10:00 AM
8: - **Chapter**

#0.00 **All hearings on this calendar will be conducted using ZoomGov video and audio.**

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Judge Theodor C. Albert's Cases" on the Court's website at: https://www.cacb.uscourts.gov/judges/honorable-theodor-c-albert under the "Telephonic Instructions" section.

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- Connect early so that you have time to check in.
- Change your Zoom name to include your calendar number, first initial and last name, and client name *(ex. 5, R. Smith, ABC Corp.)* if appearing by video. This can be done by clicking on "More" and "Rename" from the Participants list or by clicking on the three dots on your video tile.
- Mute your audio to minimize background noise unless and until it is your turn to speak. Consider turning your video off until it is your turn to appear.
- Say your name every time you speak.
- Disconnect from the meeting by clicking "Leave" when you have completed your appearance(s).

Docket 0

10:00 AM

CONT... **Chapter**

Tentative Ruling:

- NONE LISTED -

10:00 AM

8:17-10517 Lisa Hackett **Chapter 11**

#1.00 CONT Scheduling And Case Management Conference

[fr: 6/7/17, 9/6/17, 12/6/17, 1/10/18, 2/28/18, 8/29/18, 3/13/19, 10/2/19, 2/12/20, 4/1/20, 7/22/20]

Docket 1

Tentative Ruling:

Tentative for 12/9/20:
Why no updated status report?

Appearance: required

Appearances necessary. Telephonic appearances only. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878.

Party Information

Debtor(s):

Lisa Hackett Pro Se

10:00 AM

8:17-14351 Freda Philomena D'Souza **Chapter 11**

#2.00 STATUS CONFERENCE RE: Motion Pursuant To 11 USC 1142 and 11 USC 105 to Require Creditor To Complete Novation Contained Within The Confirmed Chapter 11 Plan
(cont'd from 9-23-20)

Docket 149

Tentative Ruling:

Tentative for 12/9/20:
Further continuance to accomplish re-documentation? Appearance optional.

Tentative for 9/23/20:
Grant absent compelling showing for either denial or further delay.

Tentative for 7/22/20:
Creditor requests a continuance. The court will grant a continuance to a convenient date.

Party Information

Debtor(s):

Freda Philomena D'Souza — Represented By
Michael Jones
Sara Tidd

10:00 AM
8:19-13957 Rosemaria Geraldine Altieri **Chapter 11**

#3.00 STATIS CONFERENCE RE: Chapter 11 Voluntary Petition Individual.
(cont'd from 10-14-20)

Docket 1

Tentative Ruling:

Tentative for 12/9/20:
See ##4 and 5. Are the stipulations mentioned in the papers now in hand?

Appearance: required

Tentative for 10/14/20:
See #6.

Tentative for 9/2/20:
See #12.

Tentative for 8/5/20:
No tentative. See #4.

Please note: In light of concerns about COVID-19/Coronavirus and attempts to implement physical distancing, the court encourages telephonic appearances through CourtCall on all matters other than evidentiary hearings. Telephonic appearances may be arranged by calling (866) 582-6878. If personal appearance is intended, please call the Courtroom Deputy at (714) 338-5304 by 4 p.m. the day before. Otherwise, the doors to the courtroom will be locked.

Please be advised that CourtCall has announced reduced fees for attorneys to use CourtCall and free access for parties who do not have an attorney – pro se or self-represented litigants through September 30, 2020. The Court's

10:00 AM

CONT... **Rosemaria Geraldine Altieri** **Chapter 11**

website has been updated with this new information.

Tentative for 5/27/20:
See #8 and 9.

Tentative for 4/8/20:
No status report filed? See #12 and #13. Continue to coincide with confirmation hearing. Appearance is optional.

Tentative for 2/5/20:
Continue status conference. Continue approximately 60 days to allow analysis of plan and disclosure statement due 2/28/20.

Tentative for 12/4/19:
Deadline for filing plan and disclosure statement: February 28, 2020.
Claims bar: 60 days after dispatch of notice to creditors advising of bar date.
Debtor to give notice of claims bar deadline by: December 10.

Party Information

Debtor(s):

Rosemaria Geraldine Altieri — Represented By
Misty A Perry Isaacson

10:00 AM
8:19-13957 Rosemaria Geraldine Altieri **Chapter 11**

#4.00 Motion to Use Cash Collateral
(cont'd from 10-14-20)

Docket 5

Tentative Ruling:

Tentative for 12/9/20:
Assuming confirmation is this moot? See #5

Tentative for 10/14/20:
See #6.

Tentative for 9/2/20:
Continue on same terms and condition through October 14, 2020 to coincide with confirmation hearing.

Tentative for 8/5/20:
This is an oft-continued request for use of cash collateral. As the court recalls, there is only a very marginal slice of equity in the collateral. The court has repeatedly stated (starting in November) that status quo cannot be expected to last indefinitely, and the tentative from last time (5/27) said one last extension would be granted. But the court observes now that somehow confirmation of the plan has moved to September 2. The June MOR shows a dwindling cash balance. To exacerbate the court's concern, no further status report is offered, although Ms. Altieri does file a declaration suggesting that everything is unfolding more or less as expected, with only a temporary lull in rental payments due to the pandemic. Unless the secured creditor is willing to go along further the court sees little encouragement on this record or reason to continue the use beyond September 2. So, despite the court's earlier

admonition we should continue on the same basis until the continued confirmation hearing, but further continuances of that date should not be expected and, if sought, had better include the secured creditor's acquiescence as it may be without further use of cash collateral. It probably also goes without saying that the proposed plan should be the very best possible as further time is not assured.

Please note: In light of concerns about COVID-19/Coronavirus and attempts to implement physical distancing, the court encourages telephonic appearances through CourtCall on all matters other than evidentiary hearings. Telephonic appearances may be arranged by calling (866) 582-6878. If personal appearance is intended, please call the Courtroom Deputy at (714) 338-5304 by 4 p.m. the day before. Otherwise, the doors to the courtroom will be locked.

Please be advised that CourtCall has announced reduced fees for attorneys to use CourtCall and free access for parties who do not have an attorney – pro se or self-represented litigants through September 30, 2020. The Court’s website has been updated with this new information.

Tentative for 5/27/20:
see #9. Continue on same terms one final time.

Tentative for 4/8/20:
Continue on same terms pending confirmation hearing. Appearance is optional.

Tentative for 2/5/20:
Continue use on same terms pending continued status conference.

10:00 AM
CONT... **Rosemaria Geraldine Altieri** **Chapter 11**

Tentative for 11/6/19:
Grant; the Debtor should not assume this status quo can persist for an extended period as the protective equity is very small. Revisit in 90 days?

Party Information

Debtor(s):

Rosemaria Geraldine Altieri — Represented By
Misty A Perry Isaacson

10:00 AM
8:19-13957 Rosemaria Geraldine Altieri **Chapter 11**

#5.00 Confirmation Of Chapter 11 Plan
(set from 4-08-20 discl stmt hrg)
(cont'd from 10-14-20)

Docket 66

Tentative Ruling:

Tentative for 12/9/20:
It would appear that there is no remaining opposition to confirmation, the issues of plan treatment of the judgment creditor having been resolved by stipulation. This assumes the previous opposition of U.S. Bank has been resolved. Confirm as modified by stipulation.

Tentative for 10/14/20:

This is a hearing on confirmation on the debtor's Amended plan. This hearing was continued at least twice from May 27, 2020 to address some of the issues identified in the court's tentative ruling of that date, which tentative opinion is incorporated herein. The major remaining issues are cramdown interest rate and feasibility. The debtor has offered the expert opinion of J. Michael Issa, principal of the financial advisory firm, GlassRatner Advisory & Capital Group attached to his declaration of August 10, 2020.

The objecting creditor, judgment creditor Stephanie Bryson, Class 2E, has filed an opposing brief but no expert opinion. It is unclear whether U.S. Bank, Class 2B, who filed an objection to confirmation considered in the May 27 tentative, still opposes. The major obstacles to confirmation are considered below:

1. Cramdown Interest Rate

The court cannot confirm the plan over the objection of an impaired class of secured creditors, such as Bryson, unless the court determine under the relevant portion of §1129(b)(2)(A)(i) that the payments promised under the plan provide the present value of the secured claim. As both sides acknowledge, the present value analysis is the mirror image of interest rate. So, the promised interest rate (in this case of 5% interest only over 180 monthly payments, or 15 years) leaves a balloon of $330,386 due in full at the end of the plan term. The question is, adjusted for all *appropriate* market and risk factors, does this treatment amount to the present value of the claim, which appears to be the full $330,386? The parties seem to agree with this court's conclusion expressed in *In re North Valley Mall*, 432 B.R. 825 (Bankr. C.D. Cal. 2010), and as expressed in other authorities, that a plan may not by cramdown impose uncompensated risk on the objecting secured creditor. So, to determine the appropriate rate a variety of circumstances/factors must be evaluated. Among these are market interest rates adjusted for such factors as residential vs. commercial, inflationary pressures generally, terms of repayment and the like. To be clear, there is never a true "market" rate analysis because no lender will voluntarily make the proposed treatment as a new loan; if that were the case, one presumes the debtor would refinance. Instead, the court in cramdown analysis looks at all applicable factors to find as near a proxy as possible, one that appropriately reflects all the factors adjusted for circumstances.

One such factor here is that the proposed treatment of Class 2E is for interest only, with no amortization of principal at all. In some situations, this might be thought to be a factor somewhat lowering interest rates on shorter term loans where the principal is well protected. But in a situation like this one, where the "borrower" is a debtor in possession and proposes a long term plan (15 years), who apparently lacks the resources to amortize the principal at all, on balance the court regards this as a riskier proposition and a factor creating upward pressure on interest rates to compensate for that risk. See

e.g. *In re McCombs Properties VIII,* 91 B.R. 907, 910-12 (Bankr. C.D. Ca. 1988). Neither side analyses this factor in any helpful way.

Mr. Issa opines that a *Till* approach, which takes a near riskless rate such as prime rate and then adds a few points as adjustments (in a vague, somewhat arbitrary and unexplained manner) is not appropriate for this case. The court agrees, not only because the *Till* court relied upon the prime rate, which is not used in real estate loans, but also because that was a truck loan in a Chapter 13 of short duration. Therefore, the analysis appropriate to a longer-term real estate loan relies on fundamentally different analysis.

A closer line of authority is this court's opinion in *North Valley Mall.* In *North Valley Mall*, this court opined that a more principled approach was to break a proposed treatment as a "loan" analyzed in tranches, that is, a percentage of a 100% LTV loan can be thought of in at least three segments, or tranches, a percentage equating to more or less conforming loans, say up to 70% LTV, for which there is usually abundant data in the marketplace because real lenders make real loans on this basis every day. Sure, some adjustment is made for poor or no credit, or other factors such as conforming vs non-conforming, but there is still abundant data available. The trickier portions of the *North Valley* approach is fixing the second, or mezzanine tranche of say the next 20% of riskier "hard money" loans (usually in the range of 7 or 8%) combining to 90% LTV, and the very trickiest in the last 10% up to 100% of value, where no lender (outside maybe the Mafia) would touch the transaction on any basis. A suitable proxy in *North Valley* for that last tranche was said to be the average of what equity investors into highly leveraged transactions would expect as a return. This is usually quite a high number, say 20% per annum, as was the case in *North Valley Mall*. Then the court combines the tranches in weighted fashion to reach a blended rate for cramdown.

Bryson analyses the proposed rate using the *North Valley* approach, argues that 5% is therefore way too low and instead suggests the *North*

Valley approach would yield a blended rate of 10.5%. Unfortunately, no expert is retained on behalf of Bryson. Mr. Issa does not utilize *North Valley* but adopts instead a "modified market rate" approach. Mr. Issa acknowledges that "an efficient market for traditional debt" does not exist for the Chandler property because there is, at best $25,000 or so of value therein for the Bryson lien to attach to behind almost $700,000 of senior debt. Thus, this property is well over 100% LTV and effectively yielding almost no collateral value at all (maybe 4% in Mr. Issa's view) after costs of sale. Mr. Issa correctly observes that no lender would touch this on any basis and even under a *North Valley* approach nothing but the very highest tranche (the so-called equity investor tranche) exists to add to the blended rate on a partially secured basis. He does opine, however, that "an efficient market likely does exist…" for the Bryson position on the Adams Street property which he observes attaches to about $278,000 of value behind $825,828 of senior debt. He calls this a 75% LTV situation, but the court is somewhat confused unless what he means is this is only compared to what the court in *North Valley* called mezzanine debt, i.e. effectively hard money loans into heavily mortgaged situations with correspondingly higher rates based on increased risk. He does seem to acknowledge that in any event the analog for market analysis has to be on 100% LTV situations for the combined loan structure, but since Bryson is in junior most position, the only apt comparison *for her position* is to the riskier portion of the mezzanine tranche or even to the leveraged equity positions only. In other words, the comparison is not like in *North Valley* to blended rates where a single loan is broken into tranches and then re-blended, *but instead only to the riskiest junior positions*.

Mr. Issa opines the appropriate rate is 7.1% for the Boston area "for this product." He cites in a footnote to an article by Eisfeldt and Demers from the National Bureau of Economics Research dated December 2015. Well, maybe, but the court would be very surprised to see that the conditions regarding that investment data are in any way comparable to those present in this case. To be comparable, the investments would have to have been into

very highly leveraged situations, that is, where the "equity" investment is behind maybe 80% LTV of existing debt. The court does not doubt that some investors would venture into such situations but would be extremely surprised to see only a demand for 7.1% annualized return in comparable situations. Indeed, the court "googled" the Eisfeldt and Demers paper. It is 56 pages of somewhat dense and technical economic jargon. It looks to the court's reading that while at page 42 in a table there is reference to a 7.1% rate of return in the Boston area, insofar as the court can understand it, this represents an overall investment return rate into rental housing generally, not particularized so as to correspond to only highly leveraged investments such as pertains here. So, the court is left to doubt the "market rate" analysis at any level.

At pp. 8-9 of his report Mr. Issa does opine that an approach would be to blend a 3.22-3.95% rate pertaining to 75% LTV loans on investment properties generally with the 7.1%. But again, it is left very unclear that the 75% LTV rate is comparable to what we have in the case at bar. The comparison here is not to loans up to 75% of value, *but to hard money loans behind 75% existing debt* thus 100% LTV, a much riskier pool which assuredly commands a higher rate. So, the conclusion he reaches at page 9 of the report that on a blended basis the rate should be near 5% is very suspect. He does opine at pp. 10-11 that the court can reinforce the loan rate with a total debt to net income ratio in this case ($151,536 combined income to total debt as called for in the plan of $122,114) which he says is within the standard debt service coverage ratio of 1.22x, or within the "standard metric" of between 1.2 to 1.4% used in financing of income property [but see feasibility analysis infra]. But another unsupported assumption is utilized in attempting to reconcile the 7.1% equity investment rate and the 3.22-3.95% market rate for 75% LTV properties for a resulting average of about 5%; he simply averages the two rates together. (see footnote 11). He does not attempt to weight either result. No explanation is offered for this approach and, as the court observes, even the 7.1% rate is highly suspect since it is left

unclear that such a number corresponds to investments in income properties in the Boston area generally, or more usefully to a particularized rate of investments into highly leveraged properties only. In sum, the opinion does not persuade the court that 5% is anywhere near the appropriate rate to yield "present value" even before one considers any further boost required to deal with the fact that the loan in question is non-amortizing, interest only.

2. Feasibility

As Mr. Issa analyzed it, the income to debt ratio is 1.22x. But that assumption depends on getting a very low cramdown interest rate, such that the yearly debt service for the Bryson obligation is only $16,519. But if the cramdown rate is more like 10% or about $33,000 per annum the total debt service amounts to more like $140,595, or in ratio terms 1.07x. Granted, this is still within (barely) the stated expected net income of **$**151,536. But the proposal to not amortize the obligation at all creates a whole additional set of issues. If the obligation is fully amortized at 10% over 15 years, the payment jumps to $3550 monthly or $42,600 annually which bumps debt payments to almost exactly projected income. Who knows what markets will look like in 15 years, and no details are given that the court sees telling us just how debtor will be able to refinance the property when the balloon comes due? Also, debtor relies on various assumptions such as the bonus component of her income will remain steady at an average of $12,000 per annum, or that repairs, and maintenance of the properties will remain manageable within existing budget.

3. Conclusion

The plan is not "fair and equitable" as pertains to the objecting creditor, Bryson, in that the cramdown interest rate of 5% fails to account properly for all risks and thus does not yield present value of the secured claim. The plan cannot be confirmed as written for that reason. Also, debtor bears the burden on proving not only that issue but the related issue of feasibility. On

feasibility, if the interest rate is adjusted to give present value the resulting budget is extremely tight. The court is agnostic on the question of whether it is, nevertheless, sufficient since feasibility does not mean guaranteed performance, only more likely than not.

Deny. The court will hear argument as to where we should go from here.

Tentative for 5/27/20:

This is the hearing on confirmation of debtor's plan. It is opposed in objections filed by two creditors.

A. Bryson

The first objection comes from judgment creditor from Class 2E, Stephanie Bryson ("Bryson"). Bryson obtained a judgment against Debtor in the amount of $270,658.85. Bryson has liens on two properties located in Massachusetts, the Chandler property and the Adams property. The Chandler property was valued at $775,000 (though Bryson values it at $795,000). The Adams property was valued at $978,300 (Bryson values it at $1,240,000).

The plan proposes to pay off debt of $330,386.91 (as of 10/22/19) over a period of 180 months, with monthly "interest only" payments of $1,376.61, then a balloon payment of $330,386.91 at the end of the plan.

Bryson argues that the plan does not satisfy the best interest of creditors test. Bryson does not believe that the Debtor's liquidation analysis is accurate, due partly to the undervaluing of the encumbered properties. If Bryson's fair market valuations are used instead of Debtor's, then the result is a net positive instead of negative. Bryson concedes that after administrative

costs were factored in a chapter 7 liquidation there would still be nothing left for unsecured creditors, whereas the current plan provides for at least some recovery for unsecured creditors. Despite this fact, Bryson argues that the plan still cannot be considered fair and equitable.

Specifically, Bryson argues that the 5% interest rate contemplated in the plan is not adequate to account for the risks involved. Bryson is not a lender and her Massachusetts judgment accrues interest at 12% per year. Bryson asserts that she could foreclose on the Massachusetts properties, which would pay the judgment debt in full. Bryson asserts that the plan also has feasibility issues, and the interest rate must be adjusted to account for that risk.

Bryson asserts that the plan relies on rental income from two properties in Massachusetts. Any unplanned or prolonged vacancy throws the plan into doubt. Furthermore, Bryson asserts that Debtor's financial history suggests that her projected income is optimistic to say the least. The properties are also old and may need repairs over the life of the plan. Those repairs could come at significant cost, which again, would jeopardize the plan. The supplement to the Bryson opposition states that Debtor is including a $16,000 annual bonus from her employer, Clean Energy. However, it appears that the bonus will be in the form of stock, not cash. Thus, Bryson concludes that the plan is simply not feasible and should not be confirmed. Not raised by Bryson, but of concern to the court, is what happens at the end of 180 months on the balloon? One imagines that the debtor will either refinance or sell, but the prospect of so doing should at least be explained. Interest-only, non-amortizing lien treatments are inherently riskier than fully amortizing. This is because the creditor is never put in a position of comfort on its principal, but always hangs on the precipice. There may be a further complication here in that Massachusetts rate of interest on judgment liens is reported to be 12%, which means that the balance will actually increase over time, unless it is intended that the cramdown rate supplant the state judgment

rate. That point needs clarification and briefing.

This is not inherently unconfirmable, but the fundamental precept is that the risks imposed must be fully paid. In the court's view, 5% is too low to accomplish "present value" under §1129(b)(2)(A) considering this point and that Bryson appears to be in second position, with little or no cushion. See *In re North Valley Mall,* 432 B.R. 825 (Bankr. C.D. Cal. 2010). Debtor argues for the prime plus approach found in *Till* and argues that *North Valley Mall* is distinguishable. But her argument is not convincing. What is the principled difference between a judgment lien and a defaulted loan? They are both 'allowed secured claims' and that is what the Code requires be given present value if paid over time. Debtor confuses resort to market data to help analyze what is present value (an economic concept informed by data) with the fact that most data available happens to originate in the loan marketplace. That is because lenders consult varied data when deciding whether to extend credit, and many factors such as collateral value and creditworthiness go into the analysis. That is a process done before the fact. But that does not change the fact that both are secured claims being paid over time so their origin seems immaterial *after the fact* where the court in cramdown analysis is asked to make a determination of factors in situations where no real market exists. Even if the court could be persuaded that the *Till* approach (which was after all about a truck loan and seemingly even less relevant) were correct, a 1.75% adjustment is still way too low.

B. U.S. Bank National Association

The real property that is the subject of this Objection is located at 33 Chandler Street, Newton, MA 02458 (the "Property"). Creditor holds a security interest in the Property as evidenced by a Note and Mortgage executed by the Debtor. Said Note and Mortgage are attached to Creditor's proof of claim (the "Proof of Claim") which was filed in the instant case as Claim No. 5-1.

The Proof of Claim provides for a secured claim in the amount of $590,127.29. This amount has increased since the petition date as interest has accrued and Creditor has made post-petition escrow advances to protect its interest in the Property. The current payoff balance for Creditor's claim through June 10, 2020 is $617,465.04. Creditor's claim is treated in the Plan under Class "2B." The Plan provides that the Debtor will pay Creditor's claim the amount of $590,127.29, over 360 months (30 years) at 4.625% interest, with equal monthly payments of $3,034.08.

The Plan fails to provide for maintenance of property insurance and timely payment of property taxes. The Plan should specify whether Debtors intend to maintain property insurance and tax payments directly or through establishment of an escrow account with Creditor. Creditor has advanced approximately $7,597.52 for post-petition property taxes on account of the Property. The Plan does not provide for reimbursing Creditor for such advances which were made post-petition for the benefit of the estate. Such advances qualify as administrative expenses and must be cured on or before the effective date of the plan.

The Plan indicates that the value of the Property is $775,000.00. The current payoff balance for Creditor's claim through June 10, 2020 is $617,465.04. The plan provides for a total secured claim in the reduced amount of $590,127.29. As the plan fails to provide for the full amount of Creditor's secured claim, Debtor's Plan cannot be confirmed as is, and the portion that is payable as an administrative claim must be dealt with.

C. Conclusion

The objections raise some good points regarding feasibility. According to Bryson, Debtor's own financial data demonstrate that she will not be able to

10:00 AM
CONT... Rosemaria Geraldine Altieri Chapter 11

make good on the plan payments. This plan appears to have a very (perhaps overly) optimistic outlook on Debtor's finances. Further, expenditures that may be necessary are not addressed at all, like insurance, maintenance, and the fact that there may be a $7597.52 administrative claim.

Debtor points out that Bryson has not provided any analysis as to what the appropriate interest rate would be. Debtor also points out that under the plan, unsecured creditors get at least some recovery, whereas in a liquidation, they would receive nothing. While, of course, the court wants unsecured creditors to get something, this does not substitute for the fact that it is debtor's burden to prove not only feasibility, but that cramdown treatment is providing the present value of the objecting secured claims and that this plan is better than liquidation. This has not been done. Furthermore, Debtor asserts that the First Amended Plan provides that all secured creditors encumbering the Rental Properties will receive deferred cash payments totaling the allowed amount of their claims while retaining their liens on the Rental Properties. But this assertion is devoid of analysis and, on a true present value basis, probably wrong. As Debtor's plan seems to be premised on everything going as planned over the 15 (or even thirty) years of this Chapter 11 plan, with little or no wiggle room, and while not even apparently dealing with all likely expenses, the court requires Debtor to answer Bryson's concerns about feasibility. Given the current economic climate, Debtor should account for the realistic probability of sustained occupancy in the rental properties as well as her own employment prospects.

No tentative. Continue for approximately 30 days to afford one final opportunity to fill in the gaps.

Please note: In light of concerns about COVID-19/Coronavirus and attempts to implement physical distancing, and pursuant to GO 20-02, telephonic appearances are mandatory on all matters. Telephonic appearances may be arranged with CourtCall by calling (866) 582-6878.

Please be advised that CourtCall has announced reduced fees for attorneys to use CourtCall and free access for parties who do not have an attorney – pro se or self-represented litigants through April 30, 2020.

The Parties are reminded to have all relevant filings/information easily accessible during the hearing.

Tentative for 4/8/20:

The purpose of a disclosure statement is "to give all creditors a source of information which allows them to make an informed choice regarding the approval or rejection of a plan." Duff v. U.S. Trustee (In re California Fidelity, Inc.), 198 B.R. 567, 571 (9th Cir. BAP 1996). "Adequate information" is defined under 11 U.S.C. Sec. 1125(a)(1) as "information of a kind, and in sufficient detail, as far 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 reasonable investor typical of holders of claims or interest of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan."

Bryson's objections notwithstanding (though feasibility seems questionable), the DS appears to provide adequate information. It is also worth noting that the DS has not drawn any other opposition. The plan may ultimately not be confirmable if feasibility proves too speculative, as it very well might be given the current economic climate, or if cramdown is attempted and the value of the rental properties is too low as Bryson has alleged, suggesting that creditors will do better in a liquidation (the so-called best interest of creditors test). Debtor will have the burden on these issues in order to achieve confirmation, but at this stage, the DS does not appear deficient from an i*nformation* standpoint, especially with the detailed risk factors analysis.

Grant. Set confirmation date and deadlines.

Appearance is optional.

10:00 AM

CONT... Rosemaria Geraldine Altieri **Chapter 11**

Please note: In light of concerns about COVID-19/Coronavirus and attempts to implement physical distancing, and pursuant to GO 20-02, telephonic appearances are mandatory on all matters. Telephonic appearances may be arranged with CourtCall by calling (866) 582-6878.

Please be advised that CourtCall has announced reduced fees for attorneys to use CourtCall and free access for parties who do not have an attorney – pro se or self-represented litigants through April 30, 2020.

The Parties are reminded to have all relevant filings/information easily accessible during the hearing.

Party Information

Debtor(s):

Rosemaria Geraldine Altieri — Represented By
Misty A Perry Isaacson

10:00 AM
8:20-10958 Bradley Ray Fox **Chapter 11**

#6.00 Motion For Order: (1) Authorizing Sale Of Real Property, Free And Clear Of Liens Pursuant To 11 U.S.C. §363(b) and (f); And (2) Approving Overbid Procedure
[2545 Iris Way, Laguna Beach, California]

Docket 75

Tentative Ruling:

Tentative for 12/9/20:
This is a motion to sell real property free of liens, with liens attaching to proceeds under §363(f). The motion is opposed by several creditors, but some of those objections seem to have been resolved. The Bank's conditional opposition is resolved if its lien gets paid from escrow, which appears to be acceptable to debtor. The objection of Jennifer Fox French who holds a domestic claim is resolved by depositing the net proceeds in an account along with the claimed homestead pending further order. The objections of Scullion and Aguirre, who are general unsecured creditors, is easily disposed of. The price obtained is reportedly the best available under the circumstances and no real reason to disagree papers in the papers. Reportedly, debtor is unable to further service the mortgage debt so the possibility of relief of stay and foreclosure looms, wiping out the recovery of all creditors. Besides, if the property is being sold under market the objectors could make their own offer.

Grant.

Party Information

Debtor(s):

Bradley Ray Fox — Represented By
Michael G Spector
Vicki L Schennum

10:00 AM

8:20-12963 **World of Dance Tour Inc.** **Chapter 11**

#7.00 STATUS CONFERENCE RE: Chapter 11 Subchapter V Voluntary Petition Non-Individual.

Docket 1

Tentative Ruling:

Tentative for 12/9/20:
See #8

Party Information

Debtor(s):

World of Dance Tour Inc. — Represented By
Fred Neufeld

Trustee(s):

Mark M Sharf (TR) — Pro Se

10:00 AM
8:20-12963 World of Dance Tour Inc. **Chapter 11**

#8.00 Motion To Dismiss Bankruptcy Case Pursuant to 11 U.S.C. 1112(b)

Docket 35

Tentative Ruling:

Tentative for 12/9/20:

This motion to dismiss is brought by creditors Al Hassas and Sweet Lemons, LLC ("Movants") as a bad faith filing pursuant to 11 U.S.C. § 1112(b). Debtor opposes the motion.

1. Background

The relationship between the Movants and the Debtor goes back to February 4, 2015, at which time the Debtor engaged the Movants as consultants, on a non-exclusive basis, to generate, negotiate and/or manage various business opportunities for Debtor in connection with Debtor's "World of Dance" Brand. Jonelis Decl., ¶2, Ex. A. In exchange and in consideration for the Movants rendering of consultant services, the Debtor agreed, along with other consideration including an Executive Producer Credit on the show, to pay the Movants a pre-determined percentage of all gross monies and other consideration ("GMOC") received by Debtor in connection with the various business opportunities that arose out of or related to the Movants' services (the "Projects") and afford the Movants the option to purchase certain shares of Debtor's voting common stock at an exercise price of One Dollar Fifty Cents ($1.50) per share pursuant to a mutually agreed vesting schedule as set forth in the Agreement. *Id*. With respect to any Projects concerning Debtor's production of domestic or international television programs featuring the "World of Dance" Brand, Debtor agreed to pay the Movants forty percent (40%) of the GMOC received by Debtor in connection therewith.

During the Movants' consultant services, the Debtor reportedly established a successful and highly profitable business relationship between

with Universal Television, LLC, which resulted in Debtor's production of the NBC television program World of Dance (the "WOD TV Show"). Jonelis Decl., ¶3. From April 2016 until April 2017, the Debtor paid the Movants 40% of the GMOC received by the Debtor in connection with WOD TV Show without objection. Jonelis Decl., ¶4. However, in April 2017, despite allegedly having continued to receive substantial GMOC from Universal in connection with the WOD TV Show, and despite allegedly having previously paid the Movants 40% of its GMOC from the Show, according to Movants Debtor suddenly and unexpectedly refused to pay the Movants any further monies. *Id*. Litigation in state court followed.

Movants provide a lengthy recitation of the procedural history of the contentious litigation, the settlement, Debtor's breach of that settlement, efforts to recuse various judicial officers and finally, for our purposes, the large arbitration award in favor of Movants in the approximate amount of $715,000. On the eve of the expected hearing in state court on the arbitration award confirmation, Debtor filed the petition initiating this bankruptcy proceeding.

2. Was Debtor's Filing Made in Bad Faith?

Bad faith filing of a Chapter 11 Petition is cause for dismissal. *Marsch v. Marsch (In re Marsch),* 36 F.3d 825, 828, 829 (9th Cir. 1994). In *Marsch*, the court noted that "although section 1112(b) does not explicitly require that the cases be filed in good faith, courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 Petition establishes cause for dismissal." *Marsch* 36 F.3d at 828. "The test is whether a debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy efficient reorganization on a feasible basis". Marsch, 36 F.3d at 828-829, citing *In re Arnold*, 806 F.2d, 937, 939 (9th Cir. 1986).

When the verbiage is stripped to its essence, what this case essentially comes down to is Debtor's claim that, due to massive financial losses suffered as a result of the pandemic, it simply cannot afford to pay the arbitration award or post an appeal bond, at least not in lump sum. Therefore,

Debtor argues, it (and creditors) would benefit from reorganizing, which is a proper purpose under Chapter 11. Movants believe, based on Debtor's alleged conduct in prior proceedings, that Debtor is simply engaging in more obstructive gamesmanship and attempting to hinder the confirmation of the award or possibly trying to avoid paying it at all. Movants allege that Debtor has dramatically undervalued or failed to disclose property of the estate. For example, Movants assert that Debtor has intellectual property of considerable value but failed to attribute much or any value to it. Finally, Movants note that, except for the arbitration award, Debtor has few if any other creditors, which Movants argue, leads to the inescapable conclusion that when all of Debtor's sources of revenue are disclosed and properly valued, Debtor will be solvent, and thus will have no valid bankruptcy purpose in this Subchapter V.

But Movants' analysis is grossly simplistic. Even if the court could indulge the speculation that certain assets allegedly comprised of expected revenue streams were as valuable as Movants allege (and Debtor denies), no one seriously alleges these assets could be instantly monetized enough to pay the arbitration award. Rather, Debtor plausibly argues that it will need time through reorganization to preserve those streams of income and/or to undertake rehabilitative efforts to restore the business longer term.

Although Movants create a picture of bad faith on Debtor's part based on past conduct up to and possibly including this bankruptcy proceeding, it is likely too early to dismiss this case as a bad faith filing simply because we do not have enough information upon which to decide. The court is sympathetic to Movants' frustration. There may be a better and more efficient alternative available. According to the docket, Movants have not yet moved for relief from the automatic stay as this case was only filed a little more than a month ago. A motion for relief from the automatic stay, if granted, would allow Movants to confirm the arbitration award in state court (but not to undertake levies), which should not take long as the state court was reportedly on the cusp of doing so anyway. Allowance of a disputed claim will be an indispensable step in any event. This court has absolutely no inclination to second guess the efforts of the Superior Court in that matter, and abstention to allow liquidation of the claim (but not levies) would almost certainly be granted.

10:00 AM

CONT... **World of Dance Tour Inc.** **Chapter 11**

Additionally, a Subchapter V case is not exactly a picnic. It is by design on an expedited timetable. A plan and possibly a disclosure will be required in very short order. Moreover, the Debtor has the appointed Trustee to contend with who will need to be, at least on a preliminary basis, convinced of a reasonable best effort in a proposed plan, especially if, as appears this case may require an attempted cramdown of 90% of the allowed debt. The Debtor can see what is ahead and should not expect extensions absent demonstrated ability to put something meaningful together in short order. If that cannot be done, then another motion to dismiss or convert will be entertained.

Deny

Party Information

Debtor(s):

World of Dance Tour Inc. — Represented By Fred Neufeld

Trustee(s):

Mark M Sharf (TR) — Pro Se

11:00 AM

8:15-13008 Anna's Linens, Inc. **Chapter 7**

#9.00 Final Hearing Re: Motion to Approve Compromise By and Between the Chapter 7 Trustee, On the One Hand, and Linda Martz-Gomez, On Her Own Behalf and On Behalf of Others Similarly Situated, On the Other, As to the Claims Asserted Against the Estate in Class Action Adversary Proceeding No. 8:15-ap-01293-TA, Pursuant to F.R.B.P. 9019 and 7023
(cont'd from 10-13-20)

Docket 2809

Tentative Ruling:

Tentative for 12/9/20:
It appears that there are no continuing objections and that no class member has opted out or opposed the settlement. If that is correct, approve.

Tentative for 10/13/20:

This is a motion to approve compromise by and between the chapter 7 trustee, Karen Sue Naylor ("Trustee") on the one hand, and Linda Martz-Gomez ("Plaintiff"), on her own behalf and on behalf of others similarly situated, on the other, as to the claims asserted against the estate in class action adversary proceeding no. 8:15-ap-01293-TA, Pursuant to F.R.B.P. 9019 and 7023. The motion is joined by the Plaintiff. The motion is opposed by Anna's Linens, Inc.'s ("Debtor's") former President and CEO, Scott Gladstone ("Gladstone").

1. Background

The Debtor filed a voluntary Chapter 11 on June 14, 2015 (the "Petition Date"). An Order Converting Case to Chapter 7 was entered on

March 30, 2016 (the "Conversion Order") [Dkt. No. 1455]. Trustee was appointed on March 31, 2016 [Dkt. No. 1458]. Debtor was a specialty retailer offering home textiles, furnishings, and décor through a chain of 261 company owned retail stores throughout 19 states in the United States, including Puerto Rico and Washington, D.C. It was headquartered in Costa Mesa, California, and employed a workforce of over 2,500. As of the Petition Date, the Debtor remained in operation but immediately thereafter requested that the Court authorize the commencement of asset sales and store closures, which were intended to complete liquidation of the Debtor's operating assets in short order. Various employees were terminated on about June 19, 2015, without the distribution of notices allegedly required under either the WARN Act or CAL-WARN Act.

A. The WARN Act Adversary Proceeding.

Certain employees of the Debtor contend that the Debtor's post-petition termination of their employment was in violation of the WARN Act or CAL-WARN Act, and on July 1, 2015 filed their Class Action Adversary Proceeding Complaint [Violation of Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 – 2019 and California Labor Code §§ 1400 et seq.] (the "Adversary Complaint"), commencing the Adversary Proceeding [Adv. Dkt. 1]. Linda Martz-Gomez, a district manager employed by the Debtor in Texas, filed the Adversary Complaint in her capacity as Class Representative.

By the Adversary Complaint, the Class Representative sought damages, on an allowed first priority administrative claim basis pursuant to 11 U.S.C. § 503(b)(1)(A), in an amount "equal to the sum of: unpaid wages, salary, commissions, bonuses, accrued holiday pay, accrued vacation pay pension and 401(k) contributions and other ERISA benefits, for 60 days, that

would have been covered and paid under the then applicable employee benefit plans had that coverage continued for that period", or alternatively, for a determination that "the first $12,475 of the "WARN Act claims of Plaintiff and each of the similarly situated former employees were entitled to priority status under 11 U.S.C. § 507(a)(4) and (5)", with the remainder allowed as a general unsecured claim. [Adversary Complaint, Adv. Dkt. 1].

On August 24, 2015, the Debtor filed its Answer to Class Action Adversary Proceeding Complaint [Violation of Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101– 2019 and California Labor Code §§ 1400 et seq.] [Adv. Dkt. 12], admitting that the Class Representative and certain other employees were discharged on or about June 19, 2015 without any WARN Act notifications, but otherwise generally denying the allegations of the Adversary Complaint and asserting affirmative defenses based upon certain exceptions (liquidating fiduciary, unforeseen business circumstances, and faltering company) to the provisions of the WARN statutes.

On December 18, 2015, the Class Representative filed her Motion for Class Certification and Related Relief [Adv. Dkt. 19]. The Debtor opposed class certification, filing its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Class Certification and Related Relief [Adv. Dkt. 25], with the Class Representative thereafter filing her Reply in Support of Motion for Class Certification and Related Relief [Adv. Dkt. 27]. At a hearing held on February 25, 2016, the court granted the Motion for Class Certification, with an order as to same entered on March 14, 2016 (the "Class Certification Order") [Adv. Dkt. 34]. The Class Certification Order appoints the Class Representative and appoints the firm of Outten & Golden LLP as Class Counsel. The Class Certification Order further (a) approved a proposed form of notice to the Class, (b) instructed the Debtor to provide Class Counsel with

the names and addresses of Class members, (c) directed Class Counsel to serve the approved form of notice on the Class and thereafter file a sworn statement affirming compliance with such directive, (d) established the deadline for any Class member to opt-out of the Class and directed Class Counsel to thereafter file a sworn statement listing the names of any persons who have opted out of the Class, and (e) found that the notice requirements established were the "best notice practicable under the circumstances and constitute[d] due and sufficient notice to all class members in full compliance with the notice requirements of Fed. R. Civ. P. 23."

On March 30, 2016, the Conversion Order was entered and on April 27, 2016 the Class Representative served her first round of formal discovery on the Trustee. Thereafter the Parties entered into a series of stipulations to modify adversary case scheduling orders regarding discovery deadlines and related pleadings. The Parties have reportedly been engaged in good faith, arms-length settlement discussions since 2018, including the informal exchange of damage calculations and relevant documents and information.

On or about January 1, 2020, two of the attorneys at Class Counsel formed a new firm, Raisner Roupinian LLP, and, with the consent of Class Counsel and the Class Representative, the representation of the Class Representative and the Class was transferred to the new firm. As such, when the term Class Counsel is used hereinafter and in the Proposed Settlement Agreement, the reference is to the Raisner Roupinian firm.

B. Current Status of the Estate.

As of this date, the assets of the Estate consist of, among other things, cash in the approximate amount of $7,328,865.01. Of this amount, $700,000

has been earmarked for the benefit of specific classes of creditors per orders of the court entered pre-conversion. As set forth in the Declaration of Chapter 7 Trustee, Karen Sue Naylor, in Support of Interim Fee Applications, General Case Status [Dkt. No. 2791], filed with the Court on June 9, 2020:

> "As of the date hereof, multiple adversary proceedings remain pending. One, referred to in the R&S Application as the "Warn Act Adversary", involves the claims of the Debtor's former employees for alleged post-petition violations of the Federal and California WARN Act statutes, and seeks multiple seven-figures in damages. With the assistance of my special litigation counsel in that matter, settlement discussions are progressing, and I hope to have this matter, which will result in a Chapter 11 administrative claim against the Estate, resolved this year. Until this adversary is resolved and the Chapter 11 administrative claim determined/allowed, Trustee is unable to create a claims waterfall analysis demonstrating likely distributions to Chapter 11 administrative creditors or seek an order of the Court authorizing interim distributions to Chapter 11 administrative creditors."

Four preference recovery adversary proceedings are pending against officers of the Debtor who took withdrawals from the Debtor's Deferred Compensation Plan. By these adversary proceedings, Trustee is seeking to recover approximately $1,200,000. As set forth in the R&S Application, these adversary proceedings are being vigorously defended by the defendants, with the Debtor's D&O carrier reimbursing the defendants their costs of defense. Don Fife is Trustee's expert witness in these adversary proceedings. His expert report was transmitted to the defendants on June 5, 2020, a discovery cut-off date of August 28, 2020 is pending, and the matters are scheduled for pre-trial conference on October 29, 2020.

Lastly, an adversary action was commenced against Gladstone seeking to recover damages for his alleged negligence in failing to direct the Debtor to abide by the Federal and California WARN Act statutes when he ordered postpetition layoffs. This alleged failure resulted in the commencement of the WARN Act Adversary referenced above. The adversary against Mr. Gladstone is presently being held in abeyance until the WARN Act Adversary is resolved, as such resolution will establish the Estate's alleged damages.

This Motion relates to the "WARN Act Adversary" and, if approved by the Court, will fix the Estate's damages against Gladstone, the Debtor's former president, and his alleged negligence in failing to direct the Debtor to abide by the Federal and California WARN Act statutes when he ordered post-petition layoffs, as asserted in *Naylor v. Scott Gladstone, et al*., 8:17-ap-01105 TA.

2. The Settlement Agreement

As described by Trustee, the salient terms of the proposed Settlement Agreement are as follows:

(1) The Class, as defined in the order granting class certification that was entered on March 14, 2016, is comprised of: the Class Representative and all other similarly situated former employees who worked at or reported to the facility located at 3550 Hyland Avenue, Costa Mesa, California who were terminated without cause on or about June 19, 2015, within 30 days of June 19, 2015, or in anticipation of, or as the foreseeable consequence of, the mass layoff or plant closing ordered by Defendants on or about June 19, 2015, who are affected employees, within the meaning of 29 U.S.C. §

2101(a)(5), and who have not filed a timely request to opt-out of the class. The members of the Class (the "Class Members") are listed on Exhibit A to the Proposed Settlement Agreement;

(2) The Class shall be allowed a Chapter 11 administrative claim, pursuant to 11 U.S.C. § 503(b)(1)(A) (the "Settlement Class Claim"), in the amount of $1,200,000.00 (the "Proposed Settlement Payment");

(3) The Trustee makes no representations or warranties regarding the ultimate distribution to be received by the Class on account of the Settlement Class Claim and/or the Settlement Payment through the Trustee Final Report ("TFR") process, however the Trustee may seek Court approval to make an interim distribution to all holders of allowed Chapter 11 administrative claims following final court approval of the Proposed Settlement;

(4) The Proposed Settlement Payment shall be used to satisfy any and all obligations of the Estate to the Class, including but not limited to the obligation to pay the Class Representative Service Payment, Class Counsel's Fees, Class Counsel's Expenses, Settlement Administration Costs, and all payroll taxes including the Debtor's or the Estate's portion of the payroll taxes, as defined in Paragraph 6(a) of the Proposed Settlement Agreement;

(5) In exchange for the allowance of the Settlement Class Claim, and any distributions from the Estate on account of such allowed claim, the Class Representative and Class Members shall fully and completely release the Trustee, the Estate and the Debtor for any and all claims arising out of the alleged WARN Act and CAL-WARN Act violations as alleged in the Adversary

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Proceeding, including waivers of known and unknown claims pursuant to California Civil Code Section 15425;

(6) The Proposed Settlement Agreement establishes the specific obligations of Class Counsel and the Settlement Administrator in administering the Proposed Settlement Payment, and the mechanism for seeking court approval of the Proposed Settlement, including notices to the Class, objections to the settlement procedures by Class Members, and the treatment of any residual Proposed Settlement Payment funds. In particular, Class Counsel shall be responsible for the production and mailing of all notices required to be provided to the Class Members ("Class Notices"). The address of Class Counsel will be used as the return address for the Class Notices and Class Counsel will respond to all inquiries of the Class arising from or related to the Proposed Settlement. Subject to the Trustee’s review and approval, Class Counsel shall be responsible for calculating the allocation of each Class Member’s net share of the Proposed Settlement Payment. In addition, certain Class Members have filed formal proofs of claim ("POCs") against the Estate, some of which include claims for WARN Act violations. The Trustee will provide Class Counsel with all such POCs. Class Counsel will review such POCs and provide the Trustee with a schedule setting forth the portion of each claim appropriately attributable to the Allowed Class Claim. With the information provided by Class Counsel, the Trustee will file, as appropriate, objections to such POCs to reduce the claims by the amounts identified by Class Counsel. Class Counsel and the affected Class Members agree not to oppose the reduction of their respective POCs consistent with the information provided by Class Counsel. The Trustee is not precluded from including in any such objections additional objections to other aspects of the POCs not related to the WARN Act violation claims compromised by the terms of the Proposed Settlement Agreement;

(7) Allocation of the Settlement Payment and Disbursement of the Net Settlement Amount to Class Members. The "Net Settlement Fund" is the Proposed Settlement Payment less the Class Representative Service Payment, Class Counsel's Fees, Class Counsel's Expenses, Settlement Administration Costs, and the Debtor's or the Estate's share of payroll taxes. "Settlement Administration Costs" means the fees and expenses reasonably and necessarily incurred by the Settlement Administrator as a result of administering the Proposed Settlement, as approved by the Court, including but not limited to: all costs and fees associated with preparing, issuing, and mailing any and all notices and other correspondence to Class Members; all costs and fees associated with mailing the Class Members' pro rata shares and all other payments required by the Proposed Settlement; all costs and fees associated with preparing any other notices, reports, or filings to be prepared in the course of administering the Proposed Settlement; and any other costs and fees incurred or charged by the Settlement Administrator in connection with the execution of its duties under the Proposed Settlement, including without limitation printing, distributing, and tracking documents for the Proposed Settlement, tax reporting, submitting payroll taxes on behalf of the Debtor or the Estate from the Settlement Payment, and providing necessary reports and declarations at the Parties' request. Class Counsel has retained the services of American Legal Claim Services, LLC as the Settlement Administrator, and the Trustee, on behalf of the Estate, agrees not to oppose Settlement Administration Costs not to exceed $7,000;

(8) Class Counsel's Fees and Class Counsel's Expenses. The Trustee, on behalf of the Estate, agrees not to oppose an application or motion by Raisner Roupinian LLP for an award of their attorneys' fees ("Class Counsel's Fees") in the amount of up to one-third (1/3) of the Settlement Payment, net of (a) litigation expenses (including costs associated with the production and mailing of the notice of settlement and the cost of the settlement administrator) not to exceed $10,000 ("Class Counsel's Expenses"), and (b)

the Class Representative Service Payment (defined below). Class Counsel's Fees and Class Counsel's Expenses will be paid to Class Counsel (according to instructions to be supplied by Class Counsel) contemporaneously with the distribution of proceeds from the Settlement Class Claim to Class Members and shall be payment in full for Class Counsel's work and expenses in connection with the Adversary Proceeding or the Allowed Class Claim. For the avoidance of doubt, the Parties agree that Class Counsel's Fees and Class Counsel's Expenses shall be payable solely from the Proposed Settlement Payment and from no other source;

(9) Service Payments to the Class Representative. The Trustee, on behalf of the Estate, agrees not to oppose a one-time payment of Ten Thousand Dollars ($10,000) to Class Representative Linda Martz-Gomez as compensation for her service in this matter and in exchange for a general release of all known and unknown claims ("Class Representative Service Payment"). The Settlement Administrator shall distribute this payment to the Class Representative in addition to her pro rata share of the Net Settlement Payment, and Class Counsel's Fees shall not be deducted from the Class Representative Service Payment. For the avoidance of doubt, the Parties agree that the Class Representative Service Payment shall be payable solely from the Proposed Settlement Payment and from no other source. The Class Representative Service Payment shall be characterized as non-employee compensation to the Class Representative and shall be reported to any applicable taxing authorities on behalf of the Class Representative on a Form 1099 issued to the Class Representative with her taxpayer identification number;

(10) Disbursement of Settlement Fund Payments. Class Counsel, through the services of the Settlement Administrator, shall be responsible for the preparation and mailing of the individual settlement checks to Class

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Members, withholding and paying all applicable taxes (both Class Member and on behalf of the Debtor and/or the Estate), remitting Class Counsel's Fees and Expenses, preparing all tax forms required in connection with the Proposed Settlement in accordance herewith and with any other orders of the Court, and shall bear the expense for the preparation and mailing of such settlement checks and tax forms. Payroll withholding shall include all applicable federal and local income taxes, and statutory taxes including, without limitation, Federal Insurance Contribution Act ("FICA") and federal and state unemployment insurance ("UI") amounts associated with the distributions to Class Members receiving payments under the Proposed Settlement Agreement (collectively, "Payroll Taxes"). The Settlement Administrator shall determine the amount of any Payroll Taxes that will become due and owing and shall withhold such amounts. All such Payroll Taxes shall be paid promptly to the appropriate taxing authorities. The Settlement Administrator shall determine the employer's share of all FICA and UI amounts which shall be deducted from the Proposed Settlement Payment and shall pay the employees' share of such taxes by deducting such amounts from the Class Members' pro rata shares of the Proposed Settlement Payment. The Settlement Administrator shall be responsible for fulfilling reporting requirements, including federal and state payroll tax returns, the issuance of Forms W-2 and other required federal and state tax forms, and related matters. For the purpose of calculating applicable taxes, the Parties agree that eighty percent (80%) of the amounts actually paid to the Class Members after deducting Class Counsel's Fees and Expenses, including the cost of the Settlement Administrator, and the Class Representative's Service Payment, but before deducting employee taxes, shall constitute wages reportable on Internal Revenue Service Form W-2, and twenty percent (20%) shall constitute health insurance payment amounts not subject to backup withholding or employment taxes to the extent consistent with Internal Revenue Code Regulations;

(11) The Trustee agrees to file a motion under Fed. R. Bankr. P. 9019 and 7023 for approval of the Proposed Settlement through a bifurcated hearing process, whereby an initial hearing will be held at which time the Parties shall seek entry of an order of the Court preliminarily approving the Proposed Settlement and approving the form and manner of notice to the Class Members of the Proposed Settlement, including, among other things, their right to object to the Proposed Settlement in person or to appear by counsel. The Parties shall also request a date for a fairness hearing ("Fairness Hearing"). At the Fairness Hearing, the Parties shall request that the Bankruptcy Court shall consider final approval of the Proposed Settlement. The Proposed Settlement is subject to entry of a final order by the court, after notice and hearing to creditors and parties in interest, in accordance with applicable law and local rules (the "Settlement Order"). The Settlement Order shall be deemed final when fourteen (14) days have elapsed from the entry of the Settlement Order, with no notice of appeal filed, or after the Settlement Order is finally affirmed on appeal, whichever first occurs; and,

(12) Upon entry of a final non-appeal order approving the Proposed Settlement, the Adversary Proceeding shall be dismissed, with prejudice, by stipulation of the Parties. Attached hereto as Exhibit "2" is the proposed form of notice to Class Members of the Proposed Settlement, the Fairness Hearing, and their right to object to the Proposed Settlement (the "Notice"). The Parties submit that the Notice comports with the requirements of FRBP 7023(e) and provides fair and reasonable notice to the Class Members of the Proposed Settlement and the right of any Class Members to request exclusion from the Class pursuant to section (e)(5).

3. The *A&C Properties* Factors

A bankruptcy court may approve a compromise or settlement on

motion by the trustee after notice and a hearing. Fed. R. Bankr. P. 9019(a). A bankruptcy court should affirm a compromise agreement if it was negotiated in good faith and it is fair and equitable. *Martin v. Kane (In re A & C Properties*), 784 F.2d 1377, 1381 (9th Cir. 1986). In determining the fairness, reasonableness, and adequacy of a proposed settlement agreement, the court must consider:

1. The probability of success in the litigation;

2. The difficulties, if any, to be encountered in the matter of collection;

3. The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views in the premises. *Id*.

The court does not need to conduct an exhaustive investigation into the validity of the asserted claim. *U.S. v. Alaska Nat'l Bank of the North (Matter of Walsh Const., Inc.),* 669 F.2d 1325, 1328 (9th Cir. 1982). It is sufficient that the court determines that the claim has a substantial foundation and is not clearly invalid as a matter of law, or that the outcome of the claim's litigation is doubtful. *Id*. The court must determine whether the compromise is in the best interest of the bankruptcy estate. *A & C Properties*, 784 F.2d at 1382. These factors are separately analyzed below:

a. Probability of Success in Litigation

Trustee argues that it is unclear whether the Class Representative will ultimately succeed in establishing the claims of the Class against the Estate. While the Trustee, based upon the advice of her special litigation counsel, believes that the Estate may have defenses to the claims asserted under the WARN Act, it is less clear that such defenses will be effective against the claims asserted under the CAL-WARN Act. Trustee contends that the

terminations were caused by a sudden and dramatic event outside of Debtor's control and that, at the time WARN notice was due, it was actively seeking capital or financing that would have allowed it to avoid the terminations. (Adv. Dkt. 12 at 11). Plaintiff contends that the terminations were foreseeable more than 60 days prior to June 19, 2015, and that the events that led to the terminations were not only foreseeable, but inevitable. Plaintiff also contends that the unforeseeable business circumstances exception does not apply under the CAL-WARN Act, that the Trustee is foreclosed from asserting the faltering company exception under the CAL-WARN Act because no determination from the Department of Industrial Relations (DIR) was requested at the time of the layoffs, and that none of the federal WARN Act statutory exceptions are applicable because, among other things, no written notice was provided to the Class Members.

Gladstone argues that Trustee has a high likelihood of success defending against the Plaintiff's federal WARN Act claims but only possibly (not necessarily likely) a lower likelihood of success in defending against Plaintiff's CAL-WARN Act claims. Gladstone argues that at the very least, a Settlement Payment of $1.2 million is unjustifiably high. Gladstone argues that the Trustee obtained no or little discount on the WARN Act claims even though the Trustee is settling at a very early stage of the lawsuit, without requiring the WARN Act Plaintiffs to conduct any discovery and without causing the Plaintiff's and their counsel to incur any cost or fees in prosecution of their claims. Furthermore, Gladstone argues that there is nothing complicated about the WARN Act claims alleged by Plaintiffs or the Estate's defenses thereto. According to Gladstone, certain of the Estate's defenses, such as the "faltering company" exception raise issues of law that can easily be adjudicated through a pre-trial and dispositive motion, thus potentially avoiding the need to conduct lengthy or costly discovery.

Plaintiff argues that the settlement figure is not unreasonable and Class Counsel initially calculated the Class' maximum WARN damages of 60 days' wages and benefits at $1.9 million for the smaller class of 111 class members, exclusive of reimbursable medical expenses compensable under California Labor Code 1402(a)(2), the employer's payroll obligations, the cost of providing notice to the class, and the cost of administering the settlement. The proposed settlement amount, allegedly, represents an approximately 60% recovery of the fuller Class' maximum WARN damages again, exclusive of reimbursable medical expenses compensable under California Labor Code 1402(a)(2), the employer's payroll obligations, the cost of providing notice to the class, and the cost of administering the settlement. Plaintiff asserts that should the proposed settlement not be approved, and the Class were to prevail on the merits, Class Counsel would seek its attorneys' fees, pursuant to 29 U.S.C. § 2104(a)(6). Under those circumstances, Class Counsel estimates the exposure to the estate could easily exceed $3 million. (Roupinian Decl., ¶ 19).

There seems to be general agreement that Trustee's likelihood of successfully defending against the federal WARN Act claims is higher than on the CAL-WARN Act claims. But even a high likelihood of success does not equate to certainty, whereas a settlement does. To that end, Trustee points out that the "faltering company" defense may not find purchase here because, she argues, under 29 U.S.C. sec. 2102(b)(1) and Cal. Lab. Code sec. 1402.5(d), the exception applies to single site plant closures, not mass layoffs as occurred in this case. In any event, litigation, regardless of how strong a defense may seem, is likely to be expensive and laborious. Also, Plaintiff points out, if the settlement is not approved, the estate is potentially exposed to more than twice the amount of the settlement. Trustee notes that, Gladstone aside, no other interested party, creditor or otherwise, has opposed this settlement. Trustee posits that Gladstone's true motive in opposing this motion is that he seeks to avoid or at least limit the Estate's

claims against him for his alleged negligence as CEO and Chairman of the Board of the Debtor in failing to ensure that the applicable WARN statute(s) was/were complied with when he ordered the June 2015 post-petition mass layoff of the Debtor's employees. Furthermore, Gladstone's assertion that the issues are not complicated itself seems overly simplistic as it is unknown what evidence might be discovered and how the potential litigation would shake out, especially given the partial description of Plaintiff's litigation strategy.

b. Difficulty in Collection

By mutual agreement this factor does not apply.

c. The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it

As noted above, Gladstone asserts that the litigation ought to be straightforward and the issues are not complex. In fact, Gladstone asserts that many of the issues raised can be dispensed with through dispositive and pre-trial motions. Unsurprisingly, Plaintiff and Trustee assume the opposite position. For example, Plaintiff asserts that the allegations and the Debtor's defenses to the claims under the WARN Acts are fact intensive and require discovery. Discovery regarding the Debtor's financial affairs leading up to the terminations would also be fact intensive and lengthy, significantly reducing the funds ultimately available for creditors. Plaintiff also points out that it is likely that, regardless of the outcome of a trial, there would be an appeal, resulting in further lengthy delays. Trustee also points to her own diligence in retaining special counsel to litigate the WARN Act claims, whose efforts of over more than year enabled targeted and productive settlement discussions, which result in the proposed Settlement Agreement. Trustee has also taken steps to liquidate certain estate assets, which resulted in greater recoveries

for Chapter 11 administrative claims, which claims total in excess of $5,400,000 before consideration of the Proposed Settlement. Thus, Trustee argues, her diligence in this matter undercut the suggestion that she is merely feigning concern over delays in the WARN Act litigation. Trustee and Plaintiff have persuasively argued that the issues involved could potentially become quite complex given the fact intensive nature of the allegations. This factor tilts in favor of granting the motion. But the biggest issue the court sees is part of this *A&C Properties* factor, *i.e.* ongoing expense from diminishing resources. The court will call it the "melting ice cube" factor. Consider the Trustee's report on the estate's current financial condition:

> "At present I hold cash in the approximate amount of $7,328,572.67. Of that amount, $700,000 has been earmarked for the benefit of specific classes of creditors as per orders of the Court entered pre-conversion. At present, allowed and unpaid Chapter 11 administrative claims (Section 503(b)(9) claims, landlords, miscellaneous chapter 11 unpaid vendor claims and the claims of employed professionals) are approximately $5,400,000, before the Proposed Settlement, with additional claims requiring my review. The total likely distribution to allowed Chapter 11 administrative claims cannot be finally determined until after final administration and allowance of final Chapter 7 costs fees and costs. As such it remains uncertain whether Chapter 11 administrative claims will be paid in full, with or without the Proposed Settlement." Trustee's Reply, p. 25.

Do the arithmetic. The Trustee is reporting that the estate is already teetering on administrative insolvency assuming only a $1.2 million recovery for the class. Depending on how the remaining litigation pans out, it is altogether likely that even administrative claims will not be paid in full in this case. So, the ancient proverb comes to mind: "If you find yourself in a hole…stop digging."

d. Best Interest of Creditors

Trustee argues that absent settlement, the Parties anticipate another year or perhaps two of expensive litigation, including formal discovery, before the Class Claim will be brought to trial. Of particular importance, Trustee argues, the Proposed Settlement provides for the complete administration, calculation, and payment of the Class Claims, including withholding and funding of payroll taxes, both of Class members and of the Estate, thereby eliminating the substantial administrative costs the Estate would incur in preforming these services.

Gladstone argues that the proposed Settlement Agreement is not in the best interests of the estate's creditors because it proposes to treat the class members as entitled to administrative claims. Gladstone points out, citing *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017), that the Bankruptcy Code sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate. Gladstone also asserts that at least one post-*Jevic* court has recognized that "[i]n 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' ... 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." *In re Fryar*, 570 B.R. 602, 610 (Bankr. E.D. Tenn. 2017).

Here, Gladstone argues, it is possible that class members would only be entitled to fourth or fifth priority as wage claims with the balance of the claims that is not entitled to priority under Sections 507(a)(4)-(5) treated as a bifurcated unsecured claim. 11 U.S. Code § 507(a)(4)-(5); see I*n re First*

Magnus Fin. Corp., 403 B.R. 659, 666 (D. Ariz. 2009) (holding that WARN Act damages should not be awarded administrative priority status because they "are not necessary to maintain the debtor as a going concern, nor are they necessary to preserve the bankruptcy estate during the liquidation process.") Both Trustee and Gladstone acknowledge that there is persuasive authority suggesting that post-petition WARN Act claims can be entitled to administrative priority, but there does not appear to be controlling authority in the Ninth Circuit. Plaintiff also points out that settling the case now obviates the need for expenditure of time and money in litigation, which works to the benefit of all creditors.

As there does not appear to be controlling authority in this circuit on the issue of priority for these class members it is difficult to assess this issue with precision. But as noted, there is at least a line of authority that suggests administrative claim priority status for post-petition WARN Act plaintiffs is the correct posture. *See In re Powermate Holding Corporation*, 394 B.R. 765, 776-77 (Bankr. D. Del. 2008) (construing WARN claims as severance pay, the court determined that the WARN claims "vest" at the time of the employees' termination, thereby making them entitled to administrative expense claims in a post-petition termination.) Furthermore, Trustee argues that all courts addressing the issue conclude that employee terminations which occur after the commencement of the case would satisfy section 503(b)(1)(A)(ii). See *In re First Magnus Fin. Corp.,* 390 B.R. 667, 679 (Bankr. D. Ariz. 2008), aff'd, 403 B.R. 659 (D. Ariz. 2009); *In re Powermate Holding Corp*., 394 B.R. 765 (Bankr. D. Del. 2008); *In re Philadelphia Newspapers, LLC*, 433 B.R. 164, 173–74 (Bankr. E.D. Pa. 2010). Trustee's persuasive authority is likely sufficient for purposes of this motion. The issue is unquestionably a gamble. Gladstone's argument to keep plowing ahead in the hope this is resolved in favor of the estate sounds like an encouragement to continue doubling down on a shaky bet in the hopes of winning, which is

considerably easier to argue if one is using other people's money.

Finally, although Gladstone asserts his own status as a creditor, it likely bears repeating that no other creditor or interested party opposed the motion or joined Gladstone's opposition to the proposed Settlement Agreement, and Gladstone's self interest in keeping the settlement low or non-existent cannot be ignored. Thus, although Gladstone may not be pleased with the Settlement Agreement for any number of reasons, his dissatisfaction alone does not mean that the Settlement Agreement is not in the best interests of the estate's creditors taken as whole.

4. Compliance with FRBP 7023

FRBP 7023 (e) provides, in pertinent part:

(e) The Claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under rule 23(b)(3), the court

may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Here, Trustee asserts that the Proposed Settlement satisfies the above requirements in that:

(1) The Parties are requesting that the court approve the proposed form of Notice, which is fair and reasonable, providing a comprehensive description of the Proposed Settlement and the options of each Class Member in considering same;

(2) The Parties are requesting that the court preliminarily or conditionally approve the Proposed Settlement, thereafter, requiring a Fairness Hearing so that it may determine that the Proposed Settlement is in fact fair, reasonable and adequate;

(3) The full, complete and fully executed Proposed Settlement Agreement is attached to this Motion for the review and consideration by each Class Member, and the Motion provides an overview of the material terms of the Proposed Settlement;

(4) The Court has previously certified the Class and Class Members were afforded an opportunity to request exclusion, with three such individuals doing so; and,

(5) The Proposed Settlement requires court approval, and proposed Notice describes for each Class Member the right to object and the deadline for filing

any such objections.

It appears the Rule 23 as adopted into FRBP 7023 is or will be complied with under the Settlement.

5. Conclusion

Trustee and Plaintiff have persuasively argued that the *A&C Properties* factors favor granting the motion over Gladstone's opposition, as the Settlement Agreement appears to have been the result of arm's-length negotiations, is fair and equitable, is carefully considered and serves the best interests of the creditors. As a practical matter, the Trustee is doing what the court expects her to do, that is, keeping a close eye on the relative benefit of continued litigation considering the lack of available resources. This is particularly so in a borderline administratively insolvent case which this one appears likely to be. The proposed Settlement Agreement also appears to comply with the requirements of FRBP 7023, and for all these reasons should be approved.

Approve

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz
Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

11:00 AM

CONT... Anna's Linens, Inc. **Chapter 7**

Trustee(s):

Karen S Naylor (TR)

Represented By
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Brian R Nelson
James C Bastian Jr
Melissa Davis Lowe
Steven T Gubner
Jason B Komorsky
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