

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-14210 Ufonda Richards

Chapter 7

#1.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

WESTERN NATIONAL SECURITIES
Vs.
DEBTOR

Docket 20

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Ufonda Richards

Represented By
Brad Weil

Movant(s):

Western National Securities dba

Represented By
Scott Andrews

Trustee(s):

Weneta M Kosmala (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Hearing Room

5B

10:30 AM

8:16-14334 Jon Janisse

Chapter 7

#2.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

OAKTREE INVESTMENTS, INC.
Vs.
DEBTOR

Docket 12

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Jon Janisse

Pro Se

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-14550 Amina Aadil

Chapter 13

#3.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

PETER VUONG
Vs.
DEBTOR

Docket 8

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Amina Aadil Pro Se

Trustee(s):

Amrane (SA) Cohen (TR) Pro Se

**United States Bankruptcy Court
Central District of California
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Tuesday, December 13, 2016

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5B

10:30 AM

8:16-14567 Randa Purcell-Negrete

Chapter 13

#4.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

DOVE CANYON RECOVERY ACQUISITION, LLC
Vs.
DEBTOR

Docket 8

Tentative Ruling:

Grant.

Party Information

Debtor(s):

Randa Purcell-Negrete

Pro Se

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room

5B

10:30 AM

8:16-14607 Mark Murillo

Chapter 7

#5.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

U.S. BANK TRUST
Vs.
DEBTOR

Docket 7

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Mark Murillo

Pro Se

Trustee(s):

Thomas H Casey (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-14609 Lauren Adler

Chapter 7

#6.00 Motion for relief from the automatic stay UNLAWFUL DETAINER

ROD MOHAMMAD EINECHI
Vs.
DEBTOR

Docket 7

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Lauren Adler

Pro Se

Trustee(s):

Thomas H Casey (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:15-12202 Brenna Lisa-Jeannette Smith

Chapter 13

#7.00 Motion for relief from the automatic stay PERSONAL PROPERTY

GATEWAY ONE LENDING & FINANCE
Vs.
DEBTOR

Docket 28

***** VACATED *** REASON: OFF CALENDAR - SETTLED BY
STIPULATION ENTERED 12-7-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Brenna Lisa-Jeannette Smith

Represented By
Andrew Moher

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-10160 Eric Duane Johnson

Chapter 7

#8.00 Motion for relief from the automatic stay PERSONAL PROPERTY

FORD MOTOR CREDIT COMPANY, LLC
Vs.
DEBTOR

Docket 44

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Eric Duane Johnson

Represented By
Anerio V Altman

Movant(s):

Ford Motor Credit Company LLC

Represented By
Sheryl K Ith
Jennifer H Wang

Trustee(s):

Thomas H Casey (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-13362 Maria Esther Zavala

Chapter 13

#9.00 Motion for relief from the automatic stay PERSONAL PROPERTY

SANTANDER CONSUMER USA INC
Vs
DEBTOR

Docket 31

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Maria Esther Zavala

Represented By
Andrew Moher

Movant(s):

Santander Consumer USA Inc.

Represented By
Sheryl K Ith

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-13915 CYU Lithographics Inc

Chapter 11

#10.00 Motion for relief from the automatic stay PERSONAL PROPERTY

RM MACHINERY INC.

Vs.

DEBTOR

Docket 68

Tentative Ruling:

This is the motion for relief of stay by RM Machinery, Inc. assignee of a secured obligation now reduced to a judgment for \$1,808,969 plus fees and costs. RM argues that it should be granted relief of stay under a variety of theories. Most of these theories are advanced under §362(d)(2) not (d)(1) inasmuch as the court has already made an adequate protection order which is reportedly not in default. RM argues instead that debtor bears the burden of proving the presses are necessary to a reorganization that is, in the language of the *Timbers* opinion, "in prospect." *United Sav. Assn. of Tex. V. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 375-76 (1988). RM argues that debtor has not and cannot prove such reorganization is imminent partly because debtor will need RM's vote as the only member of the secured creditor class. But this is a misstatement of the law as cram down under §1129(b)(2) may be attempted so long as there exists at least one class of consenting impaired claims. Such a class debtor claims exists. Debtor also speaks vaguely of some investment or a purchase forthcoming that will provide a basis for reorganization. RM advances another theory, i.e. that the debtor does not own the presses by reason of a judgment entered in U.S. District Court case #16-cv-07541 the day before the petition was filed. Thus, RM contends, there is nothing around which reorganization could be proposed. In response Debtor argues about unenforceability of the judgment because it is not yet registered in California. Debtor's discussion about a lien arising from the judgment is inapposite. It is not a question of a lien; rather, it is a question of ownership of the property. As the court reads the District Court opinion (and RM's argument), the judgment purports to determine immediate ownership of title, and

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CONT... CYU Lithographics Inc

Chapter 11

requires delivery of possession. See Judgment ¶3 D. At least that is one plausible reading. Other parts of the Judgment, however, can be read as treating the presses as mere collateral still requiring the formalities of foreclosure before title passes See ¶2. However, the court does not view this judgment as determinative of the whole case because, presumably, debtor still has appeal rights which are tolled under 11 U.S.C. § 108.

Of course, none of this is to say that this case is not extremely challenged. The court seems to recall its admonition to counsel last hearing that this was not a case likely to last very long absent some immediate and tangible demonstration of viability. The court notes that a further hearing is scheduled December 20 on continued use of collateral and adequate protection, and that exclusivity is scheduled to lapse in about another month. The outside deadline for filing of a plan set by order is in March. The court is inclined to find that some "prospect" still remains as of this hearing but the window is closing fast. The court will reevaluate in about 45 days. The debtor can assume that RM will succeed at that continued hearing absent a much clearer demonstration how all of this works.

Deny pending continued hearing in about 45 days.

Party Information

Debtor(s):

CYU Lithographics Inc

Represented By
John H Bauer
Scott Talkov

**United States Bankruptcy Court
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10:30 AM

8:10-20593 Laurie Carole Smith

Chapter 13

#11.00 Motion for relief from the automatic stay REAL PROPERTY
(cont'd from 11-15-16)

MTGLQ INVESTORS, LP
Vs.
DEBTOR

Docket 83

Tentative Ruling:

Tentative for 12/13/16:
Status?

Tentative for 11/15/16:
Same tentative.

Debtor admits to being almost \$8,000 delinquent post-petition instead of the \$16,491 claimed by movant. Debtor has no privilege to be delinquent at all post confirmation. Grant unless fully current within 30 days.

Party Information

Debtor(s):

Laurie Carole Smith

Represented By
Sunita N Sood

Movant(s):

MTGLQ INVESTORS, L.P.

Represented By
Virginia Underwood
Erin M McCartney
Stephanie StMartin-Ancik

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Hearing Room 5B

10:30 AM

8:12-24575 David J. Sukert and Denise R. Sukert

Chapter 13

#12.00 Motion for relief from the automatic stay REAL PROPERTY
(Cont'd from 11-15-16) **[HOLDING DATE]**

CITIBANK, N.A.
Vs.
DEBTORS

Docket 72

Tentative Ruling:

Tentative for 12/13/16:
Status?

Tentative for 11/15/16:
Same tentative.

Grant unless APO stipulation.

Party Information

Debtor(s):

David J. Sukert

Represented By
Don E Somerville
Tate C Casey

Joint Debtor(s):

Denise R. Sukert

Represented By
Don E Somerville
Tate C Casey

Movant(s):

Citibank, N.A.

Represented By
William F McDonald III

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10:30 AM

CONT... David J. Sukert and Denise R. Sukert

Chapter 13

Trustee(s):

Amrane (SA) Cohen (TR)

Represented By

Amrane (SA) Cohen (TR)

**United States Bankruptcy Court
Central District of California
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Hearing Room 5B

10:30 AM

8:15-13013 Susie M. Huff

Chapter 13

#13.00 Motion for relief from the automatic stay REAL PROPERTY

NUVISION FEDERAL CREDIT UNION
Vs.
DEBTOR

Docket 38

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Susie M. Huff

Represented By
Stephen Parry

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:15-13095 Harry L. Williams and Laurel Williams

Chapter 13

#14.00 Motion for relief from the automatic stay REAL PROPERTY
(cont'd from 11-29-16)

HSBC BANK USA, N.A.
Vs.
DEBTORS

Docket 55

Tentative Ruling:

Tentative for 12/13/16:
Same tentative (grant) unless all arrearage cured and loan is current.

Grant. Appearance optional.

Party Information

Debtor(s):

Harry L. Williams

Represented By
Mufthiha Sabaratnam

Joint Debtor(s):

Laurel Williams

Represented By
Mufthiha Sabaratnam

Movant(s):

HSBC Bank USA, N.A., as Trustee

Represented By
Leslie M Klott
April Harriott
Erin M McCartney

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Tuesday, December 13, 2016

Hearing Room

5B

10:30 AM

8:16-14366 Lisette Nguyen

Chapter 13

#15.00 Motion for relief from the automatic stay REAL PROPERTY

WILMINGTON SAVINGS FUND SOCIETY
Vs.
DEBTOR

Docket 9

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Lisette Nguyen

Pro Se

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-14304 Rockland Acquisitions, LLC

Chapter 7

#16.00 Motion for relief from automatic stay ACTION IN NON-BANKRUPTCY FORUM

Docket 15

Tentative Ruling:

Grant. Appearance optional.

Party Information

Debtor(s):

Rockland Acquisitions, LLC

Represented By
Alex L Benedict

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
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Tuesday, December 13, 2016

Hearing Room 5B

10:30 AM

8:16-14781 Chih Lee

Chapter 13

#17.00 Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate
(OST Signed 12-07-16)

Docket 11

Tentative Ruling:

Opposition due at hearing.

Party Information

Debtor(s):

Chih Lee

Represented By
Nathan Fransen

Movant(s):

Chih Lee

Represented By
Nathan Fransen
Nathan Fransen

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

**United States Bankruptcy Court
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Santa Ana
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Hearing Room 5B

11:00 AM

8:09-12450 Kristine Lynne Adams

Chapter 7

#18.00 STATUS CONFERENCE RE: Chapter 7 Voluntary Petition .

Docket 1

Tentative Ruling:

Deadline for completing discovery: September 1, 2017
Last Date for filing pre-trial motions: September 18, 2017
Pre-trial conference on October 5, 2017 at 10:00 am

Party Information

Debtor(s):

Kristine Lynne Adams	Pro Se
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Trustee(s):

Weneta M Kosmala (TR)	Pro Se
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**United States Bankruptcy Court
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11:00 AM

8:15-11026 California Oil Independents, Inc.

Chapter 7

#19.00 First Interim Application for Compensation and Reimbursement of Expenses for Counsel to the Chapter 7 Trustee, Period: 3/30/2015 to 11/21/2016:

Lobel Weiland Golden Friedman LLP, Trustee's Attorney:

\$61,565.00 FEES
\$362.86 EXPENSES

Docket 40

Tentative Ruling:

Allow as prayed. Appearance optional.

Party Information

Debtor(s):

California Oil Independents, Inc.

Represented By
Chris Gautschi

Trustee(s):

Richard A Marshack (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

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11:00 AM

8:15-13999 Roy Dekel

Chapter 7

#20.00 First Interim Application for Allowance and Payment of Fees and Reimbursement of Expenses For Period: 10/7/2015 to 11/11/2016:

LOBEL WEILAND GOLDEN FRIEDMAN LLP, COUNSEL FOR THE TRUSTEE

\$38,945.00	FEES
\$193.16	EXPENSES

Docket 53

Tentative Ruling:

Allow as prayed. Appearance optional.

Party Information

Debtor(s):

Roy Dekel

Represented By
Kent Salvesson
Julian K Bach

Trustee(s):

Thomas H Casey (TR)

Represented By
Christopher J Green
Jeffrey I Golden
Beth Gaschen

**United States Bankruptcy Court
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11:00 AM

8:13-18057 Banyan Limited Partnership, a Nevada limited partn

Chapter 7

#21.00 First And Final Application For Allowance and Payment For The Period:
1/7/2013 to 11/21/2016

WEILAND, GOLDEN, SMILEY & WANG-EKVALL, LLP, f/k/a WEILAND,
GOLDEN, SMILEY, WANG EKVALL & STROK, LLP, FORMER COUNSEL FOR
THE TRUSTEE

\$45,417.00
\$631.83

Docket 125

Tentative Ruling:

Allow as prayed. Appearance optional.

Party Information

Debtor(s):

Banyan Limited Partnership, a

Represented By
Hutchison B Meltzer

Trustee(s):

Thomas H Casey (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
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11:00 AM

8:13-18057 Banyan Limited Partnership, a Nevada limited partn

Chapter 7

#22.00 First Interim Application For Allowance And Payment Of Fees And Reimbursement Of Expenses For The Period: 9/1/2014 to 11/21/2016

LOBEL WEILAND GOLDEN FRIEDMAN LLP, COUNSEL FOR THE TRUSTEE:
\$154,985.00 FEES
\$923.18 EXPENSES

Docket 126

Tentative Ruling:

Allow as prayed. Appearance optional.

Party Information

Debtor(s):

Banyan Limited Partnership, a

Represented By
Hutchison B Meltzer

Trustee(s):

Thomas H Casey (TR)

Represented By
Beth Gaschen
Jeffrey I Golden

**United States Bankruptcy Court
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11:00 AM

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

Chapter 7

#23.00 Motion For Order Approving Payment Of Claim

Docket 1660

Tentative Ruling:

This is Performance Team Freight Systems, Inc.'s ("Performance") motion for order approving immediate payment of claim in the amount of \$773,785.21. Performance Team is a creditor that provided prepetition services to Debtor as a warehouseman.

Debtor filed a chapter 11 petition on June 14, 2015. The case was subsequently converted on March 30, 2016. On June 15, 2015 Debtor filed two first day emergency motions—a motion for order authorizing Debtor to provide adequate protection for warehouse and carrier liens ("Adequate Protection Motion") and a motion for entry of an interim and final order authorizing debtor to obtain post-petition finance and utilize cash collateral; granting adequate protection to pre-petition secured creditors, scheduling a final hearing; and granting related relief ("Financing Motion"). As a warehouseman, Performance had a possessory lien over Debtor's inventory in its possession. At the time the Adequate Protection Motion was filed, Debtor sought adequate protection for Performance in exchange for release of the inventory. Debtor argued at that time that release of the inventory in Performance's possession was necessary so that Debtor could continue its business operations. The court on June 17, 2015 entered an order granting the Adequate Protection Motion ("Adequate Protection Order").

Performance argues that the Adequate Protection Motion and Order established that their lien (along with the other possessory lien creditors) would maintain the same priority and extent as their prepetition lien. In addition, Performance contends that the Financing Motion and two subsequent orders established that the "liens and rights created in favor of the DIP Lenders were junior to the 'Prepetition Permitted Liens' of Performance..." Motion at 3, lines 6-7. In addition, while Performance acknowledges Debtor's payment of \$400,000, Performance notes that no payments have since been made. Finally, because the case has since been converted to chapter 7, Performance argues that it is no longer adequately protected because Debtor is no longer operating and that in consequence the adequate protection offered in the Adequate protection Order has failed invoking the provisions of §

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CONT... Anna's Linens, Inc.

Chapter 7

507(b), providing it a "superpriority" claim.

Trustee in response argues that whatever priority Performance may have started with, that priority has been changed by more recent events and later stipulation. According to Trustee, Performance first entered into and executed the Prior Stipulation, which was not filed with the court. Following execution of the Prior Stipulation, Trustee paid \$400,000 to Performance, leaving Performance with an outstanding claim in the amount of \$773,785.21. Performance then released Debtor's inventory. Following conversion, Trustee and Performance entered into the Stipulation. Trustee asserts that Performance agreed to the following terms: that Performance had a claim in the amount of \$773,785.21 and was entitled to an administrative priority claim in this amount. Performance also agreed that the scheduled claim was superseded by Claim 1235, Claim 1235 was superseded and replaced by Claim 1273, and Claim 1273 would be allowed as an administrative claim in the amount of \$773,785.21. Trustee highlights that this Stipulation was entered into after the case was converted to Chapter 7, when Debtor was no longer maintaining its business operations. Nothing is mentioned about any continuing lien or superpriority.

This motion must be denied both on substantive and practical grounds. "The Bankruptcy Code does not establish rigid and inexorable rules relating to the payment of administrative expenses which prevent the interest of justice and equity from being served." *In re Barron*, 73 B.R. 812, 813 (Bankr. S.D. Cal. 1987) "Under the Bankruptcy Code, administrative expense creditors must be treated equally and the court should not set up its own order of priorities." *In re Lazar*, 83 F.3d 306, 308-09 (9th Cir. 1996), citing *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 n. 22 (9th Cir.1983); *In re Barron*, 73 B.R. 812, 813-14 (Bankr.S.D.Cal.1987); *In re Nana Daly's Pub., Ltd.*, 67 B.R. 782, 787 (Bankr.E.D.N.Y.1986). The determination of when an administrative expense is to be paid is within the discretion of the trial court." *In re Verco Indus.*, 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982). See also *In re GPLA, Inc.*, 2016 WL 4440376, at *1 (Bankr. C.D. Cal. 2016)("Courts take into account several factors in determining whether an administrative expense should be paid immediately: [1] the likelihood all administrative claims will be paid in full; [2] whether the administrative claimant could repay any payment that proves to be excessive; [3] the status of the case (i.e., how close a Chapter 11 or 13 case is to confirmation); [4] whether the expense was incurred in the ordinary course of the debtor's business."), citing 3 March, Ahart and Shapiro, California Practice Guide: Bankruptcy, ¶ 17:730 at 17-890."

Taking judicial notice of the order approving the Stipulation (see Trustee's Request

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Chapter 7

for Judicial Notice at Tab No. 6 for Order, and Tab. No. 5, Exhibit 2 for stipulation), Performance has an administrative priority claim. The terms of the Stipulation do not appear to provide that Performance's alleged lien enjoys priority over all other liens nor is there anything else that would change the usual order of administrative priority as no mention is made of superpriority. Moreover, the Stipulation expressly states that this treatment *supersedes prior claims*. Accordingly, the assertion that Performance still has a lien with priority over all other liens no longer seems accurate or tenable.

Moreover, for reasons articulated by Trustee, full payment of Performance Team's claim at this time is simply not appropriate. As this court previously stated in a tentative ruling (now incorporated in an ordered entered June 24, 2016 (docket number 1556)) that "the problem of administrative insolvency looms." Here, the court has discretion to determine if administrative claims should be immediately paid. Several factors seem to weigh against such payment. First, Trustee has represented that it is still unclear whether this case is administratively solvent. Second, Trustee has only \$225,000 in funds that are free and clear, as other lenders (e.g. Salus Capital Partners, LLC) have asserted interests in nearly all of the estate's property. Third, as noted in the above referenced tentative, §726(b) provides that the administrative claims in the Chapter 7 have priority over those arising in the 11. Although Trustee argues that Performance agreed to a chapter 11 administrative claim, it is not entirely clear from the terms of the Stipulation whether the administrative claim was intended to be under chapter 7 or chapter 11. But, if Trustee is indeed correct, then this is yet another factor weighing against full payment at this time.

Deny

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

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CONT... Anna's Linens, Inc.

Chapter 7

Jeffrey S Kwong

Trustee(s):

Karen S Naylor (TR)

Represented By

Nanette D Sanders
Brian R Nelson
James C Bastian Jr
Melissa Davis Lowe
Steven T Gubner
Jason B Komorsky

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

Chapter 11

#24.00 Motion to Compel Return of Attorneys Fees and Costs Paid to Defendant Lenders Counsel, For An Accounting Of All Monies Purportedly Invoiced by Or Paid to Defendant Lenders and Their Agents Since June 2015, And To Prevent Defendant Lenders Or Their Agents from Obtaining Any Further Payments Thereon
(con't from 9-27-16)

Docket 1382

***** VACATED *** REASON: CONTINUED TO 5-02-17 AT 11:00 A.M.
PER ORDER APPROVING STIPULATION REQUESTING
CONTINUANCE OF HEARING ENTERED 12-01-16**

Tentative Ruling:

Movants are unsecured creditors of Debtor who have initiated an adversary proceeding against Debtor's secured lender Salus Capital Partners et al ("Lender"). The adversary proceeding involves tort claims stemming from Movants' allegations that Lender induced Movants to accept notes Lender knew were worthless, and to ship goods when Lender knew that a bankruptcy was imminent, a "pump and dump" scheme, if you will. Movants assert that Lender sought to plump up its portfolio of unpaid inventory collateral so Lenders would be in an oversecured position at the expense of unpaid vendors.

Movants assert that Lender improperly submitted invoices to the DIP and have been paid thereon a total amount of between \$1.5 million and \$2.213 million in improper professional fees from the estate. Movants offer an analysis of the indemnity provisions of both the pre-petition Credit Agreement and the DIP Financing Order entered in this case. Movants argue neither appears to cover litigation over alleged torts committed pre-petition. The Creditors Committee and another creditor, Baltic Linen Company, Inc., have joined the motion. The Trustee has filed a "Statement of Position" generally supporting the motion.

These fees (in whole or in part) apparently cover services for pre-litigation investigation, mediation and litigation of the adversary proceeding. Movants argue

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that the adversary proceeding has nothing to do with DIP financing, but rather involves tort claims arising out of pre-petition conduct, and so Lender should not have been reimbursed. Movants assert that these services are not covered by the indemnification provision in the Credit Agreement, and that even if they were, there is no duty to defend or advance costs. Movants argue Lender would have to first negate the possibility of gross negligence or willful misconduct for indemnification to be ripe, and that cannot be done because the complaint has not been litigated. Movants request that Lender be required to return all of the fees and costs that have been paid from the estate and that an accounting from June 2015 to the present be provided at Lender's expense. Movants also request that no other fees be paid to Lender unless Lender demonstrates that the fees fall correctly within the indemnification provision and all contingencies for indemnification are satisfied.

Lender opposes the motion, arguing that the fees are valid prepetition obligations that were properly charged under the Credit Agreement and DIP Financing Order. Lender notes that Movants do not identify the specific fees that are not appropriate, but assert a blanket objection to everything. Lender asserts that the fees were immediately reimbursable as "Credit Party Expenses" pursuant to § 10.04(a) of the Credit Agreement because Lender's only relationship with Debtor was through the Credit Agreement, so defending against claims that it abused its position as lender falls within this section. Lender cites the DIP Financing Order for authority to receive payment on a monthly basis. Lender also argues that the fees fall within the indemnification rights under § 10.04(b)(i) of the Credit Agreement because the claims in the adversary proceeding are claims in connection with Lender's obligations under the Credit Agreement. Lender asserts that immediate payment was provided for in § 10.04(e) of the Credit Agreement. Lender also argues that the Final DIP Order at ¶26 provides a procedure for submitting invoices to Debtor for immediate payment and creates a 10-day window for objections to be made. Lender asserts that this objection procedure was not complied with, so Movants either have waived their argument or do not have standing and should not be permitted to circumvent the procedures set forth in the DIP Financing Order. Lender quotes ¶ 26:

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DIP and Other Expenses. The Debtor is authorized and directed to pay all reasonable and documented out-of-pocket expenses of (x) the DIP Agent and the DIP Lenders in connection with the DIP Facility (including, without limitation, expenses incurred prior to the Petition Date), as provided in the DIP Loan Documents, and (y) the Prepetition Agent (including, without limitation, expenses incurred prior to the Petition Date) as provided in the Prepetition Credit Documents, including, without limitation, reasonable legal, accounting, collateral examination, monitoring and appraisal fees, financial advisory fees, fees and expenses of other consultants, and *indemnification and reimbursement of fees and expenses*, upon the Debtor's receipt of invoices for the payment thereof. Payment of all such fees and expenses shall not be subject to allowance by the Court and professionals for the DIP Agent, the DIP Lenders and the Prepetition Agent shall not be required to comply with the U.S. Trustee fee guidelines. *Notwithstanding the foregoing, at the same time such invoices are delivered to the Debtor, the professionals for the DIP Agent, the DIP Lenders and the Prepetition Agent shall deliver a copy of their respective invoices to counsel for the Committee and the U.S. Trustee, redacted as necessary with respect to any privileged or confidential information contained therein. Any objections raised by the Debtor, the U.S. Trustee or the Committee with respect to such invoices within ten (10) business days of the receipt thereof will be resolved by the Court. In the event of any objection, the provisions of section 107 of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy*

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Procedure shall apply. Pending such resolution, the undisputed portion of any such invoice will be paid promptly by the Debtor. Notwithstanding the foregoing, the Debtor is authorized and directed to pay on the Closing Date all reasonable fees, costs and expenses of the DIP Agent, the DIP Lenders and the Prepetition Agent incurred on or prior to such date without the need for any professional engaged by the DIP Agent, the DIP Lenders or the Prepetition Agent to first deliver a copy of its invoice as provided for herein. (italics and emphasis added)

The scheme endorsed above was obviously an attempt to bypass the usual allowance requirement, but it can be argued that the allowance requirement was maintained if objection was timely filed (within 10 days).

To further support their entitlement to immediate compensation, Lender cites to § 10.04(e) of the Credit Agreement, which provides that "[a]ll amounts due under this Section shall be payable on demand therefor."

Lender notes that there is no provision for the return of payments in ¶ 26 of the DIP Financing Order, as compared to ¶ 3 of the same order, where the potential return of funds is contemplated. A procedure for doing so is set forth. ¶ 3 of the DIP Financing Order provides:

Authorization of the DIP Financing and DIP Loan Documents. The Debtor is expressly and immediately authorized and empowered...(y) repay in full in cash of the Prepetition Obligations subject only to the ability of the Court to unwind the repayment of the Prepetition Obligations in the event there is a successful Challenge (as defined herein) to the validity, enforceability, extent, perfection and priority of the Prepetition Secured

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This seems to create the possibility of a clawback if fees are successfully challenged. It may not answer whether such payments were correctly made in the first place.

In their reply, Movants argue that Lender has ignored New York law for contract interpretation and indemnification. Movants believe that the indemnification provision should control, not the Credit Party Expense provisions because the indemnification provision specifically covers third-party tort claims. Movants also reiterate that there is no advancement of fees provision. Movants reply that the 10-day period in the DIP Financing Order does not apply to them as unsecured creditors (although several of them are also Committee members). Movants note that their counsel received the invoices for the first time on February 26, 2016 and filed this motion only five days later.

The Credit Agreement, at § 10.14(a), provides that it is governed by New York law. [Motion, Exhibit 1, bates p. 158] In order to avoid inconsistency, all parts of a contract should be reconciled. *National Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969). Agreements should be read in their entirety, and interpretations that would render parts of an agreement superfluous should be avoided. *Lawyers' Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 N.Y.2d 398, 404 (2000). Specific provisions generally restrict general provisions. *Bowmer v. Bowmer*, 50 N.Y.2d 288, 294 (1980) citing 4 Williston, Contracts [3d ed], § 624, pp 822-825.

With these general principles in mind, the court must review the provisions of the Credit Agreement relied upon by the parties to determine if there is any merit to Movants' argument. Lender asserts that all of the fees and costs incurred in connection with the pre-litigation investigation, mediation and adversary proceeding are immediately compensable as "Credit Party Expenses." The Credit Agreement, at § 10.04(a), provides that the Borrower shall pay all Credit Party Expenses. [Motion, Exh. 1, bates p. 149] "Credit Party Expenses" are defined at § 1.01, p. 11, in part, as:

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(a) all reasonable and documented allocable expenses incurred by the Agent, the Tranche A-1 Agents, any Lender and its Affiliates in connection with this Agreement and the other Loan Documents, including without limitation (i) the reasonable fees, charges and disbursements of (A) counsel for the Agent, Tranche A-1 Agents and Lenders, (B) outside consultants for the Agent, (C) appraisers, (D) commercial finance examinations, and (E) all such reasonable and documented allocable expenses incurred during any workout, restructuring or negotiations in respect of the Obligations, (ii) in connection with . . . (D) the enforcement or protection of the rights of the Credit Parties in connection with this Agreement or the Loan Documents or efforts to monitor, preserve, protect, collect, or enforce the Collateral...

[Id. at bates p. 42]

Lender also asserts that the fees and costs are compensable under the indemnification provision of the Credit Agreement, at § 10.04(b), which provides, in part, as follows:

The Loan Parties shall indemnify the Agent (and any sub-agent thereof), each other Credit Party, and each Related Party of any of the foregoing Persons...against...any and all losses, claims, causes of action, damages, liabilities, settlement payments, costs and related expenses...arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby, the performance by the parties hereto of their respective

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obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby, or, in the case of the Agent (and any sub-agents thereof) and their Related Parties only, the administration of this Agreement and the other Loan Documents . . . or (v) *any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by any Borrower or any other Loan Party or any of the Loan Parties' directors, shareholders or creditors, and regardless of whether any Indemnatee is a party thereto, in all cases, whether or not caused by or arising, in whole or in part, out of the comparative, contributory or sole negligence of the Indemnatee; **provided that** such indemnity shall not, as to any Indemnatee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted **from the gross negligence or willful misconduct** of such Indemnatee or (y) result from a claim brought by the Borrower or any other Loan Party against an Indemnatee for breach in bad faith of such Indemnatee's obligations hereunder or under any other Loan Document, if the Borrower or such Loan Party has obtained a final and nonappealable judgment in its favor on such claim as determined by a court of competent jurisdiction.* (italics and emphasis added)

Stated differently, the main issue at bench seems to be whether by reason of the "provided that" language the fees and costs charged by Lender in connection with

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pre-litigation investigation, mediation and litigation of the adversary proceeding were properly charged under the Credit Agreement and/or Final DIP Order *and paid immediately*, before there was any determination whether the indemnification expenses were of the excluded category, merely because such claims are prospective. Stated differently, is determination of the character of the indemnity obligation a condition precedent to payment? If Lender had its way, anything that ever arose in connection with this loan to Debtor would be a "Credit Party Expense" because its only relationship with Debtor is through the Credit Agreement. But if this were the case, then arguably there would be no need for the indemnification provision, which specifically identifies tort claims brought by third parties as excludable.

It is difficult to see how defending against third-party tort claims qualifies as enforcing or protecting rights in connection with the Credit Agreement or Lender's collateral. Lenders are not enforcing or protecting their rights under the Credit Agreement, they are defending against claims that they induced Movants to accept notes and ship goods when they knew that Debtor was insolvent. The fees and expenses for the pre-litigation investigation, mediation and litigating the adversary proceeding do not look like Credit Party Expenses, and it cannot be the case that Lender can charge a borrower the costs of Lender's fraud.

It is possible that Lender will be covered under the indemnification provision of the Credit Agreement, at § 10.04(b)(v), because it covers tort claims brought by third parties. But, viewing the above language as a condition precedent, it would appear that Lender first needs to determine what its liability is and the basis of that liability before it can be reimbursed. The indemnification provision is limited by the following language: "...provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee..." This seems to indicate that first Lender must first demonstrate that there was no gross negligence or willful misconduct before it can be reimbursed. This conclusion appears to be supported by New York law, which

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provides that indemnification and advancement of legal fees are two distinct obligations. *Crossroads ABL LLC v. Canaras Capital Management, LLC*, 963 N.Y.S. 2d 645, 647 (1st Dept. 2013) citing *Ficus Invs., Inc. v. Private Capital Mgt., LLC*, 61 A.D.3d 1, 9 (1st Dept. 2009). Lender cites to *Bank of the West v. The Valley National Bank of Arizona*, 41 F.3d 471, 479 (9th Cir. 1994), but even in that case the suit was to recover fees and costs that had already been incurred in a case that had concluded. The dispute here is not whether Lender may ever be entitled to reimbursement, but whether it is entitled to it immediately and on an ongoing basis. *Bank of the West* does not address this question.

In further support of its claimed right to immediate payment, Lender cites to § 10.04(e) of the Credit Agreement, which provides that "[a]ll *amounts due* under this Section shall be payable on demand therefor." (emphasis added) As Movants correctly argue, in order to receive payment under this section there must be something due. At this time, with respect to the pre-litigation investigation, mediation and litigation of the adversary proceeding, Lender has not demonstrated (at least not convincingly) that anything is due. The Final DIP Order at ¶ 26 provides for payment of expenses in connection with the DIP Facility and Prepetition Credit Documents. Lender has similarly not demonstrated any entitlement to payment under this provision and the court does not believe that merely insertion of the word "prospective" in the Credit Agreement changes this calculation. The more natural reading seems to condition recovery of the indemnity costs on first a determination that they do not arise from a tort involving gross negligence or willful misconduct.

Lender argues that Movants motion is moot because ¶ 26 of the DIP Financing Order provides a 10-day window for Debtor, the United States Trustee and the Committee to object to Lenders' invoices. While Movants are members of the Committee, the invoices were only sent to Committee's counsel. [Reply filed March 16, 2016, Exh. B]. Perhaps the Committee qua committee should not be permitted to join in the motion as it had the opportunity to object but arguably waived the right. But that is about as far as this argument can go. Movants note that they filed this motion very quickly (five days) after receiving the invoices.

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There are other complications. The funds involved are reportedly Lender's cash collateral. A major gap appears in the facts as recited in the papers. Has the Lender been otherwise paid in full except for these fees and expenses? If not, the question may be largely academic and merely one of accounting for the size of the deficiency since until all principal and interest accrued up to value of the collateral are paid, there is no room left for accrual of attorney's fees under §506 in any event. The court cannot tell from this record whether the Lender is in fact over secured except for the disputed fees. Specifics are also lacking; no evidence has been provided by the parties regarding which fees need to be returned. Movants ask for an accounting. Perhaps this will be necessary. Movants could identify exactly which fees and costs are objectionable, rather than just asking that everything that has been paid be returned. Moreover, the court sees no basis to rule in summary fashion that the subject fees are of the excluded character, or that the disputed funds must be paid over to the trustee until there has first been an adjudication on the merits (provided repayment is assured). Some of the terms in the Credit Agreement (and maybe the DIP Financing Order as well) are vague and therefore subject to admission of parol evidence. See e.g. *Bank of the West*, 41 F.3d at 477 citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 37-40 (1968). This does not recommend itself to a summary adjudication as is requested here.

At most, this would suggest an order issue segregating the disputed sums pending adjudication on the merits and that an accounting be provided in meantime.

Grant in part; monies will be segregated and held pending accounting and a determination of the character and allowability of the indemnification expenses.

Party Information

Debtor(s):

Anna's Linens, Inc.

Represented By
David B Golubchik
Lindsey L Smith
Eve H Karasik
John-Patrick M Fritz

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Todd M Arnold
Ian Landsberg
Juliet Y Oh
Jeffrey S Kwong

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8:07-12994 South Coast Oil Corporation

Chapter 7

#25.00 Chapter 7 Trustees Objection Seeking Disallowance Of Proof Of Claim Number 24 Filed By Orange County Tax Collector

Docket 2090

***** VACATED *** REASON: CONTINUED TO 1-24-2017 AT 11:00
A.M. PER ORDER GRANTING STIPULATION TO CONTINUE
HEARING ON TRUSTEE'S OBJECTION TO ORANGE COUNTY TAX
COLLECTOR'S PROOF OF CLAIM #24 ENTERED 12-07-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

South Coast Oil Corporation

Represented By
David M Poitras
Edward O Lear
Douglas L Mahaffey

Trustee(s):

James J Joseph (TR)

Represented By
Ronald Rus
Olman J Valverde