

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:00 AM

1:16-13392 Ezra Levi

Chapter 13

■

#0.01 Order 1- Setting Status Conference: 2- Directing Compliance with Applicable Law; and 3- Requiring Debtor(s) to explain why this case should not be converted or dismissed with 180-day bar to refile

Docket No: 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ezra Levi

Pro Se

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:10-18651 Bachan Kaur

Chapter 11

#1.00 Debtors Motion For Entry Of Discharge
And Final Decree In Chapter 11 Case
Pursuant To 11 USC 1141(D)(5) Upon
Completion Of Payments To Unsecured Creditors

Docket No: 177

Tentative Ruling:

No opposition. Proof has been provided that unsecured creditors have been paid pursuant to the plan. Motion to be GRANTED
NO Appearance required

Party Information

Debtor(s):

Bachan Kaur

Represented By
Anthony Obehi Egbase

Movant(s):

Bachan Kaur

Represented By
Anthony Obehi Egbase

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:11-13493 Jack Piandaryan

Chapter 11

#2.00 U.S. Trustee's Motion to dismiss or convert Case
with an Order Directing Payment of Quarterly
Fees and for Judgment Thereon

Docket No: 140

*** VACATED *** REASON: Ntc. of withdrawal filed 11/22/16 (eg)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Jack Piandaryan

Represented By
Vahe Khojayan

Movant(s):

United States Trustee (SV)

Represented By
Katherine Bunker

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:13-16225 Ghassan Fayoumi

Chapter 11

#3.00 US Trustee's Motion to Dismiss or Convert
Case With an Order Directing Payment of
Quarterly Fees and for Judgment Thereon

Docket No: 158

*** VACATED *** REASON: Ntc. of withdrawal filed 11/22/16 (eg)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ghassan Fayoumi

Represented By
Vahe Khojayan

Movant(s):

United States Trustee (SV)

Represented By
Katherine Bunker

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-10136 Choice Providers Medical Group APC

Chapter 11

#4.00 Motion to Approve First and Final Fee Application
for Terzian Law Group, APC

Period: 1/7/2014 to 10/5/2016,
Fee: \$99977.50,
Expenses: \$11352.00.

Docket No: 351

Tentative Ruling:

No objections. Fees and costs are fine, Application to be GRANTED. NO
APPEARANCE REQUIRED

Party Information

Debtor(s):

Choice Providers Medical Group APC

Represented By
Tamar Terzian

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-11061 Son Corporation

Chapter 11

#5.00 Motion for Appointment of Chapter 11
Trustee or to Convert Case

fr. 5/19/16, 6/2/16, 9/1/16; 10/19/16

Docket No: 159

Tentative Ruling:

On October 27, 2016, the Court authorized Son Corporation ("Debtor") to sell to G&M Gapco the real property located at 10685 Laurel Canyon Blvd., Pacoima, CA 91331 (the "Laurel Canyon Property") for the sum of \$3,000,000.

Per Debtor's status report, the subject property has been sold and proceeds have been paid. As such, the parties are preparing stipulations to dismiss the Motion to Appoint Chapter 11 Trustee and the Evidentiary Hearing on the Objection to Claim of the State Board of Equalization.

This hearing will be continued to **March 9, 2016 at 9:30 a.m.**

APPEARANCE WAIVED on 12/15/16.

Party Information

Debtor(s):

Son Corporation

Represented By
Raymond H Aver

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-11061 Son Corporation

Chapter 11

#6.00 Status and Case Management Conference

fr. 5/8/14, 6/5/14, 10/30/14, 12/18/14, 1/15/15,
3/5/15, 5/21/15, 5/28/15, 6/11/15, 7/23/15,
8/20/15, 8/27/15, 9/17/15; 1/28/16, 5/31/16, 6/16/16,
9/1/16; 10/19/16

Docket No: 1

Tentative Ruling:

Having considered Debtor's status report, and for good cause appearing, the status conference will be continued to **March 9, 2016 at 9:30 a.m.**

APPEARANCE WAIVED on 12/15/16. Debtor to give notice of continued hearing.

Party Information

Debtor(s):

Son Corporation

Represented By
Raymond H Aver

Movant(s):

Son Corporation

Represented By
Raymond H Aver

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-11061 Son Corporation

Chapter 11

▪
#7.00 Evid. Hearing Re:
Objection to Claim # 3 by California State
Board of Equalization

fr. 9/17/15, 1/19/16, 4/5/16; 5/31/16, 9/1/16, 6/16/16,
9/1/16; 10/19/16

Docket No: 122

Tentative Ruling:

This hearing will be continued to **March 9, 2016 at 9:30 a.m.**

APPEARANCE WAIVED on 12/15/16.

Party Information

Debtor(s):

Son Corporation

Represented By
Raymond H Aver

Movant(s):

Son Corporation

Represented By
Raymond H Aver

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-12529 John M Genga and Hilary B Genga

Chapter 11

#8.00 Trustee's Motion to dismiss or convert Case
With an Order Directing Payment of Quarterly
Fees and for Judgment Thereon

Docket No: 164

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

John M Genga

Represented By
M Jonathan Hayes

Joint Debtor(s):

Hilary B Genga

Represented By
M Jonathan Hayes

Movant(s):

United States Trustee (SV)

Represented By
Katherine Bunker

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-12529 John M Genga and Hilary B Genga

Chapter 11

#9.00 Post Confirmation Status Conference

fr. 8/7/14, 1/22/15, 1/29/15, 4/23/15; 5/28/15,
8/13/15, 10/15/15, 10/29/15; 3/3/16; 4/7/16; 6/16/16,
9/15/16, 11/17/16

Docket No: 1

Tentative Ruling:

Appearance required

Party Information

Debtor(s):

John M Genga

Represented By
M Jonathan Hayes

Joint Debtor(s):

Hilary B Genga

Represented By
M Jonathan Hayes

Movant(s):

Hilary B Genga

Represented By
M Jonathan Hayes

John M Genga

Represented By
M Jonathan Hayes

**United States Bankruptcy Court
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-12971 Michael T Stoller

Chapter 11

#10.00 Motion for relief from stay

CAPITAL ONE AUTO FINANCE

fr. 10/20/16, 11/17/16

Docket No: 96

Tentative Ruling:

Motion for continued from November 17, 2016 for parties to work out an adequate protection order. Nothing new has been filed.

What is the status of this motion?

APPEARANCE REQUIRED.

Party Information

Debtor(s):

Michael T Stoller

Represented By
Matthew Abbasi

Movant(s):

Capital One Auto Finance, a division of

Represented By
Timothy J Silverman

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:14-12971 Michael T Stoller

Chapter 11

#11.00 Status and Case Management Conference

fr. 9/11/14, 12/11/14, 3/26/15; 6/18/15, 10/29/15
1/28/16; 6/16/16, 9/29/16

Docket No: 44

Tentative Ruling:

Appearance required

This was to be the disclosure hearing. Neither a disclosure statement nor status report was filed. Nothing permanent has been worked out on the RFS. There has been no real movement in the case. The monthly operating reports show a severe negative cash flow. Debtor should discuss whether he wants a dismissal or conversion at this point.

Party Information

Debtor(s):

Michael T Stoller

Represented By
Matthew Abbasi

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:15-11473 Smadar Rees

Chapter 11

#12.00 Hearing on Revised First Amended
Disclosure Statement

Docket No: 123

Tentative Ruling:

On October 10, 2016, Debtor's two secured creditors, Bank of New York Mellon and U.S. Bank, stipulated to treatment under Debtor's proposed chapter 11 plan.

Bank of NY Mellon holds a first deed of trust on the Venice Property (935-935 ½ Venezia Ave., Venice CA 90291). Debtor agrees to treat its claim as a secured claim in the amount of \$1,221,720.52 over 30 years at a fixed interest rate of 5% per annum, and an unsecured of \$39,490.76.

US Bank holds a first deed of trust on the Texas Property (535 Mesa Bluff, San Antonio, Texas 78258). Debtor agrees to surrender the Texas Property to U.S. Bank, thereby excising the properties from the bankruptcy estate. Debtor shall continue to make insurance payments until confirmation.

At the October 20, 2016 hearing, the Court denied approval of the initial disclosure statement as it failed to include the stipulated treatments of the Bank of NY Mellon and U.S. Bank. The Court required Debtor to file a revised disclosure statement to comport with the stipulations.

On October 21, 2016, the Court entered two orders, each noting that "The Court will evaluate this stipulation as part of the disclosure statement approval and the plan of reorganization confirmation process, where other interest holders will be provided the opportunity to raise objections to the plan or disclosure statement. Any court approval of the stipulation is unnecessary and premature at this time." ECF No.118, 2:5-8; ECF No. 117, 2:7-10.

Absolute Priority Rule

Debtor proposes to pay 5% of its unsecured claims. In Zachary v. California Bank & Trust, 811 F.3d 119, 1199 (9th Cir. 2016), the Ninth Circuit Court of Appeals held that the absolute priority rule in 11 U.S.C. §1129(b)(2) applies to individual chapter 11 debtors' rights to retain prepetition property of the estate where the chapter 11 plan

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

CONT... Smadar Rees

Chapter 11

proposes to pay unsecured creditors less than the full amount of their allowed unsecured claims.

Here, Debtor's revised plan provides for Debtor to retain an interest in the Venice Property without fully paying its Class 11 general unsecured claims of \$628,132.24. This provision violates the Absolute Priority Rule under §1129(b)(2)(B). If an unsecured creditor objects, the plan cannot be confirmed in this form.

There were no objections, so this will be approved at this point. Debtor should propose a solicitation and confirmation schedule with potential confirmation dates on 1/26 or 2/9

APPEARANCE REQUIRED.

Party Information

Debtor(s):

Smadar Rees

Represented By
Rachel S Milman Esq
Mark E Goodfriend

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:15-11473 Smadar Rees

Chapter 11

#13.00 Status and Case Management Conference

fr. 11/12/15; 6/16/16, 8/11/16, 9/1/16, 10/20/16

Docket No: 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Smadar Rees

Represented By
Rachel S. Ruttenberg Milman
Mark E. Goodfriend

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-12603 Rade Raicevic

Chapter 11

#14.00 Trustee's Motion to Determine
Value of Property

fr. 11/3/16

Docket No: 13

***** VACATED *** REASON: Stipulation to market value of property
filed on 12/13/16 - CW**

Tentative Ruling:

Party Information

Debtor(s):

Rade Raicevic

Represented By
Mark J Markus

United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#15.00 Debtor's Final hearing on use of cash collateral
fr. 11/17/16

Docket No: 16

*** VACATED *** REASON: Will be heard today at 11:00 a.m. - jc

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#16.00 Hearing on Setting/Increasing
Insider Compensation

fr. 11/17/16

Docket No: 0

***** VACATED *** REASON: Will be heard today at 11:00 a.m. - jc**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#17.00 Status and Case Management Conference

fr. 11/17/16

Docket No: 0

*** VACATED *** REASON: Will be heard today at 11:00 a.m. - jc

Tentative Ruling:

Having considered the Debtor's status report, Motion for Use of Cash Collateral, and Stipulation to Continue Hearing on Use of Cash Collateral, along with Creditor Jon Blumenthal's Opposition to the Continuance of Cash Collateral Hearing, for good cause appearing, the status conference is continued **December 15, 2016** at 9:30 a.m. to be heard with the Motion for Use of Cash Collateral.

APPEARANCE Waived in November 17, 2016. Debtor to give notice of continued hearing.

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-13035 Laura Eileen Sanchez

Chapter 11

#18.00 Motion for Setting Property Value of Real
Property Located at 400 Rancho Road,
Thousand Oaks, CA 91362

Docket No: 17

*** VACATED *** REASON: Continued to January 26 per stipulated
order

Tentative Ruling:

Creditor Wells Fargo Bank N.A. ("Wells Fargo") (as holder of first deed of trust) opposed the Motion. Creditor alleges Debtor undervalued the property and requests a continuance so that it can obtain its own appraisal.

APPEARANCE is Waived. Hearing continued to **January 26, 2016 at 9:30 a.m.** Creditor is to file its appraisal two weeks before the hearing. The parties will discuss a briefing schedule at the next hearing once all appraisals are submitted.

Party Information

Debtor(s):

Laura Eileen Sanchez

Represented By
Daniel King
Kevin Tang

Movant(s):

Laura Eileen Sanchez

Represented By
Daniel King
Kevin Tang

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-13295 K&A Global Management Company, a California corpor

Chapter 11

#19.00 Motion For Order Approving Payment of Insurance
Premiums and Maintenance of Pre-Petition Bank
Accounts for the Purpose of Depositing Accounts
Receivables

Docket No: 9

Tentative Ruling:

No opposition as of 12/12/16.

Motion GRANTED. NO APPEARANCE REQUIRED.

Party Information

Debtor(s):

K&A Global Management Company, a	Represented By Jeffrey S Shinbrot
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Movant(s):

K&A Global Management Company, a	Represented By Jeffrey S Shinbrot
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**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:15-12519 Spotless Cleaners, Inc.

Chapter 7

- #20.00** Chapter 7 Trustee's Motion For:
- 1 - Entry of an Order Authorizing the Private Sale of Personal Property, subject to all Liens and Encumbrances and Not subject to Overbid;
 - 2 - Approval of Payment of Fee to be Paid from Purchase Price; and
 - 3 - Determination that buyer is Entitled to a Good Faith Determination pursuant to 11 USC Sec. 363(m).

Docket No: 103

Tentative Ruling:

Chapter 7 Trustee David Seror seeks to sell Debtor's business located at 11050 Venture Blvd Studio City, California, including without limitation all equipment, the business name, inventory, supplies, customer lists and accounts receivables, but excluding cash and the 2010 Nissan Cube listed on Debtor's Schedule B (collectively the "Business") to Hamid Hashemi and Ali Hashemi (together as "Buyers") for \$42,500.

MOTION GRANTED. APPEARANCE REQUIRED due to shortened time. The sale is subject to all existing liens and not subject to overbid. The Court makes a finding that the Buyers are good faith purchasers under 11 U.S.C. §363(m).

Party Information

Debtor(s):

Spotless Cleaners, Inc.

Represented By
Marvin Levy

Trustee(s):

David Seror (TR)

Represented By
Reed Bernet
Richard Burstein
Talin Keshishian

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

9:30 AM

1:16-13444 Pedro Castillo

Chapter 13

#21.00 Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate SFR at 12514 Herrick Avenue Sylmar, CA 91342 .

Docket No: 10

Tentative Ruling:

On December 4, 2016, Debtor filed this chapter 13 case. Debtor has one previous bankruptcy case that was dismissed within the previous year. The First Filing, 16-12183-VK, was a chapter 13 that was filed on 7/28/16 and dismissed on 11/23/16 for failure to make post-petition mortgage payments.

Debtors now move for an order continuing the automatic stay as to all secured creditors. Debtors argue that the present case was filed in good faith notwithstanding the dismissal of the previous case for failure to post-petition mortgage payments. Debtor is making an honest attempt to save his house and intends to pay his mortgage in a time manner. Debtor claim that the presumption of bad faith is overcome as to all creditors per 11 U.S.C. 362(c)(3)(C)(i) because there has been he has been depositing all of his income into his bank account and can provide proof of his income.

Opposition permitted at hearing. APPEARANCE REQUIRED.

Party Information

Debtor(s):

Pedro Castillo

Represented By
Terrence Fantauzzi

Trustee(s):

Elizabeth (SV) F Rojas (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#22.00 Hearing on Setting/Increasing
Insider Compensation

fr. 11/17/16

Docket No: 0

Tentative Ruling:

Menco Pacific, Inc. ("Debtor") seeks to pay \$3,800 per week to President and CEO Oscar Mendoza ("Mendoza") for overseeing "all operations, administrative, accounting, marketing, project management, all other tasks as needed, walks job sites as needed." Notice of Setting/Increasing Insider Compensation (the "Notice"), ¶6.¹ According to the Notice, despite a salary increase in 2013 from \$2,400 per week to \$3,800 per week, Mendoza elected to only receive \$2,115.38 per week in 2015, equating to an annual salary of \$110,000. See ¶15. On October 25, 2016, Jon Blumenthal ("Blumenthal") and International Fidelity Insurance Company ("IFIC") filed objections to the Notice. Debtor did not file a reply. Instead, on December 9, 2016, Debtor filed a notice for the insider compensation of a chief restructuring officer. Notice: Submission of Insider Compensation for Chief Restructuring Officer ("Notice of Compensation for CRO"), ECF No. 88.

1. Service of Process

Blumenthal argues that that while the Notice of Insider Compensation indicates that he was served on October 6, 2016, the envelope was not postmarked until October 14, 2016. See Opposition of Jon Blumenthal, Exh. A. Creditor IFIC also asserts that the Notice was improperly served as it only received notice by way of Debtor's reply to IFIC's opposition to the Motion for Use of Cash Collateral.

Local Bankruptcy Rule 2014 requires a Notice of Insider Compensation to be served on "the United States trustee, creditors' committee or the 20 largest creditors if no committee has been appointed in the case, counsel for any of the foregoing, and any secured creditor that claims an interest in cash collateral." Local Bankr. R. 2014-1 (a)(2).

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... Menco Pacific, Inc.

Chapter 11

Despite deficiencies in the service of process, the hearing on the Notice was continued from November 17, 2016 to December 15, 2016. Both Blumenthal and IFIC were on notice and both parties have filed responses stating the merits of their respective objections to Mendoza's fee increase. This will be treated as a non-issue. See Local Bankr. R. 1001-1(d)("The court may waive the application of any Local Bankruptcy Rule in any case or proceeding, or make additional orders as it deems appropriate, in the interest of justice.")

2. Compensation of Goodrich

On November 29, 2016, David M. Goodrich was appointed as CRO on November 29, 2016 pursuant to Debtor's bylaws. ECF No. 87. Therein, Debtor requests compensation at an hourly rate of \$425 for "approximately at least 10 hours per week." Notice of Insider Compensation for CRO, ¶9-10.

The application does not clarify under what authority Debtor seeks to employ Goodrich. Some courts permit a debtor to retain a CRO pursuant to 11 U.S.C. §105 (a) and 363(b)(1). See In re The 1031 Tax Group, LLC., 2007 Bankr. LEXIS 2484 (Bankr. S.D.N.Y. 2007)(debtor in possession or trustee may use property of the estate to pay the CRO in the ordinary course of business without notice or hearing). Others do so under 11 U.S.C. §327(a). See In re In re Blue Stone Real Estate Constr. Dev. Corp., 392 B.R. 897 (Bankr. M.D. Fla. 2008)(a CRO is considered a professional subject to the requirement of a formal application and judicial determination of "reasonableness.") The key questions are whether the nominated CRO is disinterested under the definition of 11 U.S.C. §101(14) and whether he or she has a potential conflict of interest. In re Copenhaver, Inc., 506 B.R. 757, 762 (Bankr. C.D. Ill. 2014). Here, Goodrich is a well-known professional in the district with no potential conflict of interest and is not a creditor, equity holder, insider, or otherwise a partial party under 11 U.S.C. §101(14).

There is also policy rationale to retain Goodrich under 11 U.S.C. §327 as noted in Blue Stone, 392 B.R. 897 at n. 14:

The two main purposes of section 327 are to permit the Court to control administrative expenses in the form of

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT...

Menco Pacific, Inc.

Chapter 11

professionals' compensation and ensure that the professional is conflict free and impartial. Absent such judicial oversight and the opportunity for continuing party-in-interest scrutiny of both a professional's retention and compensation, these important goals of the Bankruptcy Code cannot be met. The so-called 'Jay Alix' protocol that depends upon section 363 for retention of an executive officer does not provide the Court the same ability to meet the twin goals of section 327 when the candidate for employment is also a professional.

The Court will therefore review the Debtor's CRO application under 11 U.S.C. §327(a).² Trustees or debtors in possession may employ attorneys, accountants, appraisers, auctioneers, and other professionals after obtaining court approval. 11 U.S.C. §327(a); 11 U.S.C. §1107(a). In order to be employed, professionals must be disinterested and must make a formal application to be employed which includes a verified statement regarding the person's connections to other persons or entities involved in the case. Fed. R. Bankr. P. 2014(a). Compensation is awarded based on a number of factors:

- (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

**United States Bankruptcy Court
Central District of California
San Fernando Valley
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Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT...

Menco Pacific, Inc.

Chapter 11

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

11 U.S.C. §330(a)(3);

Goodrich's duties include "assisting management; negotiating, preparing and navigating through chapter 11 process; identifying potential sources of revenue for debtor [...] [a]ssisting in creation of chapter 11 plan." *Id.* at ¶6. As neither Blumenthal nor IFIC have had adequate time to review Goodrich's application, it is premature for the Court to assess whether an hourly rate of \$425 for at least 10 hours per week is reasonable as there has been no opportunity to respond. It would appear reasonable, but the parties may comment at the hearing before any decision is made.

3. Compensation of Mendoza

Debtor seeks to pay \$3,800 per week and to have a stipend for a car allowance to President and CEO Oscar Mendoza. Debtor argues that the compensation is justified as Mendoza works an average of fifty (50) hours per week and elected to reduce his full stated salary to benefit the corporation. Blumenthal and IFIC contend that this increase is unjustified and unsupported by evidence. Both parties voice concern over the absence of the proposed compensation increase in Debtor's final cash collateral motion budget.

Section 503(c)(3) as amended in 2005 permits payments to a debtor's insiders outside the ordinary course of business if such payments are justified by "the facts and circumstances of the case." 11 U.S.C. §503(c)(3). The amendment was meant to reflect Congress' concern over excesses in the amount paid to executives of companies in bankruptcy. *See In re U.S. Airways, Inc.*, 329 B.R. 793, 797 (Bankr. E.D. Va. 2005). Even prior to the BAPCPA's amendments to §503, the Supreme Court has made clear that bankruptcy courts have a duty of "rigorous scrutiny" when authorizing a claim against a bankruptcy estate that accrues to the benefit of an officer. *Pepper v. Litton*, 308 U.S. 295, 306-08 (1939); *see also Mark IV Props., Inc. v. Club Dev. & Mgmt. Corp (In re Club Dev. & Mgmt. Corp.)*, 27 B.R. 610, 612 (B.A.P. 9th Cir. 1982).

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

Courts have held that Section 503(c)(3) creates a standard that is "no different than the business judgment standard under section 363(b)." See, e.g., In re Residential Capital, LLC, 491 B.R. 73, 84 (Bankr. S.D.N.Y. 2013); In re Patriot Coal Corp., 492 B.R. 518, 530-31 (Bankr. E.D. Mo. 2013); In re Borders Grp., Inc., 453 B.R. 459 (Bankr. S.D.N.Y. 2011).

Mendoza's duties include overseeing "all operations, administrative, accounting, marketing, project management, all other tasks as needed, walks job sites as needed." Notice, ¶6.

With Goodrich's appointment, Mendoza's duties and workload may be altered. Debtor should explain how this role may change for Mendoza. Parties should come to the hearing to discuss how Goodrich's appointment changes Mendoza's compensation.

APPEARANCE REQUIRED.

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#23.00 Debtor's Final hearing on use of cash collateral
fr. 11/17/16

Docket No: 16

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#24.00 Motion for relief from stay

JON BLUMENTHAL

fr. 12/1/16

Docket No: 33

Tentative Ruling:

Under 11 U.S.C. 362(d)(1) and on request of a party in interest, "the court shall grant relief from stay...for cause." The bankruptcy code does not define cause, outside of lack of adequate protection. Instead, cause is defined on a case-by-case basis. In re Tucson Estates, Inc., 912 F.2d 1162, (9th Cir. 1990). Bankruptcy courts have discretion in determining whether cause exists to modify the stay. In re MacDonald, 755, F.2d 715 (9th Cir. 1985). Cause may exist where a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues. Id. "Courts have identified various factors relevant to determining whether the stay should be lifted to allow a creditor to continue pending litigation in a non-bankruptcy forum. These factors are closely related to those that a bankruptcy court must consider in deciding whether to exercise abstention under 28 U.S.C. 1334 (c)(1)." In re Plumberex, 311 B.R. 551, 558 (Bankr. C.D. Cal. 2004). A number of factors are commonly analyzed to determine whether cause exists to grant relief from the stay. In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984).

III. DISCUSSION

The following factors are implicated here:

1. Whether Relief Will Result in a Partial or Complete Resolution of the Issues

Debtor argues that relief from stay would only result in partial resolution because the Superior Court's adjudication of the prejudgment attachment issue would interfere with this Court's potential rejection of the Settlement Agreement. To clarify, Debtor's motion to reject the Settlement Agreement needs no further resolution. It is

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... Menco Pacific, Inc.

Chapter 11

not an executory contract. As explained in the Court's tentative ruling, the Settlement Agreement fails the Countryman Test because no material obligation remained after Debtor's right to cure expired pre-petition on September 12, 2016.

Another issue that requires resolution is the adjudication of the avoidance claims. Specifically, whether Debtor can void the attachment liens as preferential transfers under 11 U.S.C. §547 or actual or constructive fraudulent transfers under 11 U.S.C. §548. Amended Adversary Complaint, ECF No. 4. Blumenthal contends that relief from stay would allow the Superior Court to determine the merits for Blumenthal's request for an entry of judgment, and its status as a secured creditor. This would be a fair result if only state law is implicated. Instead, when a bankruptcy is filed before perfection, claim priority is determined by both California perfection law and federal bankruptcy avoidance law. Relief from stay would therefore only resolve one issue and complicate another.

As it currently stands, Blumenthal is not a secured creditor. With only an attachment lien, Blumenthal merely has a potential right or contingent lien that must be perfected by means of a judgment within the statutory period. See Puissegur v. Yarbrough, 29 Cal. 2d 409 (Cal. 1946). Blumenthal has no right to proceed against the property until it is perfected. See Arcturus Mfg. Corp. v. Superior Court, 223 Cal. App. 2d 187 (Cal. App. 1964). He is only a secured creditor once and if a judgment is entered,

Blumenthal argues that despite its unperfected interest, it is entitled to entry of judgment because the perfection date relates back to the pre-petition issuance date of the attachment writ orders. Debtor contends that before Blumenthal can obtain an entry of judgment, the question of whether the attachment was a preferential transfer must be answered.

Section 544 governs the "strong arm" power of the trustee or debtor in possession to avoid security interests in estate assets. 11 U.S.C. §544. The trustee stands in the shoes of a "hypothetical lien creditor" with a lien on the day the bankruptcy petition was filed; hence has the right and power to avoid any lien claims or security interests that are unperfected on the date that the bankruptcy petition is filed. 11 U.S.C. §547(b). A preference is any transfer of interest, including security interest, of the debtor's property (1) to or for the benefit of a creditor, (2) for or on account of an antecedent debt, (3) made within 90 days before the date of filing or one year if transfer was made to an insider at the time of transfer, and (4) allows the

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

creditor to receive more than it would under a chapter 7 liquidation. See Id. at §547 (b), and (f).

In In re Wind Power Systems, Inc., 841 F.2d 288 (9th Cir. 1988), pursuant to a writ of attachment from the state court, a customer creditor levied upon the debtor's property. Id. at 290. Within 90 days of the levy, the debtor filed for chapter 11 bankruptcy, and the trustee subsequently sought to avoid the lien as a preferential transfer. Id. The Ninth Circuit Court of Appeals (the "Ninth Circuit") was faced with the question of whether "the *creation* of [the creditor]'s lien relates back to the date on which it obtained its [temporary protective order]" – which predated the ninety-day preference period. Id. at 291 (citing Metcalfe v. Barker, 187 U.S. 165 (1902)). The Ninth Circuit held that because California law provides for the priority of an attachment lien to relate back to the date of the issuance of the writ of attachment, the lien arose prior to the 90-day preference period and is therefore not voidable under 11 U.S.C. §547. Id. at 291-93.

Here, the Superior Court issued orders for a writ of attachment on March 12, 2016 and an additional writ of attachment on April 4, 2016. Debtor filed its petition on September 26, 2016. Under Wind Power, upon entry of judgment in Superior Court, Blumenthal's liens would relate back to the respective issuance dates. However, unlike the debtor in Wind Power, Blumenthal is a purported insider and therefore is therefore subject to a one-year preference period. See 11 U.S.C. §547(b)(4)(B); cf. Wind Power, 841 F.2d at 292 ("Because the lien was created outside the ninety-day preference period, the Trustee may not avoid it under *section 547.*") The questions of whether Blumenthal is an insider and the other elements of 11 U.S.C. § 547 are fact intensive issues that require further development via discovery. This is the prerequisite step to resolving the issue of Blumenthal's secured status. The only forum to adjudicate a preferential transfer claim is in the bankruptcy court.

The Court is therefore inclined to adjudicate the avoidance issues, and consider the entry of judgment as part of its analysis. This decision is supported by a post-Wind Power Ninth Circuit decision where the bankruptcy court was caught in between a state court action and an adversary proceeding. In In re Jensen, 980 F.2d 1254, 1258-59 (9th Cir. 1992), the Federal Deposit Insurance Corporation (the "FDIC") failed to obtain an entry of judgment on its prejudgment attachment lien before debtor filed for bankruptcy. The state court deficiency action was referred to

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

the bankruptcy court, and was subsequently consolidated with a motion to object to FDIC's claim and debtor's adversary to avoid the lien. *Id.* at 1256. The bankruptcy court entered judgment for the FDIC in that action, and allowed the claim as secured. *Id.* The Ninth Circuit, citing to *Wind Power*, found that since judgement was entered as required by California law, the perfection of the attachment lien relates back to the writ issuance date. *Id.* at 1258-59. As a judgment on the issue by the bankruptcy court has the same binding effect as a state court judgment, Blumenthal's right to perfect remains the same even if relief from stay is denied. This offers a better alternative than rendering a purely bankruptcy decision. In *In re Southern Cal. Plastics, Inc.*, 165 F.3d 1243 (9th Cir. 1999), the creditor obtained a prejudgment attachment lien against debtor's property. *Id.* at 1244. Before creditor obtained a judgment to perfect the lien, the debtor filed bankruptcy. *Id.* at 1245. The question was whether allowance of the claim in bankruptcy would perfect the attachment lien. *Id.* at 1246. The Ninth Circuit held that only an entry of judgment, with all of its procedural protections, can perfect an attachment lien under California law – rejecting creditor's claim allowance method of perfection. *Id.* 1247-1248.

This factor weighs in against relief from stay.

2. The Impact of the Stay on the Parties and the "Balance of Harm"

Blumenthal argues that denial of the motion for relief would delay his right to ascertain the validity and priority status of its \$670,000 claim. As a creditor with contingent claims against the estate during a foreseeably long and extensive adversary proceeding will leave Blumenthal's priority status in limbo. The same delay, however, would occur in the state court adjudication, given the complexity of the issues at hand and the possibility that the Superior Court may need to abstain from bankruptcy issues and leave them for this Court to hear.

Blumenthal's contingent liens are preserved as of the date of writ attachment under both Section 108(c) and *Wind Power*, 841 F.2d 288 (9th Cir. 1988); See 11 U.S.C. §108(c)(tolling during bankruptcy). No judgment creditor with liens perfected after the writ issuance dates (March 21, 2016 and April 4, 2016) may gain priority over Blumenthal's lien. Neither party indicates that Blumenthal's writ of attachment can be otherwise extinguished by the operation of law. While the State Court Action

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

was dismissed after the settlement, the Superior Court explicitly retained jurisdiction on any breach of the Settlement Agreement, including the entry of judgment. See RJN, Exh. 7, ¶8 ("Jurisdiction is retained by this Court for the purpose of [...] entry of Judgment against Defendant Menco as set forth above, in the event that Defendant fails to comply with the terms of the Agreement."); See Southern Cal. Plastics, 165 F.3d at 1248-1249 (even where the state court case was closed and the debtor was unable to reopen the case to obtain a judgment, the appellate court did not deem the liens avoided and remanded to determine whether the debtor is absolutely precluded from entering a judgment to perfect its lien).

The factor weighs against relief from stay.

3. The Lack of Any Connection with or Interference with the Bankruptcy Case

In arguing that his right to an entry of judgment in the Superior Court lacks connection to this bankruptcy, Blumenthal raises the Rooker-Feldman doctrine. He avers that if the Court were to adjudicate the adversary proceeding, it would be a collateral attack on the Superior Court's order approving the Settlement Agreement. This is a critical issue – if keeping the action here runs afoul of the Rooker-Feldman doctrine, relief from stay is mandated as this Court would not have jurisdiction to hear the matter.

The Rooker-Feldman doctrine prohibits federal district and circuit courts from reviewing state court judgments. Where a party did not actually present its federal claims in state court, the Rooker-Feldman doctrine forecloses lower federal court jurisdiction over claims that are "inextricably intertwined" with the claims adjudicated in a state court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n. 16 (1983). A federal claim is inextricably intertwined with the state-court claims "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Hill v. Town of Conway, 193 F.3d 33, 39 (1st Cir.1999); Sheehan v. Marr, 207 F.3d 35, 39-40 (1st Cir. 2000); see also In re Spookyworld, Inc. v. Town of Berlin, et al (In re Spookyworld, Inc.), 266 B.R. 1, 13-14 (Bankr.D.Mass.2001). The doctrine is applicable in the bankruptcy context. Audre, Inc. v. Casey (In re Audre), 216 B.R. 19 (B.A.P. 9th Cir. 1997). The doctrine applies to judgments from any state court. Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986). "The [Rooker-Feldman] doctrine bars a district court from

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

exercising jurisdiction not only over an action explicitly styled as a direct appeal, but also over the 'de facto equivalent' of such an appeal." **Cooper v. Ramos, 704 F.3d 772, 777 (9th Cir. 2012)**

Debtor argues that the Rooker-Feldman doctrine does not apply because the Superior Court neither ruled on nor entered a judgment in the State Court Action. The lack of a final judgment is inconsequential. It is clear under Ninth Circuit law that the Rooker-Feldman doctrine applies not only to final state court judgments, but to interlocutory orders and non-final judgments issued by the state court. Doe & Assoc. Law Offices v. Napolitano, 252 F. 3d 1026, 1030 (9th Cir. 2001); Worldwide Church of God v. McNair, 805 F. 2d 888, 893 n.3 (9th Cir. 1986). A settlement agreement has been treated as a final judgment for purposes of the Rooker-Feldman doctrine. King v. Legal Recovery Law Offices, Inc., 2015 U.S. Dist. LEXIS 29816, *9-10 (2014)(quoting Green v. City of New York, 438 F. Supp. 2d 111, 119 (E.D.N.Y. 2006)).

Debtor admits that its claims in its adversary complaint arise from the same set of operative facts as the claims in the Superior Court. Opposition, 8:26-9:2. The claims are "inextricably linked" because the removal of the attachment liens as voidable transfers under §544 or §547 would render the Superior Court's settlement order null and void. Cooper v. Ramos, 704 F.3d at 779 (a federal claim and a state claim are "inextricably intertwined" where "the relief requested in the federal action would effectively reverse the state court decision or void its ruling")(citing Fontana Empire Ctr., LLC v. City of Fontana, 307 F. 3d 897, 992 (9th Cir. 2002)).

Debtor argues that adversary proceeding is not a "de facto appeal" because it does not seek to overturn the state court order but to pursue an independent legal cause of action under bankruptcy law. An action is a forbidden "de facto appeal" when the plaintiff (1) asserts as his injury "legal errors by the state court," and (2) seeks as his remedy relief from the state court judgment." Kougasian v. TMSL, 359 F.3d 1136, 1140 (9th Cir. 2004)(quoting Noel v. Hall, 341 F.3d 1148, 1163 (9th Cir. 2003)).

Here, Debtor is alleging a wrongful act, and not a legal error by the Superior Court. The Ninth Circuit in Kougasian v. TMSL explained:

If a federal plaintiff asserts as a legal wrong an allegedly

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT...

Menco Pacific, Inc.

Chapter 11

erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, Rooker-Feldman bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, Rooker-Feldman does not bar jurisdiction.

Kougasian v. TMSL, 359 F.3d 1136, 1140 (9th Cir. 2004)(quoting Noel v. Hall, 341 F.3d. 1148, 1164 (9th Cir. 2003).

Debtor does not claim that the Superior Court erroneously entered the order approving the Settlement Agreement. Rather, it argues the order should be *void ab initio* because Blumenthal allegedly omitted its wrongful underbidding in his capacity as officer and hid costs on five separate projects. Debtor is not seeking to overturn the Settlement as a matter of law, rather it is seeking to raise bankruptcy claims that are independent federal rights, albeit closely related to the State Court Action. Thus, Debtor's action is not a "de facto appeal" and does not fall under the Rooker-Feldman doctrine.

Blumenthal's right to enter judgment is deeply connected with Debtor's bankruptcy case. Menco Pacific's reorganization hinges on whether Blumenthal's \$670,000 claim will be allowed as a secured claim, and whether Debtor can retrieve the alleged \$876,900 fraudulent payment from Blumenthal.

This factor weighs against relief from stay.¹

4. Whether the Debtor's Insurance Carrier has Assumed Full Financial Responsibility for the Litigation

No indication has been made that Debtor has an insurance carrier to pursue the State Court Action. Presumably, then, the implication is that Debtor is left to pursue the State Court Action and thereby exhaust assets and efforts Debtor might otherwise contribute towards reorganization. Still, litigating the issue here would expose Debtor to the same costs. Additionally, Debtor would likely be left to litigate elsewhere the claims this Court cannot hear due to limitations Stern imposes on the resolution of the adversary complaint before the Court. This is all before the Court can even address the issues on the merits.

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT...

Menco Pacific, Inc.

Chapter 11

Thus, although the lack of insurance exposes Debtor to pursue the litigation out of its own pocket and hamper reorganization, Debtor would expend an equal amount of effort and money in proceeding here with its adversary complaint.

This factor weighs neither in favor nor against relief.

5. Whether Litigation in Another Forum Would Prejudice the Interests of Other Creditors, the Creditors' Committee and Other Interested Parties

Debtor argues that relief from stay would result in Blumenthal becoming a secured creditor and thereby prejudice other creditors in the estate. Debtor is conflating relief from stay with a compulsory entry of judgment and an allowance of an automatic secured claim of \$670,000. California Code of Civil Procedure requires a prevailing party to serve and file a notice of entry of judgment, which triggers the period in which an appeal by Debtor must be filed. C.C.P. §644.5. Debtor will therefore have the opportunity to appeal the entry of judgment. The stay still applies to the enforcement of any judgment.

Still, relief from the automatic stay in this context goes against the all-important bankruptcy policy of equal distribution among similarly situated creditors. See Valley Bank v. Vance (In re Vance), 721 F.2d 259, 260 (9th Cir. 1983). If Blumenthal becomes a secured creditor, it would over-encumbering the estate's equity in the vehicles, receivable, and accounts. Blumenthal as an adverse creditor has a real possibility of submerging the claims of other creditors. Adjudicating all issues in the bankruptcy court would provide notice to all creditors and parties-in-interest as to the progress of this dispute between Debtor and Blumenthal.

This factor weighs against relief from stay.

6. The Interest of Judicial Economy and the Expedious and Economical Determination of Litigation for the Parties

The state court action only lasted seven months. RJN, Exh. 8 (Blumenthal filed the state court complaint on November 13, 2015. He filed his "Request for Dismissal" on June 27, 2016). It would not require much time for this Court to familiarize itself with the parties and issues. In fact, in the process of preparing for the five concurrent motions on for the December 15, 2016 hearing, the Court has already

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... Menco Pacific, Inc.

Chapter 11

reviewed the initial complaint and cross-complaint, the orders for attachment writs, Settlement Agreement, and their interplay with the amended adversary complaint.

This factor weighs against relief from stay.

Conclusion

Upon evaluation of the factors above, the Court is inclined to DENY relief from stay.

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

Movant(s):

Jon Blumenthal

Represented By
William P Fennell

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#25.00 Motion to Reject Executory Settlement Agreement
Between The Debtor and Jon Blumenthal

fr. 12/1/16

Docket No: 49

Tentative Ruling:

On or about June 14, 2016, Menco Pacific, Inc. ("Debtor") and Jon Blumenthal ("Blumenthal") entered into a "Stipulated Settlement Between Plaintiff and Defendant Menco Pacific, Inc." (the "Settlement Agreement"). The Settlement terms required Debtor to pay Blumenthal \$400,000 by (1) selling vehicles subject to Blumenthal's attachment liens sufficient to pay Blumenthal \$200,000 within 10 days after execution of the Settlement, (2) releasing \$51,000 from its bank accounts to Blumenthal, (3) paying Blumenthal \$50,000 by August 31, 2016, and \$100,000 by May 31, 2017. Request for Judicial Notice ("RJN"), Exh. 7, ¶6. If any of the provisions were not met within ten (10) days of its due date and after a notice of default, Blumenthal was entitled to obtain a judgment of \$670,000. Id. at ¶6(v). On June 27, 2016, the San Diego Superior Court entered the Settlement Agreement as an order of the court.

Debtor subsequently failed to perform under the agreement. On September 2, 2016, Blumenthal's counsel mailed a notice of default to Debtor. Declaration of Jon Blumenthal in Support of Motion for Relief from Stay ("Blumenthal Declaration"), ¶ 19. On September 26, 2016, before Blumenthal obtained an entry of judgment, Debtor filed a voluntary chapter 11 petition. Debtor now moves for an order to reject the Settlement Agreement as an executory contract.

A contract is "executory" where there is performance due on both sides of a contract at the petition date:

The Ninth Circuit adopted the "Countryman" test to determine whether or not a contract is "executory," for bankruptcy purposes. Under this test, a contract is executory if, when the bankruptcy petition is filed, "the

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT...

Menco Pacific, Inc.

Chapter 11

obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other."

Unsecured Creditors' Committee v. Southmark Corp., 139 F.3d 702, 705 (9th Cir. 1988)(quoting Griffel v. Murphy (In re Wegner), 839 F.2d 533, 536 (9th Cir. 1988)).

Debtor argues that, as of the petition date, it had the unperformed obligation to pay Blumenthal \$400,000, and Blumenthal had unperformed obligations to (1) release attachment liens on Debtor's vehicles, (2) refrain from exercising its rights under the attachment liens, and (3) grant a 30-day extension to Debtor to pay \$100,000 by May 31, 2016 if requested by Debtor. Motion, 2:21-3:3.

The Settlement Agreement explicitly established four deadlines for Debtor to pay \$400,000 to Blumenthal:

- (1) By **June 27, 2016** (date of agreement execution), Debtor must "take all steps necessary to" release \$51,000 from its bank accounts to Blumenthal;
- (2) By **July 7, 2016** (10 days after date of execution), Debtor must begin to sell vehicles subject to Blumenthal's attachment liens sufficient to pay Blumenthal \$200,000;

By **August 31, 2016**, Debtor must pay Blumenthal \$50,000; and

By **May 31, 2017**, Debtor must pay Blumenthal \$100,000

RJN", Exh. 7, ¶6(i)-(iii)(emphasis added). The agreement further provides: in the event that Debtor does not meet any of its four-part performance, Blumenthal is entitled to obtain an entry of judgment of \$670,000 if two conditions are met: (a) first, Blumenthal gives Debtor a written notice of default, and (b) Debtor fails to pay the

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

owed amount within ten (10) days of the notice mailing date. Id. at ¶6(v).

Debtor argues that the contract is executory as the petition was filed before the time to cure expired. Yet a review of the chronology of events shows that the time to cure expired before the petition date. It is undisputed that Debtor failed to meet any of the above deadlines. Blumenthal was therefore entitled to mail its notice of default to Debtor as early as July 7, 2016, ten days after its default on June 27, 2016. Blumenthal's counsel did not mail the notice until September 2, 2016. Blumenthal Declaration, ¶19. The last day for Debtor to cure was on September 12, 2016, ten days after the mailing of the notice. Therefore, as of the petition date on September 26, 2016, Debtor's right to cure had already expired.

Debtor then argues that as Blumenthal failed to obtain an entry of judgment before the petition date, the agreement is executory. This argument ignores the undisputed facts and language of the settlement contract. Its right to cure ended on September 12, 2016. After that date, no material obligation remained on Debtor's end. No material obligation remained on Blumenthal's end as well. When Debtor failed to cure on September 12, 2016, Blumenthal's previous obligations, such as to release its attachment liens, terminated, Blumenthal's only remaining task was to a right to obtain an entry of judgment – a ministerial task that does not arise to a "material" obligation. See In re Ter Bush, 273 B.R. 625 (Bankr. S.D. Cal. 2002). In Ter Bush, the chapter 7 debtors entered into a pre-petition agreement to sell their residence. Id. at 627. Before close of escrow, the debtors backed out of the contract because of a medical emergency; the purchaser filed suit seeking damages and specific performance in California state court. Id. In mandatory arbitration, the purchaser was granted specific performance and awarded costs of escrow and attorney's fees. Id. The arbitration decision was signed on August 2, 2001. Id. Before the purchaser could get the arbitration confirmed, the debtors filed for chapter 7 bankruptcy on August 14, 2011. Id. Debtors argued that the sale agreement is an executory contract and therefore should be rejected and reduced to a monetary claim instead of a specific performance. Id. at 627-28. The court held that the arbitration proceeding had concluded pre-petition because an unconfirmed arbitration award is equivalent to a final judgment under California law. Id. at 628 (citing Thibodeau v. Crum, 4 Cal. App. 4th 749, 759 (1992)). The pre-petition purchase agreement's unperformed obligations were deemed non-material. Id. The only obligation that remained was the ministerial act of confirming the award and entering the judgment. Id.

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

CONT... **Menco Pacific, Inc.**

Chapter 11

The facts here are similar. The purported executory settlement resulted from a pre-petition breach of contract suit. Debtor did not meet any of the explicit deadlines as set out in the agreement. Blumenthal was entitled to an entry of judgment as a matter of law; the only remaining task was to file its request for an entry of judgment. Debtor attempts to distinguish the present case from Ter Bush – that Debtor and Blumenthal did not adjudicate their claims in an arbitration forum and therefore the merits of their respective claims were not determined. This distinction is irrelevant. Debtor and Blumenthal executed the settlement with the understanding that if Debtor breached the agreement, an entry of judgment would be the result. This is what was binding on the parties regardless of the merits of each party's position. As no material obligation remained as of the petition date, the Settlement Agreement does not constitute as an executory contract under the Countryman Test.

Motion to Reject Executory Rejection Agreement to be DENIED.

APPEARANCE REQUIRED.

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

Movant(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

#26.00 Status and Case Management Conference

fr. 11/17/16

Docket No: 0

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

**United States Bankruptcy Court
Central District of California
San Fernando Valley
Judge Maureen Tighe, Presiding
Courtroom 302 Calendar**

Thursday, December 15, 2016

Hearing Room 302

11:00 AM

1:16-12791 Menco Pacific, Inc.

Chapter 11

Adv#: 1:16-01140 Menco Pacific, Inc. v. Blumenthal

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#27.00 Motion to Dismiss Amended Complaint, Or,
in the Alternative, For a More Definite
Statement; Motion to Strike

fr. 12/14/16

Docket No: 13

Tentative Ruling:

1. Preferential Transfer Claim – Insider Issue

The reach-back period for a preferential transfer differs depending on whether the transferee is an "insider" as defined as 11 U.S.C. §101(31). 11 U.S.C. §547(b). These so called "statutory insiders" or "per se insiders" are subject to a preferential period of between ninety days and one year of the petition date. 11 U.S.C. §547(b)(4) (B).

Bankruptcy law also recognizes that "non-statutory insiders" are also subject to the one-year preference period. In re Enter. Acquisition Partners, Inc., 319 B.R. 626, 631 (B.A.P. 9th Cir. 2004). A "non-statutory insider" is where his or her relationship "compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable to simply to affinity rather than to the course of business dealings between the parties." Id (quoting In re Friedman, 126 B.R. 63, 69 (B.A.P. 9th Cir. 1991).

The prevailing Ninth Circuit test requires the bankruptcy court to consider: (1) the closeness of the relationship with the debtor is comparable to that of the enumerated insider classification in §101(31), and (2) the relevant transaction is negotiated at less than arm's length. U.S. Bank N.A. v. Vill. At Lakeridge, LLC. (In re Vill. At Lakeridge, LLC.), 814 F.3d 993, 1001 (9th Cir. 2016)(citing In re U.S. Med., Inc., 531 F.3d 1272, 1277 (10th Cir. 2008). This requires a fact-intensive analysis to determine the relationship between Blumenthal and Debtor, and whether the transactions between the two were negotiated at arm's length.

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To establish a preferential transfer under 11 U.S.C. §547, the burden of proof is on the debtor to prove a transfer of interest of the debtor's property is (1) for the benefit of a creditor, (2) for or on account of an antecedent debt, (3) made within 90 days before the date of filing or between 90 days and one year if transfer was made to an insider at **the time of transfer**, and (4) allows the creditor to receive more than it would under a chapter 7 liquidation. See Id. at §547(b)(emphasis added); In re Gulino, 779 F.2d 546, 549 (9th Cir. 1985).

Debtor argues that the writs of attachment obtained within the one-year of the petition date are avoidable because while Blumenthal was not "statutory insider" at the time of the writ attachment, the writs were the result of a larger scheme put in motion by Blumenthal when he was Vice President or as a "non-statutory insider." The scheme as alleged is that Blumenthal in his capacity as Vice President and in control of Debtor, put in motion the Stock Purchase Agreement to (1) underbid projects and devalued Debtor's stocks to expedite payment to himself, then (2) sued to attain the writ of attachment. Opposition to Motion to Dismiss, 9:4-12. If that is Debtor's theory then, the question becomes: how many of the underbids occurred before Blumenthal resigned as Vice President (September 11, 2015) and the one year insider preference period cut-off date (August 26, 2015). Neither Debtor's amended complaint nor its opposition to the motion to dismiss specifics the underbid dates. In the alternative, is Debtor arguing that Blumenthal's insider status should be extended beyond Blumenthal's resignation date (September 11, 2015) to the date of the writs of attachments (March 21, 2016 and April 29, 2016) under the theory that the writs are a part of the scheme initiated while Blumenthal was Vice President?

Debtor must come to the hearing prepared to answer questions on these issues.

2. Particularity Under Fed. R. Civ. P. 9(b).

Federal Rule of Civil Procedure 9(b) imposes heightened pleading requirements for claims of fraud. See Fed. R. Civ. P. 9(b). Under Rule 9(b), a plaintiff "must state with particularity the circumstances constituting fraud," but can allege generally "[m]alice, intent, knowledge, and other conditions of a person's mind." Id. The particularity requirement "has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of

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CONT... Menco Pacific, Inc.

Chapter 11

the parties to the misrepresentation." In re MannKind Sec. Actions, 2011 U.S. Dist. LEXIS 145253, 19-20 (C.D. Cal. Dec. 16, 2011)

The plaintiff "must specifically plead as to (1) how, (2) where, and (3) when the alleged misrepresentation was communicated as well as the (4) specific contents of the misrepresentation, rather than a vague and conclusory synopsis." Blake v. Dierdorff, 856 F.2d 1365, 1369 (9th Cir. 1988).

Debtor's allegations as to Blumenthal's fraudulent underbidding and transfer of \$876,900 do not meet the 9(b). Specifically, Debtor's allegations of "Blumenthal's fraudulent intent in underbidding projects" and "intent to defraud other creditors on Plaintiff's behalf" are conclusory. The First Amended Complaint must be amended to answer the following questions:

1. As for the alleged underbid, which bid proposal is Debtor referring to, and to whom?
2. What were the specific dates that NASA, the Marine Corps, et al., solicited bids on the projects?
3. What were the nature of requests for bids by NASA, et al.?
4. How much would Menco's bids have had to be to have been profitable?
5. How much below the correct level of staffing did Blumenthal allegedly misrepresent to Menco regarding these jobs?
6. Who participated in surveying the proposed jobs, and in estimating the costs drafting and submitting the bids?
7. How and to what amount did Blumenthal's alleged actions "artificially inflate" the value of Menco's shares?

To the extent that fraudulent intent is implicated in other transfer causes of action, Debtor must also amend its allegation therein.

Debtor to AMEND First Amended Complaint to answer the Court's concerns regarding Blumenthal's insider status and the particularity requirement under FRCP 9 (b).

Party Information

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Chapter 11

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

Defendant(s):

Jon Blumenthal

Represented By
William P Fennell

Plaintiff(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

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#28.00 Status Conference re: First Amended Complaint
For 1. Avoidance, Recovery, and Preservation of
Intentional Fraudulent Transfers; 2. Avoidance,
Recovery, and Preservation of Constructive
Fraudulent Transfers; and 3. Avoidance, Recovery,
and Preservation of Preferential Transfers

fr. 12/14/16

Docket No: 4

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot

Defendant(s):

Jon Blumenthal

Pro Se

Plaintiff(s):

Menco Pacific, Inc.

Represented By
Jeffrey S Shinbrot