | \$442,850.87 |         |             | \$0.00         | 12.24%         | \$0.00       |                               | Claim satisfied through sale of buildings to Orleans Parish School, no amounts owed. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).   |
| Pacific Continental Modular Enterprises |             | U    | \$0.00       |         |             | \$0.00         | 12.24%         | \$0.00       |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Pacific Continental Modular Enterprises |             | U    | \$0.00       |         |             | \$0.00         | 12.24%         | \$0.00       |                               | Schedule recently amended to reflect no amounts owed.                                                                                                               |
| Pac-Van, Inc.                           |             | U    | \$51,338.00  |         |             | \$51,338.00    | 12.24%         | \$6,281.58   |                               |                                                                                                                                                                     |

| Creditor                                | Account No.  | Type | Sched. Claim | POC No. | POC Amount | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                     |
|-----------------------------------------|--------------|------|--------------|---------|------------|----------------|----------------|--------------|------------------------|------------------------------------------------------------------------------------------------------------------------------|
| Pair Networks, Inc.                     | 102593       | U    | \$91.85      |         |            | \$91.85        | 12.24%         | \$11.24      |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition            |
| PD Benson Investment, LLC               |              | U    | \$950.00     |         |            | \$1,425.00     | 12.24%         | \$174.36     |                        | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition            |
| Perfect Installers Cleanup              |              | U    | \$500.00     |         |            | \$500.00       | 12.24%         | \$61.18      |                        |                                                                                                                              |
| Perry Walchshauser                      |              | U    | \$13,673.00  |         |            | \$13,673.00    | 12.24%         | \$1,672.99   |                        |                                                                                                                              |
| PFP Abatement Group, LLC                |              | U    | \$9,762.50   |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670).     |
| Phoenix Modular Acquisition Corp.       |              | U    | \$2,340.00   |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Paid warehousemen lien from sale, Doc. No. 342. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Pitney Bowes - xxxx-1090                | 0293-1090    | U    | \$935.73     |         |            | \$935.73       | 12.24%         | \$114.49     |                        |                                                                                                                              |
| Pitney Bowes Global Financial Services  | 1312422-1A16 | U    | \$402.00     |         |            | \$402.00       | 12.24%         | \$49.19      |                        |                                                                                                                              |
| Planet Shred, LLC                       |              | U    | \$615.25     | 5       | \$615.25   | \$615.25       | 12.24%         | \$75.28      |                        |                                                                                                                              |
| PNC Bank N.A.                           |              | U    | \$236,525.58 |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Will be paid remaining funds                                                                                                 |
| Pot O Gold Rentals, Inc.                | 52291-017    | U    | \$572.94     |         |            | \$572.94       | 12.24%         | \$70.10      |                        |                                                                                                                              |
| Progressive Waste Solutions             |              | U    | \$1,477.79   |         |            | \$1,477.79     | 12.24%         | \$180.82     |                        |                                                                                                                              |
| Questar Gas                             | -5284        | U    | \$961.69     | 1       | \$1,094.40 | \$1,094.40     | 12.24%         | \$133.91     |                        |                                                                                                                              |
| Quick Buildings LLC                     |              | U    | \$4,013.80   |         |            | \$4,013.80     | 12.24%         | \$491.12     |                        |                                                                                                                              |
| Rackspace - 1902351                     | 1902351      | U    | \$13,432.72  | 3       | \$6,716.36 | \$6,716.36     | 12.24%         | \$821.80     |                        |                                                                                                                              |
| RAI Electric, LLC                       |              | U    | \$4,744.18   |         |            | \$4,744.18     | 12.24%         | \$580.49     |                        |                                                                                                                              |
| Randisi & Associates, Inc.              | RAND 141     | U    | \$99.00      |         |            | \$99.00        | 12.24%         | \$12.11      |                        |                                                                                                                              |
| Resurrection Anglican Church            | RO13010      | U    | \$3,000.00   |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).          |
| Richland Co. Valley View Water District |              | U    | \$230.00     |         |            | \$230.00       | 12.24%         | \$28.14      |                        |                                                                                                                              |
| Ridgeview Park, LLC                     |              | U    | \$57,222.77  |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Objection. Tenant offset rent. No amount owed. Objection (Doc. No. 558), Order sustaining objection (Doc. No. 628).          |
| Right Way Plumbing and Heating          | HL 16010     | U    | \$0.00       |         |            | \$0.00         | 12.24%         | \$0.00       |                        | Schedule recently amended to reflect no amounts owed.                                                                        |

| Creditor                        | Account No.    | Type | Sched. Claim | POC No. | POC Amount     | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                                       |
|---------------------------------|----------------|------|--------------|---------|----------------|----------------|----------------|--------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Road 11 Storage, LLC            |                |      |              | 37/74   | \$3,300.00     | \$3,300.00     | 12.24%         | \$403.78     |                        | Schedule recently amended to show amount owed is not secured. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                     |
| Roadmasters Transport Co. LLC   |                | U    | \$25,608.36  |         |                | \$25,608.36    | 12.24%         | \$3,133.37   |                        |                                                                                                                                                                |
| Robert F. McGinley, Sr.         |                | U    | \$1,100.00   |         |                | \$1,100.00     | 12.24%         | \$134.59     |                        |                                                                                                                                                                |
| Robert J. Guenther Construction |                | U    | \$32,056.00  |         |                | \$32,056.00    | 12.24%         | \$3,922.29   |                        |                                                                                                                                                                |
| Robin Hood Finance              |                |      |              | 36      | \$230,000.00   | \$113,000.00   | 12.24%         | \$13,826.38  |                        | Objection (Doc. No. 562), Amended Objection (Doc. No. 634), Settled.                                                                                           |
| Rocky Mountain Power - 002      | 44956484-002 2 | U    | \$839.58     | 12      | \$1,056.10     | \$1,056.10     | 12.24%         | \$129.22     |                        |                                                                                                                                                                |
| Root Construction, Inc.         |                | U    | \$1,145.51   |         |                | \$1,145.51     | 12.24%         | \$140.16     |                        |                                                                                                                                                                |
| Rose Office Systems, Inc.       |                | U    | \$780.00     |         |                | \$780.00       | 12.24%         | \$95.44      |                        |                                                                                                                                                                |
| RR Mobile Home Services         |                | U    | \$25,000.00  |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Paid warehousemen lien from sale, Doc. No. 168. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                   |
| RTC                             | 2266000        | U    | \$146.39     |         |                | \$146.39       | 12.24%         | \$17.91      |                        |                                                                                                                                                                |
| Sand Creek Productions, LLC     |                | U    |              |         |                | \$5,000.00     | 12.24%         | \$611.79     |                        | Schedule recently amended to show amount owed is not secured.                                                                                                  |
| Sidney Herald                   |                | U    | \$195.86     |         |                | \$195.86       | 12.24%         | \$23.96      |                        |                                                                                                                                                                |
| Site Prep                       |                | U    | \$6,000.00   |         |                | \$6,000.00     | 12.24%         | \$734.14     |                        |                                                                                                                                                                |
| Southeast Modular Manufacturing |                | U    | \$111,589.24 |         |                | \$111,589.24   | 12.24%         | \$13,653.76  |                        |                                                                                                                                                                |
| Southern Mobile Installers, LLC |                | U    |              |         |                | \$5,865.00     | 12.24%         | \$717.63     |                        | Schedule recently amended to show amount owed is not secured.                                                                                                  |
| Southland Fire Protection       |                | U    | \$31.00      |         |                | \$31.00        | 12.24%         | \$3.79       |                        |                                                                                                                                                                |
| Specialized Structures, Inc.    |                | U    | \$855,729.22 | 63      | \$1,005,172.72 | \$50,339.68    | 12.24%         | \$6,159.43   |                        | Objection, balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Stahl & DeLaurentis, P.C.       | -555Z          | U    | \$1,605.00   |         |                | \$1,605.00     | 12.24%         | \$196.38     |                        |                                                                                                                                                                |
| Staples Business Advantage      | NYC 1558276    | U    | \$1,792.25   |         |                | \$1,792.25     | 12.24%         | \$219.29     |                        |                                                                                                                                                                |
| Statoil                         | HL 16017       | U    | \$1,000.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                            |
| Statoil                         | HL 16016       | U    | \$1,000.00   |         |                | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                            |

| Creditor                         | Account No. | Type | Sched. Claim | POC No. | POC Amount   | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred | Comments                                                                                                                                                       |
|----------------------------------|-------------|------|--------------|---------|--------------|----------------|----------------|--------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Stearns Bank, N.A.               |             | U    | \$139,088.43 | 28      | \$128,389.32 | \$128,389.32   | 12.24%         | \$15,709.38  |                        | Objection, unsecured claim. Objection (Doc. 528), Order sustaining objection (Doc. No. 590).                                                                   |
| Strategic Value Media            |             | U    | \$990.00     |         |              | \$990.00       | 12.24%         | \$121.13     |                        |                                                                                                                                                                |
| Sunrise Heating & Cooling LLC    |             | U    | \$4,186.00   |         |              | \$511.36       | 12.24%         | \$62.57      |                        | Objection, balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Sunshine Manufactured Structures |             | U    | \$2,250.00   |         |              | \$2,250.00     | 12.24%         | \$275.30     |                        |                                                                                                                                                                |
| Superior Building Supplies LLC   |             | U    | \$19,179.82  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670).                                       |
| SW Williams & Sun Coast          |             | U    | \$2,400.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).         |
| TA Bevin, Inc.                   |             | U    | \$3,950.00   |         |              | \$3,950.00     | 12.24%         | \$483.31     |                        |                                                                                                                                                                |
| Teddy Alan Davis Construction    |             | U    | \$18,913.60  |         |              | \$18,913.60    | 12.24%         | \$2,314.22   |                        |                                                                                                                                                                |
| Tell Manufacturing               | 58211       | U    | \$135.54     |         |              | \$135.54       | 12.24%         | \$16.58      |                        |                                                                                                                                                                |
| Teton Buildings, LLC             | 1559291     | U    | \$40,758.20  |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Paid warehousemen lien from sale, Doc. No. 203. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                                   |
| The Carmel School                | RO15022     | U    | \$8,986.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, liability assumed by Vesta. Omnibus Objection (Doc. No. 539), Order sustaining                                                                      |
| The Dickinson Press              | 264963      | U    | \$658.31     |         |              | \$658.31       | 12.24%         | \$80.55      |                        |                                                                                                                                                                |
| The Hartford                     | 10975427    | U    | \$63.00      | 10      | Unknown      | \$63.00        | 12.24%         | \$7.71       |                        |                                                                                                                                                                |
| Titan Modular Systems, Inc.      |             | U    | \$269,012.00 |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order)                                                                                       |
| TM Poly Film, Inc.               | 2151        | U    | \$1,273.50   | 4       | \$1,273.50   | \$1,273.50     | 12.24%         | \$155.82     |                        |                                                                                                                                                                |
| Tognarelli Heating and Cooling   |             | U    | \$1,580.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670).                                       |
| Top to Bottom Cleaning Service   |             | U    | \$5,950.00   |         |              | \$0.00         | 12.24%         | \$0.00       |                        | Objection, paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No.               |
| Touax Modular Buildings          |             | U    | \$34,299.00  | 52      | \$38,007.00  | \$38,007.00    | 12.24%         | \$4,650.44   |                        |                                                                                                                                                                |

| Creditor                        | Account No.        | Type | Sched. Claim | POC No. | POC Amount | Allowed Amount | Distribution % | Distribution | Claim Sold/Transferred        | Comments                                                                                                                                            |
|---------------------------------|--------------------|------|--------------|---------|------------|----------------|----------------|--------------|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| Township of Wall Bureau of FP   |                    | U    | \$0.00       |         |            | \$0.00         | 12.24%         | \$0.00       |                               | Schedule recently amended to reflect no amounts owed.                                                                                               |
| Turnkey Modular LLC             |                    | U    | \$3,500.00   |         |            | \$0.00         | 12.24%         | \$0.00       |                               | Objection, claim paid by Hanover Insurance. Omnibus Objection (Doc. No. 648), Order sustaining Objection (Doc. No. 670).                            |
| Tyco Integrated Security        | 01300 108922208    | U    | \$146.18     |         |            | \$146.18       | 12.24%         | \$17.89      |                               |                                                                                                                                                     |
| Uncle Bob's Storage             |                    | U    | \$198.36     |         |            | \$198.36       | 12.24%         | \$24.27      |                               |                                                                                                                                                     |
| USA Modular Inc.                |                    | U    | \$13,566.00  |         |            | \$13,566.00    | 12.24%         | \$1,659.90   | Yes, Fair Harbor Capital, LLC |                                                                                                                                                     |
| Vac- Tec Septic & Water LLC     |                    | U    | \$16,240.00  |         |            | \$1,601.50     | 12.24%         | \$195.96     |                               | Balance paid per Bison Run settlement, Doc Nos. 367, 368, 417 (Order). Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591). |
| Verizon                         | 732-919-0626       | U    | \$553.59     |         |            | \$553.59       | 12.24%         | \$67.74      |                               |                                                                                                                                                     |
| Verizon                         | 272435096-00002    | U    | \$196.60     |         |            | \$196.60       | 12.24%         | \$24.06      |                               |                                                                                                                                                     |
| Verizon                         | 272435096-00001    | U    | \$2,984.00   | 18      | \$2,244.44 | \$2,244.44     | 12.24%         | \$274.62     |                               |                                                                                                                                                     |
| Virginia Albanna                |                    | U    | \$906.00     |         |            | \$1,334.00     | 12.24%         | \$163.22     |                               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition                                   |
| Vyve Broadband                  | 951-303322         | U    | \$40.52      |         |            | \$40.52        | 12.24%         | \$4.96       |                               |                                                                                                                                                     |
| Vyve Broadband                  | 950-152416         | U    | \$245.60     |         |            | \$245.60       | 12.24%         | \$30.05      |                               |                                                                                                                                                     |
| WA Dept of Labor & Industries   | 343.750-02         | U    | \$172.15     |         |            | \$172.15       | 12.24%         | \$21.06      |                               |                                                                                                                                                     |
| Wanzek Construction             | HL 13117           | U    | \$19,176.00  |         |            | \$0.00         | 12.24%         | \$0.00       |                               | Objection, withheld rent to satisfy claim. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                             |
| Wanzek Construction-Office Bldg | RO14033            | U    | \$95,000.00  |         |            | \$0.00         | 12.24%         | \$0.00       |                               | Objection, withheld rent to satisfy claim. Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).                             |
| Waste Management                | 791-0132706-1791-6 | U    | \$2,095.55   |         |            | \$2,119.64     | 12.24%         | \$259.35     |                               | Schedule recently amended to reflect amount increased from additional pre-petition invoice received post-petition                                   |
| Water Science, Inc.             |                    | U    | \$156.33     |         |            | \$156.33       | 12.24%         | \$19.13      |                               |                                                                                                                                                     |
| Watford City Chamber            |                    | U    | \$30.00      |         |            | \$30.00        | 12.24%         | \$3.67       |                               |                                                                                                                                                     |
| WesCo Disposal, Inc. dba ABCO   |                    | U    | \$2,640.00   |         |            | \$2,640.00     | 12.24%         | \$323.02     |                               |                                                                                                                                                     |

| Creditor                                    | Account No. | Type | Sched. Claim          | POC No. | POC Amount             | Allowed Amount        | Distribution % | Distribution        | Claim Sold/Transferred | Comments                                                                                                                                                                                     |
|---------------------------------------------|-------------|------|-----------------------|---------|------------------------|-----------------------|----------------|---------------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Westchester Surplus Lines Insurance Company | 1459        |      |                       | 30      | \$4,707.39             | \$4,707.39            | 12.24%         | \$575.98            |                        | Claim duplicative of ACE American Insurance. ACE disallowed in its entirety, and POC 30 allowed in its entirety. <i>Objection (Doc. No. 560), Order sustaining objection (Doc. No. 641).</i> |
| Whitley Evergreen, Inc.                     |             | U    | \$182,040.00          |         |                        | \$182,040.00          | 12.24%         | \$22,273.93         |                        |                                                                                                                                                                                              |
| Whitley Manufacturing Co., Inc.             |             | U    | \$96,099.00           |         |                        | \$0.00                | 12.24%         | \$0.00              |                        | Objection, claim paid by Hanover. <i>Omnibus Objection (Doc. No. 539), Order sustaining objection (Doc. No. 591).</i>                                                                        |
| XYZ Two Way Radio Service                   | 37170       | U    | \$295.11              |         |                        | \$295.11              | 12.24%         | \$36.11             |                        |                                                                                                                                                                                              |
|                                             |             |      | <b>\$3,916,166.62</b> |         | <b>\$10,314,162.50</b> | <b>\$3,677,751.86</b> |                | <b>\$450,000.00</b> |                        |                                                                                                                                                                                              |

M Space Holdings, LLC Exhibit 4 - Unclaimed Funds

| Check Date   | Check # | Description                      | Address                                                           | Amount                 |
|--------------|---------|----------------------------------|-------------------------------------------------------------------|------------------------|
| 6/30/2017    | 54082   | Bakken Wireless, LLC             | PO Box 218, Boyd TX 76023                                         | 451.10                 |
| 6/30/2017    | 54098   | Drury HVAC Inc. dba              | 7523 N Main Street, Jacksonville FL 32208                         | 69.61                  |
| 6/30/2017    | 54123   | McKenzie County Water 796-04     | 201 5th St NW Ste 1456, Watford City, ND 58854                    | 16.52                  |
| 6/30/2017    | 54124   | McKenzie County Water 977-04     | 201 5th St NW Ste 1456, Watford City, ND 58854                    | 213.87                 |
| 6/30/2017    | 54127   | Miller's Garbage Service         | PO Box 117, Savage MT 59262                                       | 4.89                   |
| 6/30/2017    | 54133   | Newalta                          | 1600 Broadway, Suite 1600, Denver CO 80202                        | 91.77                  |
| 6/30/2017    | 54143   | RAI Electric, LLC                | c/o Panther Dev. 6401 Congress Ave, Ste 250, Boca Raton, FL 33487 | 580.49                 |
| 6/30/2017    | 54157   | TA Bevin Inc.                    | PO Box 1055, Clayton ND 58502                                     | 483.31                 |
| 6/30/2017    | 14748   | North Dakota Manufactured        | PO Box 2681, Bismarck ND 58502                                    | 20.19                  |
| 6/30/2017    | 14770   | Sunshine Manufactured Structures | PO Box 1439, Rockwell NC 28138                                    | 275.30                 |
| <b>Total</b> |         |                                  |                                                                   | <b><u>2,207.05</u></b> |







**This order is SIGNED.**

**Dated: June 15, 2017**



**JOEL T. MARKER**  
**U.S. Bankruptcy Judge**



*msc*

*Prepared and submitted by:*

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF UTAH**

In re:

M SPACE HOLDINGS, LLC

Debtor.

Case No. 16-24384

Chapter 11

Hon. Joel T. Marker

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**ORDER GRANTING JOINT MOTION OF THE DEBTOR, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND PNC BANK, NATIONAL ASSOCIATION FOR THE ENTRY OF AN ORDER (A) DISMISSING THE DEBTOR'S CHAPTER 11 CASE AND (B) GRANTING RELATED RELIEF**

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Upon consideration of the *Joint Motion of the Debtor, the Official Committee of Unsecured Creditors and PNC Bank, National Association for the Entry of an Order (a) Dismissing the Debtor's Chapter 11 Case and (B) Granting Related Relief* [Doc. 542, the “**Joint Motion**”]<sup>1</sup>, filed by M Space Holdings, LLC, the debtor-in-possession (the “Debtor”) in the above-entitled case, the Official Committee of Unsecured Creditors (the “**Committee**”) appointed in the Chapter 11 Case, and PNC Bank, N.A. (“**PNC**”) seeking entry of an order, pursuant to sections 105(a), 305(a), or alternatively 1112(b), and 349 of title 11 of the United States Code (the “**Bankruptcy Code**”) and rule 1017(a) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), dismissing the Debtor's Chapter 11 Case and granting related relief; and the Court having jurisdiction to consider the Joint Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Joint Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Joint Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and the Court having considered the Joint Motion, and the arguments of counsel made, the entire record in the case and related proceedings, and the evidence adduced, at the hearing on the Joint Motion; and it appearing that the legal and factual bases set forth in the Joint Motion constitute just cause for the relief granted herein; and it

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meanings used in the Joint Motion.

appearing that the relief requested by the Joint Motion is in the best interests of the Debtor, its estate, its creditors, and other parties in interest; and based on the findings of fact and conclusions of law set forth in the record; and good and sufficient cause appearing therefor, it is hereby,

**ORDERED, ADJUDGED AND DECREED** that:

1. The Joint Motion is GRANTED as set forth herein.
2. All objections to the Joint Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.
3. The Chapter 11 Case shall be dismissed upon a Certification that (a) the Debtor has completed its claims reconciliation process; (b) all U.S. Trustee fees attributable to the Debtor have been paid in full; (c) the Debtor has addressed the disposition of the few assets remaining in the estate (other than the Excluded Asset Reserve), which are subject to the liens and security interests of the Lenders; (d) as part of the Joint Motion, the Debtor gave notice to all parties listed on the creditor matrix in the Chapter 11 Case of its estimated distribution of funds pursuant to the terms of the Settlement Agreement and any objections to the estimated distribution of funds have been withdrawn, waived, settled or overruled; and (e) the Court has entered orders with respect to final fee applications and all allowed amounts have been paid consistent with the terms of the Final Cash Collateral Order and Settlement Agreement.
4. The Certification will attach a summary of distributions to creditors (other than the claims of professionals retained pursuant to sections 327, 328 and 1103 of the Bankruptcy Code which will be paid pursuant to the final fee application process).

5. Final fee applications shall be filed by no later than June 5, 2017, and a hearing on any objections to the final fee applications filed shall be held on June 28, 2017 at 2:00 p.m. (MT).

6. Distributions to creditors will be made by check. Distributions to creditors made by check must be negotiated within forty-five (45) days of the date of issuance. With each distribution, the Debtor shall indicate on the instrument that it must be negotiated within forty-five (45) days of the date of issuance, which shall be the date indicated on the check. With each distribution, the Debtor shall also include a transmittal letter consistent with this paragraph setting forth the forty-five (45) day period and the result if checks are not negotiated within that period. The Debtor shall make distributions by check by mail (a) at the address set forth in the proof of claim filed by each creditor receiving a distribution; (b) at the address set forth in any written notice of address delivered to the Debtor after the date of any related proof of claim; or (c) at the address reflected in the Debtor's schedules, as amended, if no proof of claim is filed and no written notice of address has been received. If a check is not negotiated within thirty (30) days of the date of issuance, or if a check is returned to the Debtor as undeliverable within that time period, the Debtor shall within five (5) days make a commercially reasonable effort to locate the creditor, resend the issued check, and the transmittal letter. After forty-five (45) days of the date of issuance, the Debtor will stop payment on any check not negotiated. The amounts represented by those checks issued to general non-priority unsecured creditors shall be treated as unclaimed dividends and deposited with the Clerk of the Bankruptcy Court, as provided by Fed. R. Bankr. P. 3011. Any distribution to secured or priority unsecured creditors not negotiated within forty-five (45) days shall be paid to PNC.

7. Notwithstanding section 349 of the Bankruptcy Code, all prior orders of this Court entered in the Chapter 11 Case and any adversary proceeding related to the Chapter 11 Case, and all terms of this Order, shall remain in full force and effect and shall survive the dismissal of the Chapter 11 Case.

8. Notwithstanding any applicability of any Bankruptcy Rules, the terms and conditions of the Order shall be immediately effective and enforceable upon its entry, and the Debtor shall be, and hereby is, authorized to make distributions consistent with the terms contained in the Settlement Agreement and take such other actions as are necessary and appropriate to effectuate the terms of this Order.

9. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or relating to the interpretation or implementation of this Order and any other order of the Court entered in the Chapter 11 Case and any adversary proceeding related to the Chapter 11 Case.

**--- END OF ORDER ---**

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

|                                                       |   |                                                       |
|-------------------------------------------------------|---|-------------------------------------------------------|
|                                                       | ) | Chapter 11                                            |
| In re:                                                | ) |                                                       |
|                                                       | ) | Case No. 17-10561 (KG)                                |
| Sunco Liquidation, Inc., <i>et al.</i> , <sup>1</sup> | ) |                                                       |
|                                                       | ) | Jointly Administered                                  |
| Debtors.                                              | ) |                                                       |
|                                                       | ) | <b>Hearing Date: August 16, 2017 @ 2:00 p.m.</b>      |
|                                                       | ) | <b>UST Obj. Deadline: August 4, 2017 at 4:00 p.m.</b> |

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) DISMISSING THE DEBTORS' CHAPTER 11 CASES; (II) ESTABLISHING BAR DATE FOR ADMINISTRATIVE CLAIMS ARISING AFTER MAY 24, 2017; (III) ESTABLISHING PROCEDURES WITH RESPECT TO FINAL FEE APPLICATIONS; (IV) AUTHORIZING DISTRIBUTIONS OF REMAINING ASSETS PURSUANT TO 11 U.S.C. §§ 507(a) AND 726; AND (V) GRANTING RELATED RELIEF (D.I. 592)**

Andrew R. Vara, Acting United States Trustee for Region 3 (“U.S. Trustee”), by and through his counsel, hereby files this Objection to Debtors’ Motion For Entry Of An Order (I) Dismissing The Debtors’ Chapter 11 Cases; (II) Establishing Bar Date For Administrative Claims Arising After May 24, 2017; (III) Establishing Procedures With Respect To Final Fee Applications; (IV) Authorizing Distributions Of Remaining Assets Pursuant To 11 U.S.C. §§ 507(a) And 726; And (V) Granting Related Relief (D.I. 592; the “Motion”). In support of the Objection, the U.S. Trustee states as follow:

## INTRODUCTION<sup>2</sup>

1. The Debtors seek an order approving what has come to be known as a “structured dismissal.” The proposed structured dismissal amounts to “cafeteria style” relief under which

<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sungevity, Inc. (4328), Sungevity SD, LLC (4847), Sungevity Development, LLC (0323), and Sungevity International Holdings LLC (5598). The principal place of business for each of the Debtors is 66 Franklin Street, Suite 310, Oakland, CA 94607.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

the Debtors implement their own “plan” of liquidation. The broad relief sought by the Debtors is not contemplated by the he Bankruptcy Code and ignores important safeguards Congress built into the Chapter 11 plan confirmation process. The dismissal provides impermissible releases and injunctions that on its own are enough to deny the motion. Because the Debtors admit they are unable to propose a confirmable Chapter 11 plan and their estates continue to hold assets requiring administration, these cases should be converted to cases under Chapter 7.

### **BACKGROUND**

#### **I. Liquidation of the Debtors’ Assets**

2. On March 13, 2017, the Debtors each filed for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate and manage their business as debtors-in-possession.

3. On March 22, 2017, the U.S. Trustee appointed a Committee of Unsecured Creditors [D.I. 97].

4. Prior to the Petition Date, the Debtors’ management negotiated the Stalking Horse Purchase Agreement for a sale of substantially all of the Debtors’ assets [Motion at ¶ 10].

5. On the Petition Date, the Debtors filed their Bidding Procedures Motion, which sought approval of the marketing and sale process [D.I. 142].

6. After negotiations with the Debtors, the Committee, the proposed purchaser and the Debtors’ secured lenders, the parties reached a Global Settlement related to the Sale. The Global Settlement included an allocation of \$2.25 million of the purchase price to unencumbered assets (the “Excluded Cash”), as well as the funding of an escrow for the payment of allowed professional fees of the Estate through the Closing Date [Motion at ¶ 12].

7. On April 17, 2017, the Court entered an order approving the Sale [D.I. 280] and

on April 19, the Court entered an order approving the Global Settlement [D.I. 283].

8. The Sale closed on April 25, 2017 [Motion at ¶ 14]. The Debtors have liquidated or abandoned any property remaining in the estate after the Sale [Motion at ¶ 15]. The Debtors' estate currently consists of \$2.25 million Excluded Cash, the proceeds of the liquidation of the miscellaneous remaining property, and any remaining funds held in escrow for professional fees incurred prior to the Closing Date.

## **II. Priority Claims Against the Estate**

9. On March 14, 2017, Andrew Adelman filed an adversary proceeding, on behalf of himself and the Purported Class of terminated employees, alleging that Sunco violated the WARN Act by ordering plant closings and/or mass layoffs beginning on or about March 9, 2017, without providing sixty days' advance notice, among other allegations [Adv. Pro. No. 17-50197].

10. The Debtors and the Plaintiff have reached a settlement, subject to final Court approval, which provides that the claim amount for the Proposed Class will be fixed at \$3,5932,130, entitled to priority pursuant to section 507(a)(4) of the Bankruptcy Code [Motion at ¶ 17].

11. The proposed settlement also provides for the Debtors' transfer to the Proposed Class of certain claims and causes of action against the Debtors' directors and officers [*Id.*]. To the extent that the recovery on these transferred causes of action exceed the Proposed Class's claim, plus fees and expenses in litigating the causes of action, the amount in excess will be distributed to next-in-line priority creditors [D.I. 571, at Exhibit C, p.6].

12. The proposed settlement also provides that "the Debtors shall transfer to Class Counsel on account of the Class Claim Amount the remaining funds in their estates after the payment of . . . (iii) pro rata share distributions to Non-Class Members and Opt-Out Parties who



hold allowed claims under section 507(a)(4) of the Bankruptcy Code (the “Funds”). . . . For purposes of calculating the amount of the pro rata share distributions to be made pursuant to section (6)(c)(iii), pro rata share means the proportion that an allowed claim held by a Non-Class Member or an Opt-Out Party bears to the sum of all allowed claims under section 507(a)(4) of the Bankruptcy Code including the Class Claim Amount, provided however, that there shall not be double-counting for any claims and as set forth in Section 6(a), the Class Claim Amount shall be reduced by the amount of any claim held by an Opt-Out Party.” [*Id.* at Exhibit C, p.4].

### **III. The Motion**

13. The Debtors acknowledge that they, “... cannot confirm a plan of liquidation because the Remaining Assets are insufficient to pay all Priority Claims in full, as required by section 1129(a)(9) of the Bankruptcy Code.” [Motion, at ¶ 31].

14. Rather than convert the cases to cases under Chapter 7, the Debtors seek to dismiss the cases through a two-step process.

15. The dismissal process, however, includes many provisions typically seen in a plan, as well as provisions that would not be permissible even if encompassed in a plan.

16. The initial order includes the following plan-like provisions:

- a. Establishment of professional fee escrow;
- b. Establishment of final professional fee bar date;
- c. Establishment of objection deadline for objections to professional fees;
- d. Payment of professional fee claims;
- e. Distribution of escrowed funds in excess of allowed professional fee claims;
- f. Establishment of escrow for funds to be used to pay fees and expenses relating to dissolution of the Debtors;

- g. Distribution of amounts in escrow in excess of funds needed to pay fees and expenses relating to dissolution of the Debtors;
  - h. Establishing an Administrative Claims bar date;
  - i. Procedures for service of notice of Administrative Claims bar date;
  - j. Establishment of a deadline to object to Administrative Claims;
  - k. Setting a date for a hearing on all objections to Administrative Claims;
  - l. A distribution scheme for all Remaining Assets (including the transfer of causes of action to be pursued by Class Counsel, and the reversionary interest in any amounts recovered in excess of the Class Claim amount);
  - m. The abandonment, destruction or disposal of all of the Debtors Books and Records, including shredding of any documents containing any PII;
  - n. Limiting the service of notice of the Certification of Counsel regarding dismissal.
17. The final dismissal order contains the following plan-like provisions:
- a. Terminating the representation of the Debtors' bankruptcy counsel;
  - b. Dissolving the Committee;
  - c. Abandoning, destroying, or disposing of any remaining records;
  - d. Dismissing the Debtors' officers and directors;
  - e. Authorizing the dissolution of the Debtors, without paying any taxes or fees to cause such dissolution;
  - f. Retention of jurisdiction by the Bankruptcy Court.

18. In addition, the proposed procedures order contains the following provisions, which constitute non-consensual third party releases, exculpations, and injunctions, for which there is no statutory authority in a dismissal order, and which would not be permissible even in a

confirmed Chapter 11 plan:

10. Neither the Debtors, nor the Committee, and none of their respective present or former directors, officers, employees, shareholders, members (including ex officio members), partners, attorneys, consultants, advisors and agents (in each case, acting in such capacities) (collectively, the “Released Parties”), shall have or incur any liability to any person for and are hereby released from any liability for any act taken or omitted to be taken in good faith in connection with or related to the Chapter 11 Cases or the formation, preparation, dissemination, implementation or consummation of the Motion (other than an act in contravention of the Motion or the implementation of this Order) or any contract, instrument, release, agreement or document created or entered into, or any other act taken or omitted to be taken in good faith in connection with the Chapter 11 Cases, the Motion or this Order, except for any claim or cause of action arising from the fraud, gross negligence or willful misconduct of such party (the “Released Claims”).

11. From and after the date of this Order, the Released Parties shall be released and permanently enjoined from any prosecution or attempted prosecution of any of Released Claims.”

### **ARGUMENT**

#### **I. Plan Relief Cannot Be Achieved Through a Dismissal Order.**

19. A fundamental purpose of the bankruptcy laws is to bring about an equitable distribution of the bankrupt’s estate. *Begier v. Internal Revenue Service*, 496 U.S. 53, 58 (1990).

20. The administration of a corporate debtor’s estate is accomplished either through a proceeding commenced under Chapter 7 or Chapter 11 of the Bankruptcy Code. In a Chapter 7 bankruptcy, the company’s pre-petition assets are liquidated and distributed to creditors by a Chapter 7 trustee. 11 U.S.C. § 701 *et seq.*

21. In a Chapter 11 bankruptcy, in contrast, the debtor remains in possession and distributes estate assets through a “plan” that assigns to “classes” the various allowed claims and specifies the treatment each class of claims shall receive. 11 U.S.C. §§ 1122, 1123, 1141.

22. Chapter 11 of the Bankruptcy Code includes many protections for creditors and equity holders. Primary among those protections is the right of creditors and equity holders to

vote for or against the proposed plan, along with the prohibition against soliciting acceptances or rejections of a proposed plan prior to transmitting “a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.” 11 U.S.C. § 1125(b). “Adequate information” is defined as “information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records . . . that would enable . . . a hypothetical investor of the relevant class to make an informed judgement about the plan.”

23. Chapter 11 contains numerous other protections to ensure that the plan is fair. See e.g. 11 U.S.C. §§ 1123 (contents of a plan); 1126 (right to vote on a plan); 1129 (confirmation requirements, including that plan be proposed in good faith and be fair and equitable to any rejecting class).

24. The present Motion has not been served on all creditors, but rather the Debtors served only a notice of the hearing along with instructions on how to obtain a free copy of the motion on most of the creditor body. Even parties who did receive service of the full motion have not received a court-approved disclosure statement containing “adequate information” to enable such party to make an informed decision.

25. Creditors and equity holders do not have the ability to simply vote to make their voices be heard, but must file and prosecute an objection if they do not accept any of the conditions or provisions contained in the order.

26. Yet, the proposed “structured dismissal” provides for the type of relief that is permitted in a plan, but for which there is no statutory authority to include in a dismissal order: (a) an end-of-case distribution scheme of the estates’ assets; (b) the establishment of escrows to protect certain creditors; (c) various releases, exculpations, and injunctions, including non-

consensual third-party releases; (d) abandonment, destruction or disposal of the Debtors' books and records; and (e) dissolution of the Debtors, all without even serving the motion itself on all creditors, without providing adequate information, and without soliciting acceptances or rejections.

27. The Debtors, recognizing the Supreme Court's recent decision in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. \_\_\_, 137 S.Ct. 973 (2017), submit that their end-of-case distribution scheme and related bells and whistles can be approved because the "Initial Order provides for distributions that are strictly compliant with sections 507(a) and 726 of the Bankruptcy Code and expressly prohibits distributions that are not." However, strictly complying with sections 507(a) and 726 does not end the inquiry.

28. First, the Supreme Court's decision did not approve end-of-case distributions through a dismissal order in a Chapter 11 case. Rather, it left unresolved whether structured dismissals that do not violate priority are permissible. *Id.*, at 985 ("We express no view about the legality of structured dismissals in general."). Indeed, the *Jevic* court discussed the type of transfers of estate assets that the Bankruptcy Code expressly permits in connection with a dismissal. It concluded that, other than the reversal of transfers that occurred in the case to "restore all property rights to the position in which they were found at the commencement of the case," "[n]othing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter 11 plan . . . ." *Id.* at 984-85.

29. Second, the dismissal orders that the Debtors seek contain significantly greater relief than merely approving a distribution scheme that comports with the priority required by the Bankruptcy Code. Such relief "circumvents the Bankruptcy Code's procedural safeguards" and

should be denied. *Id.* at 986 (citing with approval cases that denied approval of sales and other transactions that short circuited the requirements of Chapter 11).

30. The Supreme Court recognized that it cannot “alter the balance struck by the statute” even in rare cases. *Jevic*, at 987. The Bankruptcy Code balances the interests of the Debtors to remain in possession and restructure or control its liquidation with the rights of creditors and equity holders by requiring that distributions of estate assets in Chapter 11 be effected pursuant to a confirmed Chapter 11 plan.

31. In the present case, the Debtors seek court approval to wrap-up their estates without the procedural protections afforded to creditors by the Bankruptcy Code and with inclusion of a litany of releases, injunctions and other benefits that stretch beyond the statutory permission of 11 U.S.C. § 349. This type of remedy goes too far in ignoring the distribution scheme embodied in the Bankruptcy Code and the limits imposed by Congress on relief that can accompany case dismissal.

## **II. The Dismissal Order Includes Impermissible Provisions**

### **A. The Debtors Are Not Entitled to a Discharge**

32. There is no provision in the Bankruptcy Code that permits a debtor to obtain a discharge upon dismissal. To the contrary, the Bankruptcy Code provides that the dismissal restores the status quo ante. See 11 U.S.C. § 349.

33. Even if the Debtors in this case were to confirm a plan, they would not be entitled to a discharge. Section 1141(d)(3) of the Bankruptcy Code states:

The confirmation of a plan does not discharge a debtor if-

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan;  
and

(C) the debtor would be denied a discharge under Section 727(a) of this

title if the case were a case under chapter 7 of this title.

34. Section 727(a)(1) provides: “The court shall grant the debtor a discharge, unless the debtor is not an individual...”.

35. Here, the Debtors are not individuals, they have liquidated substantially all of the property of their estates, and they will not engage in any business. Thus, the Debtors would not be entitled to a discharge even if they were otherwise able to confirm a chapter 11 plan of liquidation.

36. The Order Dismissing Chapter 11 Cases includes:

Neither the Debtors . . . shall have or incur any liability to any person for and are hereby released from any liability for any act taken or omitted to be taken in good faith in connection with . . . any contract, instrument, release, agreement or document created or entered into, or any other act taken or omitted to be taken in good faith in connection with the Chapter 11 Cases . . . .

37. This provides the equivalent of a partial discharge to the Debtors on any claim under any contract, instrument, release, agreement or document created in connection with the Chapter 11 Cases. The Debtors would not be entitled to such relief in a Chapter 11 plan, and cannot receive such relief through a dismissal.

**B. The Proposed Order Includes Improper Third Party Releases and Injunctions**

38. The proposed dismissal order includes release and injunction language, purporting to grant releases from third parties to “the Debtors, the Committee, and . . . their respective present or former directors, officers, employees, shareholders, members (including ex officio members), partners, attorneys, consultants, advisors and agents” for various actions relating to the Chapter 11 Cases, the Motion or the orders contemplated by the Motion. None of the Debtors’ creditors or equity holders has consented to these releases. Such releases would not be permissible in the context of a confirmed plan, and should not be granted in the context of a

dismissal. To the extent case law exists allowing the imposition of third party releases, it generally is found in the context of plan confirmation. The court should not countenance Debtors' attempt to gain these advantages through Section 349 and Section 1112(b). The releases and injunctive relief will not serve the best interests of creditors and the estates.

39. In the context of confirmation, some Courts in this District have determined that third party releases of non-debtors should be allowed only if they are consensual. See *In re Washington Mutual, Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia, In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Technologies*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan). Thus, even if there were any legal support for including third party releases in a dismissal order – which there is not – such releases would have to be consented to by the releasing entities.

40. Further, to the extent that there is support for non-consensual releases, such releases must be grounded upon fairness, consideration, and their need to permit the Debtors to reorganize. None of the releases here satisfy any of these requirements.

41. In *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000), the Third Circuit surveyed cases from various circuits as to when, if ever, a non-consensual third party release is permissible. The Court acknowledged that a number of Circuits do not allow such non-consensual releases under any circumstances. See *id.* at 212. Other



Circuits, the Court found, “have adopted a more flexible approach, albeit in the context of extraordinary cases,” such as mass tort cases. See *id.* at 212, citing *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc.* ( *In re Drexel Burnham Lambert Group, Inc.*), 960 F.2d 285, 293 (2d Cir. 1992); *Kane v. Johns-Manville Corp.* ( *In re Johns-Manville Corp.*), 843 F.2d 636, 640, 649 (2d Cir. 1988). See also, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (third party release may be granted “only in rare cases”).

42. The Third Circuit in *Continental Airlines* ultimately determined that the proposed releases in that case, which enjoined shareholder lawsuits against debtors’ directors and officers, did “not pass muster under even the most flexible test for the validity of no-debtor releases.” *Continental*, 203 F.3d at 214. Therefore, the Court determined that it “need not speculate on whether there are circumstances under which we might validate a non-consensual release that is both necessary and given in exchange for fair consideration.” *Id.* at 214, n.11 However, the Court did describe the “hallmarks of permissible non-consensual releases” to be “fairness, necessity to the reorganization, and special factual findings to support these conclusions.” *Id.* at 214.

43. In the present case, no consideration is being provided by any of the Released Parties in exchange for the release, and thus cannot be “fair.” Because the releases are nonconsensual and there is no consideration being provided for them, the release and injunction provisions in the proposed orders are impermissible.

**C. The Exculpation of the Released Parties is Impermissible.**

44. The Debtors may argue that the “release” provisions are in the nature of exculpation, and should be approved. However, the Debtors have not provided any legal authority to support the granting of exculpation in a dismissal order. Exculpation of estate

fiduciaries should be limited to confirmed plans.

45. Further, even if exculpation were permissible in a dismissal order, most of the Released Parties would not be entitled to exculpation even pursuant to a confirmed plan. As stated by the Court in *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011)(Walrath, J.), an “exculpation clause must be limited to the *fiduciaries* who have served during the chapter 11 proceeding: estate professionals, the Committees and their members, and the Debtors’ directors and officers.” *Id.* at 350-51 (emphasis added). The Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011)(Carey, J.), stated agreement with the holding in *Washington Mutual* relating to exculpated parties, and held that the exculpation clause in *Tribune*, “must exclude non-fiduciaries.” *Id.* at 189, quoting *Washington Mutual*, 422 B.R. at 350 -51. *Accord, Indianapolis Downs*, 486 B.R. 286 (Bankr. D. Del. 2013).

46. In *In re PTC Holdings LLC*, 55 Bankr. Ct. Dec 206, 2011 Bankr. LEXIS 4436, \*38 (Bankr. D. Del. Nov. 10, 2011)(Shannon, J.), the Court sustained the U.S. Trustee’s objection to the exculpation clause, stating that such clause “must be reeled in to include only those parties who have acted as estate fiduciaries and their professionals.” *Id.* at \* 38.

47. The Debtors are attempting to provide more relief than they would be entitled to provide in a confirmed chapter 11 plan, through a dismissal order. This is simply impermissible.

**D. The Debtors have not Established “Cause” Under Section 349**

48. The proposed order provides that, notwithstanding section 349 of the Bankruptcy Code, all prior orders, releases, stipulations, settlements, rulings, orders and judgments of the Court made during the course of the case, including any adversary proceeding, will be unaffected by the dismissal.

49. Section 349(b) provides:

Unless the court, for cause, orders otherwise, the dismissal of a case other than under section 742 of this title –

. . .

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550 or 553 of this title . . .

50. The Debtors' motion does not establish "cause" for the court to order otherwise.

Absent an evidentiary record establishing such cause for each order, the Motion should be denied.

### **III. The Two-Step Dismissal Process is Inappropriate**

51. The Debtors' motion seeks a two-step dismissal process, whereby the Court first enter an order authorizing various distributions, bar dates, objection deadlines, and other necessary steps to prepare the case for dismissal, and a second order that actually dismisses the case.

52. To the extent that dismissal is appropriate in this case, it should be ordered only after the Debtors have completed the wind-down of their estate. The Debtors should be required to comply with the Bankruptcy Code, Bankruptcy Rules and Local Rules to conduct the orderly and efficient wind-down of their estates, and seek dismissal at the appropriate time.

### **IV. Dismissal under 11 U.S.C. § 305(a) is not warranted.**

53. The Debtors alternatively move to dismiss their case under Section 305 (a) of the Bankruptcy Code. Section 305(a) of the Bankruptcy Code provides

The court, after notice and a hearing, may dismiss a case under this title, or may suspect all proceedings in a case under this title, at any time if –

(1) The interests of creditors and the debtor would be better served by such dismissal or suspension; . . .

54. The Debtors attempt for relief under this section is not proper. This rather

ordinary chapter 11 situation – an administratively insolvent liquidating chapter 11 – does not justify the use of abstention. Further Debtors cannot ask the court to abstain from jurisdiction under Section 305(a)(1) while at the same time proposing that the court exercise and retain jurisdiction to impose broad releases and exculpation and enforce all prior orders entered in the case.

55. Dismissal under Section 305(a) is an extraordinary remedy. *In re AMC Investors, LLC*, 406 B.R. 478, 487-88 (Bankr. D. Del. 2009). “Granting 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.” *Id.*

56. The Debtors have not met the heightened burden for dismissal under § 305.

WHEREFORE, the United States Trustee requests that this Court deny the Motion or grant such other relief as it deems just.

**Andrew R. Vara,**  
**Acting United States Trustee, Region Three**

Dated: August 4, 2017

**BY:**                      /s/  
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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

SUNCO LIQUIDATION, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 17-10561 (KG)

(Jointly Administered)

**D.I. 592 and 672**

**JOINDER AND LIMITED REPLY OF THE  
OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE  
UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION TO DISMISS**

The Official Committee of Unsecured Creditors (the "Committee") of Sunco Liquidation, Inc. f/k/a Sungevity, Inc. and its affiliated debtors-in-possession (collectively, the "Debtors"), by and through its counsel, Brown Rudnick LLP and Morris James LLP, hereby submits this limited reply (the "Limited Reply") to the United States Trustee's objection to the Debtors' motion to dismiss these cases, dated August 4, 2017 [Docket No. 672] (the "Objection"). By this Limited Reply, the Committee supports the Debtors' motion to dismiss these cases [Docket No. 592] (the "Motion to Dismiss") and joins in the Debtors' reply to the Objection [Docket No. 688], and respectfully states as follows:

**INTRODUCTION**

In its Objection, the United States Trustee argues that the Debtors' proposed structured dismissal in these Chapter 11 bankruptcy cases "goes too far in ignoring the distribution scheme embodied in the Bankruptcy Code and the limits imposed by Congress on relief that can

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<sup>1</sup> The Debtors in the above-captioned Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation, LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

accompany case dismissal." The United States Trustee acknowledges that the Supreme Court in Czyzewski v. Jevic Holding Corp., 580 U.S. \_\_\_, 137 S. Ct. 973 (2017) explicitly declined to rule on the propriety of structured dismissals that comply with the Bankruptcy Code's distribution scheme. Nevertheless, the United States Trustee asserts that the Court should expand the Jevic holding to encompass nearly all Chapter 11 dismissals accompanied by payments to creditors and related end-of-case relief.

The Committee disagrees. The Jevic decision left standing Third Circuit law providing for structured dismissals that comply with the distribution scheme articulated under sections 507(a) and 726 of the Bankruptcy Code. While the United States Trustee complains that the "bells and whistles" contained in the proposed dismissal orders would circumvent procedural safeguards, these "bells and whistles" as contained in the Debtors' recently submitted revised proposed order are standard end-of-case relief that are being combined with dismissal relief to maximize efficiency and, ultimately, distributions to creditors. Dismissing the case consensually after paying out estate funds to priority creditors would thus accomplish "a significant Code-related objective;" in other words and pursuant to Jevic, the Debtors have met their burden to show cause for dismissal in the manner proposed. See 137 S. Ct. at 985.

Moreover, the United States Trustee's position may undermine the incentive professionals have to distribute estate assets to creditors in small and mid-size cases such as these, in which there is no other way to get money "out the door." Thus, the Committee requests that the Court determine that the Debtors have shown sufficient cause for a distribution to creditors via the requested structured dismissal. The Committee respectfully submits that the relief it seeks is necessary and appropriate to ensure efficient case administration and maximum distribution to creditors in these cases.

**REPLY**

**I. Third Circuit Law Permits Structured Dismissals.**

1. Setting aside policy concerns, structured dismissals that comply with the Bankruptcy Code's distribution scheme are permissible in the Third Circuit. See Jevic v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.), 787 F.3d 173, 181-82 (3rd Cir. 2015) (holding that structured dismissals are generally permissible), rev'd on other grounds, 137 S. Ct. at 985; In re Fleurantin, 420 Fed.Appx. 194, 197 (3rd Cir. 2011) (approving structured dismissal); In re Petersburg Regency LLC, 540 B.R. 508, 532-33 (Bankr. D.N.J. 2015) (approving structured dismissal where "no classes are being skipped" and there exists "no possibility of a reorganization or other legitimate bankruptcy purpose").

2. While Code section 349 ordinarily contemplates that dismissal will "reinstate the pre-petition state of affairs by re-vesting property in the debtor and vacating orders and judgments of the bankruptcy court," it permits the bankruptcy court to alter the effect of dismissal "for cause." 11 U.S.C. § 349; In re Jevic, 787 F.3d at 181-82; Fleurantin, 420 Fed.Appx. at 197 (finding cause where structured dismissal was in best interests of creditors and the estate). The Supreme Court has indicated that "cause," and a "significant offsetting bankruptcy-related justification" for structured dismissal may exist where distributions to creditors outside of plan confirmation or conversion to Chapter 7 would "make...disfavored creditors better off" and "protect reliance interests." Jevic, 137 S. Ct. at 985-86 (describing sufficient cause for payments outside bankruptcy distribution scheme and declining to express a view as to "the legality of structured dismissal in general"). Moreover, cause for dismissal exists where a debtor cannot confirm and effectuate a plan of reorganization and dismissal is in the "best interests of creditors and the estate." 11 U.S.C. § 1112(b)(1),(4)(M).

3. In Jevic, the Supreme Court found that there was no cause for a bankruptcy court to dismiss a Chapter 11 case on terms that otherwise violated the Bankruptcy Code distribution scheme. Id. In that case, the "disfavored creditors" were the debtor's former employees, who filed priority claims for benefits due as a result of the debtor's violations of the WARN Act. The structured dismissal struck down by the Supreme Court would have provided nothing to the priority WARN Act claimants while distributing funds to general unsecured creditors via a settlement negotiated without involvement of the WARN Act claimants.

4. The circumstances of this case are similar, except that (1) the WARN Act claimants are being paid in accordance with the priority scheme applicable in Chapters 7 and 11, and (2) the WARN Act Claimants and the Committee took part in all relevant negotiations and fully support the Debtors' dismissal request. In fact, the requested structured dismissal will provide more certainty and value to creditors than any other bankruptcy exit strategy.

5. Accordingly, not only do the facts comport with Third Circuit law left standing in the wake of the Supreme Court's Jevic decision, but "cause" exists of the very sort identified by Congress and the Supreme Court as permissible for distributions to creditors made effective after dismissal. See 11 U.S.C. §§ 349, 1112; 137 S. Ct. at 985-87.

**II. Cause Exists to Grant the Requested Relief  
Because Eliminating Structured Dismissals Would Chill  
Case Administration Efficiency Efforts to the Detriment of Creditors.**

6. Forbidding structured dismissal here would be inconsistent with the concerns the Supreme Court stated should be addressed, namely the potential to (a) cause harm to particular creditor classes such as employees by decreasing their bargaining power and rendering them vulnerable to collusion by other bankruptcy factions, and (b) making settlement more difficult to achieve. See Jevic, 137 S. Ct. at 986-87. The Debtors' cases provide sufficient illustration that



denying the Court flexibility to fashion an expedient bankruptcy exit, as the United States Trustee proposes, would have harmful consequences to creditors and bankruptcy estates. See id. at 986.

7. In the beginning of these cases, the Committee fought hard to add value to a proposed nearly 100% credit bid sale of the Debtors' assets to secured lenders. The Committee succeeded in securing an amount sufficient to leave the Debtors' estates with up to \$1-2 million after payment of administrative expenses through the closing date.

8. The Debtors and their unsecured creditors were well aware that this amount might be insufficient to fund confirmation and effectuation of a plan of reorganization. Likewise, conversion of the case to Chapter 7 would prolong the pendency of the cases and absorb much of the remaining value by virtue of the time and expense necessary for a Chapter 7 Trustee to enter the cases and re-evaluate litigation claims and preferences already assessed by Chapter 11 professionals. Meanwhile, a "traditional," i.e. non-structured dismissal of the cases would not provide a mechanism for any distribution to creditors, potentially inviting a "race to the courthouse" for first crack at the remaining funds.

9. In sum, confirmation, conversion, and non-structured dismissal are not reasonable options for the Debtors' unsecured creditors. If structured dismissal is not an option, it is unclear whether the funds can be made available for distribution. Previously, envisioning an efficient exit and distribution of remaining estate funds, the parties' attorneys recommended against "gilding the lily" and potentially wasting millions investigating and pursuing uncertain litigation claims against directors, officers, and secured lenders. Without the option of an efficient exit, given that the litigation claims represent the only potential source of a meaningful distribution to

their clients from these bankruptcy cases, counsel would have to re-evaluate that recommendation.

10. Likewise, if structured dismissal were not a possibility, it is not certain that unsecured creditors would have been incentivized to fight to create value from the Debtors' sale. It is similarly uncertain whether, knowing of the unsecured creditors' relative impotence, the secured lenders would have been willing to bargain away value they thought was theirs.

11. In Jevic, the Supreme Court pointed to "uncertainty" as the most harmful consequence of structured dismissals by courts overly empowered to fashion exit relief. See id. at 986. As these Chapter 11 cases demonstrate, a *per se* rule against structured dismissal would disempower courts with similar extremity, rendering creditors vulnerable to similar uncertainty and disenfranchisement in virtually any case in which potential estate assets are not sizeable enough to provide a material distribution from confirmation or liquidation.

12. If the option of structured dismissal is not available in this case, the Debtors' creditors will be denied a meaningful distribution, and a large portion of remaining estate funds will be absorbed by professional fees. Moreover, in similar cases in the future, parties will be forced to engage in value-depleting litigation that departs from the protections Congress has granted to creditor classes, restricting the power of the Court to fashion the most necessary and appropriate relief to carry out significant Code-related objectives. In this case, distribution of estate funds through dismissal must be permitted subject to a showing of cause. See 11 U.S.C. §§ 349, 1112; Jevic, 137 S. Ct. at 985-87.

#### **RESERVATION OF RIGHTS**

13. The Committee supports the Motion to Dismiss. The Debtors have shown sufficient cause for entry of a dismissal order that permits certain distributions of estate funds.

The United States Trustee's position that such orders are *per se* impermissible is wrong and denial of the Motion to Dismiss would deprive the Debtors' creditors of value in this case. Accordingly, a determination of this limited issue is required under the circumstances.

14. Additionally, the Committee reserves the right to be heard regarding any issues raised in the Limited Reply as well as any other issues relating to the Motion to Dismiss, including without limitation, the propriety of requested releases, exculpations, and entry of pre-dismissal orders. The Committee fully reserves its rights to brief and argue any issues related to the Motion to Dismiss which are not otherwise addressed in the Limited Reply.

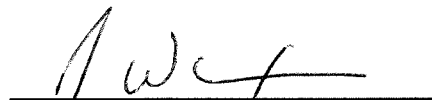
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**CONCLUSION**

15. The Committee respectfully requests that the Court (i) overrule the Objection, (ii) grant the Debtors' Motion to Dismiss, and (iii) grant such other and further relief as is just and proper.

Dated: August 14, 2017  
Wilmington, Delaware

**MORRIS JAMES LLP**



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*Counsel to the Official  
Committee of Unsecured Creditors*

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

In re:

Sunco Liquidation, Inc., *et al.*,

Debtors.

Chapter 11

Case No. 17-10561 (KG)

(Jointly Administered)

**AFFIDAVIT OF JAMIE L. DAWSON, PARALEGAL**

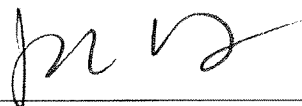
STATE OF DELAWARE :  
: SS:  
NEW CASTLE COUNTY :

I, Jamie L. Dawson, certify that I am, and at all times during the service, have been an employee of Morris James LLP, not less than 18 years of age and not a party to the matter concerning which service was made. I certify further that on August 14, 2017, I caused to be served:

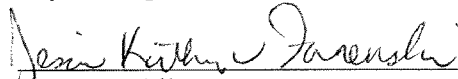
**JOINDER AND LIMITED REPLY OF THE  
OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE  
UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION TO DISMISS**

Service was completed upon the following parties listed below in the manner indicated thereon.

Date: August 14, 2017

  
\_\_\_\_\_  
Jamie L. Dawson

**SWORN AND SUBSCRIBED** before me this 14th day of August, 2017.

  
\_\_\_\_\_  
Notary Public



**VIA HAND DELIVERY**

M. Blake Cleary, Esq.  
Jaime Luton Chapman, Esq.  
Kenneth A. Listwak, Esq.  
Young Conaway Stargatt & Taylor, LLP  
Rodney Square  
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[Counsel for the Debtors and Debtors-in-Possession]

Linda J. Casey  
U.S. Trustee  
Office of the United States Trustee  
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Lockbox 35  
Wilmington, DE 19801  
9662631/1

**VIA FIRST CLASS MAIL**

Jonathan I. Levine, Esq.  
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Melissa A. Hager, Esq.  
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[Counsel for the Debtors and Debtors-in-Possession]

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

SUNCO LIQUIDATION, INC., *et al.*,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. 592, 688, and 689

**ORDER ESTABLISHING (I) CLAIMS BAR DATE WITH RESPECT TO  
ADMINISTRATIVE CLAIMS ARISING AFTER MAY 24, 2017; (II) FILING DATE,  
HEARING DATE, AND OBJECTION DEADLINE WITH RESPECT TO  
PROFESSIONALS' FINAL FEE APPLICATIONS; (III) AUTHORIZING  
DISTRIBUTIONS OF REMAINING ASSETS PURSUANT TO 11 U.S.C. §§ 507(a) AND  
726; AND (IV) GRANTING RELATED RELIEF IN CONNECTION WITH  
DISMISSING THE DEBTORS' CHAPTER 11 CASES**

Upon the motion (the "Motion")<sup>2</sup> of the Debtors for entry of an order, pursuant to sections 105(a), 305, 349, 363(b)(1), 507(a), 554(a) 726 and 1112(b) of title 11 of the United States Code (as amended, the "Bankruptcy Code"), rules 1017, 2002, 3003, and 6007 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules"), and rule 1017-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), dismissing the Chapter 11 Cases and granting related relief; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice is

<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

necessary; and it appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all the proceedings had before the Court; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtors are authorized to establish the Professional Fee Reserve, and all Professionals shall file final fee applications for Professional Fees by October 5, 2017. Any objections to the final fee applications shall be filed, and served on counsel for the Debtors and the Professional submitting the application to which an objection is being filed, by October 19, 2017 at 4:00 p.m. (Eastern Time). The Court will hold a hearing, if necessary, on October 26, 2017 at 11:00 a.m. (Eastern Time), to resolve any disputes related to fee applications.
3. To the extent that there are any unused funds remaining in the Professional Fee Reserve after the Final Fee Applications have been heard and allowed Professional Fees have been paid, the Debtors are authorized to further reserve such funds to be used to pay any fees and expenses that may arise in connection with the Chapter 11 Cases after their dismissal including, among other things, the effectuation and consummation of the dissolution of the Debtors. To the extent that any funds remain in the Professional Fee Reserve after paying such post-dismissal fees and expenses, such funds shall constitute Remaining Assets and shall be distributed in accordance with this Order.
4. The final deadline for filing an Administrative Claim (excluding claims for Professional Fees set forth in paragraph 2 of this Order) arising after May 24, 2017 (a "Final Administrative Claim") against the Debtors is September 18, 2017 at 4:00 p.m. (Eastern Time)



(the "Final Administrative Claims Bar Date"). Notice of the Final Administrative Claims Bar Date will be provided to (a) counsel to the Committee, (b) the U.S. Trustee, (c) all entities that have requested notice pursuant to Bankruptcy Rule 2002, and (d) any party who has previously filed an Administrative Claim in the Chapter 11 Cases by service of a copy of this Order within two (2) business days of its entry.

5. All Final Administrative Claims must be submitted so as to be actually received by Kurtzman Carson Consultants LLC, the Debtors' noticing and claims agent, by the Final Administrative Claims Bar Date via U.S. mail or hand delivery, at:

**Sungevity Claims Processing Center  
2335 Alaska Ave  
El Segundo, CA 90245**

6. The deadline for the Debtors to submit a Claim Objection is September 26, 2017 at 4:00 p.m. (Eastern Time), provided that the Debtors may seek a later deadline for Claim Objections to claims filed by members of the Proposed Class if the proposed settlement of the Class Action [Docket No.571] is not approved on a final basis. A hearing to resolve any such Claim Objections shall take place on October 26, 2017 at 11:00 a.m. (Eastern Time).

7. The Debtors are authorized to distribute the Remaining Assets as follows: first, to pay all U.S. Trustee's fees, to fund the Professional Fee Reserve, and to pay all valid Administrative Claims pursuant to section 503 of the Bankruptcy Code; and second, to the extent that any funds remain, to pay allowed Priority Claims in accordance with the priorities established by sections 507(a) and 726 of the Bankruptcy Code.

8. All distributions of the Remaining Assets must be paid in accordance with the priorities established by sections 507(a) and 726 of the Bankruptcy Code. Distributions of the Remaining Assets that do not comply with the priorities set forth in sections 507(a) and 726 of the Bankruptcy Code are prohibited.

9. The Debtors are authorized, but not directed, to destroy, abandon, or otherwise dispose of the remaining Books and Records in their discretion, and to make all payments necessary to effectuate such destruction; provided that any documents containing personally identifiable information must be shredded.

10. Any party not objecting to the relief requested in the Motion will be deemed to have accepted the distributions to be made pursuant to this Order; provided, however, that nothing in this Order shall be deemed to automatically disallow any timely-filed and allowed Administrative Claim and Professional Fee claims.

11. As soon as reasonably practicable following the completion of the payment of U.S. Trustee's fees, establishment of the Professional Fee Reserve and the payment of allowed Professional Fees from such reserve, payment of all other valid Administrative Claims, and any distributions to holders of Priority Claims (or their designated agent in connection with distributions on account of the Class Claim), the Debtors may file a certification (the "Certification") of counsel requesting entry of the Dismissal Order, substantially in the form attached hereto as Exhibit A. Among other things, the Certification should verify that: (a) all quarterly fees of the U.S. Trustee have been paid in full; (b) the Professional Fee Reserve has been established and the Professional Fees incurred in the Chapter 11 Cases have been approved on a final basis and paid; (c) all other valid Administrative Claims have been paid pursuant to this Order; and (d) to the extent that any Remaining Assets are available, Priority Claims have been paid pursuant to this Order.

12. The Certification and this Order shall be served only on the Notice Parties and no further notice regarding the dismissal of the Chapter 11 Cases shall be required because the

Debtors' entire matrix of creditors and parties in interest have received reasonable notice of the proposed dismissal through notice of the hearing on the Motion.

13. Notwithstanding any provision of this Order to the contrary, the obligation of each Debtor to file a monthly operating report and to pay quarterly fees to the U.S. Trustee shall continue until such Debtor's case is dismissed pursuant to the provisions of this Order.

14. On April 5, 2017, the Court entered its *Final Order (I) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Service, (II) Deeming Utility Companies Adequately Assured of Future Performance, (III) Establishing Procedures for Determining Adequate Assurance of Payment, and (IV) Granting Related Relief* [Docket No. 176] (the "Utilities Order"). Under the Utilities Order, the Debtors were ordered to segregate \$23,000 (the "Adequate Assurance Deposit") in order to provide RingCentral, Inc. ("RingCentral"), a creditor and party-in-interest, with adequate assurance that the Debtors would pay on a timely basis and in accordance with prepetition practice all undisputed invoices for post-petition services provided by RingCentral. The Debtors have confirmed that they continue to hold the Adequate Assurance Deposit in accordance with the Utilities Order. The Debtors further confirmed that they will continue to hold the Adequate Assurance Deposit in accordance with the Utilities Order until further order of the Court or upon the affirmative consent of RingCentral. RingCentral reserves its rights to seek turnover of the Adequate Assurance Deposit or assert an administrative claim for certain post-petition amounts, subject to appropriate documentation; provided, however, that the Debtors expressly reserve all rights to object to any such turnover or administrative claim in accordance with any applicable order entered by the Court; provided further, however, that RingCentral shall comply with any order of the Court that establishes a deadline for the filing of an administrative proof of claim.

15. To the extent applicable, Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective and enforceable immediately upon entry.

16. The Debtors are authorized to take any and all actions necessary to effectuate the relief granted pursuant to this Order.

17. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: August 17, 2017  
Wilmington, Delaware

  
\_\_\_\_\_  
THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT A**

**Dismissal Order**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

SUNCO LIQUIDATION, INC., *et al.*,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. 592 and

**ORDER DISMISSING CHAPTER 11 CASES**

Pursuant to that (i) *Debtors' Motion for Entry of an Order (I) Dismissing the Debtors' Chapter 11 Cases and (II) Granting Related Relief* [D.I. 592] (the "Motion"),<sup>2</sup> filed on July 14, 2017, (ii) Order granting the Motion, entered on \_\_\_\_\_, 2017 [D.I. \_\_\_\_], and (iii) Certification of Counsel and Request for Entry of an Order Dismissing Chapter 11 Cases, filed on \_\_\_\_\_, 2017 [D.I. \_\_\_\_], it is

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Pursuant to section 1112(b) of the Bankruptcy Code, each of the Chapter 11 Cases is dismissed.
3. All objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.
4. Notwithstanding section 349 of the Bankruptcy Code, all prior orders, releases, stipulations, settlements, rulings, orders and judgments of this Court made during the course of

<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

the Chapter 11 Cases including any adversary proceeding, including without limitation, the Class Action, shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

5. Effective immediately, the Debtors' retention of Young Conaway Stargatt & Taylor, LLP and Morrison & Foerster LLP as bankruptcy counsel shall be terminated without the need for further action on the part of this Court, the Debtors, or such firms.

6. Effective immediately, the Committee shall dissolve without need for further action on the part of this Court; provided, however, that obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered during the Chapter 11 Cases shall remain in full force and effect according to their terms.

7. Pursuant to sections 105(a) and 554 of the Bankruptcy Code and Bankruptcy Rule 6007, to the extent not previously authorized, the Debtors are authorized, but not directed, to abandon or destroy, or cause to be abandoned and destroyed, any and all of the Books and Records; provided that any documents containing personally identifiable information must be shredded.

8. Upon dismissal of the Chapter 11 Cases, the Debtors' remaining officers and directors are dismissed from their positions.

9. Upon the dismissal of the Chapter 11 Cases, Kurtzman Carson Consultants LLC ("KCC"), as the Debtors' claims and noticing agent, shall be relieved of its responsibilities as the Debtors' claims and noticing agent in these cases; provided that KCC shall provide the services described in this paragraph and shall be entitled to charge the fees and costs it incurs in providing such services against any prepetition retainer provided to KCC in connection with these cases. In accordance with Local Rule 2002-1(f)(ix), within fourteen (14) days of the dismissal of the

Chapter 11 Cases, KCC shall (a) forward to the Clerk of the Court an electronic version of all imaged claims, (b) upload the creditor mailing list into CM/ECF, (c) docket a combined final claims register containing claims against each Debtor, and (d) box and transport all original claims to the Philadelphia Federal Records Center, 14700 Townsend Road, Philadelphia, Pennsylvania 19154 and docket a completed SF-135 Form indicating the accession and location numbers of the archived claims.

10. As soon as reasonably practicable after the entry of this Order, without the need for further action on the part of this Court and without the need for further corporate action or action of the boards of directors or stockholders of the Debtors, to the extent not previously dissolved, the Debtors shall be dissolved pursuant to applicable state law, and the Debtors shall not be required to pay any taxes or fees to cause such dissolution. Any officer of the Debtors is authorized to execute and file on behalf of the Debtors all documents necessary and proper to effectuate and consummate the dissolution of the Debtors in accordance with the laws of the states in which they are formed.

11. The Debtors are hereby authorized and empowered to take any and all steps necessary and appropriate to effectuate the terms of this Order.

12. To the extent applicable, Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective and enforceable immediately upon entry.



13. Notwithstanding the dismissal of the Chapter 11 Cases, this Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation, interpretation, or enforcement of this or any other Order of this Court entered in the Chapter 11 Cases.

Dated: \_\_\_\_\_, 2017  
Wilmington, Delaware

\_\_\_\_\_  
THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

SUNCO LIQUIDATION, INC., *et al.*,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. 592, 688, 689 & 706

**CERTIFICATION OF COUNSEL AND REQUEST FOR ENTRY OF AN ORDER  
DISMISSING THE CHAPTER 11 CASES**

On July 14, 2017, the debtors and the debtors-in-possession in the above-captioned cases (the “Debtors”) filed the *Debtors’ Motion for Entry of an Order (I) Dismissing the Debtors’ Chapter 11 Cases; (II) Establishing Bar Date for Administrative Claims Arising after May 24, 2017; (III) Establishing Procedures with Respect to Final Fee Applications; (IV) Authorizing Distributions of Remaining Assets Pursuant to 11 U.S.C. §§ 507(a) and 726; and (V) Granting Related Relief* [D.I. 592] (the “Motion”).<sup>2</sup> On August 18, 2017, the Court entered the *Order Establishing (I) Claims Bar Date with Respect to Administrative Claims Arising after May 24, 2017; (II) Filing Date, Hearing Date, and Objection Deadline with Respect to Professionals’ Final Fee Applications; (III) Authorizing Distributions of Remaining Assets Pursuant to 11 U.S.C. §§ 507(a) and 726; and (IV) Granting Related Relief in connection with Dismissing the Debtors’ Chapter 11 Cases* [D.I. 706] (the “Initial Order”).

Pursuant to the Initial Order, the Debtors are permitted to request the entry of proposed order dismissing the Chapter 11 Cases, upon certification of counsel that the following

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<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

requirements have been met: (a) all quarterly fees of the U.S. Trustee have been paid in full; (b) the Professional Fee Reserve has been established; (c) the Professional Fees incurred in the Chapter 11 Cases have been approved on a final basis and paid; (d) all other valid Administrative Claims have been paid pursuant to the Initial Order; and (e) to the extent that any Remaining Assets are available, Priority Claims have been paid pursuant to the Initial Order. Attached hereto as Exhibit A is a revised proposed order dismissing the Chapter 11 Cases (the “Final Dismissal Order”). The revisions to the Final Dismissal Order expand the parties who are authorized to execute and file documents on behalf of the Debtors to effectuate and consummate the dissolution of the Debtors to include the Debtors’ counsel and restructuring advisor. For the convenience of the Court and other parties in interest, a blackline comparing the Final Dismissal Order against the original proposed dismissal order that was attached as an exhibit to the Initial Order is attached hereto as Exhibit B.

In accordance with the Initial Order, the Debtors hereby certify that (a) all quarterly fees of the U.S. Trustee have been paid in full, and (b) the Professional Fee Reserve has been established, and (c) all Professional Fees that were approved pursuant to the (i) *Order Granting the First and Final Fee Application of Greentech Capital Advisors Securities, LLC as Special Renewable Energy Banker to the Debtors from March 13, 2017 through April 27, 2017* [D.I. 588], (ii) *Order Granting the First and Final Fee Application of Ducera Securities LLC as Investment Banker to the Debtors from March 13, 2017 through April 27, 2017* [D.I. 589], and (iii) *Omnibus Order Approving Final Fee Applications* [D.I. 852] have been paid in full.

The Debtors further certify that pursuant to the Initial Order, the Debtors have paid or caused the payment of: (a) all valid Administrative Claims and (b) Priority Claims under

507(a)(4) of the Bankruptcy Code on a pro rata basis to the extent that Remaining Funds were available.

WHEREFORE, the Debtors respectfully request that the Court enter the Final Dismissal Order attached hereto as Exhibit A, at the earliest convenience of the Court without further notice or hearing.

Dated: November 3, 2017  
Wilmington, Delaware

/s/ M. Blake Cleary

M. Blake Cleary (No. 3614)

Jaime Luton Chapman (No. 4936)

Kenneth A. Listwak (No. 6300)

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-and-

Jonathan I. Levine (admitted *pro hac vice*)

Jennifer L. Marines (admitted *pro hac vice*)

Melissa A. Hager (admitted *pro hac vice*)

Erica J. Richards (admitted *pro hac vice*)

**MORRISON & FOERSTER LLP**

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New York, New York 10019

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*Counsel for Debtors and Debtors-in-Possession*

**EXHIBIT A**

**Final Dismissal Order**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

SUNCO LIQUIDATION, INC., *et al.*,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. 592, 688, 689, 706 & \_\_\_\_

**ORDER DISMISSING CHAPTER 11 CASES**

Pursuant to that (i) *Debtors' Motion for Entry of an Order (I) Dismissing the Debtors' Chapter 11 Cases; (II) Establishing Bar Date for Administrative Claims Arising after May 24, 2017; (III) Establishing Procedures with Respect to Final Fee Applications; (IV) Authorizing Distributions of Remaining Assets Pursuant to 11 U.S.C. §§ 507(a) and 726; and (V) Granting Related Relief* [D.I. 592] (the "Motion"),<sup>2</sup> filed on July 14, 2017, (ii) Order granting the Motion, entered on August 18, 2017, 2017 [D.I. 706], and (iii) *Certification of Counsel and Request for Entry of an Order Dismissing Chapter 11 Cases*, filed on November 3, 2017 [D.I. \_\_\_\_], it is

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 1112(b) and 305(a) of the Bankruptcy Code, each of the Chapter 11 Cases are dismissed.
3. All objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.

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<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

4. Notwithstanding section 349 of the Bankruptcy Code, all prior orders, releases, stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases including any adversary proceeding, including without limitation, the Class Action, shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

5. Effective immediately, the Debtors' retention of Young Conaway Stargatt & Taylor, LLP and Morrison & Foerster LLP as bankruptcy counsel shall be terminated without the need for further action on the part of this Court, the Debtors, or such firms.

6. Effective immediately, the Committee shall dissolve without need for further action on the part of this Court; provided, however, that obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered during the Chapter 11 Cases shall remain in full force and effect according to their terms.

7. Pursuant to sections 105(a) and 554 of the Bankruptcy Code and Bankruptcy Rule 6007, to the extent not previously authorized, the Debtors are authorized, but not directed, to abandon or destroy, or cause to be abandoned and destroyed, any and all of the Books and Records; provided that any documents containing personally identifiable information must be shredded.

8. Upon dismissal of the Chapter 11 Cases, the Debtors' remaining officers and directors are dismissed from their positions.

9. Upon the dismissal of the Chapter 11 Cases, Kurtzman Carson Consultants LLC ("KCC"), as the Debtors' claims and noticing agent, shall be relieved of its responsibilities as the Debtors' claims and noticing agent in these cases; provided that KCC shall provide the services described in this paragraph and shall be entitled to charge the fees and costs it incurs in providing

such services against any prepetition retainer provided to KCC in connection with these cases. In accordance with Local Rule 2002-1(f)(ix), within fourteen (14) days of the dismissal of the Chapter 11 Cases, KCC shall (a) forward to the Clerk of the Court an electronic version of all imaged claims, (b) upload the creditor mailing list into CM/ECF, (c) docket a combined final claims register containing claims against each Debtor, and (d) box and transport all original claims to the Philadelphia Federal Records Center, 14700 Townsend Road, Philadelphia, Pennsylvania 19154 and docket a completed SF-135 Form indicating the accession and location numbers of the archived claims.

10. As soon as reasonably practicable after the entry of this Order, without the need for further action on the part of this Court and without the need for further corporate action or action of the boards of directors or stockholders of the Debtors, to the extent not previously dissolved, the Debtors shall be dissolved pursuant to applicable state law, and the Debtors shall not be required to pay any taxes or fees to cause such dissolution. Any officer of the Debtors, partner of Morrison & Foerster LLP, counsel for the Debtors, partner of Young Conaway Stargatt & Taylor, LLP, counsel for Debtors, or managing director of AlixPartners, LLP, restructuring advisor to the Debtors, is authorized to execute and file on behalf of the Debtors all documents necessary and proper to effectuate and consummate the dissolution of the Debtors in accordance with the laws of the states in which they are formed.

11. The Debtors are hereby authorized and empowered to take any and all steps necessary and appropriate to effectuate the terms of this Order.

12. To the extent applicable, Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective and enforceable immediately upon entry.



13. Notwithstanding the dismissal of the Chapter 11 Cases, this Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation, interpretation, or enforcement of this or any other Order of this Court entered in the Chapter 11 Cases.

Dated: \_\_\_\_\_, 2017  
Wilmington, Delaware

\_\_\_\_\_  
THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT B**

**Blackline**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re

SUNCO LIQUIDATION, INC., *et al.*,  
Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. ~~592 and~~ 592, 688, 689, 706 &

**ORDER DISMISSING CHAPTER 11 CASES**

Pursuant to that (i) *Debtors' Motion for Entry of an Order (I) Dismissing the Debtors' Chapter 11 Cases and (H); (II) Establishing Bar Date for Administrative Claims Arising after May 24, 2017; (III) Establishing Procedures with Respect to Final Fee Applications; (IV) Authorizing Distributions of Remaining Assets Pursuant to 11 U.S.C. §§ 507(a) and 726; and (V) Granting Related Relief* [D.I. 592] (the "Motion"),<sup>2</sup> filed on July 14, 2017, (ii) Order granting the Motion, entered on August 18, 2017, 2017 [D.I. 706], and (iii) *Certification of Counsel and Request for Entry of an Order Dismissing Chapter 11 Cases*, filed on November 3, 2017 [D.I. \_\_\_\_], it is

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 1112(b) and 305(a) of the Bankruptcy Code, each of the Chapter 11 Cases are dismissed.

<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.<sup>1</sup>

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

3. All objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.

4. Notwithstanding section 349 of the Bankruptcy Code, all prior orders, releases, stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases including any adversary proceeding, including without limitation, the Class Action, shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

5. Effective immediately, the Debtors' retention of Young Conaway Stargatt & Taylor, LLP and Morrison & Foerster LLP as bankruptcy counsel shall be terminated without the need for further action on the part of this Court, the Debtors, or such firms.

6. Effective immediately, the Committee shall dissolve without need for further action on the part of this Court; provided, however, that obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered during the Chapter 11 Cases shall remain in full force and effect according to their terms.

7. Pursuant to sections 105(a) and 554 of the Bankruptcy Code and Bankruptcy Rule 6007, to the extent not previously authorized, the Debtors are authorized, but not directed, to abandon or destroy, or cause to be abandoned and destroyed, any and all of the Books and Records; provided that any documents containing personally identifiable information must be shredded.

8. Upon dismissal of the Chapter 11 Cases, the Debtors' remaining officers and directors are dismissed from their positions.

9. Upon the dismissal of the Chapter 11 Cases, Kurtzman Carson Consultants LLC (“KCC”), as the Debtors’ claims and noticing agent, shall be relieved of its responsibilities as the Debtors’ claims and noticing agent in these cases; provided that KCC shall provide the services described in this paragraph and shall be entitled to charge the fees and costs it incurs in providing such services against any prepetition retainer provided to KCC in connection with these cases. In accordance with Local Rule 2002-1(f)(ix), within fourteen (14) days of the dismissal of the Chapter 11 Cases, KCC shall (a) forward to the Clerk of the Court an electronic version of all imaged claims, (b) upload the creditor mailing list into CM/ECF, (c) docket a combined final claims register containing claims against each Debtor, and (d) box and transport all original claims to the Philadelphia Federal Records Center, 14700 Townsend Road, Philadelphia, Pennsylvania 19154 and docket a completed SF-135 Form indicating the accession and location numbers of the archived claims.

10. As soon as reasonably practicable after the entry of this Order, without the need for further action on the part of this Court and without the need for further corporate action or action of the boards of directors or stockholders of the Debtors, to the extent not previously dissolved, the Debtors shall be dissolved pursuant to applicable state law, and the Debtors shall not be required to pay any taxes or fees to cause such dissolution. Any officer of the Debtors, partner of Morrison & Foerster LLP, counsel for the Debtors, partner of Young Conaway Stargatt & Taylor, LLP, counsel for Debtors, or managing director of AlixPartners, LLP, restructuring advisor to the Debtors, is authorized to execute and file on behalf of the Debtors all documents necessary and proper to effectuate and consummate the dissolution of the Debtors in accordance with the laws of the states in which they are formed.

11. The Debtors are hereby authorized and empowered to take any and all steps necessary and appropriate to effectuate the terms of this Order.

12. To the extent applicable, Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective and enforceable immediately upon entry.

13. Notwithstanding the dismissal of the Chapter 11 Cases, this Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation, interpretation, or enforcement of this or any other Order of this Court entered in the Chapter 11 Cases.

Dated: \_\_\_\_\_, 2017  
Wilmington, Delaware

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THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

SUNCO LIQUIDATION, INC., *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 17- 10561 (KG)

(Jointly Administered)

Re: Docket Nos. 592, 688, 689, 706 & 854

**ORDER DISMISSING CHAPTER 11 CASES**

Pursuant to that (i) *Debtors' Motion for Entry of an Order (I) Dismissing the Debtors' Chapter 11 Cases; (II) Establishing Bar Date for Administrative Claims Arising after May 24, 2017; (III) Establishing Procedures with Respect to Final Fee Applications; (IV) Authorizing Distributions of Remaining Assets Pursuant to 11 U.S.C. §§ 507(a) and 726; and (V) Granting Related Relief* [D.I. 592] (the "Motion"),<sup>2</sup> filed on July 14, 2017, (ii) Order granting the Motion, entered on August 18, 2017, 2017 [D.I. 706], and (iii) *Certification of Counsel and Request for Entry of an Order Dismissing Chapter 11 Cases*, filed on November 3, 2017 [D.I. 854], it is

**ORDERED, ADJUDGED AND DECREED THAT:**

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 1112(b) and 305(a) of the Bankruptcy Code, each of the Chapter 11 Cases are dismissed.
3. All objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits and denied with prejudice.

<sup>1</sup> The Debtors in the above-captioned chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sunco Liquidation, Inc. (f/k/a Sungevity, Inc.) (4328), SSD Liquidation, LLC (f/k/a Sungevity SD, LLC) (4847), SD Liquidation, LLC (f/k/a Sungevity Development, LLC) (0323), and SIH Liquidation LLC (f/k/a Sungevity International Holdings LLC) (5598). The mailing address for each of the Debtors is 969-G Edgewater Blvd, #324, Foster City, CA 94404.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

4. Notwithstanding section 349 of the Bankruptcy Code, all prior orders, releases, stipulations, settlements, rulings, orders and judgments of this Court made during the course of the Chapter 11 Cases including any adversary proceeding, including without limitation, the Class Action, shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

5. Effective immediately, the Debtors' retention of Young Conaway Stargatt & Taylor, LLP and Morrison & Foerster LLP as bankruptcy counsel shall be terminated without the need for further action on the part of this Court, the Debtors, or such firms.

6. Effective immediately, the Committee shall dissolve without need for further action on the part of this Court; provided, however, that obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered during the Chapter 11 Cases shall remain in full force and effect according to their terms.

7. Pursuant to sections 105(a) and 554 of the Bankruptcy Code and Bankruptcy Rule 6007, to the extent not previously authorized, the Debtors are authorized, but not directed, to abandon or destroy, or cause to be abandoned and destroyed, any and all of the Books and Records; provided that any documents containing personally identifiable information must be shredded.

8. Upon dismissal of the Chapter 11 Cases, the Debtors' remaining officers and directors are dismissed from their positions.

9. Upon the dismissal of the Chapter 11 Cases, Kurtzman Carson Consultants LLC ("KCC"), as the Debtors' claims and noticing agent, shall be relieved of its responsibilities as the Debtors' claims and noticing agent in these cases; provided that KCC shall provide the services described in this paragraph and shall be entitled to charge the fees and costs it incurs in providing



such services against any prepetition retainer provided to KCC in connection with these cases. In accordance with Local Rule 2002-1(f)(ix), within fourteen (14) days of the dismissal of the Chapter 11 Cases, KCC shall (a) forward to the Clerk of the Court an electronic version of all imaged claims, (b) upload the creditor mailing list into CM/ECF, (c) docket a combined final claims register containing claims against each Debtor, and (d) box and transport all original claims to the Philadelphia Federal Records Center, 14700 Townsend Road, Philadelphia, Pennsylvania 19154 and docket a completed SF-135 Form indicating the accession and location numbers of the archived claims.

10. As soon as reasonably practicable after the entry of this Order, without the need for further action on the part of this Court and without the need for further corporate action or action of the boards of directors or stockholders of the Debtors, to the extent not previously dissolved, the Debtors shall be dissolved pursuant to applicable state law, and the Debtors shall not be required to pay any taxes or fees to cause such dissolution. Any officer of the Debtors, partner of Morrison & Foerster LLP, counsel for the Debtors, partner of Young Conaway Stargatt & Taylor, LLP, counsel for Debtors, or managing director of AlixPartners, LLP, restructuring advisor to the Debtors, is authorized to execute and file on behalf of the Debtors all documents necessary and proper to effectuate and consummate the dissolution of the Debtors in accordance with the laws of the states in which they are formed.

11. The Debtors are hereby authorized and empowered to take any and all steps necessary and appropriate to effectuate the terms of this Order.

12. To the extent applicable, Bankruptcy Rules 6004(h) and 6006(d) are waived and this Order shall be effective and enforceable immediately upon entry.

13. Notwithstanding the dismissal of the Chapter 11 Cases, this Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation, interpretation, or enforcement of this or any other Order of this Court entered in the Chapter 11 Cases.

Dated: November<sup>6</sup> 2017  
Wilmington, Delaware

  
\_\_\_\_\_  
THE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY JUDGE

[illegible]

# Presentation by the Clerk of the Bankruptcy Court

## This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

# Annual National Review

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THE 33RD ANNUAL  
BANKRUPTCY YEAR IN REVIEW SEMINAR

ANNUAL NATIONAL REVIEW

March 9, 2018

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PRESENTED BY:<sup>1</sup>

*Jeffrey H. Davidson*

PACHULSKI STANG ZIEHL & JONES LLP

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<sup>1</sup> The views expressed herein are for discussion purposes only and are not necessarily reflective of the position of the author, his firm, or any of its clients. The author wishes to recognize the invaluable assistance in the preparation of these materials of his colleagues at Pachulski Stang Ziehl & Jones LLP.

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## **I. BANKRUPTCY JURISDICTION AND PROCEDURE**

### **A. Post-Confirmation Rule 2004 Examination**

#### ***In re Millennium Lab Holdings II, LLC*, 562 B.R. 614 (Bankr. D. Del. 2016)**

The bankruptcy court held that a postconfirmation trustee's motion for a Bankruptcy Rule 2004 exam "arises in" a case under title 11. Thus, the court had jurisdiction over the request, and it did not need to consider whether the "close nexus" test applicable to postconfirmation proceedings that are "related to" a case under title 11 was satisfied. The court granted the 2004 exam request with respect to a litigation trust holding estate causes of action for the benefit of the debtors' creditors, but denied it for another trust that held creditors' own claims that were assigned to it by the creditors.

The trustee for two litigation trusts appointed pursuant to the debtors' confirmed plan filed a motion pursuant to Rule 2004 for permission to examine the debtors' former accountants and the administrative agent for a prepetition lender group and its lawyers to investigate potential claims against them arising out of a prepetition refinancing. The trustee was acting on behalf of two trusts, one which held the debtors' claims arising from the refinancing (the "Debtor Trust") and one which held claims that were contributed by certain consenting lenders arising from the refinancing (the "Lender Trust").

The targets of the Rule 2004 motion objected, claiming, *inter alia*, that the bankruptcy court lacked subject matter jurisdiction. The objectors argued that the 2004 motion was only "related to" a case under title 11, and that a proceeding "relates to" a bankruptcy case postconfirmation only if "there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." 562 B.R. 614, 622 (quoting *In re Resorts Int'l*, 372 F.3d 154, 166-67 (3d Cir. 2004)). The court disagreed, holding:

The "related to" analysis proposed by the Objectors is unsuitable for a Rule 2004 motion. Multiple courts have held that Rule 2004 is a rule of bankruptcy procedure that does not exist "independent of a bankruptcy environment." Put another way, Rule 2004 "by its nature, and not the particular factual circumstance, could arise only in the context of a bankruptcy case." As such, Rule 2004 "arises in" title 11 of the Bankruptcy Code, and the Court has subject matter jurisdiction to adjudicate this dispute.

*Id.* at 622 (quoting *In re Refco*, 2006 WL 1379616, at \*2 (S.D.N.Y. May 16, 2006), and *In re New Century TRS Holdings*, 505 B.R. 431, 442 (Bankr. D. Del. 2014)). The fact that this Rule 2004 motion was filed postconfirmation did not alter the court's conclusion. Once the bankruptcy court determines that it has "arising in" jurisdiction over a matter, the analysis is complete. The court is not required to address the "close nexus" test because the test is not applicable in an "arising in" proceeding. The court

also rejected the objectors' contention that the court is required to look at the potential causes of action that the trustee might bring against the targets to determine its jurisdiction in the context of a 2004 motion.

Finally, the objectors argued that the court lacked subject-matter jurisdiction because the plan did not contain language reserving jurisdiction. Again, the court held that this requirement is not applicable in the context of "arising in" jurisdiction. The court explained:

In the context of post-confirmation "related to" jurisdiction, courts have held that a plan needs to contain a specific retention of jurisdiction provision because such language helps ensure that "bankruptcy court jurisdiction would not raise the specter of 'unending jurisdiction'" post-confirmation. But, when the court's jurisdiction "arises in" title 11, the cause of action has an "intimate connection to the bankruptcy proceedings" and therefore there is less of a risk of "unending jurisdiction."

*Id.* at 625 (quoting *In re BWI Liquidating Corp.*, 437 B.R. 160, 165 (Bankr. D. Del 2010), and *In re Seven Fields Dev. Corp.*, 505 F.3d 237, 265 n.26 (3d Cir. 2007); citations omitted).

Having dealt with all of the objections to the court's jurisdiction, the court concluded that it had subject matter jurisdiction over the Rule 2004 motion. Finally, with respect to the scope of the 2004 requests, the court held that the trustee's request on behalf of the Debtor Trust was proper, but the request on behalf of the Lenders Trust was not. As the court explained,

In this case, the Trustee is entitled to Rule 2004 examinations on behalf of the [Debtor] Trust, as such an examination is a "legitimate post-confirmation inquiry" to ascertain potential causes of action, which success would benefit the Debtors' creditor body. Any request for information regarding potential causes of action belonging to the Lenders' Trust, however, is denied, as Rule 2004 was not intended to provide private litigants [i.e. the Consenting Lenders] with "a strategic advantage in fishing for potential private litigation." The fact that the Lender Trust was created by the Plan does not infuse the Lender Trust with bankruptcy tools that would not otherwise be available to third party creditors pursuing claims against non-debtor entities.

*Id.* at 629 (quoting *In re Good Hope Refineries*, 9 B.R. 421, 423 (Bankr. D. Mass 1981); citations omitted).

## II. APPEALS

### A. Final Order Requirement

***Gugliuzza v. Federal Trade Commission (In re Gugliuzza)*, 852 F.3d 884 (9th Cir. 2017)**

The Ninth Circuit held that it lacked jurisdiction to review the district court's order, which reversed in part a bankruptcy court's grant of summary judgment against a debtor and remanded for further fact-finding in an adversary proceeding brought by the Federal Trade Commission. The court declared that *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015), effectively overruled a line of Ninth Circuit cases that recognized broader appellate jurisdiction under 28 U.S.C. § 158(d)(1).

The FTC successfully brought an enforcement action against the debtor, proving that he was liable for his company's deceptive acts. The debtor then filed a chapter 7 petition, and the FTC sought a determination that a restitution debt arising from the FTC enforcement action was nondischargeable under Bankruptcy Code section 523(a)(2)(A) (debt arising from false pretenses, a false representation, or actual fraud). The bankruptcy court granted summary judgment for the FTC, holding that the judgment in the enforcement action foreclosed the debtor from relitigating the five elements necessary to establish that the debt was obtained by false premises. On appeal, the district court held that the bankruptcy court correctly concluded that the debtor was collaterally estopped from relitigating four of the five elements necessary under section 523(a)(2)(A), but had erred in holding that the debtor was collaterally estopped from relitigating the issue of his intent to deceive consumers. The district court affirmed in part, reversed in part, and remanded the case to the bankruptcy court for further fact-finding on the issue of the debtor's intent to deceive. The debtor timely appealed to the Ninth Circuit.

The Ninth Circuit dismissed the appeal, holding that it lacked jurisdiction under any of the three relevant jurisdiction-conferring provisions, 28 U.S.C. §§ 1291, 1292, and 158(d)(1). There was no jurisdiction under 28 U.S.C. § 1291, because that section applies only to "appeals from all final decisions of the district courts." The district court's opinion was interlocutory because of its remand order. The Ninth Circuit also lacked jurisdiction under 28 U.S.C. § 1292, because the district court did not certify its decision for interlocutory review. Finally, the court lacked jurisdiction under 28 U.S.C. § 158(d)(1), which gives courts of appeals jurisdiction of appeals from final bankruptcy decisions, judgments, orders, and decrees of district courts and bankruptcy appellate panels.

The Ninth Circuit considered *Bullard*, in which the Supreme Court had held that an order denying confirmation of a plan was not a final order under section 158(d)(1), except when it was accompanied by a dismissal of the bankruptcy case. The Supreme Court had stated that a final order is one that "alters the status quo and fixes the rights and obligations of the parties" or "alters the legal relationships among the parties" (such as would be the case with either confirmation of a plan or dismissal of a case). The

Supreme Court had acknowledged that the “rules are different in bankruptcy” than in ordinary civil litigation, in that there may be multiple final orders during a single bankruptcy case but clarified that this difference arises because a bankruptcy case involves an aggregation of individual controversies, many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor. According to the Ninth Circuit, the Supreme Court’s interpretation of finality in bankruptcy cases in *Bullard* determines the scope of the district court and BAP’s authority to hear appeals “from final judgments, orders, and decrees” under section 158(a)(1), as well as the circuit court’s authority to hear “appeals from all final decisions, judgments, orders, and decrees” of bankruptcy judges entered by the district court and BAP under section 158(d)(1), which are governed by the same constraints.

Consistent with *Bullard*’s ruling that section 158 provides jurisdiction over orders in bankruptcy cases that alter “the legal relationships among the parties,” the Ninth Circuit looks to whether the bankruptcy court’s decision: (1) resolves and seriously affects substantive rights, and (2) finally determines the discrete issue to which it is addressed in determining whether a particular bankruptcy court order is final. When the district court (or BAP) affirms or reverses such a decision, the Ninth Circuit considers it to be final and immediately appealable. By contrast, when an appeal is taken from a district court or BAP ruling that remands the case for further proceedings in the bankruptcy court, the Ninth Circuit applies a four-factor test, considering (1) the need to avoid piecemeal litigation, (2) judicial efficiency, (3) the systemic interest in preserving the bankruptcy court’s role as the finder of fact, and (4) whether delaying review would cause either party irreparable harm. See *Sahagun v. Landmark Fence Co. (In re Landmark Fence Co.)*, 801 F.3d 1099 (9th Cir. 2015). “When an intermediate appellate court remands a case to the bankruptcy court, the appellate process likely will be much shorter if we decline jurisdiction and await ultimate review of all the combined issues.” *Id.* at 1103.

The Ninth Circuit rejected the debtor’s argument that in evaluating whether the district court’s order qualifies as a final order, the court was not bound by *Bullard* and *Landmark Fence*, but should apply a different line of cases beginning with *Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993). In *Bonner Mall*, the Ninth Circuit held that it had jurisdiction “even though a district court has remanded a matter for factual findings on a central issue if that issue is legal in nature and its resolution either 1) could dispose of the case or proceeding and obviate the need for fact finding; or 2) would materially aid the bankruptcy court in reaching its disposition on remand.” *Id.* at 904. Applying this rule to the dispute in *Bonner Mall*—whether the “new value principle” survived enactment of the 1978 Bankruptcy Code—the Ninth Circuit determined that “[t]he central question is a legal one that is clearly potentially dispositive.” *Id.* Accordingly, the court held that the first prong of the new test applied and asserted jurisdiction over the appeal. See also *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1144 (9th Cir. 2004) (applying “materially aid” prong). The court went even further in *Price v. Lehtinen (In re Lehtinen)*, indicating that it may assert jurisdiction over an appeal of an interlocutory BAP order whenever “the appeal concerns primarily a question of law.” 564 F.3d 1052, 1057 (9th Cir. 2009).

The court held that *Bullard* and *Landmark Fence* clearly limit the applicability of the *Bonner Mall* line of cases. *Bullard* provides that orders that are technically interlocutory are “final” for purposes of section 158 only when they “finally dispose of [a] discrete dispute[] within the larger case.” 135 S. Ct. at 1692. A decision that remands a case for further fact-finding will rarely have this degree of finality, unless the remand order is limited to ministerial tasks. Further, *Bullard* expressly rejected the argument that a decision should be deemed final because it presented a pure question of law that was important to the parties, reasoning that there are several mechanisms for interlocutory review to address such cases. Accordingly, to the extent *Bonner Mall* and *Lehtinen* hold that the Ninth Circuit has jurisdiction over an interlocutory order in a bankruptcy case because ruling on a legal issue could “dispose of the case” or “aid the bankruptcy court in reaching its disposition,” or merely because the appeal involves “a purely legal question,” they are inconsistent with *Bullard* and therefore no longer binding.

***BCL-Sheffield LLC v. Gemini Int’l Inc. (In re Tolomeo)*, 832 F.3d 815 (7th Cir. 2016)**

The Seventh Circuit held that a turnover action is a core matter, even if it is brought to enforce a judgment in what had been treated as noncore litigation. As a consequence, the defendants were required to appeal the bankruptcy court’s turnover order, rather than wait for the district court to enter its own judgment on the turnover.

Creditors filed an adversary proceeding against the debtor’s wife and businesses controlled by the debtor. The suit alleged that certain assets held by those defendants actually belonged to the debtor’s chapter 7 estate under an alter-ego theory and should be turned over to the trustee under Bankruptcy Code section 542(a). Pursuant to 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033, the bankruptcy court recommended to the district court that judgment on the pleadings be entered in the creditors’ favor. The district court accepted the recommendation and entered judgment that the assets were property of the estate. The district court remanded the case for the bankruptcy court to implement its ruling, which the bankruptcy court did by ordering turnover.

The defendants failed to file a timely appeal of the bankruptcy court’s turnover order under Bankruptcy Rule 8002, but instead attempted to appeal to the Seventh Circuit the district court’s order remanding the case to the bankruptcy court to implement the turnover. Defendants argued that the bankruptcy court lacked authority to enter a final order on the turnover action under 28 U.S.C. § 157(c)(1), and thus only the district court could enter the final turnover order.

In a short decision, the Seventh Circuit (Judge Posner writing) dismissed the defendants’ appeal. Section 157(c)(1) provides that while a bankruptcy court can hear noncore matters “related to” a case under chapter 11, absent consent of the parties it may only submit recommendations to the district court, which then must decide whether to enter a binding order. That section, however, was not applicable to the matter at hand because it only applies to noncore matters. The turnover action was a core proceeding. Thus, although the adversary proceeding was noncore in declaring that the property belonged to the estate, the court held that the turnover order (entered *after* the noncore

question of alter ego was decided by the district court) was a core proceeding, allowing the bankruptcy judge to enter a final order, which the defendants had failed to challenge in a timely appeal.

#### **B. Constitutional Mootness**

##### ***Rich Dad Operating Co. v. Zubrod (In re Rich Global LLC)*, 652 F. App'x 625 (10th Cir. 2016)**

The Tenth Circuit (1) held that an appeal of a bankruptcy court's order approving a settlement under Federal Rule of Bankruptcy Procedure 9019 was not constitutionally, equitably, or statutorily moot, and (2) affirmed the order approving the settlement. The court rejected the argument that the bankruptcy court erred by not applying the requirements of Bankruptcy Code section 363(b) to the settlement, and held that the bankruptcy court did not abuse its discretion in approving the settlement under Rule 9019.

Rich Global LLC suffered a judgment in a lawsuit brought against it by Learning Annex. Both Rich Global and Learning Annex appealed. In lieu of posting an appeal bond, however, Rich Global filed a chapter 7 petition in the District of Wyoming, and a trustee was appointed. Only two creditors filed proofs of claim: (a) Learning Annex, in the amount of its judgment against the debtor, and (b) Rich Dad Operating Company, LLC ("RDOC"), the sole member and manager of the debtor.

RDOC offered to indemnify the estate for the costs of pursuing the appeal. But, ultimately, the chapter 7 trustee and Learning Annex entered into a settlement agreement. Under the settlement, Learning Annex would pay Rich Global \$100,000 cash and receive an allowed claim for approximately \$23.7 million in the bankruptcy case. The bankruptcy court approved the settlement over RDOC's objection. The district court affirmed, and RDOC appealed to the Tenth Circuit. By this time, Learning Annex had paid the \$100,000, and the debtor and Learning Annex had dismissed their respective appeals in the underlying litigation.

The Tenth Circuit held that the appeal was not moot. The court noted that "constitutional mootness" is implicated when "'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" 652 F. App'x 625, 627-28 (quoting *Already LLC v. Nike*, 133 S. Ct. 721, 726 (2013)). The court then held that the \$100,000 payment, which Learning Annex had already made, could be returned. It acknowledged, however, that the settlement could not be unwound, because the appeal in the underlying litigation could not be resurrected. Nonetheless, the court held that the appeal was not moot because partial relief could be granted—the funds could be returned, and RDOC would be able to challenge Learning Annex's claim in the bankruptcy in ways it could not if the settlement agreement were not overturned.

The Tenth Circuit declined to determine whether the appeal was "equitably moot" or whether equitable mootness could even apply in a chapter 7 case, because the parties did not raise the argument. The court also held that the appeal was not statutorily



moot under Bankruptcy Code section 363(m) because that section requires a determination of “good faith” on the part of Learning Annex, and there was no such determination in the record.

As to the merits, the Tenth Circuit rejected RDOC’s argument that the bankruptcy erred by approving the settlement under Rule 9019 without applying Bankruptcy Code section 363(b). The court noted that the majority rule is that a settlement of estate claims can also qualify as a sale of property under Bankruptcy Code section 363, but held that the decision whether to apply section 363’s requirements is discretionary and “context-dependent.” Here, the estate claims that were settled here were “defensive appellate arguments,” no other person or entity offered to settle for more, RDOC only offered to indemnify the debtor for the cost of pursuing the appeal, and the parties already had demonstrated the futility of an auction. Thus, the bankruptcy court’s failure to consider the requirements of Bankruptcy Code section 363 was within its discretion.

The Tenth Circuit also held that the bankruptcy court did not abuse its discretion in approving the settlement under Bankruptcy Rule 9019. The court rejected the argument that the bankruptcy court could not approve the settlement in light of RDOC’s indemnity offer. The Tenth Circuit also held that the bankruptcy court was properly concerned about the potential for (1) further appeals or extended litigation and (2) RDOC’s indemnity offer putting the trustee in a difficult position of working for one creditor against another.

Finally, the Tenth Circuit summarily rejected RDOC’s argument that the bankruptcy court’s order did not sufficiently state findings of fact and conclusions of law separately under Bankruptcy Rule 7052.

### **III. VOLUNTARY AND INVOLUNTARY PETITIONS**

#### **A. “Bankruptcy Remote” Debtors**

##### ***In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016)**

The Delaware bankruptcy court declared void, as against public policy, a provision in the operating agreement of a limited liability company that both required the consent of the lender/minority member for the debtor’s filing of any bankruptcy petition, and eliminated all fiduciary duties that member otherwise would have had.

The LLC debtor entered into a prepetition forbearance agreement with its lender that, among other things, provided for the lender to become a member of the LLC (with one common unit) and amended the LLC operating agreement to require that each holder of common units must consent before the debtor would be deemed authorized to file any bankruptcy petition. The lender made a \$1 capital contribution in exchange for its common unit. Another entity, the majority owner, held the remaining 22,000,000 common units.

After the debtor nevertheless filed a bankruptcy petition at the direction of the majority owner (and without the consent of the lender/member), the lender filed a motion to dismiss the case on the ground that the filing was unauthorized.

The lender argued that Delaware law permits an LLC to abrogate fiduciary duties in its operating agreement and that the majority owner could contract away its right to cause the LLC to file for bankruptcy without the lender/minority member's consent.

However, the court found it unnecessary to address the state law issues because it held that federal bankruptcy law "pre-empts the private right to contract around its essential provisions":

The federal public policy to be guarded here is to assure access to the right of a person, including a business entity, to seek federal bankruptcy relief as authorized by the Constitution and enacted by Congress. It is beyond cavil that a state cannot deny to an individual such a right. I agree with those courts that hold the same applies to a "corporate" or business entity, in this case an LLC.

553 B.R. at 265.

In denying the motion to dismiss, the court concluded that "[a] provision in a limited liability company governance document obtained by contract, the sole purpose and effect of which is to place into the hands of a single, minority equity holder the ultimate authority to eviscerate the right of that entity to seek federal bankruptcy relief, and the nature and substance of whose primary relationship with the debtor is that of creditor—not equity holder—and which owes no duty to anyone but itself in connection with an LLC's decision to seek federal bankruptcy relief, is tantamount to an absolute waiver of that right, and, even if arguably permitted by state law, is void as contrary to federal public policy." *Id.*

***Accord, In re Jeff Benfield Nursery, Inc.*, 2017 WL 358591 (Bankr. W.D.N.C. Jan. 24, 2017)** ("[T]his Court concludes that [prepetition waivers of the automatic stay], which effectively render the automatic stay meaningless, are unenforceable as a matter of public policy. Upholding pre-petition waivers of this sort deprives debtors of the 'breathing spell' contemplated by the Bankruptcy Code and thwarts the congressional intent underlying imposition of the automatic stay. . . . [T]he Court reiterates that it deems such waivers per se unenforceable . . ."). *Id.* at \*4, \*5.

#### IV. SALES AND CASH COLLATERAL

##### A. Credit Bidding

*In re Aéropostale, Inc.*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016)

After declining to equitably subordinate the claims of the secured lenders, the New York bankruptcy court refused to deny lenders the right to credit bid in connection with an asset sale merely because the lenders' right to credit bid might tend to chill the bidding by other potential buyers.

The debtors in possession had filed a motion seeking (i) to equitably subordinate the lenders' secured claims under Bankruptcy Code section 510(c) on the grounds that the lenders had allegedly engaged in inequitable conduct, (ii) to disqualify the lenders from credit bidding under section 363(k), and (iii) to recharacterize the lenders' claims as equity. After an extensive trial, the court found that the facts did not support the allegations of inequitable conduct or provide a basis for recharacterization of the debt.

In considering the credit bidding issue, the court summarized the applicable standard for denying the right to credit bid a secured claim:

But the right to credit bid is not absolute. Specifically, Section 363(k) of the Bankruptcy Code provides that a party may credit bid "unless the court for cause orders otherwise . . . ." 11 U.S.C. § 363(k). The term "cause" is not defined by the Bankruptcy Code, and it is left to the court to determine whether cause exists on a case-by-case basis. . . . [C]ause is "intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis." . . . "Section 363 gives courts the discretion to decide what constitutes" and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis."

555 B.R. at 514-15 (citations omitted; quoting *In re River Road Hotel Partners*, 2010 WL 6634603, at \*1 (Bankr. N.D. Ill. 2010)).

The decision of whether to deny credit bidding based on cause is within the discretion of the court. But this "discretion does not give the bankruptcy court the authority to act arbitrarily or to be freewheeling. In other words, the standard is not standardless." "Intrinsically, acting 'for cause' looks to the court's equity powers that allow the court to balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors." . . . But "whatever equitable powers remain in the bankruptcy courts must and can only

be exercised within the confines of the Bankruptcy Code.” . . . The “modification or denial of credit bid rights should be the extraordinary exception and not the norm.”

*Id.* at 515 (quoting *In re RML Dev.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014)).

Courts will deny a secured creditor’s right to credit bid due to inequitable conduct. These cases often feature conduct that also directly impacts the estate or the bidding process. For instance, in the case of *In re Aloha Airlines, Inc.*, 2009 Bankr. LEXIS 4588, 2009 WL 1371950 (Bankr. D. Haw. May 14, 2009), a secured creditor was denied the right to credit bid because of its undisclosed sponsorship of a third party’s acquisition of the debtor’s assets through that bid. Prior to the petition date, the third party, Mesa Air Group (“Mesa”), had entered into the Hawaii air market with the intention of forcing the debtor out of business through the misuse of information obtained through confidential agreements with the debtor and others. In subsequent litigation regarding the issue, Mesa made sworn misstatements to cover the truth regarding its dishonesty and destroyed records. The debtor was subsequently forced to file bankruptcy. During the bankruptcy process, the credit bidder had reached an agreement, initially undisclosed to the court, to grant a license in the debtor’s intellectual property to Mesa. When the agreement was made public, the court denied the secured creditor’s right to credit bid.

Courts have also limited the right to credit bid when the validity of a creditor’s lien is in dispute. Other cases look to whether the party seeking to credit bid has failed to comply with the procedural requirements established by the court for the sale of the collateral.

*Id.* (citations omitted).

The court went on to find that the requirements for denial of the right to credit bid were not satisfied here based upon the evidence at trial:

Relying upon the same allegations asserted for their equitable subordination claim, the Debtors seek to limit the Term Lenders’ ability to credit bid at any sale auction. But for the same reasons set forth above, the Court does not find inequitable conduct that would justify limiting a credit bid by the Term Lenders in this case. Moreover,

there is no evidence of inappropriate behavior by the Term Lenders in the bankruptcy. . . . There are no allegations of collusion, undisclosed agreements, or any other actions designed to chill the bidding or unfairly distort the sale process. Consistent with the exercise of their own legal rights, the Term Lenders have been relatively cooperative with the process by, among other things, agreeing to the payment of an expense reimbursement request to a potentially interested bidder and agreeing to a one-week extension of the sale process. Moreover, no party has challenged the validity or extent of the Term Lenders' liens.

*Id.* at 516 (citations omitted).

The court rejected the notion that the lenders should be denied the right to credit bid in order to avoid the potential for chilling bidding by others:

Putting aside the allegations of inequitable conduct then, the Court is left with the Debtors' allegations that bidding on the sale of their assets will be chilled by the Term Lenders ability to credit bid. But there are two problems with this argument. The first is the case law. In considering whether to limit the ability to credit bid, it is true that courts will sometimes refer to concerns about the chilling of bidding as a factor. But cases that cite concerns about chilling a bid almost invariably also feature some other factor that supports a limitation on the creditor. Indeed, the Court is unaware of any cases where the chilling of bidding alone is sufficient to justify a limit on a credit bid. For instance, the court in *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014), found that "[t]he evidence in this case is express and un rebutted that there will be no bidding—not just the chilling of bidding—if the Court does not limit the credit bid." *Id.* at 60 (noting that without cap on credit bidding "bidding will not only be chilled . . . ; bidding will be frozen."). But the Fisker court also relied on other problematic conduct present in that case, observing that the creditor "as the proposed sale purchaser insisted on an unfair process, i.e., a hurried process, and the validity of its secured status has not been determined." . . . Even with all these considerations, the Fisker court ultimately did not deny the right to credit bid in its entirety, but rather limited the amount to the price that the creditor has paid to purchase the claim.

*Id.* at 416-417.

Similarly, the court in *Free Lance-Star Publishing* references a concern about chilling bidding, but the case also involved inequitable conduct. In that case, the creditor initially worked with the debtor prepetition to purchase the debtor's assets in bankruptcy. But at the same time, the same creditor was unilaterally filing financing statements on certain of the debtors' assets. The court stated that it was troubled by the recordation of the financing statements, noting that the creditor had made "the unilateral decision to expand the scope of its security interest when [its] overt request for the Debtors to grant such liens . . . failed" and that the creditor "knew it did not have a valid lien on the [assets] when it filed the [f]inancing [s]tatements." It was "equally troubled by [the creditor's] efforts to frustrate the competitive bidding process," citing to the creditor's pressure on the debtors to shorten the marketing period for the assets and to conspicuously advertise the creditor's credit bidding rights. . . . Thus, while the court cited to bid chilling, it also specifically concluded that the creditor explicitly "tried to depress the sale price of the Debtors' assets, not to maximize the value of those assets." Like *Fisker*, the court did not extinguish the right to credit bid, but limited it to those assets in which the creditor had a valid, properly perfected lien.

*Id.* at 417 (quoting *In re Free Lance-Star Publishing*, 512 B.R. 798, 802-06 (Bankr. E.D. Va. 2014)).

The court also pointed out that the expressed concerns regarding bid chilling were not supported by the evidence at trial. In fact, "That record demonstrates an active interest in the Debtors' assets. This includes parties interested in acquiring the business as a going concern and parties interested in liquidating the assets." *Id.* at 418.

The court denied the motion.

#### **B. Appeal of Sales Order**

***Brown v. Ellmann (In re Brown)*, 851 F.3d 619 (6th Cir. 2017), cert. denied, 138 S. Ct. 328 (2017)**

The Sixth Circuit held that Bankruptcy Code section 363(m) does not bar an appeal from an unstayed sale order when the appellate relief requested would only affect the distribution of the sale proceeds.

The chapter 7 trustee filed a motion to sell the debtor's home. In response, the debtor asserted that she was entitled to a portion of the sale proceeds, claiming they were exempt under Bankruptcy Code section 522(d) based on her state-law redemption rights. The bankruptcy court denied the debtor's claim for an exemption because there was no residual equity in the property upon which her claimed exemption could attach. The bankruptcy court approved the sale. The debtor appealed, and the district court and Sixth Circuit affirmed.

The Sixth Circuit rejected the trustee's contention that the appeal was statutorily moot under section 363(m). Section 363(m) provides:

The reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

The Sixth Circuit recognized that a majority of the other Circuits construe section 363(m) as creating a per se rule automatically mooting appeals for failure to obtain a stay of the sale. However, at least two other Circuits require the party alleging mootness to prove an additional element: that the reviewing court is unable to “grant effective relief without impacting the validity of the sale.” 851 F.3d at 622 (citing *In re ICL Holding Co.*, 802 F.3d 547, 554 (3d Cir. 2015), and *C.O.P. Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1239 (10th Cir. 2011)). The Sixth Circuit adopted the approach of the Third and Tenth Circuits, holding that their interpretation upholds the validity of bankruptcy sales without unduly restricting the appellant's right to contest errors made by the bankruptcy court. Moreover, it is in line with the plain language of section 363(m), which prohibits reviewing courts from modifying or setting aside a sale of property purchased in good faith, but does not prevent a reviewing court from redistributing the proceeds from such a sale.

The trustee bears the burden to prove that the appeal is moot. The trustee failed to do so because he did not demonstrate that the appellate court could not provide effective relief to the debtor without disturbing the sale. Among other things, the trustee did not show that imposition of a constructive trust over the sale proceeds would disturb the sale. The Sixth Circuit also rejected the trustee's contention that the appeal was constitutionally moot, and that the debtor lacked standing to appeal.

The Sixth Circuit nonetheless affirmed the lower courts on the merits, holding that the bankruptcy court correctly found that there was no equity in the property to which the debtor's exemption could attach.

## V. AUTOMATIC STAY

### A. Effect on Third-Party Actions

*In re Linear Elec. Co.*, 852 F.3d 313 (3d Cir. 2017)

The Third Circuit affirmed the lower courts' holdings that the filing of a supplier's lien on real property owned by a third-party customer of a debtor-contractor violated the automatic stay in the contractor's bankruptcy case. The lien affected the ability of the debtor-contractor to collect on its accounts receivable, which were property of the debtor's bankruptcy estate.

Under New Jersey law, if a supplier sells materials on credit to a construction contractor and the contractor incorporates those materials into property owned by a third party without paying the supplier, the supplier can file a construction lien (a/k/a mechanics' lien) on the third-party property. In essence, the supplier can step into the shoes of the contractor and collect a debt owed to the contractor from the third-party property owner in order to recoup what the contractor owes to the supplier.

The suppliers in this case filed their construction liens after the debtor-contractor had filed a chapter 11 petition. The debtor filed a motion with the bankruptcy court to discharge the liens as violating the automatic stay. The bankruptcy court granted the motion, and the debtor proceeded to collect the receivables from the third-party owner. The suppliers appealed, and the district court and Third Circuit both affirmed.

The Third Circuit first rejected the debtor's argument that the appeal was moot on the grounds that the receivables had been paid. Were the suppliers' liens valid (i.e., not in violation of the automatic stay), they would be worth what the debtor was owed at the time they were filed, which was before the receivables had been paid.

The Third Circuit also rejected the suppliers' contention that the bankruptcy court lacked authority to void the liens under *Stern v. Marshall*, 564 U.S. 462 (2011). Enforcement of the automatic stay arises under the federal bankruptcy laws and involves the enforcement of rights created by Congress. Thus, Article III did not limit the bankruptcy court's authority.

As to whether the suppliers' filing of their liens violated the automatic stay, the Third Circuit held that the liens allowed the suppliers to collect the amounts owing to them by subtracting them from the debtor's accounts receivable. Thus, the suppliers' liens were against the debtor's property. Where, as here, a lien will be paid by transferring part or all of an asset from the bankruptcy estate to the lienholder, the lien is against the property of the bankruptcy estate. Thus, the suppliers' filing to perfect their liens violated the automatic stay.

The Third Circuit noted that unlike some states' mechanics' liens, the suppliers' liens did not "relate back" to before the bankruptcy. Thus, the suppliers were not able to take advantage of Bankruptcy Code section 546(b)(1)(A), which provides that the automatic stay is subject to any generally applicable law that permits perfection of an



interest in property to be effective against an entity that acquires rights in such property before the date of perfection.

***Southwest Airlines Co. v. Tidewater Finance Co. (In re Cole)*, 552 B.R. 903 (Bankr. N.D. Ga. 2016)**

The Bankruptcy Court for the Northern District of Georgia held that the automatic stay in a debtor's chapter 13 bankruptcy case did not apply to the continuation of a state-court garnishment proceeding by a judgment creditor against debtor's employer, where the judgment creditor had obtained a default judgment against that employer prior to the debtor's bankruptcy petition, and the proceeding did not implicate any of the debtor's property.

Tidewater, a judgment creditor of the debtor, filed a garnishment action in state court and obtained a default judgment against debtor's employer, Southwest Airlines. Southwest sought to modify or vacate the default in state court but, before that motion was ruled on, the debtor filed a chapter 13 bankruptcy petition. Tidewater continued the action against Southwest without obtaining relief from the automatic stay. The state court held that the automatic stay did not apply due to Southwest's independent liability to Tidewater arising from the default judgment. Southwest then filed a motion to enforce the stay with the bankruptcy court.

The bankruptcy court held that Southwest had standing to bring the motion to enforce the automatic stay, stressing the broad protection of the automatic stay and the unique nature of garnishment proceedings. The court held that in a garnishment action, the garnishee is required to take an action against the debtor and potentially the property of the estate, so the garnishee faces a situation where it could either potentially violate the automatic stay or be independently liable under state law. Thus, if the garnishee cannot seek the protection of the automatic stay, it may become involved in litigation that may become void ab initio. The court also noted that Southwest was not seeking to extend the reach of the automatic stay, but rather just a determination that the stay applied.

The court also held the *Rooker-Feldman* doctrine did not prevent it from hearing the dispute. That doctrine prevents a losing party in state-court from seeking review of the state court action in the lower federal courts. The bankruptcy court, acknowledging a split of authority on the matter, held that bankruptcy courts can review decisions of state courts regarding the automatic stay, taking the side of the Third and the Ninth Circuits. (The Sixth Circuit BAP and courts in New York and Florida have held otherwise.) In doing so, the court stressed that the "automatic stay is one of the most fundamental protections" under the Bankruptcy Code and that bankruptcy courts have exclusive jurisdiction to grant relief from the automatic stay. Thus, if a state court incorrectly determines that the stay does not apply, it would, in effect, grant relief from the automatic stay, which only bankruptcy courts can do. 552 B.R. 903, 908-09.

On the merits, the court held that the automatic stay did not apply under the unique facts of the case. The court noted that Tidewater's action was for Southwest's

independent liability on the prepetition default judgment, and not for any liability of the debtor. Moreover, because Southwest had not garnished any of the debtor's property, there was no property of the bankruptcy estate at issue.

The court also distinguished *In re Johnson*, 479 B.R. 159 (Bankr. N.D. Ga. 2012), a prior decision relied on by Southwest, and rejected the *Johnson* court's holding that the prepetition judgment against a garnishee is protected by the automatic stay until it is "unmodifiable." The court noted that the default judgment against Southwest was only modifiable as to amount, and not as to liability, and thus it was a final judgment entered prior to the debtor's bankruptcy petition. As such, the automatic stay did not apply.

## **B. Police Powers**

### ***Dingley v. Yellow Logistics. LLC (In re Dingley)*, 852 F.3d 1143 (9th Cir. 2017)**

The Ninth Circuit held that the bankruptcy court erred by sanctioning creditors for violating the automatic stay by pursuing civil contempt proceedings against the debtor based on his failure to pay discovery sanctions in a state court action. Civil contempt proceedings are exempted from the automatic stay under the Bankruptcy Code's police or regulatory power exemption, 11 U.S.C. § 362(b)(4), when, as here, the contempt proceedings are intended to effectuate the court's public policy interest in deterring litigation misconduct.

The debtor failed to appear for a deposition in prebankruptcy state court litigation, and the state court imposed discovery sanctions against him. The debtor failed to timely pay the sanctions, and the court issued an order requiring the debtor to show cause why he should not be held in contempt. After the state court set a hearing date on its order to show cause, the debtor filed for chapter 7. When the opposing party attempted to go forward with the show cause hearing, the debtor moved for sanctions under Bankruptcy Code section 362(k) in the bankruptcy court, contending that the opposing party violated the automatic stay. The bankruptcy court agreed and awarded sanctions in the amount of \$1,500.

The Ninth Circuit BAP reversed in a published decision (*In re Dingley*, 514 B.R. 591 (BAP 9th Cir. 2014)). The BAP reasoned that the civil contempt proceedings were exempted from the automatic stay because, under *David v. Hooker Ltd.*, 560 F.2d 412 (9th Cir. 1977), they did not turn on the determination or collection of an underlying debt and were not a ploy to harass the debtor. In a concurring opinion, Judge Jury reluctantly agreed with the BAP majority's application of *Hooker*, but she questioned whether *Hooker* remained good law after the enactment of the 1978 Bankruptcy Code.

The Ninth Circuit affirmed the BAP, but for a different reason. The Ninth Circuit held that civil contempt proceedings are not covered by the automatic stay because they qualify under the Bankruptcy Code's statutorily enumerated exception for regulatory actions taken by a government entity. *See* 11 U.S.C. § 362(b)(4). The government regulatory exemption provides that the automatic stay does not apply to "the

commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power.” This exemption has been applied in a variety of contexts, including labor-law enforcement, state-bar disciplinary proceedings, and employment-discrimination actions brought by the Equal Employment Opportunity Commission.

Courts in the Ninth Circuit have applied two alternative tests when determining whether government action falls under the government regulatory exemption: the pecuniary-purpose test and the public-policy test. Satisfaction of either test will suffice to exempt the action from the reach of the automatic stay. Under the pecuniary-purpose test, the court must determine whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to matters of public safety and welfare. By contrast, under the public-policy test, the court must determine whether the government's action is intended to either effectuate public policy or to adjudicate private rights. If the court determines that the government's action is intended either to protect the government's pecuniary interest in the debtor's property or to adjudicate private rights, the government regulatory exemption will not apply and the automatic stay will be imposed.

The Ninth Circuit also relied on its prior holding in *In re Berg*, 230 F.3d 1165, 1168 (9th Cir. 2000), in which the court held that the government regulatory exemption applies to proceedings to collect a sanctions award imposed against a debtor to deter litigation misconduct. In extending the government regulatory exemption to the FRCP Rule 38 sanctions proceedings, the court reasoned that because the purpose of Rule 38 sanctions is to effectuate public policy in deterring unprofessional conduct in litigation, not to protect private rights or the government's interest in the sanctioned person's property, the government regulatory exemption applies to a creditor's attempt to collect sanctions against a debtor under Rule 38. This is true regardless of whether the sanctions are initially pursued by a private party or whether the sanctions award is ultimately payable to a private party. As with the present case, the creditor in *Berg* pursued the collection of sanctions to effectuate the court's public policy interest in deterring litigation misconduct.

Because the panel relied instead upon the Bankruptcy Code's government regulatory exemption, it did not address whether *Hooker* remains good law.

***Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757 (1st Cir. 2016)**

The Court of Appeals for the First Circuit held that the police and regulatory power exception to the automatic stay applied to the postpetition termination by the Centers for Medicare & Medicaid Services (“CMS”) of a provider agreement with a chapter 11 debtor hospital. Accordingly, CMS did not violate the automatic stay by doing so.

Prepetition, Parkview operated as a fifty-five bed hospital that provided emergency services, inpatient services, and a variety of outpatient, ambulatory clinics, and other medical services. It maintained a provider agreement with CMS that bound

Parkview to various conditions in order to participate in Medicare and receive reimbursements for both Part A (inpatient) and Part B (outpatient) services. Parkview sent CMS a letter dated June 15, 2015, stating that it would file a chapter 11 petition the next day and that it would be “closing as a hospital effective upon the order of the Bankruptcy Court and will no longer participate in the Medicare Program . . . as an acute care hospital provider.” After Parkview filed its chapter 11 petition, CMS notified Parkview that it would terminate the provider agreement, for reasons including that Parkview’s discontinuation of inpatient services disqualified it from receiving benefits under the provider agreement.

Parkview filed a motion to compel CMS to perform under the provider agreement, arguing, among other things, that CMS’s termination of the provider agreement violated the automatic stay and was an impermissible discrimination against a debtor in bankruptcy, within the meaning of Bankruptcy Code section 525(a). The Court of Appeals disagreed on both counts.

Bankruptcy Code section 362(a)(3) provides that counterparties may not take “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” Parkview argued that, because the provider agreement was an executory contract, CMS could not involuntarily terminate it. CMS argued, however, that (a) the provider agreement was not “property of the estate” under the meaning of subsection 362(a)(3), (b) the automatic stay did not expand Parkview’s contractual rights, (c) Parkview never had a cognizable property or contractual interest in participating in Medicare without meeting Medicare’s conditions of participation, (d) the automatic stay did not apply to the termination because it was a “nonfinal agency action,” and (e) even if Parkview had a property interest in the provider agreement and the stay applied on its face to the termination, the “police and regulatory power” exception to the stay in 11 U.S.C. § 362(b)(4) applied.

Without reaching the other arguments, the First Circuit agreed that the police and regulatory power exception to the stay applied to CMS’s termination of the provider agreement. Bankruptcy Code section 362(b)(4) provides that the automatic stay of actions against the debtor does not apply to “an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power.” The court’s analysis of the reach of this exception turned on two inquiries: First, is the governmental action designed primarily to protect the public safety and welfare? If so, the government action (i.e., the termination of the provider agreement) is exempt. Second, however, if the action is an attempt by the government to recover property from the estate, it has a pecuniary purpose and so remains subject to the stay.

While Parkview argued that the termination was not based on findings of a threat to the health or safety of patients, the court explained that this argument was “based on too circumscribed a view of the public interest,” and that, “[t]he question is whether CMS’s termination enforces a generally applicable regulatory law or furthers a public policy interest beyond the contractual rights in the provider agreement.” 842 F.3d 757, 764. Because “CMS has a strong public policy interest in seeing that Medicare-program dollars are not spent on institutions that fail to meet qualification standards,” and

Parkview “had taken actions to disqualify itself from the Medicare program, rendering it unable to provide services required by that program,” the court found that, “applying the stay against CMS here would threaten CMS’s ability to enforce generally the Medicare statute’s carefully articulated regulatory structure.” The termination was, therefore, “plainly the exercise of a regulatory power provided in the Medicare statute.” *Id.*

Moreover, CMS’s termination of the provider agreement did not meet the pecuniary test because CMS was “not seeking recovery from Parkview, nor is it demanding any payment.” The court concluded: “Because CMS’s termination of the provider agreement enforced the generally applicable framework of the Medicare statute and advanced a significant public policy interest, the police and regulatory power exception applies, and the automatic stay does not bar the termination.” *Id.*

Parkview also argued that CMS’s termination of the provider agreement within days of the filing violated the “nondiscrimination” provision in section 525(a), which states that a “governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, or discriminate with respect to such a grant against . . . a person that is or has been a debtor under [title 11].” 11 U.S.C. § 525(a). The court disagreed and found that CMS’s termination of the provider agreement was based not on Parkview’s insolvency or bankruptcy petition, but on Parkview’s decision to close its inpatient facilities, which disqualified it as a hospital under the Medicare statute.

***Porter v. Nabors Drilling USA, L.P.*, 854 F.3d 1057 (9th Cir. 2017)**

The Ninth Circuit held that the automatic stay bars an employee’s action for violations of state labor laws under California’s Private Attorney General Act of 2004 (“PAGA”). Although the employee was suing on behalf of the state, the exception for governmental regulatory or police power actions under Bankruptcy Code section 362(b)(4) did not apply.

The employee sued the debtor under PAGA, and the district court referred the case to arbitration. The employee appealed, but while the appeal was pending, the debtor filed for chapter 11. The debtor moved for recognition of the stay, and the Ninth Circuit granted the motion. The Ninth Circuit rejected the employee’s argument that the stay did not apply under section 362(b)(4). The Ninth Circuit reasoned that a PAGA claim is like a *qui tam* action, which is also subject to the automatic stay.

**C. Sanctions for Violation**

***Sundquist v. Bank of Am., N.A.*, 566 B.R. 563 (Bankr. E.D. Cal. 2017), *vacated in part and settled*, 2018 Bankr. LEXIS 135 (Bankr. E.D. Cal. Jan 28, 2018)**

The bankruptcy court awarded over \$1 million in actual damages and \$45 million in punitive damages based on a bank’s violations of the automatic stay. “The mirage of promised mortgage modification lured the plaintiff debtors into a kafkaesque nightmare of stay-violating foreclosure and unlawful detainer.”

The debtors were having financial trouble, but were current on their mortgage. They were told by Bank of America that in order to obtain a loan modification, they had to be in default. The debtors thus reluctantly missed their mortgage payments. The debtors submitted loan modification forms to the bank many times, but the bank consistently lost paperwork or denied modification for no apparent reason. The evidence showed that the bank never genuinely intended to modify the loan. The bank began foreclosure proceedings, but the debtors filed a chapter 13 petition before the foreclosure sale had occurred.

Notwithstanding knowledge of the debtor's bankruptcy filing, the bank consummated its foreclosure on the debtors' home in violation of the automatic stay. Agents for the bank harassed the debtors, causing them to vacate the home. The bank subsequently reconveyed title to the debtors, but did not inform them of that fact. The debtors' home was vandalized, and homeowners' association dues went unpaid. The bank also attempted to collect mortgage payments for the period that the debtors were not in possession of the house. The debtors suffered physical and emotional distress.

The debtors sued the bank in state court. The state court dismissed, however, holding that the bankruptcy court had exclusive jurisdiction over stay violations. The debtors then sued in the bankruptcy court.

The bankruptcy court found the bank's conduct to be willful and intentional and that it resulted in "emotional distress, lost income, apparent heart attack, suicide attempt, and post-traumatic stress disorder, for all of which Bank of America disclaim[ed] responsibility."

The court ordered over \$1 million in actual damages. The court also ordered \$45 million in punitive damages, \$5 million payable to the debtors, and \$40 million payable to organizations devoted to the public purposes of education and consumer protection, including the National Consumer Bankruptcy Rights Center, the National Consumer Law Center, and the five University of California Law Schools.

Following a settlement, the bankruptcy court modified the damage award but declined to vacate its opinion, saying it was important "to name and to shame" the bank.

#### **D. Exercising Control Over Estate Property**

##### ***WD Equipment v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017)**

The Court of Appeals for the Tenth Circuit adopted the minority rule and held that only affirmative acts to gain possession of, or to exercise control over, property of the estate violate Bankruptcy Code section 362(a)(3).

Prepetition, the debtor owned two commercial trucks. On one, he defaulted on a loan to cover repair costs. On the other, he defaulted on a purchase money loan. Both trucks were repossessed by the holders of the security interests securing the respective loans, one under shady circumstances. The debtor filed a chapter 13 bankruptcy case on the deadline to pay off truck one and within the cure period for truck two. He then

notified both lenders of the filing and requested the immediate return of the trucks. Lenders refused. Lender one claimed he had changed the title into his own name prepetition, and lender two claimed he had sold the truck to an unknown Mexican national for cash prepetition.

The debtor moved the bankruptcy court for orders to show cause why lenders should not be held in contempt for willful violations of the automatic stay. The bankruptcy court granted the motions and ordered the lenders to immediately turn over the trucks and further warned that continuing failure to turn over might result in the imposition of monetary damages for willful violation of the automatic stay. Lenders refused to comply, and the debtor filed an adversary proceeding for violations of the automatic stay.

A few months later, the bankruptcy court dismissed the underlying bankruptcy case because, without the trucks, the debtor had no regular income, which rendered him ineligible for chapter 13 relief. The court, however, expressly retained jurisdiction over the adversary proceeding. During the adversary proceeding, the lenders asserted that the debtor's rights in the trucks had been properly terminated prepetition, but the bankruptcy court did not believe them. The court went on to find that the lenders had manufactured the paperwork showing the title transfers and had perjured themselves. It also found that even if they had taken the prepetition actions they claimed to repossess the trucks and transfer title, their actions violated Colorado law. Finally, the bankruptcy court concluded that by failing to return the trucks, the lenders had violated Bankruptcy Code section 362(a)(3) and imposed actual and punitive damages under section 362(k)(1).

Lenders appealed; the district court reversed on the calculation of damages but otherwise affirmed, and the Court of Appeals for the Tenth Circuit reversed in part and affirmed in part.

First, the appellate court disposed of the lenders' argument that the dismissal of the underlying chapter 13 case divested the bankruptcy court of jurisdiction over the section 362(k)(1) proceeding. Relying on its own prior precedent, the court disagreed, noting that nothing in the Bankruptcy Code mandates dismissal of a section 362(k)(1) proceeding when the bankruptcy case is closed.

With respect to the merits, section 362 provides that a bankruptcy petition operates as a stay of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. 11 U.S.C. § 362(a)(3). The bankruptcy court and the district court applied the majority rule (along with the Second, Seventh, Eighth, and Ninth Circuits) that the act of passively holding onto an asset constitutes "exercising control" over it and violates section 362(a)(3). The Tenth Circuit bankruptcy appellate panel also joined with the majority position in *In re Yates*, 332 B.R. 1 (BAP 10th Cir. 2005). The Tenth Circuit disagreed, holding that the statute's language is plain and, therefore, the sole function of the court is to enforce it according to its terms.

Section 362(a)(3) provides that a bankruptcy petition “operates as a stay . . . of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” The court noted:

Breaking down the sentence, “any act” is the prepositive modifier of both infinitive phrases. In other words, § 362(a)(3) prohibits “any act to obtain possession of property” or “any act to exercise control over property.” “Act”, in turn, commonly means to “take action” or “do something.” New Oxford American Dictionary 15 (3d ed. 2010) (primary definition of “act”). This section, then, stays entities from doing something to obtain possession of or to exercise control over the estate’s property. It does not cover “the act of passively holding onto an asset,” *Thompson*, 566 F.3d at 703, nor does it impose an affirmative obligation to turnover property to the estate. “The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate.” *Inslaw*, 932 F.2d at 1474. Stay means stay, not go.

849 F.3d 943, 949. The court held that the majority rule reads too much into the legislative history of the 1984 amendments to section 362, noting “Notwithstanding that ‘Congress did not provide an explanation of that amendment,’ the majority reads from ‘the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset,’ that Congress ‘intended to prevent creditors from retaining property of the debtor.’ *Weber*, 719 F.3d at 80. ‘This significant textual enlargement is consonant with [the majority rule].’ *Id.*” *Id.*

The use of the word “control” in the 1984 amendment suggests that the drafters meant to distinguish the newly prohibited “control” from the already-prohibited acts to obtain “possession,” in order to reach nonpossessory conduct that would nonetheless interfere with the estate’s authority over a particular property interest. The court cited examples of “acts” that “exercise control” over, but do not “obtain possession of,” the estate’s property, e.g., a creditor in possession who improperly sells property belonging to the estate or intangible property rights that belong to the estate, such as contract rights or causes of action that are incapable of real possession unless they are reified. The court explained that section 362(a)(3) guards against interference with them by staying any act to exercise control over estate property.

In the end, however, the Tenth Circuit’s holding came down to congressional intent as is expressed through the plain language of the statute:

If Congress had meant to add an affirmative obligation—to the automatic stay provision no less, as opposed to the turnover provision—to turn over property belonging to the



estate, it would have done so explicitly. The majority rule finds no support in the text or its legislative history.

In the end, the best argument for the majority rule is that § 362 should be read in conjunction with another part of the bankruptcy code—§ 542, the turnover provision, which provides that any entity “in possession, custody, or control, during the case of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver” such property to the trustee “unless such property is of inconsequential value or benefit to the estate.” 11 U.S.C. § 542 (emphasis added). . . .

But this policy argument, too, is simply not supported by the statute’s text or its legislative history. Even if the turnover provision were “self-executing” (which we do not decide), there is still no textual link between § 542 and § 362. And, contrary to one argument for the majority rule, *see id.* at 243, bankruptcy courts do not need § 362 to enforce the turnover of property to the estate. Bankruptcy courts have “broad equitable powers” under 11 U.S.C. § 105(a). . . . And so, adhering to the text of the statute, as we must, we adopt the minority rule: only affirmative acts to gain possession of, or to exercise control over, property of the estate violate § 362(a)(3).

*Id.* at 950.

The court, however, also held that on remand the damage award against the lenders may be sustainable under the proper application of section 362(a)(3) and under section 105(a), which grants bankruptcy courts the power to sanction conduct abusive of the judicial process because the lenders forged documents and perjured themselves in an effort to convince the court that the debtor’s rights in the trucks had terminated prepetition.

## VI. EXECUTORY CONTRACTS AND LEASES

### A. Effect of Rejection of Intellectual Property Contracts

*Mission Prod. Holdings, Inc. v. Tempnology LLC (In re Tempnology LLC)*, 879 F.3d 389 (1st Cir. 2018)

The First Circuit Court of Appeals held that (i) Bankruptcy Code section 365(n) does not apply to a trademark license rejected by the debtor/licensor, and (ii) rejection by the debtor licensor of a trademark license deprived the licensee of the right to utilize the licensed trademark.

Tempnology was a party to a prepetition agreement with Mission Products that granted Mission the exclusive right to sell certain of Tempnology's products to certain retailers in specified territories. In addition, Tempnology granted Mission a nonexclusive, perpetual license to exploit the debtor's intellectual property and a limited license during the term of the agreement to exploit the debtor's trademark, brand, and logo. Either party could terminate with or without cause by providing written notice. Any event of termination, however, would trigger a two-year winddown period during which Mission would retain certain rights to purchase, distribute, and sell certain products in accordance with the agreement.

After Mission exercised its right to terminate the agreement without cause, Tempnology filed a bankruptcy petition. It subsequently filed a motion to reject the agreement. It also filed a motion seeking bankruptcy court approval for the sale of substantially all of its assets free and clear of liens, claims, and encumbrances. Mission objected to both the sale motion and the rejection motion and gave notice of its election pursuant to section 365(n)(1)(B) to retain use of the rejected intellectual property.

Mission argued that under section 365(n) it retained its exclusive distribution rights, its rights under the IP license, and its rights under the trademark license. Tempnology argued that, although section 365(n) protected the IP license, it did not protect its distribution or trademark rights.

Section 365(n) allows a counterparty who is the licensee under an intellectual property license to elect to retain certain rights under the contract notwithstanding its rejection:

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect . . . (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by

applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—(i) the duration of such contract; and (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—  
(A) the trustee shall allow the licensee to exercise such rights; (B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and (C) the licensee shall be deemed to waive—(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and (ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

11 U.S.C. § 365(n)(1) & (2). In addition, section 365(n)(3)(B) provides, “If the licensee elects to retain its rights . . . the trustee shall . . . not interfere with the rights of the licensee as provided in such contract . . . to such intellectual property . . . including any right to obtain such intellectual property . . . from another entity.” *Id.* § 365(n)(1)(3).

Congress enacted section 365(n) in response to the decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985), in which the court had held that rejection of an intellectual property license deprived the licensee of all rights previously granted under the license. The legislative history reflects that the purpose of section 365(n) was “to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§] 365 in the event of the licensor’s bankruptcy.” S. Rep. No. 100-505, 5 (1988).

Mission argued that its exclusive distribution rights were preserved because section 365(n) provides that a licensee of intellectual property may retain its rights under the contract, “including a right to enforce any exclusivity provision of such contract” and “including any embodiment of such intellectual property,” and Tempnology’s grant of the exclusive distribution rights was an “exclusivity provision” that related to the IP license.

The bankruptcy court held that section 365(n) protected Mission’s rights under the IP license, but not the exclusive distribution rights or trademark license rights.

Mission appealed to the Bankruptcy Appellate Panel, and the BAP held that the bankruptcy court did not err in ruling that the exclusive distribution rights were unprotected by section 365(n). With respect to the trademark license, the BAP noted that while the purpose of section 365(n) is to protect licensees of intellectual property,

the definition of “intellectual property” in section 101(35A) does not include trademarks:

The term “intellectual property” means—

- (A) trade secret;
- (B) invention, process, design, or plant protected under title 35 [relating to patents];
- (C) patent application;
- (D) plant variety;
- (E) work of authorship protected under title 17 [relating to copyrights]; or
- (F) mask work protected under chapter 9 of title 17 [relating to microchips];

to the extent protected by applicable nonbankruptcy law.

11 U.S.C. § 101(35A). Although Mission acknowledged that the definition of intellectual property in section 101(35A) did not encompass trademarks, it argued that the bankruptcy court should have used its equitable powers (as some other courts have) to determine that Mission’s rights in the debtor’s trademark were protected. The BAP declined to do so:

We agree that § 365(n) incorporates the definition of intellectual property set forth in § 101(35A), and that the definition does not encompass trademarks and logos. But we decline Mission’s invitation to rule that, despite the omission of trademarks from the Code’s definition of intellectual property, Mission’s licensee rights in the Debtor’s trademark and logo should be preserved under § 365(n) on equitable grounds as suggested in § 365(n)’s legislative history. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Comm. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 117 L. Ed.2d 391 (1992). . . .

We agree with the bankruptcy court that, based on a plain reading of the statute, Mission’s rights in the Debtor’s trademark and logo were not and could not be protected by its § 365(n) election.

559 B.R. at 821-22.

However, the BAP went on to hold that, irrespective of the applicability of section 365(n), rejection of a trademark license by a debtor/licensor does not result in the termination of the rights of the licensee:

We must part company with the bankruptcy court, however, on the effect the Debtor's rejection of the Agreement had on Mission's licensee rights in the Debtor's trademark and logo. The bankruptcy court ruled that, because the Debtor's trademark and logo were not protected by Mission's election under § 365(n), Mission did "not retain rights to the Debtor's trademarks and logos post-rejection." This conclusion endorses *Lubrizol's* approach to the rejection of executory contracts, namely that rejection terminates the contract. *Lubrizol*, however, is not binding precedent in this circuit and, like the many others who have criticized its reasoning, we do not believe it articulates correctly the consequences of rejection of an executory contract under § 365(g). We adopt *Sunbeam's* interpretation of the effect of rejection of an executory contract under § 365 involving a trademark license.

. . . After rejecting a contract, a debtor is not subject to an order of specific performance. . . The debtor's unfulfilled obligations are converted to damages; when a debtor does not assume the contract before rejecting it, these damages are treated as a pre-petition obligation, which may be written down in common with other debts of the same class. But nothing about this process implies that any rights of the other contracting party have been vaporized.

Applying *Sunbeam's* rationale, we conclude that, while the Debtor's trademark and logo were not encompassed in the categories of intellectual property entitled to special protections under § 365(n), the Debtor's rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and applicable non-bankruptcy law.

Thus, we conclude that the bankruptcy court did not err in ruling that Mission's § 365(n) election failed to protect its rights under the Agreement as licensee of the Debtor's trademark and logo, but it erred in ruling that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement.

*Id.* at 821-823 (quoting *Sunbeam*, 686 F. 3d. at 377)).

The BAP's decision was appealed to the First Circuit. The Circuit agreed with the lower courts that the exclusive distribution rights and the trademarks were not protected, because they did not satisfy the definition of "intellectual property" under Bankruptcy Code section 101(35A) and, therefore, were not covered by Section 365(n).

However, the First Circuit rejected the reasoning of *Sunbeam*, followed *Lubrizol*, and held that rejection of the trademark license deprived the licensee of its rights to use of the trademarks:

. . . . Sunbeam therefore largely rests on the unstated premise that it is possible to free a debtor from any continuing performance obligations under a trademark license even while preserving the licensee's right to use the trademark. . . .

Careful examination undercuts that premise because the effective licensing of a trademark requires that the trademark owner -- here Debtor, followed by any purchaser of its assets -- monitor and exercise control over the quality of the goods sold to the public under cover of the trademark. . . . Trademarks, unlike patents, are public-facing messages to consumers about the relationship between the goods and the trademark owner. They signal uniform quality and also protect a business from competitors who attempt to profit from its developed goodwill. . . . The licensor's monitoring and control thus serve to ensure that the public is not deceived as to the nature or quality of the goods sold. Presumably, for this reason, the Agreement expressly reserves to Debtor the ability to exercise this control: The Agreement provides that Debtor "shall have the right to review and approve all uses of its Marks," except for certain pre-approved uses. Importantly, failure to monitor and exercise this control results in a so-called "naked license," jeopardizing the continued validity of the owner's own trademark rights. . . .

The Seventh Circuit's approach, therefore, would allow Mission to retain the use of Debtor's trademarks in a manner that would force Debtor to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks, thereby diminishing their value to Debtor, whether realized directly or through an asset sale. Such a restriction on Debtor's ability to free itself from its

executory obligations, even if limited to trademark licenses alone, would depart from the manner in which section 365(a) otherwise operates. And the logic behind that approach (no rights of the counterparty should be “vaporized” in favor of a damages claim) would seem to invite further leakage. If trademark rights categorically survive rejection, then why not exclusive distribution rights as well? Or a right to receive advance notice before termination of performance? And so on.

....

In sum, the approach taken by Sunbeam entirely ignores the residual enforcement burden it would impose on the debtor just as the Code otherwise allows the debtor to free itself from executory burdens. The approach also rests on a logic that invites further degradation of the debtor's fresh start options. . . . For these reasons, we favor the categorical approach of leaving trademark licenses unprotected from court-approved rejection, unless and until Congress should decide otherwise.

#### **B. Covenants Running with the Land**

***HPIP Gonzales Holdings, LLC v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas Corp.), 2017 U.S. Dist. LEXIS 38204 (S.D.N.Y. March 10, 2017)***

In consolidated appeals, the New York district court affirmed the bankruptcy court's determinations that gas gathering contracts between the debtor (an energy company that explores and develops onshore oil and natural gas properties) and two “midstream gatherers” (companies that gather, transport, and process oil and gas after they have been extracted from the land but before they are refined) did not constitute covenants that run with the land under Texas law and could, therefore, be rejected as executory contracts pursuant to Bankruptcy Code section 365.

Prior to bankruptcy, the debtor and the midstream gatherers had entered into agreements under which the debtor agreed to deliver all of the gas and condensate it produced in specified areas to the gatherers, and the gatherers agreed to receive, treat, dehydrate, and then redeliver the gas and condensate to the debtor, for which the debtor agreed to pay gathering fees and to make a “deficiency payment” if it failed to deliver specified minimum volumes of gas and condensate each year. The agreements provided that title to the gas and condensate would remain with the debtor, that the agreements would be “covenant[s] running with [the debtor's] Interests,” and that the agreements would be binding on the debtor's successors and assigns. In addition, the agreements contemplated a separate and subsequent conveyance from the debtor to the gatherers of a tract of land on which the gatherers could (and did) construct the facilities and pipelines needed for their gathering services.

After the debtor filed its chapter 11 petition, the debtor moved to reject the gathering agreements pursuant to section 365(a). The gatherer/counterparties objected on the ground that the agreements could not be rejected because they contained covenants that run with the land under Texas law. The bankruptcy court rejected that argument and granted the rejection motion. However, the bankruptcy court noted that, in the procedural context of a motion to reject, it was unable to make a definitive decision as to whether the covenants at issue run with the land. Accordingly, the debtor commenced adversary proceedings against each of the gatherer/counterparties and sought declaratory judgments that the covenants contained in the agreements did not run with the land. The bankruptcy court subsequently issued summary judgment in favor of the debtor, and on appeal, the district court affirmed.

The district court explained that under section 365 of the Bankruptcy Code, a debtor in possession, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. However, it is not possible for a debtor to reject a covenant that "runs with the land," since such a covenant creates a property interest that is not extinguished through bankruptcy. In Texas, a covenant runs with the land when (1) it touches and concerns the land, (2) it relates to a thing in existence or specifically binds the parties and their assigns, (3) it is intended by the original parties to run with the land, and (4) the successor to the burden has notice. At issue in this case was the first factor—whether the covenant "touches and concerns the land."

In making that determination, courts in Texas have applied two tests. First, a covenant touches and concerns the land "if it affect[s] the nature, quality or value of the thing demised, independently of collateral circumstances, or if it affect[s] the mode of enjoying it." *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982). Second, a covenant touches and concerns the land either "[i]f the promisor's legal relations in respect to the land in question are lessened" or "if the promisee's legal relations in respect to that land are increased." *Id.* Meeting one of the two tests will satisfy the "touch and concern" requirement. Applying the second test, the district court concluded that the gas gatherers had not shown that the agreements either increased their legal relations to the real property interests at issue or decreased the debtor's.

One of the gatherers argued that the debtor's dedication of the gas and condensate that was "produced and saved" in the dedicated area conveyed minerals in the ground, which under Texas law is a property interest. *See American Ref. Co. v. Tidal W. Oil Corp.*, 264 S.W. 335, 338 (Tex. Ct. App. 1924) ("It is settled law in Texas that oil and gas are minerals, and while in place are a part of the realty, and one who acquires an interest in them by proper conveyance has a legal estate and interest in the land under which they are situated."). That gatherer also reasoned that royalty interests are property interests, and because conveyances of royalty interests refer to minerals produced and saved, the debtor's dedication of gas and condensate that is "produced and saved" must convey a property interest.



The court rejected this claim, noting that the nature of the interest that the gas gatherer received is different from a royalty interest. While a royalty interest is a right to a specified proportionate share of production once the minerals are produced, gas gatherers received no right to any share of the gas and condensate, but rather were entitled to process those minerals in exchange for a fee. Accordingly, the gatherers could not show that they received a royalty interest in the mineral estate or any of the other mineral rights or interests recognized under Texas law.

Further, the court concluded that the agreements did not increase the gatherers' real property interests, but rather granted them the merely contractual right to be the exclusive providers of certain services for gas and condensate produced in certain areas. The court also concluded that the agreements did not decrease the debtor's legal relation to its real property interests. The court rejected the argument that the debtor's interests were burdened by its obligation to deliver all of the gas and condensate it produced to gatherers. The debtor did not convey real property interests to the gatherers and, notwithstanding the agreements, the debtor was free to produce as much or as little gas and condensate from the dedicated areas as it chose. While failing to deliver the minimum volume set out in the agreements would require the debtor to make a deficiency payment, the obligation is merely contractual. Accordingly, the agreements did not "touch and concern the land," did not run with the land, and could be rejected.

The gas gatherers argued in the alternative that the agreements constituted equitable servitudes. Under Texas law, a covenant that does not technically run with the land can still bind successors to the burdened land as an equitable servitude if: (1) the successor to the burdened land took its interest with notice of the restriction, (2) the covenant limits the use of the burdened land, and (3) the covenant benefits the land of the party seeking to enforce it.

The gatherers' argument failed on this count because the agreements, for the reasons discussed above, did not limit the debtor's use of its property interests. The agreements benefit only the gatherers, not their land. Through the agreements, the gatherers are entitled to receive fees for processing delivered gas and condensate, regardless of where that processing takes place, and thus the agreements themselves do not render more valuable the land on which gatherers have located their processing facilities. Accordingly, the court concluded that the bankruptcy court did not err in holding that the agreements did not constitute equitable servitudes.

### **C. Insurance Contracts**

***Transamerica Life Ins. Co. v. Shubert (In re Friese)*, 2016 WL 6821516 (E.D. Pa. Nov. 16, 2016)**

The United States District Court for the Eastern District of Pennsylvania affirmed the bankruptcy court's determination that an insurance contract was executory at the time the debtors filed their chapter 13 petition. Moreover, even though the policy lapsed postpetition due to nonpayment postpetition, the debtors' affirmative act of filing their chapter 13 plan in which they sought to assume the contract and cure any arrearage

was sufficient to maintain its executory status, even though the chapter 13 plan was not confirmed and the case was converted to a chapter 7. The district court also upheld the bankruptcy court's order granting the chapter 7 trustee's motion to assume and assign the insurance contract.

The debtors were behind on their insurance premiums. The insurance company notified them that the contract had entered a "grace period," and would lapse unless they made certain payments. One week before the insurance contract was to lapse, the debtors filed for chapter 13. The debtors then proposed a chapter 13 plan (the "Plan") after the policy was scheduled to lapse, but while they were still within the 60-day period to cure defaults established by Bankruptcy Code section 108(b). The debtors' Plan proposed to assume the insurance contract and cure any arrears. The bankruptcy court never confirmed the Plan, and instead converted the case to a chapter 7.

The chapter 7 trustee then filed a motion to assume and assign the contract, long after the section 108(b) cure period had expired. The court granted the trustee's motion over the objection of the insurance company. The insurance company appealed.

The appeal presented two questions: (1) was the insurance contract executory on the date the debtor filed their chapter 13 petition and (2) was it still executory on the date on which the chapter 7 trustee filed her motion to assume and assign it, notwithstanding its lapse for nonpayment? The district court answered "yes" to both questions.

Bankruptcy Code section 365 expressly requires that a contract be "executory" in order to be assumed or assigned. The traditional test for determining if an agreement is an executory contract is the "Countryman" definition, which states that a contract is executory only where the obligations "of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." The Countryman test requires a court to determine whether the failure to perform an obligation under the contract would constitute a material breach. Typically, courts examine whether a contract is executory as of the date that the bankruptcy petition is filed.

As of the chapter 13 petition date, the insurance contract had entered a grace period that had not yet expired by its terms. Accordingly, performance obligations by both parties were extant on the date of bankruptcy. The debtors' obligation to pay premiums was still in effect and the insurance company's duty to pay in the event of a covered event remained. The obligations that remained were obligations that, if not performed, would constitute a material breach. Accordingly, the insurance contract was executory as of the petition date.

The district court then addressed the question of whether the contract lost its executory status prior to the trustee's motion to assume and assign due to the fact that it had, by that time, lapsed according to its terms. Its answer was "no." The court explained that while the typical time for determining executory status is the date of a debtor's bankruptcy petition, sometimes postpetition events alter the executory status of a

contract, such as when a contract expires postpetition. In those circumstances, a court will look to the date the motion to assume or reject is made or heard rather than the petition date. The insurance company relied on two cases to argue that there were “postpetition events” that altered the executory status of the insurance contract, both of which the district court found distinguishable. The courts in *Counties Contracting and Construction Co. v. Constitution Life Ins. Co.*, 855 F.2d 1054 (3d Cir. 1988), and *Aetna Casualty & Surety Co. v. Gamel*, 45 B.R. 345 (N.D.N.Y. 1984), each held that even though the relevant contract did not expire until after the petition date, the contract had lost its executory status by the time the debtor formally moved to assign it. However, these cases were distinguishable because in this case, unlike those, the debtors took a “mandatory affirmative act” to assume the contract after it lapsed but before the trustee filed her motion to assume and assign.<sup>2</sup> That affirmative act was the filing of the chapter 13 plan, which proposed to assume the contract and cure the arrearages.

The court explained:

[In this case, the debtors] undeniably took the “affirmative act” to assume the Insurance Contract that was missing in both *Counties* and *Aetna*. Specifically, Debtors filed the Plan 14 days after the Chapter 13 Petition Date, on April 21, 2015, and “[t]he Plan sought to assume the Insurance Contract and cure any arrearage.” (Stip. ¶ 18). Accordingly, the very conditions that lead those courts to reason that a post-petition evaluation of the nature of the insurance policies was warranted were not present in the instant case. In fact, the fatal flaw identified in *Aetna*—failure to specifically designate the insurer as a recipient of funds in a submitted plan—was cured by Debtors in this case, in that both Transamerica and the Insurance Contract are specifically identified in Debtors’ Plan.

## **VII. TRUSTEE’S AVOIDING POWERS; ESTATE CAUSES OF ACTION**

### **A. Contractual Termination as Transfer**

***Hometown 2006-1 1925 Valley View, LLC v. Prime Income Asset Mgmt.*, 847 F.3d 302 (5th Cir. 2017), cert. denied, 138 S. Ct. 270 (2017)**

The Fifth Circuit held that the debtor’s waiving of the right to 60 days’ notice of termination of a contract, without receiving the compensation contemplated by the contract during the 60-day period, is a transfer of an “asset” that can be recoverable under the Texas Uniform Fraudulent Transfer Act (“TUFTA”).

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<sup>2</sup> Note that while the court stated that the contract had lapsed before the debtors filed their Plan, it in fact had not, due to the 60-day period to cure defaults under Bankruptcy Code section 108(b).

The debtor was party to certain service contracts that required 60 days' notice of termination. The debtor and the counterparties to the contracts agreed to terminate the contracts immediately, rather than on 60 days' notice.

The debtor's judgment creditor sued the debtor and the counterparties, claiming that the voluntary termination of the contracts without receipt of the consideration that the debtor would have received during the 60-day notice period was a fraudulent transfer.

The district court dismissed the judgment creditor's suit, ruling that terminating a contract is not the transfer of an asset under the TUFTA.

The Fifth Circuit reversed, holding that "[w]aiver of the sixty-day notice period effected a transfer of the right to continue performance under the Agreements and receive the payments due thereunder, payments which had ascertainable value and were sufficiently vested to constitute 'assets' under TUFTA's broad definition of 'anything that may be the subject of ownership.'" 847 F.3d at 307.

The circuit court distinguished two Seventh Circuit cases holding that the termination of contracts did not effect a transfer by the fact that those contracts were "freely terminable," while the contracts at issue here required 60 days' notice.

The circuit court also dismissed the defendants' argument that the presence of a non-assignment clause rendered the contracts valueless. "That the contracts themselves are not assignable does not render the stream of income and the opportunity to perform services within the sixty-day notice period valueless. While the presence of the nonassignment clause dampens the market value of the Advisory Agreements, the right to perform and collect revenue during the sixty-day notice period still had value and was an asset under TUFTA." *Id.* at 309.

## **B. Fraudulent Transfers**

### **1. Actual Intent to Hinder, Delay, or Defraud**

***Ivey v. First Citizens Bank & Tr. Co. (In re Whitley)*, 848 F.3d 205 (4th Cir.), cert. denied, 138 S. Ct. 314 (2017)**

The Fourth Circuit affirmed the dismissal of an action against a depository bank to recover as fraudulent transfers the debtor's regular deposits into his own unrestricted checking account, holding that such deposits were not "transfers" to the bank because the debtor did not dispose of or part with property, and therefore such deposits were not avoidable as fraudulent transfers under the Bankruptcy Code.

The debtor ran a Ponzi scheme under the guise of a purchase-order factoring business, and he used his personal checking account at a bank to make deposits and receive wire transfers as part of his scheme. After the fraud was discovered and the debtor was forced into bankruptcy by his creditors, the chapter 7 trustee filed a complaint against that bank, alleging that certain deposits and wire transfers were made

with actual intent to hinder, delay, or defraud the debtor's creditors and therefore could be avoided as fraudulent transfers under section 548 of the Bankruptcy Code.

The bankruptcy court granted summary judgment in favor of the bank. The court reasoned that, although the transactions were transfers from the debtor to the bank, those transfers neither diminished the bankruptcy estate nor placed the funds beyond the creditors' reach, and they were therefore not avoidable as fraudulent transfers. The district court affirmed on the same grounds.

The trustee appealed to the Fourth Circuit. The trustee contended that the bankruptcy court and the district court erred by requiring that the transactions diminish the bankruptcy estate in order to qualify as fraudulent transfers, arguing that where, as here, actual fraudulent intent is present, there is no requirement that the transaction diminish the estate.

The Fourth Circuit, rather than focusing on whether diminishment is required under section 548, instead based its decision on the "threshold" issue of whether the transactions at issue were even "transfers" within the meaning of section 101(54) of the Bankruptcy Code.

Under section 548(a)(1)(A), a "trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily [] made such transfer . . . with actual intent to hinder, delay, or defraud any" creditor. Section 101(54)(D) of the Bankruptcy Code defines "transfer," in pertinent part, as any "mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with[] (i) property; or (ii) an interest in property." 11 U.S.C. § 548(a)(1)(A).

The Fourth Circuit noted that, while Congress sought to make the definition of "transfer" in the Bankruptcy Code "as broad as possible" and included bank account deposits as examples of transfers, courts are divided as to whether the section 101(54) definition of "transfer" includes a debtor's deposits *in the debtor's own* unrestricted bank account in the regular course of business.

The Fourth Circuit concluded that the better interpretation of "transfer" does not include a debtor's regular deposits into his own unrestricted checking account. When the debtor made deposits and accepted wire transfers into his checking account at the bank, he continued to possess, control, and have custody over those funds, which were freely withdrawable at his will, and always would have been part of the bankruptcy estate. The court held that the bank's mere maintenance of the debtor's checking account did not suffice to make deposits and wire transfers in that account "transfers" from the debtor to the bank.

The Fourth Circuit concluded its opinion noting that it "express[ed] no opinion on whether other types of deposits, such as those made to restricted checking accounts, would constitute transfers under § 101(54)." 848 F.3d 205, 210. Thus, it limited its holding to the narrow circumstances presented: When a debtor deposits or receives a

wire transfer of funds into the debtor's own unrestricted checking account in the regular course of business, the debtor has not transferred those funds to the depository bank. When the debtor is still free to access those funds at will, the requisite "disposing of" or "parting with" property has not occurred; there has not been a "transfer" within the meaning of section 101(54).

## **2. Reasonably Equivalent Value**

***DeGiacomo v. Sacred Heart Univ. (In re Palladino)*, 556 B.R. 10 (Bankr. D. Mass. 2016)**

The Massachusetts bankruptcy court held that parents paying their child's college tuition received "reasonably equivalent value" in the form of the college degree's contribution to the child's financial self-sufficiency.

Parents who ran a Ponzi scheme paid approximately \$65,000 in their daughter's college tuition over two years. After they filed for bankruptcy, the chapter 7 trustee sought to recover the tuition payments from the college as actual and constructive fraudulent transfers. The parties filed cross motions for summary judgment.

The court granted summary judgment in favor of the college on the actual fraudulent transfer claims, finding that the Ponzi scheme presumption (of actual fraudulent intent) applies only to transfers in furtherance of the Ponzi scheme. The court observed that the trustee did not contend that the tuition payments were in furtherance of the Ponzi scheme and did not dispute that the college received the tuition payments in good faith and without knowledge of the parents' fraudulent activity.

The court also granted summary judgment in favor of the college on the constructively fraudulent transfer claims, finding that the debtor parents had received reasonably equivalent value in exchange for the tuition payments. While noting that some "courts have found that tuition payments for children were avoidable because the benefits parents received in exchange were not 'concrete' or 'quantifiable,'" the court found that the debtors' motivation in paying the college tuition to further the child's financial self-sufficiency "concrete and quantifiable enough." 556 B.R. at 15. The court explained that: "A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent." *Id.*

***Tracht Gut, LLC v. Los Angeles County (In re Tracht Gut, LLC)*, 836 F.3d 1146 (9th Cir. 2016)**

The United States Court of Appeals for the Ninth Circuit held that a prepetition tax sale conducted in accordance with California state law, upon appropriate notice, and with an opportunity for competitive bidding conclusively established that the price received at the tax sale was, for purposes of fraudulent transfer law, "reasonably equivalent value" for the parcels of real property that were sold.

Prior to bankruptcy, the debtor had purchased two parcels of real property. Real estate taxes had not been paid on either parcel since 2008. Both properties were “tax defaulted” under California state law and subject to the county’s power to sell.

The county subsequently served on all interested parties the required notice of auction for a tax sale for each of the properties. The county then sold both properties at public auction in accordance with state law.

The debtor filed a chapter 11 petition one month later and filed an adversary complaint against the county and the buyers of the properties at the auction. The complaint asserted, among other claims, that the sales were fraudulent transfers.

The county moved to dismiss the complaint on the grounds, *inter alia*, that the properties should be conclusively presumed to have been transferred for reasonably equivalent value, insofar as they were sold at a regularly scheduled tax sale with competitive bidding procedures, all in compliance with applicable state law. The bankruptcy court dismissed the complaint and denied the debtor’s request to amend. The BAP affirmed, and the debtor appealed to the Ninth Circuit.

Under Bankruptcy Code section 548(a), a transfer of a debtor’s property made within two years of the filing of the petition can be avoided if, among other conditions, “less than a reasonably equivalent value” was received in exchange.

In *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), the Supreme Court held that a prepetition mortgage foreclosure sale conducted in accordance with state law conclusively established that the price obtained at that sale was for reasonably equivalent value. The Court, however, expressly limited that holding to mortgage foreclosures of real estate. “The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.” *BFP*, 511 U.S. at 537 n.3.

The Ninth Circuit Bankruptcy Appellate Panel held that the Supreme Court’s holding in *BFP* should also apply to tax sales conducted in accordance with California law. As a result, it agreed with the bankruptcy court that allowing the debtor to amend its complaint would have been futile because the county’s legally conducted tax sales of the properties could not constitute fraudulent transfers under Bankruptcy Code section 548. The Ninth Circuit agreed, holding, “The conclusive rule regarding mortgage foreclosures established by *BFP* should also apply to tax sales in California, because the rationale and policy considerations behind the Court’s holding in *BFP* are just as relevant in the California tax sale context.” 836 F. 3d at 1152.

Citing *BFP*, the Ninth Circuit explained that the lower price obtained from the forced sale of property at a foreclosure sale is not an indication of fraud:

[B]ecause state law allows the forced sales of real estate, property sold at such sales is “simply worth less” than property “sold at leisure and pursuant to normal marketing techniques.” Thus, the lower price obtained at a

foreclosure sale, when compared to a fair market valuation, is a result of the mechanism of forced sales, rather than a “badge of fraud” under the law of fraudulent transfers. “Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect.” The Court reasoned that if debtors were able to avoid mortgage foreclosures under federal bankruptcy law simply because the property was sold for below market value at the foreclosure sale, the state regulatory regime in which creditors can conduct forced sales on foreclosed property would be frustrated.

*Id.* at 1152-53 (quoting *BFP*).

The Ninth Circuit concluded that the *BFP* rationale also applies to tax sales:

Like mortgage foreclosures, tax foreclosure sales conducted by state and local governments are governed by state law.

The same procedural safeguards under California law that led the Supreme Court to conclude that mortgage foreclosures would yield reasonably equivalent value are also required in California for tax sales. “Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures.”

Pursuant to Cal. Rev. & Tax Code § 3691(a)(1)(A), the tax collector has the power to sell tax-defaulted property that has not been redeemed after the property has been in default for three years for commercial real estate, and five years for residential real estate. *Id.* This three- or five-year period provides a “substantial lead time,” one of the factors identified as an important safeguard in *BFP*.

In addition, when a property becomes available for tax sale, the tax collector must file notice with the county clerk, and that notice is recorded. Cal. Rev. & Tax Code §§ 3691.1, 3691.2, 3691.4. The tax collector is also required to send notice of the tax sale to all interested parties between 45 and 120 days before the proposed sale. Cal. Rev. & Tax Code § 3701. Notice must also be sent to the defaulting party, Cal. Rev. & Tax Code



§ 3691(a)(3)(A), and be published in a newspaper of general circulation weekly for three weeks, Cal. Rev. & Tax Code § 3702.

Finally, Cal. Rev. & Tax Code § 3693 requires that all tax sales shall be at public auction to the highest bidder. “Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale.” Cal. Rev. & Tax Code § 3691(a)(1)(A). After a tax sale, the tax collector is required to execute a deed to the purchaser for the property. Cal. Rev. & Tax Code § 3708. The tax deed is “conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed.” Cal. Rev. & Tax Code § 3711. The conclusive nature of the tax deed establishes that tax sales in California are conducted with “strict adherence to prescribed bidding rules and auction procedures.”

*Id.* at 1153-54 (quoting *BFP*).

The court was also persuaded by the fact that the Fifth and Tenth Circuits have explicitly extended *BFP* to tax sales. *See T.F. Stone Co. v. Harper (In re T.F. Stone Co.)*, 72 F.3d 466, 472 (5th Cir. 1995) (holding that under *BFP*, a tax sale done in accordance with state law satisfied Bankruptcy Code section 549’s “present fair equivalent value” requirement, which the court read as mirroring section 548’s “reasonably equivalent value” requirement); *Kojima v. Grandote Int’l Ltd. Liab. Co. (In re Grandote Country Club, Ltd.)*, 252 F.3d 1146, 1152 (10th Cir. 2001) (holding that *BFP* applies to tax sales challenged under a state fraudulent transfer law, so long as state law requires competitive bidding procedures).

Finally, the court concluded, “Because the policy of deferring to state law on matters of real estate applies as much to tax sales as to mortgage foreclosures, and because tax sales in California contain the procedural safeguards that apply to mortgage foreclosures, a tax sale conducted in accordance with California state law conclusively establishes that the price received at the tax sale was for reasonably equivalent value. That means that the sale did not represent a fraudulent transfer under 11 U.S.C. § 548(a).” *Id.* 836 F.3d at 1155.

## **C. Preferences**

### **1. Hypothetical Chapter 7 Test**

*Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017)

The Ninth Circuit held that in determining whether an alleged preference is avoidable under the “greater amount test” of Bankruptcy Code section 547(b)(5), a

bankruptcy court must take into account what other preference actions the trustee might have brought in a hypothetical chapter 7.

The debtor was a clinic that had decided to wind up its affairs. It sold its real property for \$1,295,000, and then used the proceeds to execute two transactions on the same day. First, the debtor paid its bank \$190,595.50 from an escrow to satisfy fully its outstanding loan obligations (“debt payment”). Next, the debtor moved the rest of its net sale proceeds—\$526,402.05—from escrow into its deposit account at the same bank (the “deposit”). The debtor then filed for chapter 7 within ninety days.

The chapter 7 trustee sought to recover the \$190,595.50 debt payment as a preference. The bankruptcy court granted the bank’s motion for summary judgment, finding that the trustee could not satisfy section 547(b)(5) because the bank had a right of setoff against the deposit account. Section 547(b)(5) requires that, in order for a transfer to be preferential, it must enable the creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7, (B) the transfer had not been made, and (C) such creditor received payment of such debt to the extent provided by the provisions of the Bankruptcy Code. The bankruptcy court rejected the trustee’s assertion that in the hypothetical liquidation, the trustee would have avoided the \$526,402.05 deposit into the account, leaving less than \$190,595.50 against which the bank could have set off. The district court affirmed.

The Ninth Circuit reversed. The court held that courts may account for hypothetical preference actions within a hypothetical chapter 7 liquidation when such an inquiry is factually warranted, is supported by appropriate evidence, and the action would not contravene an independent statutory provision. It further held that the \$526,402.05 deposit would constitute an avoidable preference in a hypothetical liquidation.

Section 547(b)(5) requires the court to construct a hypothetical chapter 7 case and determine what the creditor would have received if the case had proceeded under chapter 7 without the alleged preferential transfer. The text of the Bankruptcy Code, its legislative history, and current practice in the bankruptcy courts all support the conclusion that courts may entertain hypothetical preference actions within hypothetical chapter 7 liquidations. The section’s reference to payment under the “provisions of this title” refers to the totality of title 11, which includes the preference provisions in section 547. The Ninth Circuit also noted various bankruptcy courts’ holdings that all provisions applicable in a chapter 7 liquidation are to be taken into account when the court determines what creditors would receive under the best interests test in chapter 11.

The Ninth Circuit rejected the bank’s reliance on *Alvarado v. Walsh (In re LCO Enters.)*, 12 F.3d 938, 941 (9th Cir. 1993), which held that “the hypothetical chapter 7 analysis required by section 547(b)(5) must be based on the actual facts of the case.” In *LCO*, the debtor assumed a real property lease. Subsequently, a trustee was appointed, who sued the lessor to recover as preferences payments it had made within ninety days prior to the petition date. The trustee argued that in a hypothetical liquidation, a hypothetical chapter 7 trustee might have rejected the lease. The Ninth Circuit rejected

that argument, holding that the phrase “hypothetical chapter 7” does not mean that the bankruptcy court can construct its own hypothetical from whole cloth or from only some of the facts. Because the lease had been assumed, the bankruptcy court could neither speculate that there was no lease nor assume that the lease was rejected. Moreover, under section 365(b), once the lease was assumed, the requirement to cure any default was mandated. Thus, straying from the actual facts would permit section 547(b) to circumvent the requirements of section 365(b). In the present case, by contrast, fidelity to the actual facts is not necessary because there is no independent statutory provision with which avoidance of the deposit would conflict.

The Ninth Circuit then considered how the deposit would have been treated in a hypothetical chapter 7 liquidation. The deposit enabled the bank account to have more in it than the bank was owed. It was because of this that the lower courts concluded that the bank would have been able to set off against the account and collect the full amount that it received as a result of the challenged debt payment. The Ninth Circuit, however, held that in a hypothetical chapter 7 case, the creation of a right to set off during the ninety days before bankruptcy was preferential vis-à-vis the bank, and thus could have been avoided.

#### **D. Safe-Harbor Defenses**

***Merit Management Group, L.P. v. FTI Consulting, Inc.*, No 16-784, 2018 U.S. LEXIS 1514, 583 U. S. \_\_\_\_ (Feb. 27, 2018)**

The U.S. Supreme Court held unanimously that, in construing the “safe-harbor” of Bankruptcy Code section 546(e), the only relevant transfer is the overarching transfer that the trustee seeks to avoid; the mere presence of a “financial institution” in the component parts of the transaction does not trigger application of the safe-harbor.

Valley View owned a racetrack. It purchased all of the outstanding shares of its competitor, Bedford Downs, a company that owned another racetrack. Valley View acquired the Bedford shares for \$55 million, using money borrowed from Credit Suisse. The exchange took place through Citizens Bank as escrow agent.

After Valley View filed a bankruptcy petition, the litigation trustee sued Merit Management, a 30% shareholder of Bedford, for the return of the 30% of the \$55 million that had been received by Merit, alleging that the buyout was a fraudulent transfer. Merit asserted that the transfer was shielded from avoidance because it was “made by or to (or for the benefit of)” an entity named in the section 546(e) safe-harbor.

Section 546(e) provides that: “the trustee may not avoid a transfer that is a . . . settlement payment . . . made *by or to* (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made *by or to* (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract . . . .” 11 U.S.C. § 546(e) (emphasis added).

No one argued that either Merit or Valley View was a commodity broker, forward contract merchant, stockbroker, financial institution,<sup>3</sup> financial participant, or securities clearing agency. Rather, Merit argued eligibility for the safe harbor based on the involvement of Citizens Bank and Credit Suisse. The district court agreed with Merit, finding that “the transfers were ‘made by or to’ a financial institution because the funds passed *through* Citizens Bank and Credit Suisse.”

Parting ways with five of its sister circuits, the Seventh Circuit came to the opposite conclusion and reversed. The Circuit held that the safe harbor of section 546(e) does not shield from avoidance transfers that are made through financial institutions acting only as intermediary conduits for the funds.

The Seventh Circuit observed that it was impossible to determine from the plain language of the statute “whether the safe harbor was meant to include intermediaries, or if it is limited to what we might think of as the real parties in interest—here, the first and the final party possessing the thing transferred.” Accordingly, it turned to “the statute’s purpose and context for further guidance.” 830 F.3d at 694.

The trustee argued that because sections 544, 547, and 548 establish that only transfers “made by the debtor” prior to filing the bankruptcy petition are avoidable, transfers “made by” a named entity in section 546(e) ought also to refer to a transfer of property by the debtor. Similarly, the trustee contended that because sections 544, 547, and 548 refer to avoidance of transfers to or for the benefit of entities subject to fraudulent-transfer liability, section 546(e)’s safe harbor must refer only to transfers made to a named entity. The Seventh Circuit agreed: “Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place.” *Id.*

Turning its focus to section 550, the Seventh Circuit noted that the trustee may recover the property or its value from the “initial transferee” or “any immediate or mediate transferee.” 11 U.S.C. § 550. In *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988), the court had defined “transferee” as an entity with “dominion over the money” or “the right to put the money to one’s own purposes.” It found that a bank that “acted as a financial intermediary” and “received no benefit” was not a “transferee” within the meaning of chapter 5 of the Bankruptcy Code.

The Seventh Circuit extended its reasoning in *Bonded* to find that transfers “made by or to (or for the benefit of)” in the context of section 546(e) refers to transfers made to “transferees” as defined in the context of section 550. Thus, section 546(e)

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<sup>3</sup> In a footnote, the Supreme Court pointed out, “The parties here do not contend that either the debtor or petitioner in this case qualified as a ‘financial institution’ by virtue of its status as a ‘customer’ under §101(22)(A). Petitioner Merit Management Group, LP, discussed this definition only in footnotes and did not argue that it somehow dictates the outcome in this case. . . . We therefore do not address what impact, if any, §101(22)(A) would have in the application of the §546(e) safe harbor.”

does not shield “transfers that are simply conducted *through* financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit.” *Id.* at 691.

The court squared its holding with the purpose of the safe harbor, i.e., to “protect[ ] the market from systemic risk and allow[ ] parties in the securities industry to enter into transactions with greater confidence” – to prevent “one large bankruptcy from rippling through the securities industry.” Here, “neither Valley View nor Merit were ‘parties in the securities industry.’ They are simply corporations that wanted to exchange money for privately held stock. . . . We are not troubled by any potential ripple effect through the financial markets from returning the funds to” the litigation trustee. *Id.*

The Seventh Circuit noted that it was taking a different position than the Second, Third, Sixth, Eighth, and Tenth Circuits, all of which had interpreted section 546(e) to protect payments made through financial institutions acting as conduits. Only the Eleventh Circuit (*In re Munford*, 98 F.3d 604 (11th Cir. 1996)) agreed that section 546(e) does not shield such payments.

The Supreme Court affirmed, albeit with somewhat different reasoning. The court noted that the language of 546(e) and the specific context in which that language is used support the conclusion that the relevant transfer for purposes of the safe-harbor inquiry is the transfer that the trustee seeks to avoid:

On one side, Merit posits that the Court should look not only to the Valley View-to-Merit end-to-end transfer, but also to all its component parts. Here, those component parts include one transaction by Credit Suisse to Citizens Bank (i.e., the transmission of the \$16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (i.e., the transmission of \$16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that §546(e) bars avoidance.

FTI, by contrast, maintains that the only relevant transfer for purposes of the §546(e) safeharbor inquiry is the overarching transfer between Valley View and Merit of \$16.5 million for purchase of the stock, which is the transfer that the trustee seeks to avoid under §548(a)(1)(B). Because that transfer was not made by, to, or for the benefit of a financial institution, FTI contends that the safe harbor has no application.

The Court agrees with FTI. The language of §546(e), the specific context in which that language is used, and the

broader statutory structure all support the conclusion that the relevant transfer for purposes of the §546(e) safeharbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions.

....

Accordingly, after a trustee files an avoidance action identifying the transfer it seeks to set aside, a defendant in that action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with §546(e) . . . .

In the instant case, FTI identified the purchase of Bedford Downs' stock by Valley View from Merit as the transfer that it sought to avoid. Merit does not contend that FTI improperly identified the Valley View-to-Merit transfer as the transfer to be avoided, focusing instead on whether FTI can "ignore" the component parts at the safe-harbor inquiry. Absent that argument, however, the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under §546(e). The focus must remain on the transfer the trustee sought to avoid.

....

For the reasons stated, we conclude that the relevant transfer for purposes of the §546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers. Applying that understanding of the safeharbor provision to this case yields a straightforward result. FTI, the trustee, sought to avoid the \$16.5 million Valley View-to-Merit transfer. FTI did not seek to avoid the component transactions by which that overarching transfer was executed. As such, when determining whether the §546(e) safe harbor saves the transfer from avoidance liability, *i.e.*, whether it was "made by or to (or for the benefit of) a . . . financial institution," the Court must look to the overarching transfer from Valley View to Merit to evaluate whether it meets the safe-harbor criteria. Because the parties do not

contend that either Valley View or Merit is a “financial institution” or other covered entity, the transfer falls outside of the §546(e) safe harbor.

The Supreme Court affirmed the Seventh Circuit’s decision reversing the district court’s judgment on the pleadings, and remanded the case for determination the merits.

***Christophersen v. Pahel (In re TVGA Engineering, Surveying, P.C.), 562 B.R. 862 (Bankr. W.D.N.Y. 2016)***

The bankruptcy court held that where a bank’s only involvement in a transfer was honoring checks written by its depositor (the debtor), the transfers were “by” the debtor and not the bank for purposes of section 546(e) of the Bankruptcy Code, and thus the transfers were not subject to the safe harbor for securities transactions “by” a financial institution.

The debtor, a private company, agreed to buy back the defendant’s shares in 1996. Over 65 months, the debtor paid defendant approximately \$259,000, mostly through monthly payments of \$4,000 that were made by check from debtor’s account at the bank. The debtor filed its chapter 11 petition in 2012; the case was subsequently converted to a chapter 7 case. The chapter 7 trustee brought this action to recover payments to the defendant under several theories. The defendant moved to dismiss, arguing, among other things, that the trustee’s claims were barred by the safe-harbor provisions in section 546(e) of the Bankruptcy Code, which provide a “safe harbor” for certain transactions involving transfers “by” a financial institution.

The court looked to the Second Circuit’s decision in *In re Quebecor World (USA) Inc.*, 719 F.3d 94 (2d Cir. 2013), in which the debtor had paid \$376 million to a financial institution that was serving as trustee for the holders of commercial paper issued by the debtor’s affiliate. The Second Circuit held that the section 546(e) safe harbor applied even though the financial institution was a mere conduit that did not take title either to the debtor’s cash payment or to repurchased notes. The court noted that it was bound by the holding in *Quebecor* that the bank need not have taken a “beneficial interest” in a security in order to trigger section 546(e)’s safe harbor provisions. But *Quebecor* did not go so far as to hold that the safe harbor applies simply because a financial institution was instrumental in the transaction.

The court reasoned that, even if it assumed that each payment was a “settlement payment” or was a payment “in connection with a securities contract,” the payments were not made “by or to (or for the benefit of)” a financial institution. They were payments made “by” the debtor “to” the defendant. The court stated that if each payment had been made by a money order from a supermarket, section 546(e) “could not possibly apply,” and that the avoidability of the transfers for the benefit of debtor’s other creditors could not possibly turn on the use of a bank as opposed to a store-bought money order as the vehicle for transferring the payment. 562 B.R. at 865.

The court held that resort to legislative history was required, notwithstanding that in *Quebecor* the Second Circuit affirmed a bankruptcy court's decision that found resort to legislative history to be improper. The court noted that the Second Circuit had not expressly adopted the lower court's view on legislative history. The bankruptcy court stated that the legislative history confirmed the purpose of the safe-harbor provisions was to shield transfers where avoidance would pose a danger to the functioning of any securities market. The bankruptcy court held that the checks in this case were simply a substitute for cash and avoiding the transfers would not pose any threat to banking, financial securities, or any other markets. Accordingly, the court rejected application of section 546(e) and denied the motion to dismiss.

**E. 544(b) Reachback**

***Kelley v. Opportunity Fin., LLC (In re Petters Co.)*, 550 B.R. 438 (Bankr. D. Minn. 2016)**

The Minnesota bankruptcy court ruled that substantive consolidation could not operate to remake history by recasting creditors of certain debtors into the requisite “triggering creditors” for purposes of avoiding transfers made by other debtors under Bankruptcy Code section 544(b).

The bankruptcy court reasoned:

To give a trustee standing to use state-law fraudulent transfer remedies against pre-petition transfers by a specific debtor, § 544(b) requires the presence in the case of a specific creditor that could have used the same remedies to avoid those very transfers. If the debtor-transferor had no such creditors, the gap is not retroactively filled by a substantive consolidation of that debtor's bankruptcy estate with others, even if the other cases feature allowable creditor-claims that would qualify their holders as predicate creditors for the use of avoidance remedies against transfers by their own debtors.

Consolidation of the bankruptcy estates would not affect the substantive merits of any right of avoidance brought into the pooling of the estates' fortunes.

550 B.R. 438, 455-56.

***Hillen v. City of Many Trees, LLC (In re CVAH, Inc.)*, 570 B.R. 816 (Bankr. D. Idaho 2017)**

The Idaho Bankruptcy Court held that the chapter 7 trustee could “step into the shoes” of the Internal Revenue Service for purposes of avoiding transfers under Bankruptcy Code section 544(b) and utilize the longer “look-back” periods found in the Federal Debt Collection Procedures Act and the Internal Revenue Code to recapture



transfers within six years (under the FDCPA) or ten years (under the IRC) before the petition filing date.

#### **F. Dominion and Control**

##### ***Meoli v. Huntington Nat'l Bank*, 848 F.3d 716 (6th Cir. 2017)**

The Sixth Circuit held that a chapter 11 trustee could not recover under Bankruptcy Code section 550 certain excess deposits made by the debtor to a bank account because the bank did not gain “dominion and control” over the deposits and was, therefore, not a qualifying “transferee.” It further held that inquiry notice of fraud alone does not necessarily defeat a section 550(b)(1) affirmative defense for transferee liability, but that the bank’s “good faith” ended when the bank’s investigator discovered the debtor’s fraud.

The chairman and chief executive of Cyberco Holdings, Inc. (“Cyberco”) created a separate company, Teleservices Group, Inc. (“Teleservices”), to facilitate a Ponzi scheme in which he produced fake Teleservices invoices for computer equipment to borrow money from equipment-financing companies. The borrowed funds were deposited at Huntington National Bank (the “Bank”) and were used to benefit Cyberco by, among other things, satisfying Cyberco’s debt to the Bank.

The trustee sought to recover from the Bank three types of transfers made by Teleservices to the Bank: (i) direct loan repayments, which Teleservices sent directly to the Bank to pay down Cyberco’s debt to the Bank; (ii) indirect loan repayments, which Teleservices sent to Cyberco’s deposit account at the Bank, and which Cyberco later used to repay its debt to the Bank; and (iii) excess deposits, which Teleservices sent to Cyberco’s deposit account at the Bank, and which Cyberco later withdrew or the government later seized.

The bankruptcy court held that the trustee could recover all three types of transfers from the Bank, although the recovery was limited to the period during which the Bank did not act in good faith; i.e., after one of the Bank’s investigators discovered that the CEO was a convicted fraudster, even though the investigator failed to share that discovery with others at the Bank. After the district court affirmed, the Bank appealed, arguing that it was not a transferee of the excess deposits, and that it received the loan repayments in good faith while it cooperated with the FBI’s investigation of Cyberco. On cross-appeal, the trustee argued that the Bank’s good faith ended much earlier than the date of the investigator’s discovery, and also that the federal postjudgment rate used to calculate prejudgment interest was unreasonably low.

The Sixth Circuit majority reversed the bankruptcy court’s decision, in part, and held the trustee could not recover the excess deposits made to the Bank under section 550 of the Bankruptcy Code because the bank never gained “dominion and control” over the deposits and was, therefore, not a qualifying “transferee” of the funds.

Under the “dominion and control” test, “the minimum requirement of status as a ‘transferee is dominion over the money or other asset, the right to put the money to one’s own purposes.’” 848 F.3d at 725 (quoting *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528, 534 (6th Cir. 2003)). The Sixth Circuit distinguished between “mere possession” and “ownership,” finding that “a party is not to be considered an initial transferee if it is merely an agent who has no legal authority to stop the principal from doing what he or she likes with the funds at issue.” *Id.*

Under this analysis, neither the excess deposits nor the indirect loan repayments (before Cyberco instructed the Bank to apply those deposits to pay down its debt) constituted transfers that could be recovered by the trustee. Further, the Bank’s security interest, which was perfected to secure the loan to Cyberco, did not grant dominion and control to the Bank over Cyberco’s deposits.

The Sixth Circuit affirmed the lower court’s decision that the trustee could recover all direct loan repayments made after the date the Bank’s good faith ended (i.e., upon its discovery of Cyberco’s fraud), and that transfers prior to that date were protected under section 548(c) of the Bankruptcy Code, which allows an initial transferee to avoid liability if the transferee took the property in good faith and gave value to the debtor in exchange for the property.

With respect to the indirect loan payments, the court considered whether the Bank could avoid liability pursuant to section 550(b)(1) of the Bankruptcy Code, which requires that a subsequent transferee take the property in good faith and without knowledge of the voidability of the transfer, and give value to the debtor in exchange for the property. The Sixth Circuit held that inquiry notice alone was not sufficient to prove that the Bank had knowledge of the transfer’s voidability. Rather, the court found that the applicable standard would require the bankruptcy court to determine, on remand, whether a reasonable person would have been alerted to the transfers’ voidability.

Finally, the Sixth Circuit held that it was not an abuse of discretion for the bankruptcy court to award prejudgment interest according to the statutory, rather than the market, interest rate because the court considered case-specific factors before choosing the statutory rate.

#### **G. Extraterritorial Application**

***Spizz v. Goldfarb Seligman & Co. (In re Ampal-American Israel Corp.)*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017)**

The New York bankruptcy court held that the trustee of a chapter 7 debtor headquartered in Israel cannot recover a preference where the payment was made from the debtor’s Israeli bank to an Israeli supplier because Bankruptcy Code section 547 does not have extraterritorial effect and the transfer did not originate in the U.S.

The chapter 7 debtor was a New York corporation with offices, management, and books/records in Israel. Its stock was traded on both the U.S. and Israeli exchanges.

Within ninety days before bankruptcy, the debtor paid an Israeli supplier on account of an antecedent debt, by wiring money from the debtor's Israeli bank account to the supplier's Israeli bank account. The chapter 7 trustee sued the supplier to recover a preference. The supplier conceded that the elements of a preference existed, but contended that section 547 could not be applied extraterritorially.

The bankruptcy court observed that the "presumption against extraterritoriality" is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 562 B.R. 601, 605 (quoting *EEOC v. Arabien Am. Oil Co.*, 499 U.S. 244, 248 (1991)). In *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the United States Supreme Court outlined a two-step approach to determine whether the presumption forecloses a claim.

At the first step, the court asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* (quoting *RJR Nabisco Inc. v. European Cmty*, 136 S. Ct. 2090, 2100 (2016)). If it does not, the court must turn to the second step to determine if the litigation involves an extraterritorial application of the statute.

At the second step, the court determines "whether the case involves a domestic application of the statute, . . . by looking to the statute's 'focus.'" If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.* (quoting *Nabisco*, 136 S. Ct. at 2101)).

At the first step, the bankruptcy court held that the avoidance provisions of the Bankruptcy Code, including section 547, do not apply extraterritorially. "Property transferred to a third party prior to bankruptcy in payment of an antecedent debt is neither property of the estate nor property of the debtor *at the time the bankruptcy case is commenced*, the only two categories of property mentioned in Bankruptcy Code § 541(a)(1)." *Id.* at 612.

The court disagreed with the Fourth Circuit's decision in *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006), holding that Congress intended international application of U.S. fraudulent transfer law. The *French* court had reasoned that pursuant to section 541 of the Bankruptcy Code, "all of a debtor's property, whether domestic or foreign, [was] 'property of the estate' subject to the bankruptcy court's *in rem* jurisdiction" and, therefore, "§ 548 plainly allows a trustee to avoid any transfer of property that *would have been* 'property of the estate' prior to the transfer in question—as defined by § 541—even if that property is not 'property of the estate' *now* . . . ." 562 B.R. at 607-08 (quoting *French*, 440 F.3d at 151-52).

At the second step, the bankruptcy court ruled that the determination of whether the case involves a domestic or extraterritorial application of section 547 depends on

whether the initial transfer came from the U.S. Because the transfer here occurred between a transferor headquartered in Israel and an Israeli transferee through Israeli bank accounts, the transfer occurred in Israel, and was not domestic. Therefore, the court concluded that it could not be avoided.

## **VIII. DISCHARGE AND EXEMPTIONS**

### **A. Dischargeability of Claims**

#### ***Rupp v. Pearson*, 658 F. App'x 446 (10th Cir. 2016)**

The Tenth Circuit held that an otherwise innocent motive (such as covering basic living expenses) can coexist with the intent to hinder or delay creditors within the meaning of Bankruptcy Code section 726.

The chapter 7 trustee filed a complaint requesting that the debtor be denied a discharge because she had used her tax refund on nonexempt personal items contrary to her prior approved chapter 13 plan and with the intent to hinder, delay, or defraud creditors.

The plan in the debtor's prior chapter 13 case included a provision permitting her to retain up to \$2,000 of her 2012 tax refund, with any surplus going to the bankruptcy estate. Although her refund totaled \$4,829, she paid none of it to the estate, and spent all of it on living expenses, bills, and her children instead. The bankruptcy court dismissed the chapter 13 case for nonpayment. Thirteen days later, the debtor filed a chapter 7 petition.

The trustee's complaint relied on section 727(a)(2)(A), which provides that a discharge will not be granted if "the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of the petition." 11 U.S.C. § 727(a)(2)(A).

Although the debtor did not answer the complaint, the bankruptcy court dismissed it with prejudice, ruling that the trustee could not show fraudulent intent. The district court affirmed.

The Tenth Circuit reversed, finding that "the amended complaint states a plausible claim that [the debtor's] failure to turn over to the Chapter 13 bankruptcy estate the required portion of the tax refund was part of a scheme to hinder and delay creditors." 658 F. App'x 446, 4450.

Contrary to the bankruptcy and district courts' holdings, the Tenth Circuit explained that the absence of traditional badges of fraud was not fatal to the trustee's claim. The court stated that, "[a]lthough identification of traditional badges of fraud can be useful, they are not the exclusive means of establishing fraud." *Id.*

The circuit court also ruled that the trustee did not need to show intent to defraud; rather, “[u]nder the statute authorizing dismissals of bankruptcy petitions, it is enough to show actions taken with intent to ‘hinder or delay creditors.’” *Id.*

The court concluded:

The lower courts also relied on the failure of the amended complaint to negate the possibility of an innocent explanation for [the debtor’s] behavior, such as the need to take care of herself or feed her children . . . [yet] an otherwise innocent motive can coexist with the intent to hinder or delay creditors. Whenever a debtor hinders creditors, it is likely that the debtor wants the money to go for a “good” purpose, such as helping the debtor’s children or paying other creditors.

*Id.* (citation omitted).

#### **B. Discharge of Contingent Claims**

***Camelback Constr. v. Castellino Villas, A.K.F. LLC (In re Castellino Villas, A.K.F. LLC), 836 F.3d 1028 (9th Cir. 2016)***

The Ninth Circuit Court of Appeals held that an attorneys’ fees clause in a prepetition contract gave rise to a contingent prepetition claim against the debtor’s estate that included fees to be incurred following confirmation, which were therefore discharged under the debtor’s confirmed plan.

The prepetition construction contract between the debtor and its contractor provided:

*Attorneys’ Fees.* In any suit, action or proceeding between the parties arising out of, or in connection with, any of the terms, covenants, provisions or agreements in the Agreement, the prevailing party in such suit . . . shall be awarded . . . all reasonable attorneys’ fees incurred before any trial or proceeding, at all trials or proceedings and on all appeals.

After a prepetition payment default, the contractor filed a mechanic’s lien against the debtor’s property and subsequently sued in the state court to foreclose on the mechanic’s lien. Following an arbitration award in favor of the contractor and the entry of judgment in the state court affirming the arbitration award, the debtor filed a chapter 11 petition.

The bankruptcy court granted relief from stay to permit the parties to continue to litigate the mechanic's lien in the state court. The debtor disputed the validity, priority, and amount of the contractor's lien.

The debtor proposed a chapter 11 plan, and the contractor filed an objection. The parties resolved the objection in a settlement agreement providing that, if the contractor's foreclosure action in the state court resulted in a determination that the mechanic's lien was a "valid, properly perfected and enforceable mechanics lien against the . . . property" and was senior to the bank's lien, the contractor would receive specified payments from a trust account that the debtor would fund in connection with implementing its plan. The parties expressly did not agree as to whether the contractor was entitled to interest, costs, or attorneys' fees if it prevailed on its claim; the settlement agreement stated that the debtor "contends that under no circumstance is [the contractor] entitled to interest, attorneys' fees or costs" as part of its claim, and the contractor "disputes said contention." The debtor reserved its defenses relating to the state court litigation. The settlement agreement also provided that, upon the court's approval of the settlement terms, the debtor's plan of reorganization would be modified to include those terms and the contractor would withdraw its objection to the confirmation of the plan as modified. Finally, the parties entered into mutual releases, agreeing to release "any and all claims, demands, and causes of action . . . that exist as of the date of this Agreement or any time prior thereto."

The bankruptcy court approved the settlement, and the modified plan was confirmed.

The contractor was ultimately successful in the state court litigation. It then moved in the bankruptcy court for an order determining that it was entitled to an award of attorneys' fees incurred in the state court litigation following confirmation of the debtor's plan. The bankruptcy court denied the fees, and the district court affirmed. The contractor appealed to the Ninth Circuit.

The Ninth Circuit held that the postconfirmation fees had been discharged by virtue of confirmation of the plan:

We have recognized that under some circumstances, a creditor may have a claim against a debtor for attorneys' fees, even though the creditor has not yet incurred those fees. For instance, where the debtor and creditor have entered into a contract that includes an attorneys' fees agreement, the creditor may be deemed to have a contingent claim for payment of attorneys' fees even before any fees are incurred. "[W]hen a creditor's right to payment for fees exists prepetition [in a Chapter 7 case], the right to payment constitutes a 'claim,' within the meaning of § 101(5)(A), *albeit* an unliquidated, unmatured claim." Such a contingent claim would then include attorneys' fees incurred during and after the bankruptcy

case. “In general, if the creditor incurs the attorneys’ fees postpetition [in a Chapter 7 case] in connection with exercising or protecting a prepetition claim that included a right to recover attorneys’ fees, the fees will be prepetition in nature, constituting a contingent prepetition obligation that became fixed postpetition when the fees were incurred.” Said otherwise, when the creditor had a prepetition contingent claim for attorneys’ fees, even attorneys’ fees incurred after that date may be discharged in bankruptcy.

836 F.3d at 1034 (quoting *In re SNTL Corp.*, 571 F.3d 826, 839 (9th Cir. 2009)).

In determining whether a creditor’s claim arose prepetition, we use the “fair contemplation” test. Under this test, “a claim arises when a claimant can fairly or reasonably contemplate the claim’s existence even if a cause of action has not yet accrued under nonbankruptcy law.” For instance, . . . we held that when a state environmental regulatory agency was aware that the groundwater at the debtors’ site was seriously contaminated before the debtors filed a bankruptcy petition, a contingent claim for cleanup costs was in the “fair contemplation” of the state at the time the debtors filed their Chapter 7 petition. The state’s claim for cleanup costs was therefore discharged in bankruptcy, even though the state incurred nearly a million dollars in cleanup costs after the discharge. Accordingly, if a creditor and debtor are engaged in prepetition litigation pursuant to a contract that includes an attorneys’ fees provision, and the creditor “can fairly or reasonably contemplate” that it will have a claim for attorneys’ fees if an “extrinsic event” occurs (that is, if it prevails in the litigation), then the creditor’s claim for attorneys’ fees will be discharged in the debtor’s bankruptcy even if the creditor incurs attorneys’ fees after the debtor was discharged.

*Id.* (quoting *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993)).

We conclude that under the circumstances of this case, Picerne could “fairly or reasonably contemplate” that it would have a claim for attorneys’ fees if it prevailed in the state litigation before Castellino filed its petition for bankruptcy. Therefore, the district court correctly determined that the claim was discharged when the bankruptcy court confirmed Castellino’s plan.

*Id.* at 1037.

## **IX. CLAIMS**

### **A. Lessor's Damage Claim**

#### ***Kupfer v. Salma (In re Kupfer)*, 852 F.3d 853 (9th Cir. 2016)**

The Court of Appeals for the Ninth Circuit held that the section 502(b)(6) statutory cap on a landlord's claims against a tenant in bankruptcy applies only to claims that result directly from the termination of a lease, but not to collateral claims.

Prior to bankruptcy, the debtors had entered into leases with the landlords of two commercial properties. Each lease had a ten-year term and included an arbitration clause under which attorney fees, arbitration fees, and costs would be awarded to the prevailing party in the event of a dispute.

The debtors stopped paying rent and eventually vacated the premises, and the landlords sued for breach in state court. The debtors counterclaimed, alleging breach of contract and numerous other claims. The state court stayed the action pending arbitration. The arbitrator found for the landlords, denied all of the debtors' counterclaims, and awarded damages against the debtors of about \$1.5 million, which included both unpaid past rent and future rent discounted to present value (\$1.3 million), attorneys' fees of \$137,250, and arbitration fees of \$56,934.18.

The debtors subsequently filed chapter 11 petitions, and the landlords filed proofs of claim for the arbitration award, to which debtors objected. The debtors argued that the entire arbitration award, including attorney fees and arbitration fees—not just the portions of the award representing past and future rent—should be limited by the cap contained in section 502(b)(6). The landlords argued that the cap should apply only to past and future rent, but not to the fee awards.

The bankruptcy court sided with landlords, allowing an amount that represented the arbitration award of past and future rent as limited by the statutory cap, plus the entire uncapped claim for attorney fees and arbitration fees. The district court affirmed, *Kupfer v. Salma (In re Kupfer)*, 526 B.R. 812 (N.D. Cal. 2014), and the debtors appealed. The Ninth Circuit reversed and remanded.

Under section 502(a), claims are deemed allowed, unless a party in interest objects. Upon objection to a claim of a lessor for damages resulting from the termination of a lease of real property, the claim is allowed except to the extent that the claim exceeds—(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—(i) the date of the filing of the petition; and (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.



As the court explained, “The statute sets forth a category of claims that is subject to the cap (‘claim[s] of a lessor for damages resulting from the termination of a lease’) and then defines the cap as the sum of all outstanding current rent and the greater of one year of remaining rent or 15% of the remaining term. In some circumstances, attorney fees and arbitration fees can be categorized as damages resulting from termination. *See, e.g., In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 349 (Bankr. D. Del. 1998), *subsequently aff’d, Solow v. PPI Enters. (U.S.), Inc.*, 324 F.3d 197 (3d Cir. 2003).” 852 F.3d at 855-56.

After examining the legislative history of various landlord claim capping provisions, the court noted that the current provision caps only “damages resulting from the termination of a lease.” The Bankruptcy Appellate Panel for the Ninth Circuit had previously adopted an expansive interpretation of the 502(b)(6) cap, holding that rejection of the lease results in the breach of each and every provision of the lease, including covenants, and section 502(b)(6) is intended to limit the lessor’s damages resulting from that rejection (*Kuske v. McSheridan (In re McSheridan)*, 184 B.R. 91, 102 (9th Cir. BAP 1995), *overruled in part by Saddleback Valley Cmty. Church v. El Toro Materials Co. (In re El Toro Materials Co.)*, 504 F.3d 978 (9th Cir. 2007)). Other courts, however, have held that section 502(b)(6) should be interpreted narrowly to cap claims for future rent, but to exclude all other damages, thereby permitting collateral claims to be asserted in full. The Ninth Circuit adopted a middle ground.

Citing to its earlier decision in *El Toro Materials*, 504 F.3d at 981, the court noted, “*El Toro* established a test for determining which claims would be capped and which claims would be allowed in full: A simple test reveals whether the damages result from the rejection of the lease: ‘Assuming all other conditions remain constant, would the landlord have the same claim against the tenant if the tenant were to assume the lease rather than rejecting it?’” 852 F.3d at 858. In the context of a prepetition lease termination (as opposed to a postpetition rejection), the Ninth Circuit held that the question is:

Assuming that all other conditions remain constant, would the landlord have the same claim against the tenant had the lease not been terminated? Applying that principle here, we conclude that the parties’ and the courts’ all-or-nothing approach is incorrect.

As noted, the arbitration giving rise to the disputed fees and costs concerned two leases. The prevailing [landlords] demanded both past-due rent and future rent. Debtors brought a variety of counterclaims, alleging torts and breaches of contract committed by [landlords]. Even though Debtors did not prevail on those claims, they were litigated, and the fees and costs reflect that litigation. The obligation to reimburse [landlords] for fees and costs arose from covenants in the leases, but § 502(b)(6) does not cap damages resulting from every breach of contract—only

those claims for “damages resulting from the termination of a lease.” 11 U.S.C. § 502(b)(6) (emphases added).

Fees attributable to litigating [landlords’] claims for future rent are capped, because such claims would not arise were the leases not terminated. But the arbitration award also included damages for past rent, which [landlords] could claim independent of termination; the fees attributable to that portion of the litigation are not capped. The parties also litigated Debtors’ numerous counterclaims. To the extent that the counterclaims concerned ordinary alleged breaches, independent of a lease termination, the associated fees and costs are not capped, either.

On remand, the district court first must categorize all claims as either directly resulting from termination of the leases, or not. The former are capped; the latter are not. The court then must apportion the associated fees and costs accordingly.

*Id.* at \*858-59. Reversed and remanded.

## **B. Class Claims**

### ***In re Energy Future Holdings Corp.*, 558 B.R. 684 (D. Del. 2016)**

The Delaware district court affirmed the bankruptcy court’s decision: (a) declining to certify, for the purpose of filing of a class proof of claim, a class of claimants who alleged damages related to asbestos exposure for which symptoms had not yet manifested; and (b) holding that the proposed class proof of claim did not meet the superiority requirement of Federal Rule of Civil Procedure 23(b).

The claimants had not filed any lawsuits against the debtors prior to the filing of the bankruptcy petitions. Postpetition, just before the court-ordered deadline for the filing of proofs of claim, the claimants filed a motion for permission to file a class proof of claim pursuant to Bankruptcy Rule 7023, which incorporates Federal Rule of Civil Procedure 23. Although the claimants asserted that they were entitled to damages related to asbestos exposure, no symptoms had yet manifested.

The bankruptcy court denied the motion, stating that to allow a class proof of claim in this instance would be “unprecedented.”

On appeal to the district court, the court noted:

This is not a case where there is a previously certified class from pending litigation outside the Bankruptcy Court proceedings that is coming into Court to file a proof of claim on behalf of the class. In fact, the proposed class in

this case would never litigate anything. Rather, Appellants seek class certification “solely for the purpose of filing a proof of claim.” As Judge Sontchi recognized, the purpose of the class proof of claim would be to negate the bar date. The Bankruptcy Court recognized it had the power to allow a class proof of claim, and explained why it chose not to do so. The reasons it gave made sense.

558 B.R. at 688 (citations to record omitted).

The bankruptcy court had also denied certification because it found that Rule 23(b)(3)’s superiority requirement had not been met. Specifically, Rule 23(b) provides that a class action may be maintained if, among other things, the court finds “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

The district court rejected the claimants’ argument that, without class certification, courts would be flooded with individual lawsuits from currently unmanifested claimants, stating that “an unsubstantiated claim about the potential number of future lawsuits cannot serve as the basis for finding abuse of discretion on the efficiency prong.” 558 B.R. at 689. With respect to fairness, claimants argued that without certification, individual claimants would face the “unfair and insurmountable burden[] . . . of having to appear in Bankruptcy Court in Delaware to argue that their claims were not discharged.” *Id.* However, under current Third Circuit law, the claims of individuals exposed to asbestos arise, for purposes of the bankruptcy discharge, upon exposure, rather than the manifestation of symptoms. *See In re Grossman’s Inc.*, 607 F.3d 114, 125 (3d Cir. 2010) (overruling the accrual test *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984)). To protect unmanifested claimants’ due process rights, the Third Circuit had further provided guidance as to the type of notice procedures that would be required.

The district court noted that certifying a proposed class would amount to an end run around the bar date, stating, “[C]ertifying the proposed class would have the effect of reinstating the accrual test of Frenville, at least as applied to the proposed class. In other words, the members of the proposed class would be able to bring suit whenever they manifest, regardless of whether they received notice of the bar date, which is precisely the opposite of what the Third Circuit, sitting en banc in Grossman’s held.” 558 B.R. at 689.

### C. Priority

***Branch Banking & Trust Co. v. Beaman (In re Constr. Supervision Servs.)*, 2016 WL 2764328 (E.D.N.C. May 9, 2016)**

The United States District Court for the Eastern District of North Carolina affirmed the bankruptcy court’s denial of an oversecured lender’s motion for a superpriority administrative expense claim for postpetition interest, costs, and fees. In

doing so, the court held that where the secured creditor was paid both adequate protection payments and the entire amount of its prepetition claim, it was not entitled to a superpriority claim for additional postpetition interest, costs, and attorneys' fees notwithstanding the fact on the petition date, its equity cushion was sufficient to cover those costs.

A secured lender filed four claims against the chapter 11 debtor's estate totaling approximately \$1.3 in principal and matured interest as of the petition date. The claims were secured by a lien on the debtor's accounts receivable, valued at approximately \$5.5 million. Accordingly, as of the petition date, the lender was oversecured. When the debtor asked the court for permission to use the lender's cash collateral (i.e., the proceeds of the accounts receivable), the lender objected and requested adequate protection. The lender argued that its claim was not adequately protected because the majority of the accounts receivables were aged beyond 60 days (only \$2.5 million were aged 60 days or under). The bankruptcy court agreed and ordered the debtor to make adequate protection payments. It also found that to the extent that the adequate protection later turned out to be insufficient, the lender would be entitled to priority under 11 U.S.C. § 507(b).

For the next nine months the debtor made adequate protection payments totaling \$62,900 before its case was converted to a chapter 7 liquidation. In addition, prior to the conversion, a number of subcontractors who were entitled under state law to statutory liens perfected their liens postpetition, as they were entitled to do pursuant to Bankruptcy Code sections 362(d)(3) and 546(b). These liens were given priority over the lender's secured claim in the debtor's accounts receivable under applicable state law.

After conversion, the trustee liquidated the debtor's property and paid the secured lender all of its prepetition principal and interest (\$1,237,836.79). Including the adequate protection payments (\$62,900), the lender was paid a total of \$1,300,736.79, which exceeded lender's petition date claim by \$34,868.24, leaving it with an "equity cushion" of that amount. The lender applied that "equity cushion" toward its postpetition interest, costs, and fees. The lender then filed a motion for a superpriority administrative expense claim for additional postpetition interest, costs, and fees, in which the lender argued that the debtor's use of its accounts receivable diminished their value such that the lender no longer had an adequate equity cushion from which it could fully recover its expenses allowed under Bankruptcy Code section 506(b).

The bankruptcy court disagreed, holding that the lender could not show that its court-ordered adequate protection was inadequate because it recovered fully the principal debt and matured interest owed to it as of the petition date. In addition, the bankruptcy court held that the lender failed to establish that the diminution in value of the collateral securing the debtor's obligation was attributable solely to the debtor's use of that property, rather than the intervening subcontractors' liens. The lender appealed and the district court affirmed.

The first issue on appeal was whether the lender could rely on a superpriority claim to recoup its petition date equity cushion in an amount sufficient to cover all of its

postpetition interest, costs, and fees, where the lender had recovered fully the principal debt and matured interest owed to it as of the petition date. The court answered no. Under Bankruptcy Code section 507(b), if the debtor in possession provides adequate protection to a secured creditor and if, notwithstanding such protection, the creditor has a claim allowable under Bankruptcy Code section 507(a)(2) arising from the stay of action against that property under section 362, from the use, sale, or lease of such property under section 363, or from the granting of a lien under section 364(d), then the creditor's claim under that subsection has priority over every other claim allowable under such subsection. 11 U.S.C. § 507(b). To find that a creditor is entitled to a superpriority claim, therefore, three requirements must be met: (1) adequate protection must have been provided previously, and the protection ultimately must prove to be inadequate; (2) the creditor must have a claim allowable under section 507(a)(2) (which in turn requires that the creditor have an administrative expense claim under section 503(b)); and (3) the claim must have arisen from either the automatic stay under section 362 or the use, sale, or lease of the collateral under section 363 or the granting of a lien under section 364(d).

As to the first test, the District Court found that the value of the secured lender's "interest" in the debtor's accounts receivable was adequately protected. The relevant "interest" to be protected is the value of the creditor's *secured claim*, which is not necessarily the value of its *collateral*. The court explained, "the relevant 'interest' to be protected is not necessarily the value of the collateral. Nor does the relevant 'interest' include any 'unsecured claim,' as an 'unsecured' claim does not represent an 'interest . . . in property.'" Under no circumstance may the 'value' of creditor's 'interest' to be adequately protected exceed the value of the principal debt and matured interest owed to the creditor as of the petition date." 2016 WL at \*4-5 (citations omitted). While an oversecured creditor is allowed postpetition expenses as part of its secured claim, such expenses are allowed only "to the extent" of the creditor's oversecurity, and the extent of that oversecurity is gauged at or near the end of the case. Adequate protection payments ensure stability in the petition-date "value" of a creditor's secured claim, and the value of that claim is the lesser of the value of the collateral or the principal debt and matured interest owed the creditor as of the petition date. Here, lender was an oversecured creditor as of both the petition date as well as the date on which it requested adequate protection. Had the debtor's adequate protection payments failed, the court explained, lender would have become an undersecured creditor. That did not happen here; thus, its request for a superpriority claim was appropriately denied.

The court rejected the lender's argument that the "value" of an oversecured creditor's claim should be measured by the value of the collateral securing the debtor's obligation, distinguishing the treatment of an *oversecured* creditor's claim from that of an *undersecured* creditor, based on the text of the statute, its legislative history and the absurd results that would follow. It stated:

Under [lender's] view, an oversecured creditor always is entitled a superpriority claim to assist in the collection of its post-petition interest, costs, and fees where the debtor's post-petition use of the collateral depreciates its value,

irrespective of whether that creditor has recovered fully the principal debt and matured interest owed to it as of the petition date. However, such a construction unfairly impairs the ability of undersecured or unsecured creditors to recover on their claims; the unencumbered assets of the already depleted estate would need to be funneled toward the mounting post-petition interest, costs, and fees of the oversecured creditor in order to restore its equity cushion to an extent that allowed that creditor to recover its post-petition interest, costs, and fees.

In sum, [lender] is not entitled to a superpriority claim under § 507(b), because its adequate protection payments were not inadequate. From January 31, 2012, until present, the value of [lender's] secured claim was never altered. Thus, as the bankruptcy court put it, [lender] "recovered exactly what it [was] entitled to ... principal, interest, and various fees totaling \$1,265,868.55, the full amount of its prepetition claim."

*Id.* at \*6 (quoting the bankruptcy court, 2015 WL 4873062, at \*7 (Bankr. E.D.N.C. Aug. 13, 2015)).

The second issue on appeal was whether the bankruptcy court appropriately calculated the extent of the lender's oversecurity for purposes of an award of postpetition interest, costs, and fees pursuant to section 506(b) and, in particular, whether the court should have included the more than \$800,000 that the debtor realized on its accounts receivable during the debtor in possession period as part of that calculation. Assuming (but not deciding) that the bankruptcy court should have done so, the court nonetheless affirmed the bankruptcy court because the lender failed to show what part of the \$800,000 would have been unencumbered by the senior liens of the subcontractors.

***In re Frenchtown Drug Store, Inc.*, 2016 Bankr. LEXIS 2921 (Bankr. D.N.J. Aug. 8, 2016) (unpublished)**

The New Jersey bankruptcy court held that forgiveness of a superpriority claim for a DIP loan advance and a reduction in salary do not constitute "new value" for purposes of the exception to the absolute priority rule.

The chapter 11 debtor proposed a plan that provided for unsecured creditors to be paid 11.4% of their claims over three years and for existing equity to receive 100% of the new equity interests in the debtor in exchange for "new value." The proposed new value consisted of a combination of \$27,000 in cash, forgiveness of a \$23,000 advance on the DIP loan from the principal/shareholder, and a reduction in the principal/shareholder's salary. After the unsecured creditors voted to reject the plan, the debtor sought cram down under Bankruptcy Code section 1129(b).

Quoting from the Supreme Court's decision in *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 (1999), the bankruptcy court observed that "the new value exception to the absolute priority rule contemplates that shareholders may retain an ownership interest in the reorganized debtor if the shareholders 'contribute new capital in money or money's worth, reasonably equivalent to the property's value, and necessary for successful reorganization of the restructured enterprise.'" 2016 Bankr. LEXIS 2921, at \*6 (quoting *La Salle*, 526 U.S. at 442).

The bankruptcy court sided with the "clear majority" of courts holding that debt forgiveness does not constitute new value. "To qualify as 'money or money's worth,' a new value contribution 'must be freely tradeable in the market by the debtor; and it must be an asset in the accounting sense. . . . Forgiveness of debt by itself is not sufficient.'" *Id.* at \*7 (quoting *In re Creekside Landing*, 140 B.R. 713, 717 (Bankr. M.D. Tenn. 1992)). Although it was "unclear from the Amended Plan whether the proposal is merely to forgo the superpriority status on money already loaned or to forgo repayment of that amount entirely," the court found that "[u]nder either scenario, that may not be considered new value." *Id.* fn 14.

The court also dismissed as a "non-starter" the argument that the principal's reduced salary constituted new value. "The Supreme Court has long recognized that a contribution of labor, experience, and expertise by a junior interest holder is not money's worth." *Id.* at \*10.

Thus, the only contribution that could be considered "new value" was \$27,000 in cash. Measured against the debtor's liquidation value of \$117,580, it was not reasonably equivalent to the value of the interest that the principal would retain. The court denied confirmation.

#### **D. Reclamation (11 U.S.C. § 546(c))**

##### ***In re Reichold Holdings US, Inc.*, 556 B.R. 107 (Bankr. D. Del. 2016)**

Parting ways with two New York bankruptcy court decisions, the Delaware bankruptcy court held that a DIP lender's subsequently perfected security interest did not trump a vendor's reclamation rights, despite the fact that the proceeds from the DIP loan were used to repay the debtor's prepetition prior perfected secured loan.

The debtor's prepetition lender had a perfected security interest in all of the debtor's existing and after-acquired inventory. Two days after the debtor filed its chapter 11 petition, the court authorized the debtor to obtain DIP financing from a different lender group. The prepetition loan was then paid in full from the proceeds of the DIP loan. The DIP loan was secured by a first-priority lien on all prepetition and postpetition property of the debtor's estate, including inventory, subject to valid, non-avoidable liens in existence as of the petition date.

Soon after the bankruptcy filing, a vendor delivered a timely reclamation demand to the debtor. The vendor subsequently filed a proof of claim seeking, as an administrative expense, the value of the goods it had delivered to the debtor within

forty-five days before the petition date. The liquidating trustee objected to the reclamation claim on the ground that it had been rendered valueless when the prepetition loan was repaid.

Section 546(c) provides: “[S]ubject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, . . . a seller of goods that has sold goods to the debtor, in the ordinary course of such seller’s business, [preserves any right] to reclaim such goods if the debtor has received [them] while insolvent, within 45 days before the commencement of a case under this title . . . .” 11 U.S.C. § 546(c) (emphasis added).

Section 546(c) does not itself create an independent right of reclamation; in order to prevail, a reclaiming seller must be able to prove that it had a valid right of reclamation under applicable state law. The Uniform Commercial Code, as adopted in Pennsylvania (applicable to this case), provides that “[w]here a seller discovers that a buyer has received goods on credit while insolvent he may reclaim the goods.” 13 Pa. Stat. & Cons. Stat. Ann. § 2702(2). A seller’s right to reclaim is subject to the rights of a buyer in the ordinary course of business or other good faith purchaser, including a secured party. *Id.* The mere presence of a secured creditor with superior rights under section 2702(3) does not, however, extinguish a vendor’s reclamation rights.

The trustee relied on two New York bankruptcy court cases for his argument that the DIP lenders’ rights, although granted after the reclamation rights arose, related back to the prepetition lender’s rights because the DIP loan had been utilized to repay the prepetition loan. He argued that the two liens should be viewed as an “integrated transaction.” See *In re Dana Corp.*, 367 B.R. 409 (Bankr. S.D.N.Y. 2007), and *In re Dairy Mart Convenience Stores, Inc.*, 302 B.R. 128 (Bankr. S.D.N.Y. 2003).

The vendor argued that postpetition lender’s floating lien on the debtor’s inventory did not constitute a continuation of the prepetition lender’s lien, but was instead an entirely new lien that did not defeat an intervening reclaiming seller’s rights, relying on *In re Phar-Mor*, 301 B.R. 482 (Bankr. N.D. Ohio 2003), *aff’d*, 534 F.3d 502 (6th Cir. 2008).

The Delaware bankruptcy court agreed with the logic of *Phar-Mor*, rejecting *Dana* and *Dairy Mart*:

The Court respectfully disagrees with *Dairy Mart* and *Dana Corp.* and agrees with the *Phar-Mor* decision. The function of a lien is to secure a debt; once that debt is repaid, the lien and the rights of the lien-holder terminate. See *Unisys Fin. Corp. v. Resolution Trust Corp.*, 979 F.2d 609, 611 (7th Cir. 1992) (“A lien is parasitic on a claim. If the claim disappears - poof! the lien is gone.”). In this case, when the Prepetition Loan was paid from the DIP Loan, the Prepetition Lender’s lien was satisfied but



[seller's] reclamation rights remained in force. The fact that funds obtained from the DIP Loan were used to satisfy the Prepetition Loan, or that the Debtor granted the DIP Lenders a lien in inventory to obtain such funds, is irrelevant. [Seller's] reclamation rights arose before the DIP Lenders' security interest attached, and the DIP Lenders' lien was expressly subject to reclamation rights under section 546.

The Court agrees with *Dairy Mart's* observation that a prepetition lender could elect to foreclose on its collateral, and should it do so, would likely defeat a vendor's reclamation rights. *Dairy Mart*, 302 B.R. at 135. This conclusion is compelled by statute: a reclaiming seller's rights are subject to the prior rights of a secured lender. Foreclosure is among those rights.

However, the Court thinks it is too much of a stretch to conclude, as the *Dairy Mart* and *Dana Corp.* courts did, that the repayment of the Prepetition Loan from the DIP Loan was repayment from the "sale" of the reclaiming creditor's goods. In fact, [seller's] goods were not sold and their proceeds were not paid to the Prepetition Lender. The Prepetition Lender was paid from the proceeds of the DIP Loan and the reclaimed goods were merely pledged to secure that loan. Nor can the Court find that the DIP Loan and the Prepetition Loan are an "integrated transaction." They were two different loans by two different lenders at two different times. Because [seller's] rights arose before the DIP Lenders had any rights in the goods, the Court concludes that the DIP Lenders do not have prior rights in the goods under section 546(c).

556 B.R. at 112-13 (some citations omitted).

#### **E. FDCPA Violation**

***Midland Funding, LLC v. Johnson*, 1375 S. Ct. 1407 (2017)**

In a 5 to 3 decision written by Justice Breyer, the Supreme Court held that the filing of a proof of claim that is obviously time-barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692e, 1692f.

A company that purchased delinquent consumer debts filed a proof of claim in the chapter 13 debtor's case. The claim was for debts that were more than six years old,

and thus time-barred under the applicable state law. The bankruptcy court disallowed the claim.

The debtor then sued the creditor under the FDCPA for using “any false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. This includes attempting to collect a debt that is not “expressly authorized by the agreement creating the debt or permitted by law.” *Id.* § 1692f(1).

The district court granted the creditor’s motions to dismiss, holding that the Bankruptcy Code affirmatively authorizes a creditor to file a proof of claim—including one that is time-barred—if that creditor has a “right to payment” that has not been extinguished under applicable state law. The court held that a creditor’s right to file a time-barred claim under the Bankruptcy Code precluded debtor from challenging that practice as a violation of the FDCPA.

The Eleventh Circuit reversed, *see* 823 F.3d 1334 (11th Cir. 2016), holding that a debt collector may be held liable under the FDCPA for filing a time barred proof of claim, as such claim may be a “false, deceptive, or misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. A “debt collector” includes “any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). The circuit court held that the Bankruptcy Code does not preclude an FDCPA claim in the context of a chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time barred. The Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. *See In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015). However, when a particular type of creditor—a designated “debt collector” under the FDCPA—files a proof of claim known to be time barred, that debt collector can be sued under the FDCPA for filing a “misleading” or “unfair” claim.

The Eleventh Circuit’s decision conflicted with the majority of other Circuits that have considered the issue. In light of this split, the Supreme Court granted certiorari to consider:

(1) Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the FDCPA; and (2) whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the FDCPA to the filing of an accurate proof of claim for an unextinguished time barred debt.

The Supreme Court reversed the Eleventh Circuit, holding that no violation of the FDCPA had occurred. The creditor’s proof of claim was not “false, deceptive, or misleading.” The Bankruptcy Code defines the term “claim” as a “right to payment,” 11 U.S.C. § 101(5)(A), and state law usually determines whether a person has such a

right. The relevant Alabama law provides that a creditor has the right to payment of a debt even after the limitations period has expired. The unenforceability of a claim due to a statute of limitations is simply an affirmative defense.

The Court rejected the debtor's argument that the word "claim" means "enforceable claim." The word "enforceable" does not appear in the Code's definition, and the debtor's interpretation is inconsistent with Congress's intent to adopt the broadest available definition of claim. Even a claim that is disallowed is still a "right to payment," and thus a "claim."

In determining whether a statement is misleading under the FDCPA, a court must consider the legal sophistication of the audience. Here, that includes the chapter 13 trustee who is likely to understand that a proof of claim is a statement by the creditor that the creditors has a right to payment that is subject to disallowance, including disallowance based on untimeliness.

The Court cited the various procedures and protections that exist for debtors in bankruptcy, which weighed against finding unfairness. In a chapter 13 bankruptcy, the consumer initiates the proceeding, a knowledgeable trustee is available, procedural rules guide the evaluation of claims, and the claims resolution process is a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit. The bankruptcy system treats untimeliness as an affirmative defense and normally gives the trustee the burden of investigating claims to see if one is stale.

The Court expressed concern about how to draw the line as to when the existence of an affirmative defense such as staleness causes the filing of a claim to be an unfair collection action under the FDCPA. Does it apply only where a claim's staleness appears on the face of the proof of claim? Does it apply to other affirmative defenses or only to the running of the limitations period? Neither the FDCPA nor the Bankruptcy Code indicates that Congress intended an ordinary civil court applying the Act to determine answers to such bankruptcy-related questions.

Finally, the Court rejected the Solicitor General's view that because filing a stale proof of claim might in some cases be sanctionable under Bankruptcy Rule 9011, it could also be actionable under the FDCPA. The Federal Bankruptcy Rules Advisory Committee specifically rejected a proposal that would have required a creditor to certify that there is no valid statute of limitations defense to its proof of claim.

Justice Sotomayor dissented, noting that professional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy proceedings to collect it, and hoping that no one notices that the debt is too old to be enforced. This practice is "unfair" and "unconscionable," and thus violates the FDCPA. Consumers fail to defend themselves in court even when the claim is time-barred. In fact, according to the FTC, over 90% fail to appear at all. The result is that debt buyers have won billions of dollars in default judgments simply by filing suit and betting that consumers will lack the resources to respond.

## F. Statute of Limitations

### *PNC Bank v. Sterba (In re Sterba)*, 852 F.3d 1175 (9th Cir. 2017)

In resolving a conflict with respect to competing statutes of limitation applicable to the enforcement of a contract claim against a debtor, the Ninth Circuit held that “the unique strictures of the Bankruptcy Code” presented “exceptional circumstances” warranting the application of the longer statute of limitations adopted by a nonforum state, the law of which was selected by the parties to govern their contract.

In 2007, borrowers purchased a condominium in California with two loans secured by liens against the property. The borrowers’ promissory note to the junior lienholder bank provided in relevant part that:

[T]he Bank is a national bank located in Ohio and Bank’s decision to make this Loan . . . was made in Ohio. Therefore, this Note shall be governed by and construed in accordance with . . . the laws of Ohio . . . without regard to conflict of law principles.

After the borrowers defaulted, the senior lender foreclosed, and the junior lienholder bank was left holding an unsecured claim in the amount of \$42,000.

The borrowers filed for bankruptcy in the Northern District of California, and the bank filed a proof of claim based on the 2007 note. The borrowers objected to the claim on the grounds that the claim was barred by California’s applicable four-year statute of limitations. Cal. Code Civ. Proc. § 337. The bank argued that its claim was timely because the promissory note’s choice of Ohio law incorporated Ohio’s six-year statute of limitations period. Ohio Rev. Code § 1303.16.

The bankruptcy court held that the promissory note’s choice-of-law provision incorporated Ohio’s six-year statute of limitations period and overruled the borrowers’ objection to the claim. The Bankruptcy Appellate Panel (“BAP”) reversed, and the bank appealed.

The Ninth Circuit looked to the Restatement (Second) of Conflict of Laws to resolve the conflict between the competing statutes of limitations provided by statute in Ohio and California. An earlier version of the Restatement provided: “(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.” 852 F.3d 175, 1179 (quoting Restatement (Second) of Conflict of Laws § 142 (1971)). A revised version of that section is similarly worded, except that it provides a limited carve out which states that, “unless *exceptional* circumstances of the case make such a result unreasonable . . . the forum will apply its own statute of limitations barring the claim.” *Id.* (quoting § 142 (1988)).

The Ninth Circuit held that section 142 compelled the application of the longer statute of limitations under Ohio law based on the “exceptional circumstances” present

in this case. According to the court, “the unique strictures of the Bankruptcy Code” resulted in there being, through no fault of the bank’s, no forum for the adjudication of the bank’s claim other than the one in which the borrowers’ bankruptcy case was filed. This was not a case filed voluntarily by the bank in California, “in which a dismissal on statute of limitations grounds would be without prejudice to bringing the same claim in Ohio.” *Id.* at 1180. Rather, the court held, once the borrowers declared bankruptcy, the bank was obligated to bring all of its claims in the district where the borrowers filed. Thus, the Ninth Circuit concluded that disallowing the bank’s claim under California’s statute of limitations would be “wholly unreasonable” under the circumstances.

#### **G. Subordination Under Section 510(b)**

##### ***Khan v. Barton (In re Khan)*, 846 F.3d 1058 (9th Cir. 2017)**

The Ninth Circuit Court of Appeals held that section 510(b) of the Bankruptcy Code, which requires the subordination of claims for damages arising from the purchase or sale of a security of the debtor or its affiliate, does not apply to claims for damages arising from the fraudulent conversion of an existing shareholder’s stock.

Prior to bankruptcy, the claimant had obtained a state-court judgment against two individuals and a company that the claimant had earlier founded with those two individuals, for conversion, fraud, breach of fiduciary duty, and violation of California Business and Professions Code section 17200, based upon the claimant’s allegations that the debtors had fraudulently converted his shares of common stock in the company.

The judgment arose out of the defendants’ conduct after the claimant suffered a stroke and took leave from his work at the company. Following the stroke, the individuals caused the company to cancel the claimant’s shares of stock. The state court held that the individuals had fraudulently converted the claimant’s stock and found that they had forged corporate resolutions in an attempt to support their fraud and either “misplaced or destroyed” the shareholder registry, which was “the best evidence of the issuance of [the] stock.” 846 F.3d 1058, 1061 (quoting superior court holding). The state court awarded damages to the claimant in the amount of approximately \$4 million, the value of the converted stock at the date of conversion.

Before the state court could take further action, the two individuals each filed a chapter 13 petition. The claimant filed a proof of claim in each case, and each debtor objected, arguing that the claims should be subordinated under section 510(b).

The bankruptcy court held that the claimant’s claims were not subject to subordination because they were not for damages arising from the purchase or sale of a security, but rather were based on fraud and conversion. The claimant also filed separate motions to convert each case to chapter 7, arguing that the debtors had acted in bad faith. The bankruptcy court granted those motions.

The BAP affirmed, but on the basis that section 510(b) does not apply in an individual debtor case. However, after the BAP had ruled in this case, the Ninth Circuit

held, in a separate case, that 510(b) does in fact apply when debtors are individuals. *Liquidating Tr. Comm. section v. Freeman (In re Del Biaggio)*, 834 F.3d 1003, 1010 (9th Cir. 2016).

On appeal to the Ninth Circuit, a majority of the panel explicitly rejected the BAP's ruling that section 510(b) does not apply in an individual debtor case, but affirmed the bankruptcy court's original decision that the claimant's claims did not arise out of a purchase or sale of securities. The majority held that the claims were for damages resulting from the debtors' fraudulent conversion of the claimant's shares and did not arise out of a purchase or sale.

The dissent argued that the courts have typically given section 510(b) a broad reading. As so construed, section 510(b) would require subordination of the claim, according to the dissent, because the claimant would not have had his claim but for his initial purchase of the shares.

## **X. ATTORNEYS, OTHER PROFESSIONALS, TRUSTEES, COMPENSATION, AND UNITED STATES TRUSTEE**

### **A. Professionals' Fees**

#### ***In re MolyCorp, Inc.*, 562 B.R. 67 (Bankr. D. Del. 2017)**

The Delaware bankruptcy court held that a carveout provision in a DIP financing order did not act as an absolute limit on the fees and expenses payable to the creditors committee's counsel in a case with a confirmed chapter 11 plan.

Soon after filing its bankruptcy petition, the debtor entered into a DIP financing agreement with its prepetition secured lender. The DIP financing order contained a \$250,000 carveout for committee fees incurred in investigating claims against the lender.

As a result of its investigation—spanning over four months and involving an extensive discovery process—the committee filed a motion seeking standing to pursue certain causes of action against the lender. After mediation, the parties reached a global settlement agreement that paved the way for a consensual plan of reorganization.

After the plan had been confirmed, the committee's counsel requested \$8.5 million in fees and \$226,000 in costs. The lender argued that the \$250,000 carveout in the DIP financing order constituted an absolute cap on fee payments. The committee's counsel responded that while the carveout cap may have been relevant in an administratively insolvent case, it was irrelevant in a case with a confirmed chapter 11 plan. The court agreed.

The court explained that “[t]he carveout is essentially an agreement by the secured creditor to subordinate its liens and claims to certain allowed administrative expenses, permitting such professionals’ fees to come first in terms of payment from the estate’s assets.... [W]hen there are insufficient unencumbered assets to pay

professionals' fees and no plan has been confirmed, professionals' only recourse is the carveout." 562 B.R. 67, 76.

Here, however, because a plan was confirmed, Bankruptcy Code section 1129(a)(9)(A) required that, unless agreed otherwise, each holder of an administrative claim receive cash equal to the allowed amount of such claim on the effective date of the plan. Hence, "if the secured parties desire confirmation, the administration claims must be paid in full in cash at confirmation even if it means invading their collateral.'" *Id.* at 78 (quoting *In re Emmons Indus.*, 76 B.R. 59, 60 (Bankr. S.D.N.Y. 1987)).

The court turned to the language of the carveout, which provided: "Notwithstanding the foregoing, up to \$250,000.00 in the aggregate proceeds of the DIP Loans, the DIP Collateral, the Prepetition Collateral, and the Carve-Out may be used to pay fees and expenses of the professionals retained by the Committee that are incurred in connection with investigating (but not prosecuting any challenge to) the matters covered by the stipulations contained in Paragraphs I and J of this Final Order." *Id.* at 74.

The court found that this language was "not different than a standard carve-out provision. It does not connote in any way that the dollar-amount cap would operate as a complete bar against the allowance of administrative claims following plan confirmation. In this respect, the dollar-amount cap was going to come into play if the attempts to confirm a reorganization plan had failed; it was not intended to come into play if a Chapter 11 plan was confirmed." *Id.* at 80.

The court contrasted the carveout at issue with one in a DIP financing order entered in another case that stated: "[n]otwithstanding anything to the contrary therein, and absent further Order of the Court, (i) in no event during the course of the Chapter 11 Cases will actual payments in respect of the aggregate fees and expenses of all professional persons retained pursuant to an Order of the Court by the Creditor's Committee exceed \$450,000 in the aggregate (the 'Creditors' Committee Expense Cap') . . . (iii) any and all claims (A) incurred by the Creditor's Committee in excess of the Creditor's Committee Expense Cap or (B) incurred by any professional persons or any party on account of professional fees and expenses that exceed the applicable amounts set forth in the Budget shall not constitute an allowed administrative expense claim for purposes of section 1129(a)(9)(A) of the Bankruptcy Code." *Id.* at 79 n. 58. At the same time, the court offered "no opinion as to whether it would approve a DIP order containing [such] provisions" had it been presented here. *Id.*

Because the court's appointed fee examiner recommended (with minor adjustments) approval of the \$8.5 million in fees and \$226,000 in costs requested as reasonable compensation for actual and necessary services, the court ordered their payment.

***In re Stanton*, 559 B.R. 781 (Bankr. M.D. Fla. 2016)**

The bankruptcy court held that, notwithstanding *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015), an attorney is entitled to be compensated for supplementing its fee application following an objection to allowance of the attorney's fees.

The attorney for the chapter 7 trustee filed a fee application under section 330(a) of the Bankruptcy Code. The U.S. Trustee objected to the application as deficient. In response, the attorney supplemented the initial fee application, which was ultimately approved. The attorney billed the time spent supplementing the initial fee application to the estate and sought fees in a second interim application for that time. The U.S. Trustee objected, arguing that the Supreme Court's decision in *Baker Botts*—which held that section 330 does not authorize attorney's fees for work performed defending a fee objection—precluded the attorney from compensation for time spent supplementing the application.

The bankruptcy court rejected the U.S. Trustee's argument, holding that fees incurred to supplement the fee application were more akin to "preparation" of the fee application than its "defense" and were therefore allowed under the Supreme Court's interpretation of section 330 in *Baker Botts*. The court held that under *Baker Botts*, it is the nature of the work, and not when it is performed (i.e., in response to an objection) that determines whether that work is compensable. The court further held that the additional disclosure provided by the Attorney "benefitted the administration of the estate," by allowing the "Chapter 7 Trustee, U.S. Trustee, and other parties in interest to understand the work [the Attorney] performed and, if necessary, the ability to dispute his fees." 559 B.R. at 786.

In so holding, the court rejected the U.S. Trustee's concerns that the court's ruling would lead to a "de facto two-step fee application process" where attorneys would file a bare-bones initial application and only supplement it upon objection. The court held that the U.S. Trustee's concerns were misplaced because:

- As a practical matter, chapter 7 fee application requirements are not particularly onerous and even in chapter 11, where standards are more onerous, lawyers are compensated for the time they spend preparing fee applications—as such, there is no reason to believe lawyers will file bare-bones applications as a matter of course.
- Even if the U.S. Trustee's concern is valid, the ultimate harm is minimal. There is little or no difference between spending ten hours up front to prepare a detailed application and spending two hours at first, supplemented by an additional eight hours to supplement when an objection is filed.



- The U.S. Trustee's bright-line rule that fees incurred supplementing fee applications are not reimbursable, would, in fact, lead to over-disclosure, leading to (a) increased fees to the estate and (b) more litigation regarding the reasonableness of fees.

*Id.* at 786-87.

The court therefore held that the attorney was entitled to the payment of fees incurred for supplementing its fee application.

## **B. Status of Prepetition Retainer**

### ***In re Tuscany Energy, LLC*, 561 B.R. 910 (Bankr. S.D. Fla. 2016)**

The Southern District of Florida Bankruptcy Court held that the interest of the debtor's attorney in its prepetition retainer was senior to any interest therein of the secured lender that had claimed a security interest in the deposit account from which the retainer was disbursed and its proceeds.

Prior to the filing of the debtor's chapter 11 petition, it paid a retainer to its attorney from a deposit account claimed as collateral by the secured lender, but as to which the secured lender had not taken the necessary steps to perfect its security interest:

More than 5,000 new chapter 11 cases were filed last year. There are 565 pending chapter 11 cases in this district alone. In nearly every one of those cases, counsel to the debtor-in-possession receives prior to filing the petition a retainer for services to be rendered during the case. It is the rare chapter 11 case without at least one significant secured creditor. Particularly in commercial cases, such as this one, there is often at least one secured creditor that claims a security interest in all of the debtor's assets, including the debtor's deposit accounts and cash. When the debtor-to-be pays a retainer to its bankruptcy counsel, those funds typically come from a bank account that is subject to a security interest. Indeed, although not true here, it is often the case that the secured creditor is also the bank. Why, then, is it so difficult to find a reported decision where a secured creditor objected to the use of a pre-petition retainer for payment of approved fees and expenses of the debtor's counsel on the grounds that the retainer is the secured creditor's cash collateral? The answer is that, except in extremely unusual circumstances, the secured creditor retains no interest at all in funds paid to debtor's counsel as a pre-petition retainer. U.C.C. Article 9, section 9-332, uniformly enacted in the states,

provides that a transferee of money, or funds from a deposit account, takes free of any security interest “unless the transferee acts in collusion with the debtor in violating the rights of the secured party.” *E.g.*, Florida Statutes § 679.332. Requesting a pre-petition retainer for services to be rendered in a chapter 11 case, alone, surely does not constitute collusion as contemplated in the statute. It is not surprising, then, that nearly no secured creditor challenges the use of a pre-petition retainer to pay approved fees and expenses of the debtor’s counsel and that there are nearly no reported decisions on the issue.

In this case, Armstrong Bank does not even suggest that the Firm colluded with the Debtor to violate the rights of Armstrong Bank. Armstrong Bank has no interest in the pre-petition retainer held by the Firm. There is no cash collateral interest that might be entitled to adequate protection. Armstrong Bank’s objection should be overruled and the Firm is entitled to apply the retainer in payment of fees and expenses approved by the Court.

In this case, even if Florida Statutes § 679.332 did not answer the question, the Firm has a security interest in the pre-petition retainer senior to any security interest Armstrong Bank might claim. The Debtor and the Firm executed an engagement agreement that serves as a security agreement. All of the other requirements for attachment of that security interest are satisfied. The Firm’s security interest in the pre-petition retainer is perfected by possession. Absent the effect of Florida Statutes § 679.332, Armstrong Bank might claim to have a security interest in the pre-petition retainer as proceeds of a deposit account subject to its security interest. But because Armstrong Bank never perfected its security interest in the deposit account that was the source of the retainer, the perfected security interest held by the Firm would be senior to any interest Armstrong Bank might claim.

561 B.R. at 913.

Because the court found that the secured lender had no perfected lien on the funds held as a retainer by the debtor’s law firm, the firm was permitted to pay its allowed interim fees from that retainer.

### C. *Barton Doctrine*

#### ***Blixseth v. Brown (In re Yellowstone Mountain Club)*, 841 F.3d 1090 (9th Cir. 2016)**

Addressing an issue of first impression at the circuit level, the Ninth Circuit extended the *Barton* doctrine to the chair of the creditors' committee, shielding him with judicial immunity for actions within the scope of his authority that were noticed to the debtor and approved by the bankruptcy court.

Blixseth and his wife developed Yellowstone Mountain Club, an exclusive ski and golf resort in Montana that caters to the "ultra-wealthy." Blixseth borrowed \$375 million on behalf of the Club, but used some of funds to pay off his personal debts, allegedly on the advice of his lawyer, Brown. After the Club's shareholders sued Blixseth over the diversion of loan proceeds, Blixseth settled with them on Brown's advice. Around that same time, Blixseth divorced his wife, and gave the Club to her under a marital settlement agreement drafted by Brown.

Blixseth's wife filed bankruptcy for the Club, and the UST appointed Brown as the chair of the creditors' committee ("UCC").

Suspecting that Brown used confidential information to his detriment in the bankruptcy proceedings, Blixseth sued Brown in district court. The district court held that it lacked jurisdiction because Blixseth hadn't first obtained the bankruptcy court's permission to sue, as required by *Barton v. Barbour*, 104 U.S. 126 (1881). Blixseth then asked the bankruptcy court for permission to bring his claims in district court. The bankruptcy court denied the motion, finding it "impossible . . . to isolate Blixseth's so-called 'pre-petition malpractice and malfeasance' claims from Brown's activities as a member of the Unsecured Creditors Committee." The district court affirmed, and Blixseth appealed.

Under *Barton*, plaintiffs must obtain authorization from the bankruptcy court before initiating an action in another forum against certain officers appointed by the bankruptcy court for actions the officers have taken in their official capacities. The Ninth Circuit observed that the *Barton* doctrine has traditionally been applied to actions against receivers and bankruptcy trustees. Although no court of appeals had applied *Barton* to suits against UCC members, the Sixth and Eleventh Circuits had extended *Barton* to cover counsel for a trustee and individuals authorized to sell estate property, respectively.

The Ninth Circuit reasoned that it was appropriate to extend *Barton* to UCC members who are sued for acts performed in their official capacities "[b]ecause creditors have interests that are closely aligned with those of a bankruptcy trustee," 841 F.3d at 1095, and "UCC members are statutorily obliged to perform tasks related to the administration of the estate . . ." *Id.* "A lawsuit challenging any of [the committee's] actions could seriously interfere with already complicated bankruptcy proceedings. Even the fear that such a lawsuit could be filed—and UCC members would have to

answer for their actions in a court unfamiliar with bankruptcy proceedings—may cause UCC members to be timid in discharging their duties.” *Id.*

The Ninth Circuit rejected Blixseth’s argument that the bankruptcy court lacked jurisdiction to adjudicate his *Barton* claims under *Stern v. Marshall*, 564 U.S. 462 (2011). The court explained that “*Stern* dealt with claims that didn’t ‘stem[ ] from the bankruptcy itself’ and wouldn’t ‘necessarily be resolved in the claims allowance process.’ *Stern* thus precludes bankruptcy courts from deciding common law claims that have no connection to the bankruptcy estate other than that they happen to be assets of the estate. *Barton* claims are different . . . . [they] could not ‘exist independently of [a] bankruptcy case . . . . A suit against a bankruptcy court officer for actions undertaken in his official capacity necessarily ‘stems from the bankruptcy itself.’” *Id.* at 1097 (quoting *Stern*, 564 U.S. 462, 494 (2011), in the first instance, and quoting *In re Haris*, 590 F.3d 730, 738 (9th Cir. 2009), in the second).

The bankruptcy court had dismissed Blixseth’s claims on the merits, finding that Brown was entitled to derivative judicial immunity. The Ninth Circuit held that the *Barton* doctrine did not apply to Blixseth’s prepetition claims that sounded in “tort, contract and fraud and are untethered to Brown’s position as Chair of the UCC.” Blixseth was free to bring those in the district court. The Ninth Circuit remanded Blixseth’s postpetition claims to the bankruptcy court because Brown was not entitled to immunity for all of actions as UCC chairman, but only those that were within the scope of his authority, on notice to the debtor and approved by the bankruptcy court.

## **XI. CHAPTER 11**

### **A. Classification**

#### ***In re Rexford Props. LLC*, 558 B.R. 352 (Bankr. C.D. Cal. 2016)**

The Bankruptcy Court for the Central District of California held that the separate classification of trade claims from other general unsecured claims was permissible and that the requirement that trade creditors commit to provide future credit constituted impairment.

The debtor filed a motion under Bankruptcy Rule 3013 seeking approval for the classification scheme under the debtor’s proposed plan and a determination that the class of trade creditors was impaired by its proposed treatment under the plan.

The motion described the debtor’s classification scheme as follows:

A convenience class consisting of all general unsecured claims under \$2,500 (the “Convenience Class”); a trade class consisting of claims that are over \$2,500 and are held by trade creditors with whom the Debtor expects to have a continuing relationship (the “Trade Class”), and (iii) a class consisting of the remainder of the general unsecured claims that do not fit into the Convenience Class or the

Trade Class as described above (the “General Unsecured Creditors Class”).

Notably, the General Unsecured Creditors Class included the large unsecured deficiency claim of the debtor’s secured lender. The motion described the treatment of the Trade class as follows:

The Trade Class will be paid 100% of their claim on the Effective Date; however payment will be conditioned upon such party’s agreement to continue supplying goods and services to the Debtor for one full operating season post-confirmation in accordance with trade terms at least as favorable to the Debtor [sic] as those practices (including pricing, timing of payments, availability, and other terms) in place before the Petition Date.

A vote in favor on the ballot will function as a binding contractual arrangement between the parties governing the trade relationship of the terms explained above (and in the Amended Plan) such that a creditor’s vote to accept the Amended Plan will bind the creditors to this arrangement, provided that the Debtor also performs.

In contrast to the proposed treatment for the Trade Class, the General Unsecured Creditors Class was to receive “either: (i) payment of 10% of their allowed claims or (ii) a pro rata share of 45% of the equity interests in the reorganized debtor entity contemplated by the plan.”

The motion provided an explanation for the separate classification and disparate treatment of the General Unsecured Creditors Class: “(1) there is not enough cash to pay all creditors 100% of their claims and (2) its failure to pay its trade creditors in full under the plan would adversely affect its operations and ability to reorganize.”

The court held that the proposed classification scheme was permissible:

The Court concludes that when a plan proposes separate classification of trade vendor claims in order to provide preferential treatment to those claims, a “legitimate business or economic justification” is established when (i) the vendors provide genuine operational or financial benefits to the debtor and (ii) the preferential treatment of vendor claims is reasonably calculated to induce the continued support of those vendors.

This legal standard is consistent with well-established Ninth Circuit law. In assessing whether the proposed separate classification of substantially similar claims is appropriate, Ninth Circuit law requires a “legitimate

business or economic justification” for doing so. *In re Barakat*, 99 F.3d at 1526. The proposed preferential treatment of vendors that provide genuine operational or financial benefits to the debtor—in a genuine effort to induce them to continue doing so—is a legitimate business and economic justification for separately classifying the claims of such vendors. In both *In re Johnston* and *In re Barakat*, the Ninth Circuit sought to distinguish separate classification for the sole purpose of gerrymandering, from those circumstances in which separate classification serves other business or economic objectives. By requiring that the business or economic justification be “legitimate,” the Ninth Circuit made clear that the justification offered must be genuine. See Merriam Webster’s Collegiate Dictionary (10th ed., 1996) at 664 (“legitimate” defined as “being exactly as purposed: neither spurious nor false”). A justification that is illogical, based on false premises or bearing no logical relationship to the facts and circumstances presented obviously would not be “legitimate.”

The standard adopted herein accords with the objective of assessing whether a business or economic justification is legitimate. Vendors holding claims that are separately classified from other unsecured claims must be providing genuine operational or financial benefits to the debtor, and the preferential treatment offered to those vendors must be reasonably calculated to induce their continued support of the debtor.

558 B.R. at 363. Further:

The claims classified in the Trade Class are substantially similar to the claims in the General Unsecured Claims Class. The claims in both of these classes are nonpriority, unsecured claims. There is nothing in the record to suggest they are not substantially similar. Nevertheless, the separate classification of the Trade Class from the General Unsecured Claims Class is appropriate. The uncontroverted record shows that there is a legitimate business or economic justification for including most, but not all, of the vendor claims in the proposed Trade Class, separate and apart from other unsecured claims.

First, the separate Trade Class has been proposed in order to provide preferential treatment to the vendors in the Trade Class—payment of 100% of the claim—in a manner

reasonably calculated to induce those vendors to continue supporting Rexford following confirmation of a plan. Specifically, the proposed treatment of the Trade Class conditions payment of 100% of each vendor's claim on such party's "agreement to continue supplying goods and services to the Debtor for one full operating season post-confirmation in accordance with trade terms at least as favorable to the Debtors as those practices (including pricing, timing of payments, availability, and other terms) in place before the Petition Date." . . . Absent such separate classification and preferential treatment, Rexford estimates that the vendors—and all other unsecured creditors—will receive substantially less than 100% of their claims.

Second, [most of the] vendors that Rexford proposes to include in its Trade Class provide genuine operational or financial benefits to the Debtor. For the reasons described below, the Court concludes that there is a legitimate business or economic justification for including the claims of these creditors in the Trade Class . . . .

*Id.* at 366.

The court went on to hold that the proposed treatment of the Trade Class would constitute impairment:

The proposed Trade Class described in the present motion is clearly "impaired" within the meaning of section 1124. Under the proposed treatment of the Trade Class claims, the holders of trade claims will be provided payment equal to 100% of the allowed amount of their claims, but as a condition to such treatment they will be required to agree to continue providing goods and services to Rexford on terms and conditions no less favorable than currently provided. The imposition of this condition is an alteration of the rights of the holders of the claims in the Trade Class, even if the treatment overall results in full payment.

*Id.* at 368.

The court noted that its ruling was limited to the issues of classification and impairment and was not to be construed as addressing the confirmation issues of unfair discrimination or good faith:

[I]t is critical that the parties understand the limitations of this ruling.

First, the Court is not making any determination as to whether the proposed disparate treatment of unsecured creditors constitutes “unfair discrimination” for purposes of cramdown under Bankruptcy Code section 1129(b)(1). Although Rule 3013 contemplates the consideration and approval of a proposed classification scheme in advance of the plan confirmation process, it does not contemplate the Court making advance determinations of other confirmation issues such as unfair discrimination. The question of unfair discrimination does not arise until and unless a debtor seeks confirmation of a plan notwithstanding its failure to satisfy Bankruptcy Code section 1129(a)(8).

Second, it is not appropriate on a Rule 3013 motion to make a determination as to the good faith of the plan proponent under Bankruptcy Code section 1129(a)(3). Thus, although the Court finds that the proposed treatment of trade claims contemplated by Rexford would technically constitute “impairment” within the meaning of Bankruptcy Code section 1124, the Court cannot at this point resolve the apparent disagreement between the parties as to whether the impairment has been proposed in good faith. . . . A determination of Rexford’s good faith in proposing the plan—and all of the provisions contained therein—must wait until the plan confirmation hearing, when a more fulsome record has been established by the parties.

*Id.* at 355.

#### **B. Due on Sale; Impaired Accepting Class**

***JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.), No. 16-16221, 2018 U.S. App. LEXIS 1947 (9th Cir. January 25, 2018)***

The Ninth Circuit holds (i) that Bankruptcy Code section 1111(b) does not require a due-on-sale clause to be included in the restructured secured debt, and (ii) that Bankruptcy Code section 1129(a)(10) requiring an impaired consenting class is satisfied if any impaired class in a joint, multi-debtor plan accepts the plan (rather than requiring each debtor to have a consenting impaired class).

This case involved five affiliated debtors, two of which (the operating debtors) had acquired hotels prepetition. In connection with the acquisitions, the lender had loaned \$209 million to the operating debtors, secured by a lien on the hotels. The lender also had loaned \$21.5 million to the operating debtors’ parent companies (the mezzanine



debtors), secured by a lien on the mezzanine debtors' ownership interests in the operating debtors. After defaulting on the loans, the operating debtors, the mezzanine debtors, and their holding company each filed chapter 11 petitions.

The debtors proposed a joint plan of reorganization that would: (i) wipe out the mezzanine debtors' ownership interests in the operating debtors; (ii) grant all of the equity in the operating debtors to a third-party investor in exchange for \$30 million; (iii) give the lender an allowed claim of \$247 million on account of its loan to the operating debtors (all of which was to be treated as secured, because the lender had made the election under Bankruptcy Code section 1111(b); the agreed value of the hotels was \$92 million); (iv) restructure that loan to provide for interest-only payments, a balloon after twenty-one years, and a due-on-sale clause pursuant to which the entire \$247 million would be due on sale or restructure, except that during years 5 through 15, the hotels could be sold subject to the restructured loan without it being due on sale; and (v) give the lender nothing on account of its mezzanine loan if it rejected the plan, but some surplus cash from future operations it accepted the plan.

The lender objected to the plan, but the bankruptcy court overruled the objections and confirmed the plan. Four days later, the lender appealed and sought a stay of the confirmation order pending appeal, which the bankruptcy court denied. The district court also refused to grant the lender's request for a stay, and subsequently dismissed lender's appeal as equitably moot. The Ninth Circuit reversed the dismissal and remanded to the district court. On remand, the district court considered the merits of the bankruptcy court's confirmation order and affirmed. The lender appealed again to the Ninth Circuit.

The lender argued that the section 1111(b) election was intended by Congress to protect secured creditors against the undervaluation of their collateral and that a due-on-sale clause is essential to ensure that protection. The lender further argued that the exception to the due-on-sale clause between years five and fifteen would allow the reorganized debtors to unfairly negate the benefit of the 1111(b) election and, therefore, 1111(b) requires the inclusion of a due-on-sale clause without exception.

The Ninth Circuit disagreed, noting that "The Lender's position that section 1111(b)(2) requires a due-on-sale clause to be included in the Plan finds no support in the text of the statute, nor does the language of the statute implicitly require the inclusion of such a clause. . . . Neither the plain language of section 1111(b)(2) nor the broader context of Chapter 11 requires that a plan involving an electing creditor contain a due-on-sale clause. . . . We therefore hold that section 1111(b)(2) does not require that a plan involving an electing creditor contain a due-on-sale clause"

However, the court did caution in a footnote that "This holding does not imply that 'due-on-sale' protection is irrelevant to whether a plan is 'fair and equitable' under section 1129(b). Although the Lender here waived any argument that the Plan was not 'fair and equitable,' the availability of due-on-sale protection may inform whether a plan is confirmable in other reorganizations. Cf. *In re Monarch Beach Venture, Ltd.*,

166 B.R. 428, 436 (Bankr. C.D. Cal. 1993) ('[T]o be fair and equitable, a plan of reorganization cannot unfairly shift the risk of a plan's failure to the creditor.')."

The lender's second objection to confirmation was that section 1129(a)(10), which requires that at least one impaired class of claims vote to accept the plan, applies to each individual debtor, not to the joint, multi-debtor plan as a whole. Because the lender was the sole creditor of the mezzanine debtors and it voted against the plan, the lender argued that section 1129(a)(10) was not satisfied. Finding the plain language of the statute to be dispositive, the Ninth Circuit concluded that section 1129(a)(10) applies on a per-plan (and not a per debtor) basis:

According to the Lender, a complication arises when there is a jointly administered plan consisting of multiple debtors. The Lender argues that in such a situation, a "per debtor" approach that requires plan approval from at least one impaired creditor for each debtor involved in the plan is necessary. In contrast, the Debtors argue that the plain language of the statute contemplates a "per plan" approach in which a plan only requires approval from one impaired creditor for any debtor involved. As a matter of first impression among the circuit courts, we hold that section 1129(a)(10) applies on a "per plan" basis.

....

The plain language of the statute supports the "per plan" approach. Section 1129(a)(10) requires that one impaired class "under the plan" approve "the plan." It makes no distinction concerning or reference to the creditors of different debtors under "the plan," nor does it distinguish between single-debtor and multi-debtor plans. Under its plain language, once a single impaired class accepts a plan, section 1129(a)(10) is satisfied as to the entire plan. Obviously, Congress could have required plan approval from an impaired class for each debtor involved in a plan, but it did not do so. It is not our role to modify the plain language of a statute by interpretation. . . .

The statutory context of section 1129(a)(10) does not aid the Lender's argument. The Lender, citing the only court that has applied the "per debtor" approach, argues that section 102(7) requires that section 1129(a)(10) apply on a "per debtor" basis. *See In re Tribune Co.*, 464 B.R. 126, 182-83 (Bankr. D. Del. 2011). We disagree. Section 102(7), a rule of statutory construction, provides that "the singular includes the plural." 11 U.S.C. § 102(7). This rule of construction does not change our analysis.

Section 102(7) effectively amends section 1129(a)(10) to read: “at least one class of claims that is impaired under the plans has accepted the plans.” The “per plan” approach is still consistent with this reading. Therefore, section 102(7) does not undermine our view that section 1129(a)(10) applies on a “per plan” basis.

Thus, the procedural convenience of joint administration (i.e., filing all pleadings on a single docket) and filing a single joint plan, rather than separate plans for each of the related debtors, had significant substantive implications.

***U.S. Bank N.A. v. The Village at Lakeridge, LLC (In re The Village at Lakeridge, LLC)*, 814 F.3d 993 (9th Cir. 2016), cert. granted, 137 S. Ct. 1372 (2017)**

The Supreme Court has granted certiorari on the question:

Whether the appropriate standard of review for determining nonstatutory insider status is the de novo standard of review applied by the U.S. Courts of Appeals for the 3rd, 7th and 10th Circuits, or the clearly erroneous standard of review adopted for the first time by the U.S. Court of Appeals for the 9th Circuit in this action.

The Supreme Court denied review of what seemed to be more important questions, specifically (1) whether an assignee of an insider claim acquires the original claimant’s insider status, such that the assignee’s vote to confirm a plan cannot be counted under section 1129(a)(10), and (2) what factors a court should consider in determining nonstatutory insider status.

The case arises out of the Ninth Circuit, which held that an insider can sell its claim to a friendly third party whose vote can fulfill Bankruptcy Code section 1129(a)(10)’s requirement of an impaired consenting class, unless the third party has a close relationship with the debtor and negotiated the claim purchase at less than arm’s length.

When the debtor filed its bankruptcy petition, it had two primary creditors: the bank, with a \$10 million secured claim, and the debtor’s sole equity holder (MBP), with a \$2.76 million unsecured claim. After the debtor filed a plan seeking to cram down the bank, MBP sold its claim to a third party (Rabkin) for \$5,000. Rabkin had no prior relationship with the debtor, but had a close and personal relationship with one of MBP’s five members.

To confirm the plan, the debtor had to satisfy Bankruptcy Code section 1129(a)(10), which requires that at least one class of impaired creditors vote to accept the plan, excluding the votes of any insider. Bankruptcy Code section 101(31) defines “insider” as individuals and entities that fall within certain categories (e.g., officers, directors, affiliates, etc.). These are referred to as “statutory insiders.” However,

section 101(31) is not exclusive (“[t]he term ‘insider’ *includes*”), and courts have developed additional categories of “nonstatutory insiders.” 11 U.S.C. § 101(31).

The bank moved to designate Rabkin’s vote as not cast in good faith. The bankruptcy court held that although Rabkin was not a nonstatutory insider and did not acquire the claim in bad faith, his vote should be disregarded for purposes of section 1129(a)(10) because he acquired the claim from a statutory insider, and the insider status tainted the claim. On appeal, the BAP reversed the ruling that Rabkin became an insider by acquiring the claim of an existing statutory insider. To the contrary, “insider status cannot be assigned and must be determined for each individual ‘on a case-by-case basis, after the consideration of various factors.’” 814 F.3d 993, 998 (quoting the BAP). As to whether Rabkin was a nonstatutory insider in his own right, the BAP agreed with the bankruptcy court that he was not.

A split panel of the Ninth Circuit affirmed the BAP in all respects. As to Rabkin’s own nonstatutory insider status, the panel majority held that “[a] creditor is not a non-statutory insider unless: (1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm’s length. A court cannot assign nonstatutory insider status to a creditor simply because it finds the creditor and debtor share a close relationship.” *Id.* at 1001 (citations and footnote omitted). Rather, the court “must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm’s length.” *Id.* The Ninth Circuit found that the bankruptcy court had applied the correct legal definition of nonstatutory insider status. It then determined that the bankruptcy court’s fact finding that Rabkin was not an insider was not clearly erroneous. Whether Rabkin met the insider definition is a purely factual inquiry and properly left to clear error review.

The Ninth Circuit also held that Rabkin did not become an insider by purchasing an insider’s claim. “A person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons. First, bankruptcy law distinguishes between the status of a claim and that of a claimant. Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply. Second, a person’s insider status is a question of fact that must be determined after the claim transfer occurs.” *Id.* at 999. “Nothing in § 101(31) or case law indicates it would be improper for a debtor to sell, or even give, a claim to a friend if the friend is acting of his own volition and neither party is engaged in bad faith.” *Id.* at 1003.

The Ninth Circuit pointed out that “if a third party could become an insider as a matter of law by acquiring a claim from an insider, bankruptcy law would contain a procedural inconsistency wherein a claim would *retain* its insider status when assigned from an insider to a non-insider, but would *drop* its non-insider status when assigned from a non-insider to an insider.” *Id.* at 1000.

Judge Clifton dissented in part, arguing that Rabkin should be viewed as a nonstatutory insider. “The facts make it clear that this transaction was negotiated at less than arm’s length. Rabkin paid \$5,000 to MBP (the sole member of the debtor, Lakeridge), for an unsecured claim against Lakeridge nominally worth \$2.76 million. MBP did not offer the interest to anyone else. The purchase was not solicited by Rabkin. It was proposed to Rabkin by . . . a member of the MBP board. There was no evidence of any negotiation over price—Rabkin didn’t offer less, and MBP didn’t ask for more.” *Id.* at 1004.

Under the majority opinion, according to Judge Clifton, “insiders are free to evade the requirement [of section 1129(a)(10)] simply by transferring their interest for a nominal amount (perhaps a few peppercorns) to a friendly third party, who can then cast the vote the insider could not have cast itself . . . . By this standard, a savvy debtor can comply with the good faith requirement by following a simple formula: develop a reorganization plan that would provide a payout on the insider claim if approved, and then sell the claim to a friendly third party for a price lower than the payout. This enables the debtor to maneuver the third party into a position where it would be foolish not to vote for approval of the reorganization plan, ensuring a ‘yes’ vote and thereby allowing the debtor to effectively avoid the requirement under § 1129(a)(10) that at least one non-insider must approve the plan.” *Id.* at 1007

The Supreme Court heard oral argument on October 31, 2017, and a decision is pending.

### C. Structured Dismissal

#### ***Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017)**

In a 6-2 decision, the Supreme Court held that the Bankruptcy Code does not authorize “nonconsensual priority-violating distributions of estate property” in the context of structured dismissals, even in “rare cases” (reversing *Official Comm. v. CIT Grp./Bus. Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. 2015)).

The debtor filed a chapter 11 petition following a leveraged buyout by a subsidiary of the private equity firm Sun Capital Partners, which was financed by a group of lenders led by CIT Group. At the time of the filing, the debtor owed approximately \$53 million to its first priority senior secured creditors (CIT and Sun) and over \$20 million to its tax and general unsecured creditors.

Prior to the petition date, the debtor had ceased substantially all operations and had given notice to employees of their impending terminations. During the bankruptcy case, a group of terminated truck drivers filed a class action against Jevic and Sun, alleging violations of the federal and state Worker Adjustment and Retraining Notification (WARN) Acts. While ultimately Sun was not held liable, the bankruptcy court found that Jevic had undisputedly violated the state WARN Act; it was estimated that, of the total \$12 million in WARN Act claims, approximately \$8.3 million could be priority wage claims under section 507(a)(4).

Further, the creditors' committee brought a suit against CIT and Sun on the estate's behalf related to the prepetition LBO on a number of theories, including allegations of fraudulent conveyance and preferential transfer, some of which survived a motion to dismiss.

Three years later, before the establishment of liability against Jevic for the drivers' claims, Jevic, the creditors' committee, CIT, and Sun reached a settlement, at which time the debtor's only remaining assets were \$1.7 million in cash (which was subject to Sun's lien) and the LBO action against CIT and Sun. The proposed settlement provided that (i) the parties would exchange mutual releases and the LBO action would be dismissed with prejudice; (ii) CIT would pay \$2 million to satisfy certain unpaid administrative expenses, including professional fees; (iii) Sun would assign its lien on the debtor's remaining \$1.7 million to a trust, which would pay tax and administrative claims first and then general unsecured claims on a pro rata basis; and (iv) Jevic's chapter 11 case would be dismissed. Under the proposed settlement, the driver-claimants would receive nothing, including in respect of their asserted priority wage claims. According to the court, Sun had insisted on a distribution that would skip the driver-claimants because their WARN Act suit against Sun was still pending and Sun did not want to help finance the litigation against itself. 137 S. Ct. at 981.

The driver-claimants and the U.S. Trustee objected to the settlement. Both argued that the settlement denied the driver-claimants their statutory protections as priority wage claimants. The driver-claimants also argued that they had been betrayed by the committee, which had breached its fiduciary duty to the drivers by agreeing to a settlement that froze them out. The U.S. Trustee opposed the settlement on the additional ground that structured dismissals were not authorized under the Bankruptcy Code.

The bankruptcy court nevertheless approved the settlement under the multifactor test of *In re Martin*, 91 F.3d 389 (3d Cir 1996), given the "dire circumstances" that there was "no realistic prospect" of a meaningful distribution to anyone other than the secured creditors. The driver-claimants appealed to the district court, which affirmed the bankruptcy court's approval of the settlement and dismissal of the bankruptcy case.

On further appeal, the Third Circuit Court of Appeals affirmed. The circuit acknowledged that structured dismissals are not expressly authorized by the Bankruptcy Code, but it observed that the Code (specifically section 349) allows a bankruptcy judge to modify for "cause" the typical return to the prepetition status quo provided for in conventional dismissals. "[I]n other words, the Code does not strictly require dismissal of a Chapter 11 case to be a hard reset." 787 F.3d 173, 181 (3d Cir. 2015). According to the Third Circuit, "absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order such a disposition." *Id.* at 182. The circuit relied heavily on the bankruptcy court's uncontested finding that there was no real prospect of a confirmable plan and conversion of the debtor's case to chapter 7 would have been "a bridge to nowhere"—a chapter 7 trustee would most likely lack the funds to further litigate the claims and would likely simply turn over the remaining cash

and close the case. The circuit did not express an opinion on whether a structured dismissal would be permissible “when a confirmable plan is in the offing or conversion to Chapter 7 might be worthwhile.” *Id.* at 181-82.

The Third Circuit further held that settlements in the context of structured dismissals may skip a class of objecting creditors in favor of more junior creditors. While the court was skeptical that the Bankruptcy Code requires settlements in chapter 11 cases to comply with the priorities set forth in section 507, the court acknowledged some authorities as tacitly suggesting that the absolute priority rule or the policies thereunder should apply in the settlement context. “Although these cases provide some support to the Drivers, they are not dispositive because each of them spoke in the context of plans of reorganization, not settlements. When Congress codified the absolute priority rule . . . , it did so in the specific context of plan confirmation, and neither Congress nor the Supreme Court has ever said that the rule applies to settlements in bankruptcy.” *Id.* at 183. (citations omitted). Accordingly, the circuit was not constrained by its decision in *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005), which held that class-skipping “gifting” was improper in the plan confirmation context.

The Third Circuit examined other case law dealing with this issue in the settlement context and rejected the per se rule articulated by the Fifth Circuit in *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984), and instead concurred with the flexible approach taken by the Second Circuit in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007): Whether a settlement’s proposed distribution structure complies with the priority scheme of the Bankruptcy Code is the most important factor for the bankruptcy court to consider when determining whether a settlement is “fair and equitable” under Bankruptcy Rule 9019, but a noncompliant settlement can still be approved if the remaining factors weigh heavily in favor of approving the settlement. Although compliance with the priority scheme will usually be dispositive of whether a proposed settlement is fair and equitable, bankruptcy courts may nonetheless approve settlements that deviate from section 507 if they have “specific and credible grounds to justify [the] deviation.” 787 F.3d at 184 (quoting *Iridium*, 478 F.3d at 466). In the instant matter, it was a “close call,” but the settlement/structured dismissal was the “least bad alternative” since there was no prospect of a confirmable plan, and conversion to chapter 7 would have resulted in the secured creditors taking all that remained in the estate. Absent the settlement, there was “no realistic prospect” of a meaningful distribution to unsecured creditors. The circuit court was troubled by the fact that the exclusion of the driver-claimants added an element of unfairness, but the alternative option would not have served the interests of creditors or the estate overall. Accordingly, it concluded that courts could “in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code’s priority scheme.” *Id.* at 180.

The Supreme Court reversed, holding “A distribution scheme ordered in connection with the dismissal of a chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.” 137 S. Ct. 978. The Court noted that the priority system established for

both chapter 7 liquidations and chapter 11 reorganizations is fundamental to the operation of the Bankruptcy Code. Its importance, the Court reasoned, “leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure.” *Id.* at 984. The Court continued:

Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of non-consensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans.

We can find nothing in the statute that evinces this intent.

*Id.* The dismissal provision of the Bankruptcy Code, in so far as it authorizes transfers of assets, seeks a restoration of the prepetition status quo. *See* 11 U.S.C. § 349(b)(1) (dismissal reinstates certain avoided transfers and voided liens), § 349(b)(2) (dismissal vacates certain orders), and § 349(b)(3) (dismissal ordinarily reverts property in the prepetition entity that held it). While section 349(b) does provide that a bankruptcy judge may order otherwise “for cause,” read in this context, this language appears to be designed to make appropriate orders to protect rights acquired in reliance on the bankruptcy case. *Id.* at 984-85. The Court reasoned:

Nothing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter 11 plan—let alone final distributions that do not help to restore the *status quo ante* or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a Chapter 7 liquidation or a Chapter 11 plan because they violate priority without the impaired creditors’ consent. That being so, the word “cause” is too weak a reed on which to rest so weighty a power.

*Id.*

The Court noted that cases permitting interim payments that might violate ordinary priority rules (such as first-day payments to critical vendors or employees, or DIP financing roll-ups) do not support the payment of nonconsensual priority-violating final distributions in the context of a dismissal. These interim payments are usually justified because they increase the chance for a successful reorganization, which can leave even the disfavored creditors better off. In a structured dismissal like the one at issue, however, the priority-violating distribution is a part of a final disposition. It does not preserve the debtor as a going concern; it does not make the disfavored creditor better off; it does not promote the confirmability of a plan of reorganization or return the status quo ante or protect reliance interests. The Court concluded, therefore, “[W]e cannot find in the violation of ordinary priority rules that occurred here any significant



offsetting bankruptcy related justification.” *Id.* at 986. The court went on to reject the Third Circuit’s approval of nonconsensual priority-violating distributions in the context of a structured dismissal, even in “rare” cases, finding that Congress did not authorize a “rare case” exception. The Court noted, however, “We express no view about the legality of structured dismissals in general.” *Id.* at 985.

The dissent by Justices Thomas and Alioto argued that the writ of certiorari should have been dismissed because it had been granted based on the following question on which there was a split in the circuits: “Whether a bankruptcy court may authorize the distribution of settlement proceeds in a way that violates the statutory priority scheme.” However, after the Court granted certiorari, the petitioner recast the question as, “Whether a Chapter 11 case may be terminated by a structured dismissal that distributes estate property in violation of the Bankruptcy Code’s priority scheme.” The dissenters argued that the latter question is a novel question of bankruptcy law, on which there is no circuit split, and it would have benefited from further development at the court of appeals level. Moreover, the respondents did not brief the recast question in reliance on court rules which prohibit the parties from changing the substance of the question presented. According to the dissent, there had not been a full adversarial briefing.

***In re Fryar*, 570 B.R. 602 (Bankr. E.D. Tenn. 2017)**

The bankruptcy court declined to approve an individual chapter 11 debtor’s settlement because it provided for distributions contrary to the ordinary priority rules and did not serve important code-related objectives that would justify deviating from those priority rules. In so holding, the Bankruptcy Court relied on the Supreme Court’s decision in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017).

The debtor sought approval of a settlement in connection with a sale of the debtor’s stock interests in two corporations. The settlement would result in the debtor’s secured creditor, Pinnacle Bank, being paid more than the value of its collateral, and thus jumping ahead of other creditors under the Bankruptcy Code’s distribution scheme. The U.S. Trustee and three unsecured creditors objected to the settlement, asserting that it should not be approved because it violated the Bankruptcy Code’s priority scheme.

The bankruptcy court cited *Jevic*, where the Supreme Court held that bankruptcy courts cannot approve a structured dismissal of a bankruptcy case that provides for distributions that do not follow ordinary priority rules without the consent of affected creditors. In *Jevic* the Supreme Court acknowledged certain instances where interim distributions that violate the ordinary priority rules have been approved, including, for example, certain “first day” wage orders or “critical vendor” orders. In those instances, courts have found that the distributions would enable a successful reorganization and make creditors better off.

Turning to the settlement before it, the bankruptcy court confirmed that the settlement permitted distributions contrary to the ordinary priority rules, and that some affected creditors were in fact objecting. The bankruptcy court held that the settlement

was more of a “preamble to a conversion or structured dismissals” than an interim distribution that would help promote a subsequent reorganization. The bankruptcy court concluded that in light of *Jevic*, parties that seek approval of settlements that include distributions outside of the ordinary priorities should be prepared to prove that the deviation is justified because it “serves a significant Code-related objective.” The bankruptcy court concluded that the settlement before it failed to meet that standard.

#### **D. Third-Party Releases**

##### ***Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F. Supp. 3d 322 (D. Del. 2017)**

The Delaware district court held that a bankruptcy court order confirming a chapter 11 plan that included third-party releases of RICO, common law fraud, and other claims against the debtors’ equity holders and executive officers was “tantamount” to resolution of those claims on the merits by a non-Article-III court. Thus, the third-party releases and confirmation order raised *Stern* concerns, and the bankruptcy court should have addressed its authority to approve the releases before entering the order. The court denied without prejudice a motion to dismiss the appeal as equitably moot and remanded to the bankruptcy court for further proceedings to consider the *Stern* issue.

The debtors were providers of laboratory-based diagnostic testing services that derived significant revenue from Medicare and Medicaid reimbursements. They had borrowed \$1.8 billion prior to bankruptcy from a consortium of lenders (the “Lenders”) and had then promptly paid \$1.3 billion of the borrowing in a “special dividend” to the parent company’s shareholders. However, at the time of the borrowing and dividend, the debtors were under investigation by the Department of Justice for Medicare and Medicaid fraud. Shortly after the borrowing, the Centers for Medicare & Medicaid Services notified the debtors that it was revoking their Medicare billing privileges based on the submission of fraudulent claims. The government and the debtors ultimately agreed to settlement, pursuant to which the debtors would repay the government \$260 million. The debtors then filed chapter 11 petitions, accompanied by a prenegotiated plan.

The debtors proposed a plan that included a \$325 million contribution by the debtors’ equity holders; \$256 million would fund the government settlement, \$50 million would be paid to certain Lenders in exchange for their early commitment to support the restructuring, and \$19 million could be used as operating capital. In exchange for the contribution, the plan provided the equity holders and executive officers with full, third-party releases and discharges of any and all claims against them, including claims relating to the \$1.3 billion special dividend that had been paid while the debtors were in the midst of the government investigation. The plan provided no ability for parties to “opt-out” of the third-party releases.

Prior to the plan confirmation hearing, a group of dissenting Lenders holding about \$100 million in debt (“Appellants”) filed a complaint against the equity holders and corporate executives who were beneficiaries of the plan’s third-party releases. The

complaint demanded a jury trial and asserted claims for (i) RICO, (ii) fraud, aiding and abetting fraud, and conspiracy to commit fraud, and (iii) restitution.

Appellants raised a litany of objections to confirmation. Among other things, they argued that the bankruptcy court lacked either “arising in” or “related to” subject matter jurisdiction to approve the nonconsensual third-party releases. Although “barely mentioned in pre-confirmation briefing,” Appellants also briefly argued that the bankruptcy court’s “jurisdiction” to grant third-party releases was limited by *Stern v. Marshall*, 564 U.S. 462 (2011). Because the third-party releases would impact direct, nonbankruptcy claims held by nondebtors against other nondebtors, they argued that the court did not have the jurisdiction to approve the third-party releases without the consent of Appellants.

The bankruptcy court overruled Appellants’ objections and confirmed the plan. As to the *Stern v. Marshall* issue, the court noted that *Stern* was meant to be a narrow decision that does not “meaningfully change the division of labor between the Bankruptcy Court and the District Court.” 2017 WL 1032992, at \*7 (quoting hearing transcript in bankruptcy court). Moreover, other courts, including *In re MPM Silicones LLC*, 2014 Bankr. LEXIS 3926 (Bankr. S.D.N.Y. Sept. 9, 2014), had overruled *Stern* challenges to a plan’s nonconsensual third-party releases. The bankruptcy court then turned to the merits of the third-party releases, finding that they were fair and necessary to the reorganization. The bankruptcy court confirmed the plan. In so doing, the court acknowledged that it was issuing a quick decision in order to avoid a government-ordered shutdown of the debtors’ business.

Appellants appealed to the district court, challenging, among other things, the bankruptcy court’s subject matter jurisdiction and constitutional authority to approve the third-party releases. Appellants argued that “[t]he key question presented by this appeal is whether non-debtor Appellants’ direct, state law and federal RICO claims against certain non-debtors, with respect to which Appellants have a constitutional right to adjudication by an Article III Court, can be released and permanently enjoined by an Article I Bankruptcy Court without Appellants’ consent.” 2017 WL 1032772, at \*10. The debtors moved to dismiss the appeal as equitably moot.

The district court held that the bankruptcy court had subject matter jurisdiction. “The permanent release of a non-debtor, third-party’s claim against another non-debtor, third party—whether through a chapter 11 plan or otherwise—is an exercise of the Bankruptcy Court’s ‘related to’ jurisdiction.” *Id.* at \*2.

The district court, however, expressed concerns regarding whether the bankruptcy court had authority to order the third-party releases under *Stern*. *Stern* teaches that subject matter jurisdiction is not enough; the bankruptcy court must have constitutional adjudicatory authority as well. The district court was “persuaded by Appellants’ arguments that the Plan’s release, which permanently extinguished Appellants’ claims, is tantamount to a resolution of those claims on the merits against Appellants.” *Id.* at \*13. The court did not agree with the debtors that the plan release did not run afoul of *Stern* because it was not a final adjudication of the claims. “If

Article III prevents the Bankruptcy Court from entering a final order disposing of a non-bankruptcy claim against a non-debtor outside of the proof of claim process, it follows that this prohibition should be applied regardless of the proceeding (i.e., adversary proceeding, contested matter, plan confirmation).” *Id.*

Because the parties paid little attention to the constitutional issue below (conflating it with subject matter jurisdiction), the district court was unclear as to whether the bankruptcy court had the opportunity to decide if it had adjudicatory authority to enter a final order releasing third-party claims. Based on the foregoing lack of clarity in the parties’ papers, coupled with the exigencies of the chapter 11 cases — including the short timeframe within which the bankruptcy court had rule on plan confirmation, the district court was not convinced that the bankruptcy court had the opportunity to hear and rule on the adjudicatory authority issue.

The district court rejected the debtors’ contention that any concerns that an Article III court must consider the third-party release on a final basis may be cured and mooted by the district court’s de novo review. *See Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014). The bankruptcy court did not conduct any proceedings on the merits of the fraud actions, and the district court was not in any position to adjudicate those claims (on which, among other things, no discovery has been taken).

The district court thus remanded to the bankruptcy court to consider whether, or clarify its ruling that, the bankruptcy court had constitutional adjudicatory authority to approve the nonconsensual release of Appellants’ direct nonbankruptcy common-law fraud and RICO claims; and, if it does not have such authority, to submit proposed findings of fact and conclusions of law regarding the final disposition of these claims through the confirmation order or, alternatively, to strike the nonconsensual release of Appellants’ claims from the confirmation order. The district court denied without prejudice the debtors’ motion to dismiss the appeal as equitably moot.

On remand, the Delaware Bankruptcy Court held that it did have constitutional adjudicatory authority to approve the releases contained in the plan. *See In re Millennium Lab Holdings II, LLC*, 575 B.R. 252 (Bankr. D. Del. 2017).

#### **E. Substantive Consolidation**

*In re Republic Airways Holdings*, 565 B.R. 710 (Bankr. S.D.N.Y. 2017)

The Bankruptcy Court for the Southern District of New York overruled a creditor’s objection to the provisions of a chapter 11 plan of reorganization providing for the substantive consolidation of a corporate debtor with its corporate affiliates.

The debtors operated a regional airline through a holding company (“RAH”) and several subsidiaries, including a primary operating subsidiary (“Shuttle”). Most of the debts of the corporate group were incurred by Shuttle and guaranteed by RAH. The debtors filed a plan of reorganization that proposed, among other things, to substantively consolidate RAH, Shuttle, and other debtor affiliates. These provisions operated to merge the debtors’ assets, eliminate inter-debtor guaranties, and treat related claims

against multiple debtors as a single obligation of the consolidated debtors. The debtors' proposed plan was supported by the vast majority of its creditors, as well as the official committee of unsecured creditors (the "UCC").

One of the members of the UCC ("Residco") held direct claims against Shuttle and guaranty claims against RAH arising from multiple aircraft leases. Residco filed an objection to the plan's substantive-consolidation provisions, arguing that substantive consolidation of the debtors was inappropriate for reasons including that (i) Residco relied upon the debtors' corporate separateness when extending credit to the debtors, (ii) the debtors' financial affairs could be separated without prejudicing creditors, and (iii) Residco would be uniquely prejudiced by substantive consolidation for reasons including that its guaranty claim against RAH, which would be eliminated under the plan, was potentially more valuable than its direct claim against Shuttle, which would survive under the plan. While disputing all of Residco's objections on the merits, the debtors also proposed to temporarily "carve out" Residco's claims from the substantive consolidation provisions of the plan until the merits of those claims were resolved.

The bankruptcy court began its analysis by explaining that:

"Substantive consolidation has the effect of consolidating assets and liabilities of multiple debtors and treating them as if the liabilities were owed by, and the assets held by, a single legal entity. In the course of satisfying the liabilities of the consolidated debtors from the common pool of assets, intercompany claims are eliminated and guaranties from co-debtors are disregarded."

565 B.R. at 716 (quoting *In re Worldcom, Inc.*, 2003 Bankr. LEXIS 1401, \*\* 103-04 (Bankr. S.D.N.Y. Oct. 31, 2003)).

The court further explained that, in the Second Circuit, substantive consolidation may be warranted where either "(i) 'creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit'; or (ii) 'the affairs of the debtors are so entangled [sic] consolidation will benefit all creditors.'" *Id.* at 717 (quoting *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988)). The court also noted that, "[a]nother 'key factor' courts have considered is whether substantive consolidation 'will yield an equitable treatment of creditors without any undue prejudice to any particular group.' As an equitable remedy, courts may order substantive consolidation where the benefits to creditors outweigh the harm." *Id.* (quoting *In re Food Fair Inc.*, 10 B.R. 123, 127 (Bankr. S.D.N.Y. 1981)).

All relevant factors favored substantive consolidation in this case, the court held. First, the court found that the debtors operated as a single economic unit for reasons including that:

None of the Consolidated Debtors has ever received a credit rating independently from another Consolidated

Debtor, and analyst reports routinely discuss the Debtors as a unified enterprise. The Consolidated Debtors share the same overhead, management, accounting, and other back-office functions; there are significant intercompany obligations; and there are significant overlaps in the creditor pools due to guarantees. Moreover, the Consolidated Debtors issue consolidated financial statements, are jointly controlled from a shared business headquarters at a common business address, have no separate budgets, use the same cash management system, and file a consolidated tax return.

*Id.* at 719 (citations to record omitted). Moreover, untangling the debtors' assets would prejudice creditors, the court held, because conducting an intercompany reconciliation and audit would lead to significant costs and delays, including a delay in emerging from bankruptcy, which threatened the debtors' business prospects for recovery.

Addressing Residco's specific objections, the court concluded that Residco could not have relied upon the corporate separateness of the debtors for reasons including that Residco had only reviewed the consolidated financials of the debtors' corporate group. In response to Residco's claim of prejudice, the court began by explaining, "[a]s a threshold matter, even if Residco is prejudiced, substantive consolidation may still be granted where, as here, the benefits to all creditors greatly outweigh the possible harm to Residco." *Id.* at 724. Moreover, it was unnecessary to resolve the merits of Residco's argument that its claims against RAH were more valuable than its direct claims against Shuttle, because the debtors' proposed carveout of Residco's claims from the plan's substantive-consolidation provisions eliminated any threat of prejudice to Residco arising from the implementation of those provisions. Concluding that, "substantive consolidation can be tailored to fit the circumstances of the case and ensure that a claimant receives the recovery to which it is entitled," the court overruled Residco's objection. *Id.* at 729.

## **XII. MISCELLANEOUS**

### **A. Chapter 9**

#### ***In re City of San Bernardino*, 566 B.R. 46 (Bankr. C.D. Cal. 2017)**

The bankruptcy court held that a chapter 9 plan may include a third-party injunction that bars claimants from collecting damages from indemnified city employees. The court found that the injunction was a critical and essential element of the City's revitalization efforts and that, without such, the City's opportunity to reorganize and provide municipal services for its residents would be severely impacted.

The City of San Bernardino's plan provided for a 1 cent-on-the-dollar distribution to general unsecured creditors, which the court found was necessary so that the City could move forward with its twenty-year fiscal plan. A large number of

unsecured claims were asserted by litigation claimants, who had either filed suit or made claims against the City based on its alleged wrongdoings, including alleged violations of civil rights. Many of these claimants asserted litigation claims not only against the City, but also against employees, in particular, against members of the police department. Under California law, the City is obligated to indemnify employees for claims against them arising within the scope of their employment. Unless the claims against the employees were addressed in the plan, the court found that the indemnification requirement made the City face significant risk of having to pay damages awarded against these employees at 100% on the dollar, which the City could not afford and still be able to perform under its fiscal plan. Accordingly, the City's plan included an injunction to prevent the claimants from collecting damages awarded against certain indemnified persons.

In confirming the plan and approving the third-party injunction, the court cited the Ninth Circuit's dicta in *Deocampo v. Potts*, 836 F.3d 1134 (9th Cir. 2016), which in connection with the City of Vallejo chapter 9 case suggested that a chapter 9 plan might include a third-party release. The court rejected the objecting claimants' reliance on *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621 (9th Cir. 1989), and *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995), which did not allow third-party releases. The court noted that these cases relied on Bankruptcy Code section 524(e), which is not incorporated into chapter 9 pursuant to Bankruptcy Code section 901. The court also noted that the bankruptcy court in Detroit used this reasoning to approve a third-party injunction. See *In re City of Detroit*, 524 B.R. 147, 266 (Bankr. E.D. Mich. 2014).

The court also rejected the objectors' reliance on the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from granting an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The court held that it had authority under Bankruptcy Code section 105, and that the third-party injunction was a necessary aid to the court's jurisdiction to confirm an effective and feasible plan.

Finally, the court rejected the objectors' reliance on *Law v. Siegel*, 134 S. Ct. 1188 (2014), which held that a bankruptcy court may not enter an order under section 105(a) to circumvent or override explicit mandates of other sections of the Bankruptcy Code. Here, there was no express prohibition in the Bankruptcy Code against the third-party injunction.

#### ***Deocampo v. Potts*, 836 F.3d 1134 (9th Cir. 2016)**

The Ninth Circuit suggests in dicta that the Circuit's general prohibition of third party releases does not apply in a chapter 9 case. However, since the City of Vallejo's chapter 9 plan did not contain an express third-party release, the defendant police officers in a civil-rights action were subject to suit. The police officers' indemnification claims were not discharged by the City's chapter 9 plan, notwithstanding the fact that the alleged wrongdoing occurred prepetition.

Plaintiffs sued Vallejo police officers, alleging excessive force and other claims under 42 U.S.C. § 1983 and state law. Vallejo subsequently filed for chapter 9, and the bankruptcy court stayed the plaintiffs' action. After Vallejo confirmed its plan, however, the court lifted the stay, and the jury awarded damages to the plaintiffs. The officers moved for relief from the judgment, asserting that the judgment was effectively a claim against the City that was discharged under its plan. The district court denied the plaintiffs' motion, and the Ninth Circuit affirmed.

The Ninth Circuit recognized that the City was obligated under California law to indemnify its employees for claims against them arising from their employment. This obligation, however, did not make the claims ones against the City that were subject to discharge in chapter 9.

The Ninth Circuit rejected the officers' assertion that the City's plan granted them a third-party release. The court agreed with the officers that the Ninth Circuit's prohibition of third-party releases (*see Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401 (9th Cir. 1995)), may not apply in chapter 9. Unlike chapter 11, chapter 9 does not incorporate Bankruptcy Code section 524(e), which provides that the debtor's discharge does not discharge the obligations of other entities. *See* 11 U.S.C. § 901. Nonetheless, the Ninth Circuit found that the plan did not contain a third-party release, and thus declined to opine on the power of the bankruptcy court to confirm a hypothetical plan that does contain such a release. The court found that the plan's discharge and injunction provisions applied only to the City, and were not broad enough to include third-party claims.

Finally, the Ninth Circuit recognized that the practical effect of its decision was that the burden to pay the plaintiffs' judgment against the police officers would fall upon the City. Although the officers did not file proofs of claim in the bankruptcy proceedings, and Vallejo did not list them as creditors, it was not necessary for them to have done so to preserve their right to statutory indemnification. Under California law, the event giving rise to the officers' claim for indemnification was Vallejo's provision of a defense for the officers, not the alleged injury inflicted by the officers or the plaintiffs' filing of a lawsuit. Here, Vallejo undertook the officers' defense after the confirmation of the plan. Because this triggering event occurred after the discharge, Vallejo's indemnification obligation was a postpetition debt that was not subject to discharge or adjustment.

***Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792 (6th Cir. 2016), cert. denied, 137 S. Ct. 2270 (2017)**

In a split decision, the Sixth Circuit dismissed an appeal of an order confirming Detroit's chapter 9 plan as equitably moot.

Detroit confirmed a municipal debt adjustment plan that was based a series of "intricate and carefully woven" settlements with almost all of its creditors and stakeholders. Although the plan reduced city workers' pensions by 4.5%, 73% of the pensioners voted for the plan because the shortfall in the pension system's funding



would have required a 27% reduction in promised retirement benefits. As part of the “Grand Bargain” that served as a foundation to the plan, Detroit obtained \$816 million in outside funding from the city, state, and third parties to bolster the pension payouts under the plan.

Dissenting pensioners appealed the confirmation order, but the district court dismissed the appeal as equitably moot. The Sixth Circuit affirmed.

The circuit court observed that equitable mootness is “‘a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality’ by ‘preventing a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract.’” 838 F.3d 792, 797 (quoting *In re Ormet Corp.*, 355 B.R. 37, 40-41 (S.D. Ohio 2006)).

The court stated that this case was “not a close call,” and explained:

Altering the pension reduction would mean rescinding the Global Retiree Settlement and, consequently, nullifying the Grand Bargain. Given the immensity of the Grand Bargain, even within this enormous bankruptcy, such a drastic action would unavoidably unravel the entire Plan, likely force the City back into emergency oversight, and require a wholesale recreation of the vast and complex web of negotiated settlements and agreements. At this point, the harm to the City and its dependents—employees and stakeholders, agencies and businesses, and 685,000 residents—so outweighs the harm to these appellants that granting their requested relief and unravelling the Plan would be “impractical, imprudent, and therefore inequitable.” In short, this is the scenario that equitable mootness was designed to avoid.

*Id.* at 799 (quoting *In re United Producers*, 526 F.3d 942, 947 (6th Cir. 2008)).

The Sixth Circuit disagreed with *Bennett v. Jefferson County*, 518 B.R. 613 (N.D. Ala. 2014), in which an Alabama district court held that equitable mootness does not apply in chapter 9 cases. The court quoted the district court in *Detroit*: “‘If the interests of finality and reliance are paramount to a Chapter 11 private business entity with investors, shareholders, and employees, thus justifying equitable mootness, then these interests surely apply with greater force to the City’s Chapter 9 Plan, which affects thousands of creditors and residents.’” 838 F.3d at 803 (quoting 2015 WL 5697702, at \*5 (E.D. Mich. Sept. 29, 2015)).

In a dissenting opinion, Judge Moore stated:

In its zeal to avoid the merits of this case, the Majority extends an already questionable prudential doctrine to a context in which it has no place. . . .

As applied here, equitable mootness suggests that the importance of adjudicating the retirees' rights pales in comparison to the importance of protecting the expectations of lenders and others who have *chosen* to rely on Detroit's bankruptcy plan before appellate challenges to it were resolved. I fear that using such a justification to brush aside the retirees' legal claims will leave them with the impression that their rights do not matter. That the doctrine used to avoid their claims is a judicial invention with almost no legal basis only pours salt on the wound.

*Id.* at 806.

Judge Moore concluded:

The flaws in our equitable-mootness doctrine are many. It has little basis in the text of the Bankruptcy Code, creates precisely the type of prudential limitation on our jurisdiction that the Supreme Court has criticized, and undermines the delicate constitutional balance on which the bankruptcy-court system is based. These concerns suggest that it is high time for us to review the doctrine's basis as a full court sitting en banc.

*Id.* at 811.

## **B. Chapter 15**

### ***In re Irish Bank Resolution Corp.*, 559 B.R. 627 (Bankr. D. Del. 2016)**

The bankruptcy court denied a motion by the foreign representatives of Irish Bank Resolution Corporation, a chapter 15 debtor that was subject to a foreign main proceeding in Ireland, seeking an order directing Yahoo! Inc. to turn over all electronically stored information in a private email account (the "Yahoo Account") allegedly maintained by an individual named Abdullah Rasimov. The court held that (1) the foreign representatives failed to prove that the contents of the Yahoo Account were part of the debtor's property or related to the debtor's property or financial affairs; and (2) the Stored Communications Act ("SCA") prohibits the disclosure of the Yahoo Account under the circumstances.

The foreign representatives' turnover motion arose from large-scale litigation involving the foreign liquidation of the debtor. The debtor was seeking to recover payments on loans it made to the Quinn family in Ireland. The foreign representatives

asserted that the Yahoo Account was connected to the Quinn family's attempts to conceal assets to evade repayment of the loans.

In response to a subpoena by the foreign representatives demanding Yahoo produce all electronically stored information in the Yahoo Account, Yahoo asserted it was barred from producing emails or other content contained in the account under internal policies and the SCA. After unsuccessful attempts to compel Rasimov himself to provide the relevant electronic information and/or to consent to Yahoo providing that information, the foreign representatives sought and obtained an order from the bankruptcy court that the foreign representatives were authorized and directed to, among other things, execute or deliver "any instrument, and to perform any other act, necessary to provide 'lawful consent' pursuant to [the SCA], and any other similar or local legislative body or administrative entity, on behalf of and in the name of Rasimov."

The foreign representatives tried to provide Yahoo with "lawful consent" on behalf of Rasimov under the bankruptcy court's order. But Yahoo still declined to comply, asserting that notwithstanding the bankruptcy court's order, the foreign representatives could not provide "lawful consent," because the SCA requires consent from certain specified parties. Pursuant to a subsequent request by the foreign representatives, the bankruptcy court then entered an order stating that the "Foreign Representatives shall be and hereby are designated as the 'subscriber' of the Yahoo Account," and purporting to give the foreign representatives the power to consent to the release of electronically stored email. Yahoo continued to refuse to comply. The foreign representatives then filed the turnover motion under Bankruptcy Code section 542.

The foreign representatives argued that the information in the Yahoo Account became the debtor's property when the bankruptcy court entered the order designating the foreign representatives as the "subscriber" of the Yahoo Account or, in the alternative, that turnover was appropriate under Bankruptcy Code section 542(e) because the electronically stored information relates to the debtor's property. The court noted that although section 542 is not expressly applicable and there is no "estate" in chapter 15, courts nonetheless had authorized turnover actions in chapter 15 cases. However, in this case, the foreign representatives had not met their burden of proof to establish by a preponderance of the evidence that the property constitutes or related to property of the debtor. The foreign representatives had merely asserted that they had received information that the Yahoo Account was believed to be connected to the Quinn family's scheme to conceal assets. The court also held that its "subscriber order" did not alter the result because it was unclear whether that designation could create a property interest in the debtor's favor, and doing so would undermine the underlying notion in the Bankruptcy Code that property of the estate is limited to the debtor's interest in property at the time the case is commenced.

The court also held that section 542(e) is not "self-executing" and that the relief should be denied because neither the SCA nor caselaw interpreting it support that disclosure can be compelled based on "imputed" consent or by designating a third-party as the "subscriber." The SCA regulates the disclosure of email and other electronic

communications by email service providers to third parties and prohibits those providers from disclosing contents of a communication to a third party absent an applicable statutory exception. The court found that no such exception applied in this case.

The court further held that authority granted to bankruptcy courts does not trump the SCA's prohibition on disclosure. The court noted that it cannot order relief that violates federal law and is not empowered to amend laws enacted by the United States Congress or individual state legislatures.

***In re Sanjel (USA) Inc.*, 2016 Bankr. LEXIS 2771 (Bankr. W.D. Tex. July 28, 2016)**

A Texas bankruptcy court held that a stay order issued in a Canadian insolvency proceeding need not be given full force in the U.S. when it would impair the filing of litigation in the U.S. based on a U.S. statutory right.

The debtors commenced a Canadian insolvency proceeding. The Canadian court entered an order staying all suits against the debtors' officers and directors. The U.S. bankruptcy court subsequently granted recognition of the Canadian proceeding under Bankruptcy Code section 1517 and extended discretionary relief under section 1521 by entering a "Recognition Order" giving force to the Canadian stay order's provisions.

Two plaintiffs in actions pending against the debtors' officers and directors in pending in the U.S. district court alleging violations of the Fair Labor Standards Act moved in the U.S. bankruptcy court for relief from the stay order and/or for modification of the Recognition Order to permit other former employees of the debtors to file written consents and join the FLSA actions in the district court before the statute of limitations expired, in order to avoid the possible extinguishment of those employees' claims.

The debtors argued that the requested relief would prejudice the debtors by occupying its officers' and directors' time with onerous discovery and damage the debtors' ability to restructure. The debtors also asserted that the movants were not prejudiced because they could always seek relief from the stay order in the Canadian court, citing *In re Nortel Networks Corp.*, 2013 WL 6053845, at \*3-4 (D. Del. Nov. 15, 2013) (affirming denial of plaintiffs' motion to modify recognition order, which would have allowed plaintiffs to pursue securities litigation against debtors' D&Os). The bankruptcy court disagreed.

First, the court explained that merely granting relief from the automatic stay under Bankruptcy Code section 362 would not accomplish the movants' goal of expanding the claims against the officers and directors. Section 1520(a) states that recognition triggers section 362's stay only as to the debtor and property of the debtor. Here, the movants sought to pursue the debtors' officers and directors, who were not covered by the section 362 automatic stay.

Next, the court considered whether it should modify the relief granted in the Recognition Order pursuant to section 1522(a): "In judging whether relief should be modified pursuant to § 1522(a), courts have engaged in a balancing of the relative hardships to the parties when considering whether the interests of interested parties are

sufficiently protected. In balancing the hardships under § 1522, a court may refuse to recognize specific orders in a foreign proceeding when those orders unjustifiably harm an interested party.” 2016 WL 4427075, at \*5 (citations omitted).

The court found that the balance of hardships tipped in favor of the movants:

Under the FLSA, employees have a statutory right to bring claims against directors and officers for unpaid minimum wages or unpaid overtime, and pursuing claims is further encouraged by awarding attorney’s fees to successful litigants. . . . Further, looking at the plain language of § 108(c) of the Bankruptcy Code, any automatic tolling as a result of these bankruptcy proceedings applies only with respect to actions against debtors, not a debtor’s directors and officers. Any tolling of claims against a debtor’s officers and directors would come either from a tolling agreement between the parties or at the decision of district court where these claims are being brought. According to Movants, potential class members who have not filed written consents are particularly vulnerable to the FLSA’s running statute of limitations. Absent a modification of the stay, Movants are barred from bringing their tolling arguments before the district court until such time as the [Canadian stay order] expires, which may well be too late in the case that the district court finds that tolling does not apply. Further, Debtors indicated to this Court at the hearing that they were not prepared to enter into a tolling agreement at that time . . . . Therefore, modifying the D&O Stay would appear to be the only way to ensure protection of Movants’ interests so that consents may be filed within the applicable statute of limitations period. Without such modification, Movants risk losing their FLSA claims in their entirety during the pendency of Debtors’ CCAA proceeding.

*Id.* (citations omitted).

The bankruptcy court rejected the debtors’ argument that the movants should seek relief from the stay order in the Canadian court. “To the extent that *Nortel* determined litigants could have and should have requested relief from stay exclusively from the Canadian Court for claims which originated wholly under a United States statutory right, the Court disagrees. . . . In this case, it would be unreasonable and exceedingly burdensome to require Movants to go to Canada and request that the Canadian Court lift the D&O Stay to allow Movants to pursue claims in Colorado based wholly on a statutory right created by United States law to protect employees within the United States.” *Id.* at \*6.

The court modified the Recognition Order to permit movants to conduct limited discovery with respect to the D&Os and to allow potential opt-in plaintiffs to file written consents with the district court.

**C. Attorneys' Fees: California Civil Code Section 1717**

***Jones v. Cheplick*, 2016 WL 5340655 (E.D. Cal. Sept. 22, 2016)**

The California district court held that an action against a corporation's president alleging fraudulent transfers of the corporation's assets to avoid payment of the creditor's judgment against the corporation based on a defaulted lease is not an "action on a contract" that would entitle the prevailing party to attorneys' fees.

A corporation and its president both filed chapter 7 petitions. Prepetition, the corporation's lessor had obtained a judgment against the corporation based on a defaulted lease. The lessor filed an adversary proceeding in the president's bankruptcy case, seeking to preclude the discharge of all debt related to its judgment based on fraud, and alleging that the president had fraudulently transferred all of the corporation's assets to another entity to avoid paying creditors. The bankruptcy court found insufficient evidence to support the lessor's fraud claims and entered judgment in favor of the president. The president then moved for attorneys' fees as the prevailing party based on a fee provision in the lease between the lessor and the corporation. The bankruptcy denied the motion, and the president appealed.

The district framed the sole issue on appeal as whether the lessor's adversary proceeding was an action on a contract. California Civil Code section 1717 provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." An action is "on a contract" when "a party seeks to enforce, or avoid enforcement of, the provisions of the contract."

The district court agreed with the court below that "the bankruptcy proceedings in this case had nothing to do with the lease and everything to with [president] Jones, who was not even a party to the original contract, alleged fraudulent attempts to avoid a judgment." 2016 WL 5340655, at \*2. As the bankruptcy court observed: "In the adversary proceeding, the plaintiff did not seek a determination of amount [sic] due under the lease, of the validity of the lease, as to the terms of the lease, as to whether the lease was breached, or anything else having to do with the lease.'" *Id.* (quoting the bankruptcy court's opinion).

The district court distinguished *In re Penrod*, 802 F.3d 1084 (9th Cir. 2015), in which the Ninth Circuit found a secured creditor's objection to a chapter 13 plan's treatment of its claim to be an action on a contract. The court explained: "[T]he parties [in *Penrod*] were expressly litigating their rights under a contract to determine the

amounts of secured versus unsecured debt for which the debtor would remain liable. The contract terms, albeit in relation to the bankruptcy laws, were directly at issue. In this case, on the other hand, the only issue at trial was whether Jones fraudulently transferred assets as an individual to avoid a judgment against the corporation.” *Id.*

**D. Intercreditor Agreements / Restrictions on Junior Creditors’ Remedies**

***LESA, LLC v. Family Trust of Mandel*, 2016 WL 6599912 (N.D. Cal. Nov. 8, 2016)**

The District Court for the Northern District of California held that an intercreditor agreement prohibiting the junior creditors from commencing any legal action against the mutual borrower did not prevent the junior creditors from suing to rescind their loan transaction.

The junior creditors had signed a subordination agreement providing:

Each Creditor will not demand or receive from Borrower (and Borrower will not pay to such Creditor) all or any part of the Subordinated Debt, by way of payment, prepayment, setoff, lawsuit or otherwise, nor will such Creditor exercise any remedy with respect to the Collateral, nor will such Creditor accelerate the Subordinated Debt, or commence, or cause to commence, prosecute or participate in any administrative, legal or equitable action against Borrower, until such time as (i) the Senior Debt is fully paid in cash, (ii) Lender has no commitment or obligation to lend any further funds to Borrower, and (iii) all financing agreements between Lender and Borrower are terminated. [Emphasis added.]

The junior creditors nevertheless brought a cross-complaint in the state court seeking rescission for fraud in the inducement.

In a subsequent action in the district court, the plaintiff alleged that the filing of the cross-complaint had been a violation of the intercreditor agreement. The district court disagreed and granted the junior creditors’ motion to dismiss:

The Court concludes that the Subordination Agreement was not meant to prevent a rescission action, which is a legally distinct action from an attempt to enforce and collect on the Subordinated Debt. Thus, the filing of the cross-complaint does not constitute a breach of the Subordination Agreement.

At the hearing, Plaintiff suggested that even if the Subordinated Debt was rescinded, the Subordination

Agreement would still prevent Defendants from seeking to recover any judgment against [the borrower]. Plaintiff cites no contract language or case law in support, and the Subordination Agreement itself concerns the subordination of loans made by Defendants as *creditors*, not any debt that Insite happens to owe Defendants, even if completely unrelated to money loaned by Defendants to Insite. For example, the Recitals of the Subordination Agreement make that clear, as it focuses on the “loans or other credit accommodations” extended by “Creditors” such as Defendants.

2016 WL 6599912, at \*6.

#### **E. PROMESA**

##### ***Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938 (2016)**

In a 5-2 opinion, the Supreme Court affirmed the First Circuit’s ruling that Puerto Rico’s 2014 Recovery Act was preempted by federal law. The opinion let stand the district court’s order permanently enjoining enforcement of the Recovery Act.

From 1938 until at least 1978, Puerto Rico, like the states, could authorize its municipalities to obtain federal municipal bankruptcy relief under chapter IX of the Bankruptcy Act. The Bankruptcy Code omitted a definition of the term “State” when it was enacted in 1978, so Puerto Rico’s ability to use chapter 9 of the Bankruptcy Code was unclear. But Congress re-introduced a definition of “State” to the Code in 1984 in section 101(52), which defines “State” to include Puerto Rico “*except for the purpose of defining who may be a debtor under chapter 9*” of the Bankruptcy Code (emphasis added). 11 U.S.C. § 101(52). As a result, Puerto Rico’s municipalities could no longer file under chapter 9 absent further congressional action because Puerto Rico could not authorize its municipalities to file as required under section 109(c)(2).

Puerto Rico attempted to allow its utilities to restructure their debt by enacting its own municipal bankruptcy law (the Recovery Act), which provides different protections for creditors than chapter 9. Investors holding nearly two billion dollars in bonds from one of Puerto Rico’s distressed public utilities (PREPA) feared that PREPA was about to seek protection under the Recovery Act. They filed suit against Puerto Rico, the governor, and various Puerto Rico officials challenging the Recovery Act’s validity and seeking to enjoin its implementation. The district court found in their favor and permanently enjoined the Recovery Act on the ground that it was preempted under Bankruptcy Code section 903(1), which provides that a “State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition.” 11 U.S.C. § 903(1).

The First Circuit affirmed, holding that the Recovery Act prescribed “a method of composition of indebtedness” of Puerto Rico municipalities, and it may bind creditors



without their consent. Thus, section 903(1) by its plain language bars a state law like the Recovery Act.

The First Circuit further held that the context and the history of section 903(1) supported the conclusion that it preempted the Recovery Act. Section 903(1)'s predecessor enacted in 1946 (section 83(i) of the Bankruptcy Act) expressly prohibited state municipal bankruptcy laws from adjusting creditors' debts without their consent, which had been the status quo prior to a Supreme Court case in 1942 that upheld a state law permitting adjustments of municipal debt if the city and 85% of creditors agreed (*Faitoute Iron & Steel Co. v. Asbury Park*, 316 U.S. 502 (1942)). The First Circuit held that Congress enacted this provision "to restore what had been believed to be the pre-*Faitoute* status quo by expressly prohibiting state municipal bankruptcy laws adjusting creditors' debts without their consent." 805 F.3d at 333. Section 83(i) had expressly applied to Puerto Rico because "State" had been defined to include the "Territories and possessions," like Puerto Rico, to which the Bankruptcy Act was applicable. The First Circuit held that when section 83(i) of the Bankruptcy Act was recodified as Bankruptcy Code section 903(1), there was no evidence that Congress intended to modify its reach.

The First Circuit rejected the argument that the 1984 amendments somehow altered the applicability of section 903(1) to Puerto Rico. The court held that section 101(52) confirms that the "State law[s]" prohibited by section 903(1) include those of Puerto Rico because Puerto Rico is a "State" under that definition with only one exception. The exception is that Puerto Rico is not a state for purposes of defining who can be a debtor under chapter 9. But that exception does not expressly alter section 903(1). The First Circuit also rejected the argument that the district court's decision violated the Tenth Amendment, which does not apply to territories.

In a concurring opinion, Judge Torruella argued that the 1984 Amendments are also invalid because they violate the uniformity requirement of the Bankruptcy Clause of the Constitution, and because they lack any rational basis or clear policy reasons.

The Supreme Court affirmed in a 5-2 opinion written by Justice Thomas. The Court noted that three provisions of the Bankruptcy Code were relevant: (i) section 109(c), which requires a chapter 9 debtor to be an insolvent municipality that is "specifically authorized" by a State "to be a debtor"; (2) section 903(1), which expressly bars States from enacting municipal bankruptcy laws; and (3) the definition of "State" in section 101(52) (as amended in 1984), which "includes . . . Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9."

The Court held that the plain text supported preemption. The unambiguous language of section 903(1) "contains an express pre-emption clause," the plain wording of which "necessarily contains the best evidence of Congress' pre-emptive intent." Moreover, the definition of "State" in section 101(52) excludes Puerto Rico for the single purpose of defining who may be a chapter 9 debtor; the definition does not exclude Puerto Rico from all of chapter 9's provisions, including the preemption provision. The use of the phrase "defining who may be a debtor under chapter 9" is

tantamount to barring Puerto Rico from “specifically authorizing” which municipalities may file chapter 9 petitions. Had Congress intended to exclude Puerto Rico from chapter 9 altogether, including chapter 9’s preemption provision, Congress would have said so.

Justice Sotomayor dissented (joined by Justice Ginsburg). She wrote that because Puerto Rican municipalities cannot access chapter 9’s federal bankruptcy process, a nonfederal bankruptcy solution is not merely a parallel option; it is the only existing legal option for Puerto Rico to restructure debts that could cripple its citizens. The structure of the Code and the language and purpose of section 903 demonstrate that Puerto Rico’s municipal debt restructuring law should not be read to be prohibited by chapter 9.

Note that just a couple of weeks after this case was decided, the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) was enacted. Pub. L. 114-187, 130 Stat. 549 (2016). PROMESA provides for a restructuring process for Puerto Rico and its municipalities that is similar in many respects to chapter 9 of the Bankruptcy Code.

#### **F. “Debtor Collector” Under FDCPA**

##### ***Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017)**

The Supreme Court held that a company that regularly attempts to collect debts that it purchased after the debts had fallen into default is not a “debt collector” subject to the Fair Debt Collection Practices Act (“FDCPA”).

Four consumers sued Santander, alleging that it violated the FDCPA, 15 U.S.C. §§ 1692-1692p, by engaging in prohibited collection practices when collecting on the plaintiffs’ automobile loans. The loans were originally made by CitiFinancial Auto; Santander subsequently became the loans’ servicer. After the plaintiffs were unable to make payments, CitiFinancial Auto foreclosed on the loans, leaving the plaintiffs obligated to pay deficiencies. CitiFinancial Auto then sold the defaulted loans to Santander for pennies on the dollar as part of a \$3.55 billion (face amount) bundle of receivables, and Santander attempted to collect on the loans it had purchased. While trying to collect, Santander and its agents allegedly misrepresented the amount of the debt and their entitlement to collect it.

The district court granted Santander’s motion to dismiss on the ground that the complaint did not allege facts showing that Santander was a “debt collector” subject to the FDCPA. A “debt collector” generally is “any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another,” or “any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.” 15 U.S.C. § 1692a(6). The court concluded that Santander was not a debt collector, but rather a consumer finance company that was collecting debts on its own

behalf as a creditor and that the FDCPA generally does not regulate creditors collecting on debt owed to themselves. The court rejected the plaintiffs' argument that because the plaintiffs' loans were in default when Santander acquired them from CitiFinancial Auto, Santander qualified as a debt collector under the FDCPA, rather than as a creditor.

The Fourth Circuit affirmed, agreeing with the district court that the FDCPA generally does not regulate creditors when they collect debt on their own account and that, on the facts alleged by the plaintiffs, Santander became a creditor when it purchased the loans before engaging in the challenged practices. Because Santander was a creditor, and not a debt collector, it was not governed by the FDCPA.

The Fourth Circuit rejected the plaintiffs' argument that Santander could not be considered a "creditor" when it purchased the loans because they were already in default. The court recognized that section 1692a(4) excludes from the definition of a "creditor" "any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4). However, the default status of a debt has no bearing on whether a person qualifies as a "debt collector" under the threshold definition set forth in 15 U.S.C. § 1692a(6), and the FDCPA only applies to debt collectors.

The unanimous Supreme Court affirmed:

After all, the Act defines debt collectors to include those who regularly seek to collect debts "owed . . . another." And by its plain terms this language seems to focus our attention on third party collection agents working for a debt owner—not on a debt owner seeking to collect debts for itself. Neither does this language appear to suggest that we should care how a debt owner came to be a debt owner—whether the owner originated the debt or came by it only through a later purchase. All that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for "another." And given that, it would seem a debt purchaser like Santander may indeed collect debts for its own account without triggering the statutory definition in dispute, just as the Fourth Circuit explained.

Santander was not a debt collector because its principal business was not to collect debt, it did not use a name other than its own in collecting the debts, and it did not regularly collect debts owed to others. Although Santander did sometimes collect debts for others, it was not doing so here. A company such as Santander—which, as a consumer-finance company, lends money, services loans, collects debt for itself, collects debt for others, and otherwise engages in borrowing and investing its capital—is not subject to the FDCPA for all of its collection activities simply because one of its several activities involves the collection of debts for others.

## G. Trust Indenture Act

### *Marblegate Asset Mgmt. v. Education Mgmt. Fin. Corp.*, 846 F.3d 1 (2d Cir. 2017)

The Second Circuit held that section 316(b) of the Trust Indenture Act of 1939 (the “TIA”) prohibits only formal legal modifications to the right to collect principal and interest under indentures without the consent of all bondholders, but does not forbid other forms of reorganization-like actions, even if they are designed to eliminate a nonconsenting bondholder’s practical ability to receive payment.

The debtor, a higher education company that relied heavily on federal funding, could not restructure its debt in bankruptcy without losing its eligibility for the funding. The debt, owed by its subsidiaries, consisted of both secured debt under a credit agreement and unsecured notes. The unsecured notes were guaranteed by the debtor (the “Notes Parent Guarantee”), but the Notes Parent Guarantee could be released upon the release of any later guarantee given to the secured creditors. In conjunction with a subsequent revision of the credit agreement, the debtor also guaranteed the secured debt (the “Secured Parent Guarantee”).

A group of secured creditors designed an “Intercompany Sale” to relieve the debtor of its debt obligations outside of bankruptcy. The secured creditors would exercise their rights to foreclose on the debtor’s assets, and would also release the Secured Parent Guarantee. The release of the Secured Parent Guarantee would effect a release of the Notes Parent Guarantee. With the consent of the secured creditors (but without needing the consent of the unsecured creditors), the collateral agent would then sell the foreclosed assets to a newly formed subsidiary of the parent. That new subsidiary would distribute debt and equity only to *consenting* creditors and continue the business. “Non-consenting Noteholders would not receive anything from the new company: though not a single term of the Indenture was altered and Noteholders therefore retained a contractual right to collect payments due under the Notes, the foreclosure would transform the [subsidiary debtor] into an empty shell.” 846 F.3d 1, 4.

All creditors but one eventually consented. The dissenting noteholder sued to enjoin the Intercompany Sale on the ground that it violated Section 316(b) of the TIA, which provides, in relevant part: “*the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder . . .*” 15 U.S.C. § 77ppp(b) (emphasis added by the Court).

The debtor argued that “the Intercompany Sale complied with Section 316(b) because it did not amend any Indenture term and because [the dissenter’s] right to initiate suit against the [subsidiary debtor] to collect payment remained intact.” 846 F.3d at 5. The dissenter contended that “although the contractual terms governing [its] Notes had not changed, its practical ability to receive payment would be completely eliminated by virtue of the Intercompany Sale, to which it did not consent.

Section 316(b), [the dissenter] warned, would be rendered meaningless if issuers and secured creditors could collaborate to restructure debt without formally amending any payment terms.” *Id.*

The district court agreed with the dissenter that even where the payment terms of an indenture are not explicitly modified by a transaction, Section 316(b) is violated whenever a transaction “effect[s] an involuntary debt restructuring.” *Marblegate Asset Mgmt v. Education Mgmt Corp.*, 75 F.Supp. 3d 522, 614 (S.D.N.Y. 2014).

The Second Circuit reversed. While observing that “the text of Section 316(b) is ambiguous and the TIA’s structure fails to remove the ambiguity,” the circuit court found that the legislative history showed that section 316(b) “does not prohibit foreclosures even when they affect a bondholder’s ability to receive full payment. Rather, the relevant portions of the TIA’s legislative history exclusively addressed *formal* amendments and indenture provisions like collective-action and no-action clauses. . . . Among other things, the drafters of the TIA appear to have been well aware of the range of possible forms of reorganization available to issuers, up to and including foreclosures like the one that occurred in this case . . . .” 846 F.3d at 9. “[I]n sum, . . . Congress sought to prohibit formal modifications to indentures without the consent of all bondholders, but did not intend to go further by banning other well-known forms of reorganization like foreclosures.” *Id.* at 13-14.

The court noted that its holding did not leave the dissenter without recourse: “By preserving the legal right to receive payment, we permit creditors to pursue available State and federal law remedies. (And of course, sophisticated creditors, like [the dissenter], can insist on credit agreements that forbid transactions like the Intercompany Sale.) Having foregone the protection of bankruptcy in this case, the secured creditors and [the debtor] have also shed the protection of the Bankruptcy Code, including a discharge order. The foreclosure in this case therefore may be challenged by other creditors under State law. Moreover, where creditors foreclose on a debtor’s collateral and sell the collateral to a new entity meant to carry on the business, the debtor’s other creditors may be able to sue the new entity under State law theories of successor liability or fraudulent conveyance.” *Id.* at 16 (citations omitted).

Judge Straub dissented, contending that the unambiguous language of section 316(b) compelled the conclusion that “an out-of-court debt restructuring ‘impairs’ or ‘affects’ a non-consenting noteholder’s ‘right to receive payment’ when it is designed to eliminate a non-consenting noteholder’s ability to receive payment, and when it leaves bondholders no choice but to accept a modification of the terms of their bonds.” *Id.* at 21. Judge Straub observed that “[t]he Intercompany Sale, which stripped the issuers of their assets and removed the parent guarantee, ensured that no future payments of principal or interest would be made on the notes. This scheme did not simply ‘impair’ or ‘affect’ [the dissenter’s] right to receive payment—it annihilated it. The methodology used to accomplish that annihilation is of little interest when the end result is squarely at odds with the plain intent of Section 316(b).” *Id.* at 20 (footnote omitted).

*See also Cummings v. Chesapeake Energy Corp.*, Case No. CIV-16-00647-HE (W.D. Okla. Feb. 8, 2017) (dismissing class action alleging that exchange offer devalued notes and impaired noteholders' right to collect; relying on *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp.*, 846 F.3d 1 (2d Cir. 2017), to conclude that TIA § 316(b) did not prevent indenture's "no action clause" from barring claims where the "complaint does not allege that Chesapeake's legal obligation to pay principal and interest was altered or impaired, only that the Exchange Offer arguably impaired their practical ability to eventually collect what they are owed").

#### **H. Disclosure of Noteholder Holdings**

*Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A.*, (In re *Motors Liquidation Co.*), 561 B.R. 36 (Bankr. S.D.N.Y. 2016)

The Bankruptcy Court for the Southern District of New York held that Federal Rule of Bankruptcy Procedure 7007.1 required that hedge funds and institutional lenders file the required statements identifying owners of more than 10% of their equity in the public record without redaction.

A trust established under the debtors' (formerly General Motors) chapter 11 plan sued to recover payments made to holders of the debtors' notes after the erroneous filing of a termination statement, which purported to terminate the perfected nature of the noteholders' first priority lien interests. Rule 7007.1 applies in adversary proceedings and provides:

Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision.

Fed. R. Bankr. P. 7007.1.

Certain term loan lenders filed a motion requesting authority to file redacted 7007.1 statements that would exclude the names of the lenders' 10% owners, to file unredacted statements under seal, and to provide the court with unredacted statements for in camera review. No objection was filed, but the court denied the motion. The court had previously, however, entered an order approving a similar motion filed by BlackRock Funds. The term lenders moved for reconsideration and the court ultimately held that both the term lenders and BlackRock Funds must file the 7007.1 statements unredacted and on the public record.

The defendants argued that the identities of its investors qualified as "confidential commercial information" under section 107(b) of the Bankruptcy Code which provides: "On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—(1) protect an entity with

respect to a trade secret or confidential research, development, or commercial information . . . .” 11 U.S.C. § 107(b)(1). Therefore, the defendants contended that they should be permitted to file their 7007.1 statements under seal. The court disagreed.

The court explained, “[a]lthough there is a strong public policy favoring open access to court records, it is not unlimited.” While noting that “Section 107(b)(1) provides that the bankruptcy court may protect confidential research, development, or commercial information . . . .,” the moving party bears a heavy burden of showing that the information is confidential, which requires evidence of an “extraordinary circumstance or compelling need.” In finding that the defendants failed to prove that the identities of their investors qualified as “commercial information,” the court explained:

In order to file this information under seal, the Movants must show that the identities of the MTL Customers and BlackRock Investors are “commercial information” under the Bankruptcy Code. . . . Although the information need not rise to the level of a “trade secret,” the information must be “so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit the entity’s competitors.” . . . .

It is far from clear that the identities of the owners of 10% or more of the equity interests of a party in an adversary proceeding can ever be confidential commercial information within the meaning of section 107(b). However, it is unnecessary to decide that question today. Even assuming that section 107(b) is applicable to Rule 7007.1 disclosures, here, the Movants have failed to establish that the required high standard has been met.

561 B.R. 36, 43 (quoting *In re Borders*, 462 B.R. 42, 47-48 (Bankr. S.D.N.Y. 2011))

The parties agreed that Rule 7007.1 was enacted so that judges may determine whether or not a conflict exists that would necessitate recusal. The court rejected the defendants’ argument, however, that as long as this purpose is satisfied (which could be satisfied if the court reviewed unredacted documents in camera), a court should permit filing under seal. In doing so, the court stated:

While enabling the judge to determine whether he or she has a disqualifying conflict of interest is most certainly one of the goals of Rule 7007.1, it is not the only goal. The Movants fail to consider that courts are accountable to other parties and the public when determining whether a conflict of interest exists. Public filings permit the public to view the information courts use in this determination. This inspires public confidence in the integrity of the federal courts, ensuring that the federal judiciary provides

a fair and neutral forum for the resolution of conflicts, free from even the appearance of impropriety. Public filings advance the goal of transparent proceedings. This strong policy is overridden only where Congress—by means of the Bankruptcy Code—has explicitly instructed courts to do so.

*Id.* Because the movants had not introduced any evidence to establish that the names of their investors qualified as “commercial information,” the court denied the motion.



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# Chapter 13 Case Review and Update on Chapter 13 Issues

# **Chapter 13 Case Review and Update on Chapter 13 Issues**

*Tiffany M. Cornejo*

*Chapter 13 Standing Trustee, District of New Mexico*

*Gerald R. Velarde*

*Law Office of Gerald R. Velarde PC*

**SUMMARY NUMBER:**  
GRV

**KEY CODE SECTION(S):** §§330, 503(b), 507  
**KEY TOPIC(S):** Attorney's Fees

**COURT/JUDGE:** U.S. BAP 10<sup>th</sup> Circuit (Bankruptcy Judge Hall with Judges Romero and Hall)

**CASE NAME/NUMBER:**

In re John Thomas Bird, Case No. 12-17345 (Utah) consolidated for appeal with  
In re Brent David Christensen, Case No. 15-29773 (Utah)

577 B.R. 365 (10<sup>th</sup> Cir. BAP 2013)

**DATE DECIDED:** November 30, 2017

**NOTEWORTHY ISSUE(S):**

Whether the Chapter 7 Trustee and its counsel were entitled to an award of fees and costs set forth in their fee application.

**HOLDING(S):**

No. The requested fees and costs were for services neither necessary to administration of the cases nor reasonably likely to benefit debtors' estates.

**FACTS:**

Debtors filed Chapter 7 cases in which their homesteads were encumbered with mortgage liens (in first position), tax liens held by the IRS (in second position) and other liens which were well in excess of their scheduled value. Debtors claims exemptions in their homesteads under the Utah homestead law.

The Chapter 7 Trustee entered into a stipulation with the IRS wherein the IRS consented to: (1) sale of the homesteads; and (2) a "carve-out" of \$10,000 of the proceeds from the sale of each homestead subject to the IRS's liens for the benefit of the bankruptcy estate.

Trustee files a motion to sell the homesteads which would have exceeded the total encumbrances by minimal amounts. Proceeds from the sale would be subject to payment of Trustee's and counsel's fees and expenses and payment of a realtor commission.

Debtors file motions to convert case to chapter 13. The motions are granted. Chapter 7 Trustee files Fee Applications requesting professional compensation be allowed as an administrative expense in the Chapter 13 cases.

Bankruptcy court denies the Fee Applications on the basis the fees and costs sought were for services neither necessary to administration of the cases nor reasonably likely to benefit Debtors' estates. Bankruptcy court found that when the homesteads have no equity value in



excess of liens but were subject to valid homestead exemptions, Trustee had no obligation to seek carve-outs from secured creditors or sell encumbered property subject to such agreements.

In affirming the bankruptcy court, the court noted as the Chapter 7 Trustee's critical role in performing the bankruptcy system's balancing act: the bankruptcy's fresh start policy for honest but unfortunate debtors and payment of a dividend to unsecured creditors. In this case, the court found that abandonment of the homesteads would have better comported with a chapter 7 trustee's duties and responsibilities. Why in this case:

1. Liquidation will result in little or no payment to unsecured creditors.
2. Carve out agreements are only permitted if they result in meaningful distributions to creditors. The carve out in these cases would shift estate assets away from the IRS to professionals, causing harm to the debtors.
3. Homesteads should not be sold where the proceeds of liquidation will primarily benefit the trustee or professionals or unduly delay the resolution of the case.
4. Sale of a fully encumbered asset is generally prohibited.
5. Sale of the homesteads might have minimally benefitted unsecured creditors; however, the proceeds would primarily benefit the Trustee and its counsel to the detriment of debtors and the exemptions to which they were entitled.

**SUMMARY NUMBER:**  
GRV

**KEY CODE SECTION(S):** 11 USC §362  
**KEY TOPIC(S):** Automatic Stay

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Thuma)

**CASE NAME/NUMBER:** *In re Hamilton*, 2017 WL 1533382 (Bankr. N.M. 2017)

**DATE DECIDED:** April 27, 2017

**NOTEWORTHY ISSUE(S):**

Whether debtor's confirmed chapter 13 Plan modified the total amount owed to the holder of debtor's mortgage.

**HOLDING(S):**

No.

**FACTS:**

The Schedules filed by the debtor listed the amount owed on the bank's mortgage loan as \$35,340. Debtor filed a Chapter 13 Plan using a form that was in substantial compliance with that used in this District. In part, the Plan provided as follows: (1) under the section dealing with secured claims, debtor stated that "Wells Fargo entire loan balance as of 3/13/14 is \$35,340.80"; and (2) debtor to make regular payments directly to the bank and to pay the prepetition arrearage through the Plan. Bank filed a proof of claim in the total amount of \$57,739.14 which included pre-petition arrearages. Debtor did not object to the Bank's proof of claim.

Debtor was making plan payments as set forth in the confirmed plan. Debtor made post-petition direct mortgage payments to the Bank in the amount of \$8,090.95 but then stopped making the payments.

Bank files a motion for relief from stay based on debtor's failure to make post-petition mortgage payments. In response to the motion, debtor asserts that confirmation of the Plan reduced her total debt to the bank to \$35,340.80. The bank maintains that the Plan requires debtor to pay the full amount of the bank's allowed proof of claim.

The court found that the Plan's treatment of the bank's mortgage claim was ambiguous. As a result of the ambiguity, the court examined the parties evidence and traditional canons of construction to interpret the Plan. The court found as follows:

1. The Debtor did not intend to change the standard table (regarding secured claims) set forth in the Plan in any substantive way.
2. Ambiguous plans should be interpreted to comply with the Bankruptcy Code. Section 1322(b)(2) provides that a chapter 13 plan may not modify the rights of home

mortgage lenders. The bank's construction of the asserted loan balance harmonizes the Plan with applicable law and local practice.

3. When possible, courts should construe contracts in a way that avoids creating a conflict between provisions. Debtors proposed interpretation of the bank's loan balance conflicts with a number of other Plan provisions. The bank's interpretation of the loan balance gives effect to the various sections of the plan and harmonizes the Plan.
4. The Plan should be interpreted in light of the circumstances and principal purpose. Chapter 13 practitioners know that a chapter 13 plan cannot be used to modify a home mortgage. In the Plan, the most debtor could achieve is curing a pre-petition default on the mortgage. As a result, it would not be reasonable to interpret the Plan as attempting to achieve a result that violated the Bankruptcy Code.
5. The Plan should be construed against the drafter. Since debtor drafted the Plan, any ambiguity should be construed against the debtor.

**SUMMARY NUMBER:**  
GRV

**KEY CODE SECTION(S):** 11 USC §1325  
**KEY TOPIC(S):** Chapter 13 Confirmation

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Jacobvitz)

**CASE NAME/NUMBER:** In re Novak, 2017 WL 1104052 (Bankr. N.M. 2017)

**DATE DECIDED:** March 23, 2017

**NOTEWORTHY ISSUE(S):**

Whether unemployment compensation benefits received by the debtor must be included in the calculation of current monthly income for determining disposable income which must be paid to holders of administrative claims, priority unsecured claims and unsecured claims in debtors' chapter 13 Plan

**HOLDING(S):**

Yes.

**FACTS:**

Debtor was unemployed and receiving unemployment compensation benefits. The benefits were being paid pursuant to New Mexico's Unemployment Compensation Law. Debtor contended that the unemployment benefits were benefits received under the Social Security Act. As a result, debtor argued, the benefits were excluded from determining current monthly income (See 11 U.S.C. §101(10A)(B)).

The court noted that a mixture federal and state law exist in the unemployment compensation benefits systems. The court further noted that reasonable minds differ on whether unemployment compensation benefits are received under the Social Security Act. However, the court concluded that New Mexico's unemployment compensation benefits are not benefits received under the Social Security Act and are not excluded from determining current monthly income

**SUMMARY NUMBER:**  
GRV

**KEY CODE SECTION(S):** §§330, 503(b), 507  
**KEY TOPIC(S):** Claims Objections

**COURT/JUDGE:** U.S. Supreme Court (Opinion by Justice Breyer with Justices Roberts, Kennedy, Thomas and Alito joined; Dissenting opinion by Justice Sotomayor with Justices Ginsburg and Kagan joined)

**CASE NAME/NUMBER:**  
Midland Funding, LLC v. Aleida Johnson (In re Aleida Johnson), 137 S.Ct.1407 (2017)

**DATE DECIDED:** May 15, 2017.

**NOTEWORTHY ISSUE(S):**

Whether a creditor who files a proof of claim in a bankruptcy case with the notation that the statute of limitations governing collection of the claim had run, violates the provisions of the Fair Debt Collection Practices Act (the "FDCPA").

**HOLDING(S):**

No, the filing of a proof of claim that on its face indicates that the limitations period has run is not false, deceptive or misleading so as to constitute a violation of the FDCPA.

**FACTS:**

Debtor files for relief under Chapter 13 of the U.S. Bankruptcy Code. Creditor files a proof of claim in the bankruptcy case. On the face of the proof of claim creditor adds the statement that the last time any charge appeared on debtor's account was more than 10 years before debtor filed for bankruptcy. The relevant statute of limitations was 6 years.

Debtor objected to the proof of claim. Creditor did not respond to the objection and an Order was entered disallowing the claim.

Later debtor filed suit against creditor alleging a violation of the FDCPA based on the filing of the proof of claim.

In reaching its decision, the court found that assertion of a claim known to be time barred is not "unfair". Unlike a civil suit (where many courts have found such a claim to be unfair so as to constitute a violation of FDCPA), in the bankruptcy context a knowledgeable trustee is available to consider such claims. The procedural bankruptcy rules process more directly guide the evaluation of claims. These features of a bankruptcy case are found by the court to make it considerably more likely that an effort to collect upon a stale claim in bankruptcy will be met with resistance, objection and disallowance.

**SUMMARY NUMBER:**  
GRV

**KEY CODE SECTION(S):** 11 USC §706(a)  
**KEY TOPIC(S):** Conversion

**COURT/JUDGE:** U.S. Bankruptcy Court, District of NM (Judge Thuma)

**CASE NAME/NUMBER:** In re Lamey, 2017 WL 3575845 (Bankr. N.M. 2017)

**DATE DECIDED:** August 16, 2017

**NOTEWORTHY ISSUE(S):**

1. Whether debtor could convert his case from Chapter 7 to Chapter 13
2. Whether a Chapter 7 Trustee's settlement agreement with a creditor should be approved
3. Whether debtor should be compelled to turn over his tax refunds to the Chapter 7 Trustee

**HOLDING(S):**

1. No
2. Yes
3. Yes

**FACTS:**

Debtor filed a Chapter 7 case. Initially, the Chapter 7 Trustee entered a report of no distribution. Later, a new Chapter 7 Trustee was appointed, and a Trustee's Report of assets was filed. Several adversary cases were filed against the debtor concerning discharge and dischargability. Prior to a final hearing on the adversary to determine whether debtor was entitled to a discharge, debtor filed a motion to convert the case to Chapter 13. After a trial in the adversary proceeding, debtor was denied a discharge. Debtor had claims against a Bank which were settled by the new Trustee which formed the basis of Trustee's motion to approve settlement with Bank.

For tax year 2013 debtor was entitled to a refund of \$8,538 which was undisclosed in his Schedules. Debtor received the refund but did not tell the Trustee. Two years later, debtor amended his Schedule B to disclose the refund. Later, as a result of determining that debtor was entitled to net operating losses, amended 2010, 2011 and 2013 returns were filed. As a result, \$130,090 in tax refunds were realized. The refunds were paid to debtor. Debtor did not notify Trustee of the refunds nor turn over the money to the Trustee. The funds were spent by the debtor.

The court denied the Motion to Convert the Chapter 13. Debtor was found to have acted in bad faith and as a result forfeited his right to convert to Chapter 13. *See Marrama v. Citizens Bank*, 549 U.S. 365 (2007). Debtor was over the debt limit to qualify for Chapter 13 relief.

*See* 11 U.S.C. §109(e). Debtor did not demonstrate that he had regular income which is required for relief under Chapter 13. *See* 11 U.S.C. §109(e).

The court approved the Chapter 13 Trustee's proposed settlement with the Bank. The court analyzed the proposed settlement under the four factors established by the court in *C.K. Williams, Inc. v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020 (10<sup>th</sup> Cir. BAP 1997). Those factors are:

- A. The probable success of the underlying litigation on the merits;
- B. The possible difficulty collecting a judgment;
- C. The complexity and expense of the litigation; and
- D. The interest of creditors in deference to their reasonable views.

The court granted the Trustee's Motion for Turnover of Tax Refunds. Debtor had a duty to turnover property of the estate to Trustee. The refunds were property of the estate.

[illegible]



# Ethics and Professionalism

| American Bar Association                       |     |                 | Cloud Ethics Opinions Around the U.S.                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------------------------|-----|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ALABAMA</b><br>Opinion 2010-02              | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Know how provider handles storage/security of data.</li> <li>• Reasonably ensure confidentiality agreement is followed.</li> <li>• Stay abreast of best practices regarding data safeguards.</li> </ul>                                                                                                                                               |
| <b>ARIZONA**</b><br>Opinion 09-04              | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• "Reasonable security precautions," including password protection, encryption, etc.</li> <li>• Develop or consult someone with competence in online computer security.</li> <li>• Periodically review security measures.</li> </ul>                                                                                                                    |
| <b>CALIFORNIA</b><br>Opinion 2010-179          | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Evaluate the nature of the technology, available security precautions, and limitations on third-party access.</li> <li>• Consult an expert if lawyer's technology expertise is lacking.</li> <li>• Weigh the sensitivity of the data, the impact of disclosure on the client, the urgency of the situation, and the client's instructions.</li> </ul> |
| <b>CONNECTICUT</b><br>Informal Opinion 2013-07 | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Lawyers ownership and access to the data must not be hindered.</li> <li>• Security policies and processes should segregate the lawyer's data to prevent unauthorized access to the data, including by the cloud service provider.</li> </ul>                                                                                                          |
| <b>FLORIDA</b><br>Opinion 12-3                 | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Ensure provider has enforceable obligation to preserve confidentiality and security, and will provide notice if served with process.</li> <li>• Investigate provider's security measures</li> <li>• Guard against reasonably foreseeable attempts to infiltrate data.</li> </ul>                                                                      |
|                                                |     |                 | <ul style="list-style-type: none"> <li>•</li> </ul>                                                                                                                                                                                                                                                                                                                                            |

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|----------------------------------------------------|-----|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>IOWA</b><br/>Opinion 11-01</p>               | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Ensure unfettered access to your data when it is needed, including removing it upon termination of the service.</li> <li>• Determine the degree of protection afforded to the data residing within the cloud service.</li> </ul>                                                                                                                                                                                                                                                                                                          |
| <p><b>MAINE</b><br/>Opinion 207</p>                | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Ensure firm technology in general meets professional responsibility constraints.</li> <li>• Review provider's terms of service and/or service level agreements.</li> <li>• Review provider's technology, specifically focusing on security and backup.</li> </ul>                                                                                                                                                                                                                                                                         |
| <p><b>MASSACHUSETTS</b><br/>Opinion 12-03</p>      | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Review (and periodically revisit) terms of service, restrictions on access to data, data portability, and vendor's security practices.</li> <li>• Follow clients' express instructions regarding use of cloud technology to store or transmit data.</li> <li>• For particularly sensitive client information, obtain client approval before storing/transmitting via the internet.</li> </ul>                                                                                                                                             |
| <p><b>NEW HAMPSHIRE</b><br/>Opinion #2012-13/4</p> | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Have a basic understanding of technology and stay abreast of changes, including privacy laws and regulations.</li> <li>• Consider obtaining client's informed consent when storing highly confidential information.</li> <li>• Delete data from the cloud and return it to the client at the conclusion of representation or when the file must no longer be preserved.</li> <li>• Make a reasonable effort to ensure cloud providers understand and act in a manner compatible with a lawyer's professional responsibilities.</li> </ul> |
| <p><b>NEW JERSEY**</b><br/>Opinion 701</p>         | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Vendor must have an enforceable obligation to preserve confidentiality and security.</li> <li>• Use available technology to guard against foreseeable attempts to infiltrate data..</li> </ul>                                                                                                                                                                                                                                                                                                                                            |

|                                                          |     |                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------|-----|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>NEW YORK</b><br>Opinion 842                           | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Vendor must have an enforceable obligation to preserve confidentiality and security, and should notify lawyer if served with process for client data.</li> <li>• Use available technology to guard against foreseeable attempts to infiltrate data.</li> <li>• Investigate vendor security practices and periodically review to be sure they remain up-to-date.</li> <li>• Investigate any potential security breaches or lapses by vendor to ensure client data was not compromised.</li> </ul> |
| <b>NEVADA</b><br>Opinion 33                              | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Chose a vendor that can be reasonably relied upon to keep client information confidential.</li> <li>• Instruct and require the vendor to keep client information confidential.</li> </ul>                                                                                                                                                                                                                                                                                                        |
| <b>NORTH CAROLINA</b><br>2011 Formal Ethics<br>Opinion 6 | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Review terms and policies, and if necessary re-negotiate, to ensure they're consistent with ethical obligations.</li> <li>• Evaluate vendor's security measures and backup strategy.</li> <li>• Ensure data can be retrieved if vendor shuts down or lawyer wishes to cancel service.</li> </ul>                                                                                                                                                                                                 |
| <b>OHIO</b><br>Informal Advisory<br>Opinion 2013-03      | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Competently select appropriate vendor.</li> <li>• Preserve confidentiality and safeguard client property.</li> <li>• Provide reasonable supervision of cloud vendor.</li> <li>• Communicate with the client as appropriate.</li> </ul>                                                                                                                                                                                                                                                           |
| <b>OREGON</b><br>Opinion 2011-188                        | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Ensure service agreement requires vendor to preserve confidentiality and security.</li> <li>• Require notice in the event that lawyer's data is accessed by a non-authorized party.</li> <li>• Ensure adequate backup.</li> <li>• Re-evaluate precautionary steps periodically in light of advances in technology.</li> </ul>                                                                                                                                                                    |
| <b>PENNSYLVANIA</b><br>Opinion 2011-200                  | Yes | Reasonable<br>Care | <ul style="list-style-type: none"> <li>• Exercise reasonable care to ensure materials stored in the</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                            |

|                                              |     |                 |                                                                                                                                                                                                                                                                                                                                                                  |
|----------------------------------------------|-----|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                              |     |                 | <ul style="list-style-type: none"> <li>cloud remain confidential.</li> <li>• Employ reasonable safeguards to protect data from breach, data loss, and other risk.</li> <li>• See full opinion for 15 point list of possible safeguards.</li> </ul>                                                                                                               |
| <b>VERMONT</b><br>Opinion 2010-6             | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Take reasonable precautions to ensure client data is secure and accessible.</li> <li>• Consider whether certain types of data (e.g. wills) must be retained in original paper format.</li> <li>• Discuss appropriateness of cloud storage with client if data is especially sensitive (e.g. trade secrets).</li> </ul>  |
| <b>VIRGINIA</b><br>Legal Ethics Opinion 1872 | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Exercise care in selection of the vendor.</li> <li>• Have a reasonable expectation the vendor will keep data confidential and inaccessible.</li> <li>• Instruct the vendor to preserve the confidentiality of information.</li> </ul>                                                                                   |
| <b>WASHINGTON**</b><br>Advisory Opinion 2215 | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Conduct a due diligence investigation of any potential provider.</li> <li>• Stay abreast of changes in technology.</li> <li>• Review providers security procedures periodically.</li> </ul>                                                                                                                             |
| <b>WISCONSIN</b><br>Opinion EF-15-01         | Yes | Reasonable Care | <ul style="list-style-type: none"> <li>• Consider the sensitivity of the data, the impact of the disclosure, the client's circumstances and instructions</li> <li>• Consult an expert if lawyer's technology expertise is lacking.</li> <li>• Understand/know the experience and reputation of the service provider and the terms of their agreement.</li> </ul> |

\* Note that in most opinions, the specific steps or factors listed are intended as non-binding recommendations or suggestions. Best practices may evolve depending on the sensitivity of the data or changes in the technology.

\*\* These opinions address issues which aren't directly labeled cloud computing or software as a service, but which share similar technology (e.g.. online backup and file storage).

## This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.