

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

10:00 AM
2:00-00000

Chapter

#0.00 All hearings scheduled for today are now simultaneously 1) In person in Courtroom 1539; 2) Via ZoomGov Video; 3) Via ZoomGov Audio. Parties are free to choose any of these options, unless otherwise ordered by the Court. Parties electing to appear in person shall comply with all requirements regarding social distancing, use of face masks, etc. that are in effect at the time of the hearing.

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Hearing conducted by ZOOMGov.

Video/audio web address: <https://cacb.zoomgov.com/j/16161090855>

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**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

10:00 AM

CONT...

Chapter

(when prompted, enter meeting number and password shown above)

Judge Bluebond seeks to maintain a courtroom environment (both online and in person) in which all persons are treated with dignity and respect, irrespective of their gender identity, expression or preference. To that end, individuals appearing before the Court are invited to identify their preferred pronouns (e.g., he, she, they, etc.) and their preferred honorific (e.g., Mr., Miss, Ms., Mrs., Mx, M, etc.). Individuals may do so by advising the Courtroom Deputy or Judge prior to any appearance and/or, in the case of remote hearings, by providing this information in the person's screen name in ZoomGov.

Docket 0

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

- NONE LISTED -

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

10:00 AM

2:24-13490 Narvik Grigorian

Chapter 7

#1.00 Notice of motion and motion for relief from the automatic stay with supporting declarations PERSONAL PROPERTY RE: 2022 Tesla Model Y; VIN NO. 7SAYGDEE3NF508159

MOVANT: Wells Fargo Bank, N.A., dba Wells Fargo Auto

Docket 8

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

Grant with waiver of Rule 4001(a)(3).

Party Information

Debtor(s):

Narvik Grigorian

Represented By
Allen A Sarkisian

Movant(s):

Wells Fargo Bank, N.A., dba Wells

Represented By
Chandra Dianne Pryor

Trustee(s):

Jason M Rund (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

10:00 AM

2:24-13858 Alice Nga Thi Pham

Chapter 7

#2.00 Notice of motion and motion for relief from the automatic stay with supporting declarations PERSONAL PROPERTY RE: 2019 Honda Odyssey, VIN: 5FNRL6H79KB109256 .

MOVANT: TD Bank, N.A., successor in interest to TD Auto Finance LLC

Docket 10

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

Grant with waiver of Rule 4001(a)(3).

Party Information

Debtor(s):

Alice Nga Thi Pham

Represented By
Madhu Kalra

Movant(s):

TD Bank, N.A., successor in interest

Represented By
Sheryl K Ith

Trustee(s):

Elissa Miller (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:23-15629 Nikisha N Preston

Chapter 7

Adv#: 2:24-01104 Preston v. UNITED STATES DEPARTMENT OF EDUCATION

#200.00 Status Conference re: 63 (Dischargeability - 523(a)(8), student loan) Complaint
by Nikisha N Preston against United States of Department of Education

Docket 1

***** VACATED *** REASON: CONTINUED TO 8-27-24 AT 2PM**

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

6/28/2024 -- Court approved stipulation continuing hearing to August 27, 2024
at 2:00 p.m. OFF CALENDAR FOR JULY 16, 2024.

Party Information

Debtor(s):

Nikisha N Preston

Represented By
Sanaz Sarah Bereliani

Defendant(s):

UNITED STATES DEPARTMENT

Pro Se

Plaintiff(s):

Nikisha N Preston

Represented By
Sanaz Sarah Bereliani

Trustee(s):

Wesley H Avery (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:23-15376 Ruben Diaz Garcia

Chapter 7

Adv#: 2:23-01480 Amir et al v. Diaz Garcia et al

#201.00 Motion to Dismiss Adversary Proceeding

Docket 32

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

First Claim for Relief

Plaintiffs allege that, on or about February 10, 2014, defendants represented to them that plaintiffs would receive a 2 percent interest in AEG in exchange for \$250,000 (par. 42) and that AEG was a profitable business (par. 43). In paragraph 45, plaintiffs allege that the financial documents of AEG were withheld from plaintiffs even though plaintiffs asked to see them. This is not a claim under section 523(a)(2)(B). A claim under that section requires a fraud resulting from the plaintiffs' reliance on writings concerning the debtor's (or an insider's) financial condition (among other things). Plaintiffs themselves plead that no writings concerning AEG's financial condition were provided even though they asked for them. Therefore, they could not have made this investment in reliance on writings concerning the debtor's (or an insider's) financial condition. Grant motion with regard to first claim for relief. Dismiss this claim without leave to amend.

Third Claim for Relief

Grant motion without leave to amend with regard to the third claim for relief to the extent that it seeks to assert a claim under section 523(a)(2)(B) for the same reasons set forth above. This claim does not allege that plaintiffs relied on a writing concerning the debtor's or an insider's financial condition in making this loan. That would leave a claim under section 523(a)(2)(A), but all of the alleged misrepresentations here are statements concerning the debtor's financial condition (the profitability of the business and the existence of the accounts receivable represented by the invoices). This claim must therefore be stricken, as these representations need to be in writing. (To the

**United States Bankruptcy Court
Central District of California**

Los Angeles

Sheri Bluebond, Presiding

Courtroom 1539 Calendar

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... **Ruben Diaz Garcia**

Chapter 7

extent that plaintiffs are relying on the invoices as the writing on which they relied, that is already in the fourth claim for relief discussed below, and it appears that the loan referenced in this claim was made prior to the representations about the use of the funds generated by the VOPAK Project invoices in any event. Those representations appear to have been made in or about May of 2015. The loan referenced in the third claim for relief was made in or about August of 2014, so plaintiffs could not have been relying upon the existence and validity of these invoices in making this loan.) Therefore, the motion should be granted without leave to amend with regard to the entire third claim for relief.

Fourth Claim for Relief

The Ninth Circuit may have held that a writing needs to present a picture of the debtor's (or an insider's) overall financial health, but the Supreme Court has rejected this proposition. The Supreme Court has expressly held that "a statement about a single asset can be a 'statement respecting the debtor's financial condition.'" Lamar, Archer & Cofrin, LLP v. Appling, 584 U.S. 709 (2018) (as debtor's oral misrepresentations concerning his tax refund qualified as a statement respecting his financial condition, plaintiff's debt could not be excepted from discharge under either section 523(a)(2)(A) or 523(a)(B)).

Therefore, if plaintiffs were shown fraudulent invoices that reflected sizeable receivables from which the debtors represented that they would repay the sums they were attempting to borrow and, in reliance on the belief that these invoices were real (and not fabricated, as plaintiffs allege), plaintiffs advanced sums to AEG, these facts could state a claim under section 523(a)(2)(B). If, on the other hand, they were merely told that such invoices existed and never actually saw (and relied upon) the invoices, this would be merely an oral representation respecting the debtor's financial condition and would fall squarely within the holding of Lamar, making the obligation dischargeable. In paragraph 73, plaintiffs do appear to plead that they were shown these invoices (see page 21 at lines 26-27), but it is not clear from the manner in which the complaint was drafted whether this actually occurred before the funds were advanced. Nevertheless, deny motion to dismiss with regard to fourth claim for relief. (In order to prevail on this claim, however, plaintiffs will need to prove, among other things, that they in fact received and relied on the

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Ruben Diaz Garcia

Chapter 7

existence and validity of these invoices in making the May 2015 loan to AEG.)

In addition, there are other problems with this complaint that are worthy of note:

1. The prayer seeks relief under section 523(a)(4) (see page 22 at lines 15-16). This prayer needs to be deleted. The court has already dismissed the claims under this section without leave to amend.
2. The prayer seeks a nondischargeable judgment for the full amount of the debt. This doesn't work, as different amounts may be excepted from discharge under different theories. The prayer should break down how much the plaintiffs are seeking to recover under each of the surviving claims for relief.

For the first claim for relief, the plaintiffs can only proceed under section 523(a)(2)(A) and cannot base their claim on any representations concerning AEG's financial condition because these statements weren't in writing. This seems to leave only their claim that they were promised that they would receive a 2 percent interest in AEG and that debtors never intended to convey this 2 percent interest to the plaintiffs. This claim is for \$250,000, plus interest.

For the second claim for relief, the plaintiffs are asserting that they made a loan for \$60,000 based on the false representations that AEG needed a piece of equipment and that the funds would be used to purchase this equipment. This claim is for \$60,000, plus interest.

With regard to the fourth claim for relief, plaintiffs can only seek to recover the funds that were advanced in reliance on the existence of the invoices. That appears to be the May 5, 2015 loan for \$90,355.63. The prayer for this claim should seek only this amount, plus interest.

NOTE: There is no scenario in which the promissory note that anyone signed to evidence an obligation to repay amounts loaned by plaintiff can constitute the writing concerning the debtor's or an insider's financial condition on which the plaintiffs relied in making the loan evidenced by that note for dischargeability purposes. The plaintiffs repeatedly plead that, although they requested documents concerning AEG's financial condition, they never

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Ruben Diaz Garcia

Chapter 7

received them. Therefore, the only documents referenced in the complaint that plaintiffs could possibly have relied upon are the VOPAK Project Invoices.

Party Information

Debtor(s):

Ruben Diaz Garcia

Represented By
Leslie A Cohen

Defendant(s):

Ruben Diaz Garcia

Represented By
Leslie A Cohen

Tammy N Garcia

Represented By
Leslie A Cohen

Joint Debtor(s):

Tammy N Garcia

Represented By
Leslie A Cohen

Movant(s):

Ruben Diaz Garcia

Represented By
Leslie A Cohen

Tammy N Garcia

Represented By
Leslie A Cohen

Plaintiff(s):

Al Amir

Represented By
Christopher J Langley
Matthew P Todd

Talya Enterprises, Inc.

Represented By
Christopher J Langley
Matthew P Todd

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Ruben Diaz Garcia

Chapter 7

Trustee(s):

John P Pringle (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:23-15376 Ruben Diaz Garcia

Chapter 7

Adv#: 2:23-01480 Amir et al v. Diaz Garcia et al

#202.00 Status Conference re: 67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny)),(68 (Dischargeability - 523(a)(6), willful and malicious injury) Complaint by Christopher J Langley on behalf of Al Amir, Talya Enterprises, Inc. against all defendants

fr: 2-13-24; 4-30-24

Docket 4

Courtroom Deputy:

Tentative Ruling:

2/22/24 -- Court approved order granting motion to dismiss with leave to amend. Plaintiff is to file third amended complaint not later than March 12. Response should be filed and served not later than April 9, 2024. If response is a motion to dismiss, it should be set for April 30, 2024 at 2:00 p.m. (same date and time as continued status conference).

Tentative Ruling for April 30, 2024:

Revisit status of action after conclusion of hearing on motion to dismiss.

5/8/24 -- Court entered order granting motion to dismiss in part:
Motion granted w/o leave to amend as to fifth and sixth claims for relief under section 523(a)(4).

Motion denied with regard to second claim under section 523(a)(2)(A).
Motion granted with leave to amend as to first, third and fourth claims for relief under section 523(a)(2)(B).

Fourth amended complaint must be filed by May 13, 2024. Response must be filed and served not later than June 14, 2024.

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... **Ruben Diaz Garcia**

Chapter 7

Tentative Ruling for July 16, 2024:

Revisit status of adversary proceeding after conclusion of hearing on motion to dismiss. Discuss with parties how best to proceed. Perhaps a redacted version of the complaint deleting the allegations that are barred should be attached to the order on the motion?

Hearing required.

Party Information

Debtor(s):

Ruben Diaz Garcia

Represented By
Leslie A Cohen

Defendant(s):

Ruben Diaz Garcia

Pro Se

Tammy N Garcia

Pro Se

Joint Debtor(s):

Tammy N Garcia

Represented By
Leslie A Cohen

Plaintiff(s):

Al Amir

Represented By
Christopher J Langley

Talya Enterprises, Inc.

Represented By
Christopher J Langley

Trustee(s):

John P Pringle (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:23-15376 Ruben Diaz Garcia

Chapter 7

Adv#: 2:23-01481 Potter et al v. Diaz Garcia et al

#203.00 Status Conference re: 67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny)),(68 (Dischargeability - 523(a)(6), willful and malicious injury)) Complaint by Christopher J Langley on behalf of H&M Investment Advisors Inc, a California Corporation, Jeffrey Potter against all defendants.

fr: 2-13-24; 4-30-24

Docket 4

Courtroom Deputy:

Tentative Ruling:

2/22/24 -- Court approved order granting motion to dismiss with leave to amend. Plaintiff is to file third amended complaint not later than March 12. Response should be filed and served not later than April 9, 2024. If response is a motion to dismiss, it should be set for April 30, 2024 at 2:00 p.m. (same date and time as continued status conference).

Tentative Ruling for April 30, 2024:

Revisit status of action after conclusion of hearing on motion to dismiss.

6/5/24 -- Court approved order dismissing H&M as a plaintiff in this action (without leave to amend). Motion denied in all other respects. Defendants shall file and serve answer to amended complaint by June 14, 2024. Status conference continued to July 16, 2024 at 2:00 p.m. Parties shall file joint status report not later than July 2, 2024.

Tentative Ruling for July 16, 2024:

Did the parties manage to meet and confer in compliance with LBR 7026-1?

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Ruben Diaz Garcia

Chapter 7

Continue status conference approximately 90 days. Order parties to complete a day of mediation prior to date of continued status conference.

Party Information

Debtor(s):

Ruben Diaz Garcia

Represented By
Leslie A Cohen

Defendant(s):

Ruben Diaz Garcia

Pro Se

Tammy N Garcia

Pro Se

Joint Debtor(s):

Tammy N Garcia

Represented By
Leslie A Cohen

Plaintiff(s):

Jeffrey Potter

Represented By
Christopher J Langley

H&M Investment Advisors Inc, a

Represented By
Christopher J Langley

Trustee(s):

John P Pringle (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:22-13785 Marine Wholesale & Warehouse Co.

Chapter 11

#204.00 Pretrial Conference re: Objection to Claim Number 5 by Claimant Alcohol Tobacco Tax & Trade Bureau

fr: 11-30-22; 2-7-23; 6-13-23; 7-18-23; 8-15-23; 10-17-23; 12-5-23; 1-30-24; 4-2-24; 5-7-24; 6-20-24

Docket 90

***** VACATED *** REASON: CONTINUED TO 8-13-24 AT 2PM**

Courtroom Deputy:

Tentative Ruling:

Tentative Ruling for November 30, 2022:

It would in any event have been the court's intention to conduct this initial conference as a status conference. Continue hearing to give debtor an opportunity to remedy any possible service defects. Set new status conference within approximately the next 60 days to discuss timing for discovery, potential for mediation, and any other procedural issues.

Final Ruling for November 30, 2022:

(Service problems have now been remedied.) Deem matter to be adversary proceeding for procedural purposes. (Court entered order to this effect on December 1, 2022, docket no. 107.) Set continued status conference for February 7, 2023 at 2:00 p.m. Parties should file joint status report not later than January 24, 2023.

Tentative Ruling for February 7, 2023:

Parties have both asked that matter be sent to mediation. Continue status

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co. Chapter 11

conference for approximately 90 to 120 days and order parties to complete a day of mediation prior to date of continued status conference.

3/15/23 -- court approved scheduling order with following dates:

Cont'd status conference -- June 13, 2023 at 2:00 pm
L/D to attend mediation -- June 13, 2023
L/D to lodge order appointing mediator -- March 27, 2023
L/D to file status report -- May 30, 2023

3/28/23 -- Court approved order appointing mediator.

Tentative Ruling for June 13, 2023:

At request of parties, continue status conference to July 18, 2023 at 2:00 p.m. Parties should file a joint status report, utilizing the court's mandatory form for this purpose, not later than July 5, 2023. APPEARANCES WAIVED ON JUNE 13, 2023.

Tentative Ruling for July 18, 2023:

At the request of the parties, continue status conference to August 15, 2023 at 2:00 p.m. to give them a further opportunity to meet and confer about how best to bifurcate discovery so that the "change of control" issue can be litigated first. APPEARANCES WAIVED ON JULY 18, 2023.

Tentative Ruling for August 15, 2023:

Debtor outlines a proposal for bifurcating issues. The first of the issues identified on page 4 of its supplement to the status report may be a factual issue. The second appears to be purely a legal issue, no? What is the TTB's response to the debtor's proposal?

Set deadline for completion of discovery on change of control issue and set continued status conference shortly thereafter for parties to discuss how best to proceed once that discovery has been completed. (Court agrees that number of interrogatories, depositions, etc. completed during this first phase

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co. Chapter 11

should be disregarded in future phases of litigation, if there need to be any.)

8/22/23 -- Court signed scheduling order with following dates:

Parties to complete discovery with regard to facts surrounding 2012 transfer of shares in Debtor, the control of debtor's operations before and after the transfer and whether such transfers constituted a reportable event and/or a change of control not later than October 16, 2023. Court will conduct a continued status conference on October 17, 2023 at 2:00 p.m. (No status report is required for this status conference.)

10/16/23 -- Court approved stipulation continuing hearing to December 5, 2023 at 2:00 p.m., extending deadline for parties to respond to each other's outstanding written discovery to October 31, 2023 and extending the discovery cutoff for phase 1 of the litigation to December 1, 2023 for the sole purpose of conducting certain depositions. OFF CALENDAR FOR OCTOBER 17, 2023.

Tentative Ruling for December 5, 2023:

Are the parties requesting an extension of the discovery cutoff for what they are referring to as "phase I"? If so, for how long? Hearing required.

12/15/23 -- Court signed scheduling order setting following dates:

L/D to file discovery motions -- January 9, 2024
L/D to lodge joint pretrial order -- January 16, 2024
Pretrial conference -- January 30, 2024 at 2:00 p.m.

Tentative Ruling for January 30, 2024:

No discovery motions for phase 1 were filed by cutoff date. Parties have lodged a proposed pretrial order. Approve parties' proposed order and discuss with parties whether there is any need for an evidentiary hearing for phase 1 or whether the court can resolve the issues with briefing only.

Either a change in legal control or a change in actual control can trigger a

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

duty to report and an automatic lapse of the permits. As the pretrial order does not contain either any facts or any issues concerning who actually controlled or managed the entity, the Court assumes that the dispute here is whether or not there was a change in "legal control." Assuming the court can disregard the fact that Robert L. Hartry's shares were transferred to a (presumably revocable) family trust somewhere before 2012, he nevertheless went from owning 80.4 percent of the shares to 45.4 percent as a result of the 2012 transactions. He therefore ceased to be a "majority" shareholder, but, after the 2012 transfers/sales there was no new majority shareholder. Is this "a change in the person who owns or controls the majority of the voting stock" of the debtor? This would appear to be a legal issue that can be resolved based on the facts outlined in the pretrial order, no?

1/30/2024 -- Court modified and approved pretrial order during status conference and set the following dates:

1. Debtor's opening brief in relation to Phase I of the litigation of the Objection to Claim is due no later than February 27, 2024.
2. TTB's responsive brief in relation to Phase I of the litigation of the Objection to Claim is due no later than March 19, 2024.
3. Debtor's reply brief in relation to Phase I of the litigation of the Objection to Claim is due no later than March 26, 2024.
4. Court will conduct a hearing on Phase I of the litigation of the Objection to Claim will take place on April 2, 2024 at 11:00 a.m.
5. The parties shall meet and confer regarding the need for exhibits in relation to the above-reference briefing of Phase I of the litigation of the Obligation to Claim in light of the entered Pretrial Order [docket number 219].

NOTE: Parties agreed on record at January 30, 2024 pretrial conference that the court can resolve the Phase I issues with briefs and argument and that they have stipulated to all operative facts relevant to the determination of these issues.

Tentative Ruling for April 2, 2024:

1992 - On December 29, 1992, the shares of Debtor were held as follows:

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

Robert L. Hartry -- 804 shares, 80.4%
Robert H. Hartry -- 50 shares, 5%
Eric M. Hartry -- 146 shares, 14.6%.

2012 - At a meeting of Debtor's Board of Directors held on December 15, 2012, the shares of Debtor were transferred and sold, resulting in the following share ownership:

Robert L. Hartry, as Trustee of the Robert L. Hartry and Margareta I. Hartry Living Trust for the Benefit of Robert L. Hartry and Margareta I. Hartry and their issue under instrument Dated November 16, 1981	-- 454 shares, 45.4%
Eric M. Hartry	-- 146 shares, 14.6%
Robert H. Hartry	-- 250 shares, 25%
Jerry Anderson	-- 150 shares, 15%.

§ 44.107 Change in stockholders of a corporation.

Where the issuance, sale, or transfer of the stock of a corporation, operating as an export warehouse proprietor, results in a change in the identity of the principal stockholders exercising actual or legal control of the operations of the corporation, the corporate proprietor shall, within 30 days after the change occurs, make application for a new permit; otherwise, the present permit shall be automatically terminated at the expiration of such 30-day period, and the proprietor shall dispose of all cigars, cigarettes, and cigarette papers and tubes on hand, in accordance with this part, make a closing inventory and closing report, in accordance with the provisions of §§ 44.146 and 44.151, respectively, and surrender his permit with such inventory and report. If the application for a new permit is timely made, the present permit shall continue in effect pending final action with respect to such application.

Neither the Internal Revenue Code's tobacco export warehouse provisions, nor the related TTB regulations, specifically define the phrase "a change in the identity of the principal stockholders exercising actual or legal control of the operations of the

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

corporation" as it appears in 27 C.F.R. § 44.107. However, TTB's website contains information under a drop-down tab entitled "Changes After Original Qualification - Permits Online":

Change in Control

A change in control can either be a change in legal or actual control within a business entity holding a permit as a manufacturer or importer of tobacco products or processed tobacco or as an export warehouse proprietor under the IRC. **A change in legal control occurs when there has been a change in the person who owns or controls the majority of voting stock in a corporate entity.** A change in actual control occurs when there is a change in the person who exercises managerial control over the operations of the business. Examples of changes in actual control include changes in partnership ownership interest, in LLC membership ownership, and in officers and directors of a corporation or other business entity.

Debtor argues that there was no change in legal or actual control because (1) members of the Hatry family still controlled 85 percent of the shares of the corporation and (2) debtor remained a subchapter S corp and, pursuant to subchapter S of the IRC, all shareholders from the same family are to be treated as a single shareholder for the purpose of determining whether the corporation has satisfied the subchapter S requirement that there be less than 100 shareholders. (Hatry family members that owned stock in debtor are sufficiently closely related to qualify as members of a family for this purpose per definitions in 26 U.S.C. section 1361(c).) Debtor also argues that the officers and employees of the debtor remained unchanged and their roles and responsibilities remained unchanged, so there was no change in actual control.

Debtor also notes that, pursuant to the bylaws of the corporation, a simple majority vote is required for matters requiring shareholder approval and that therefore that the change in ownership did not alter the votes needed to achieve a majority. This is not accurate, however. Pursuant to the bylaws, each shareholder is entitled to one vote for each share he or she owns and is entitled to aggregate his/her votes. Prior to the change, Robert L. Hatry, acting alone, held a majority of the shares and therefore did not need anyone else's vote to approve an action that was required to be approved by a

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

majority vote. Following the transaction, other shareholders, acting together, could outvote him and, if everyone voted all of their shares, at least one other shareholder would need to vote with him in order to achieve a majority.

Court agrees with the debtor that it does not appear that deference to the agency's views is warranted here under Auer v. Robbins, 519 U.S. 452 (1997) and Kisor v. Wilkie, 588 U.S. ____, 139 S.Ct. 2400 (2019). The TTB does not actually have an authoritative or official interpretation of 27 C.F.R. section 44.107. The relevant regulations do not provide an official or uniform definition or any guidance as to the meaning of the phrase "change in the identity," "principal shareholders," or "control." Therefore, the court must interpret these phrases.

The debtor complains of the fact that, although Stacey Houston of the TTB learned about the change in ownership on November 16, 2015, no cease and desist letter was sent until March 31, 2017 and that, prior to the issuance of that letter, the TTB had only complained of a change of ownership, management or control giving rise to an automatic termination of the debtor's alcohol permits and not the debtor's tobacco permits or that the TTB was applying the standards set forth in sections 1.42 and 1.44 to its situation, rather than those of section 44.107. This argument is a bit difficult to follow. There is an email exchange earlier in March of 2017 that only refers to sections 1.42 and 1.44, but the March 31, 2017 cease and desist letter does cite section 44.107 and asserts that there has been an unreported change of control resulting in the loss of the tobacco permits under that section. (See Exhibit G of Compendium.) While it may be unclear when the TTB first decided that the provisions of section 44.107 had been triggered, it is clear that, by the time the March 31, 2017 cease and desist letter was drafted, the TTB was looking at the correct section and arguing that the type of change referenced in that section had occurred. And section 44.107 does provide for an automatic termination of the relevant permits if notice is not given within 30 days (subject to an extension if an application for a new permit is submitted within this 30-day period).

These facts, if relevant at all, do not have any bearing on the answer to the only issue the court will be adjudicating during Phase I -- "Whether the December 15, 2012 transfer of shares in the Debtor 'result[ed] in a change in the identity of the principal stockholders exercising actual or legal control of the operations of the corporation' within the meaning of 27 C.F.R. section 44.107." [See Pretrial Order, p. 8, at lines

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... **Marine Wholesale & Warehouse Co.**

Chapter 11

13-15.] Whether the debtor can make an equitable argument of some kind based on any delay on the part of the TTB in raising the argument that its tobacco permits automatically terminated in 2012 based on the debtor's failure to give the required notice and apply for a new permit within 30 days after the transfer or based upon the TTB's failure to provide clearer guidance and definitions is a matter for a later phase of this litigation.

Admittedly, the action commenced by the debtor against the TTB on June 30, 2017 in the US District Court for the District of Columbia [Marine Wholesale & Warehouse Co. v. United States, 315 F. Supp. 3d 498 (D.C. 2018)], was dismissed for lack of subject matter jurisdiction, but in the section in which it concludes in the alternative that the debtor has failed to state a claim upon which relief can be granted, its analysis of the relevant facts is directly on point, well-reasoned and persuasive. The following are excerpts from that decision. (Emphasis added.)

In this case, MWW's amended complaint makes clear that, "[p]rior to December 15, 2012, Robert L. Hartry [was] the principal shareholder of MWW, holding 80.4% of the shares of the corporation," and that "[t]he remaining shares were owned 5% by Robert H. Hartry, son of Robert L. Hartry, and 14.6% by Eric M. Hartry, son of Robert L. Hartry." Am. Compl. ¶ 18. MWW then states that, "[o]n or about December 31, 2012, Mr. [Robert L.] Hartry transferred a percentage of MWW shares such that, after the transfer, the shareholdings were as follows: Robert L. Hartry, 45.4%; Robert H. Hartry, and Eric M. Hartry, his sons, 25% and 14.6%, respectively; and Mr. Jerry Anderson, 15%." Id. ¶ 20. MWW does not allege that it reported **this change—which changed Robert L. Hartry's ownership by nearly 40 percent, changed Robert H. Hartry's ownership by 20 percent, and added a new shareholder from outside the Hartry family—to the TTB. Thus, taking the facts stated in MWW's amended complaint as true, MWW's permits terminated by operation of law when this transfer, resulting in a change of control and a new owner, was made**, and accordingly no notice or opportunity for a hearing was required. See 27 U.S.C. § 204(e) (requiring "due notice and opportunity for hearing to the permittee" only for the revocation, suspension, or annulment of a permit but not for an automatic termination).

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT...

Marine Wholesale & Warehouse Co.

Chapter 11

MWW nevertheless argues that " 'actual or legal control' of MMW [sic] has not been acquired by any other person as a result of the 2012 share transfer transaction" and that "[t]he Hartry family, required to be treated as a single shareholder of the Subchapter S corporation which holds the permit, retained 85% of the shares of the company after the share transfer occurred." Pl.'s Opp'n at 11. MWW is an S-corporation and is correct that, under 26 U.S.C. § 1361(c)(1), "all members of a family"—which means "common ancestor, any lineal descendant of such common ancestor, and any spouse or former spouse of such common ancestor or any such lineal descendant," id. § 1361(c)(1)(B)(i) —shall be treated as one shareholder, id. § 1361(c)(1)(A)(ii). **The fact that MWW is an S-corporation, however, does not mean that the shareholder-counting rules applicable to S-corporations also apply throughout the United States Code. Rather, § 1361(c)(1) applies only "[f]or purposes of subsection (b)(1)(A)," which defines a "small business corporation" as a "domestic corporation" with no more than 100 shareholders. Id. § 1361(b)(1)(A). Thus, the requirement in § 1361(c)(1) that family members be treated as a single shareholder applies only to § 1361(b)(1)(A), and does not extend to other sections of Subchapter S, let alone to the rest of Title 26 and Title 27 of the U.S. Code.** Indeed, the D.C. Circuit has previously affirmed an order of the TTB's predecessor agency concluding that a transfer of shares from wife to husband "constitutes a change in the control and management of the business ... necessitating the issuance of a new basic permit under the Federal Alcohol Act." *United Distillers II*, 243 F.2d at 668 (internal quotation marks omitted; alteration in original).

Even assuming, as the plaintiff argues, that Subchapter S of the Internal Revenue Code applies to the provisions of the Internal Revenue Code and the FAAA at issue in this case, the plaintiff's argument fails. The plaintiff ignores the fact that Jerry Anderson—who is not a member of the Hartry family—acquired 15 percent of outstanding MWW shares as a result of the 2012 share transfer. See Am. Compl. ¶ 20. Thus, even treating the Hartry family as a single shareholder, MWW failed to notify the TTB of "a change in the identity of the principal stockholders exercising actual or legal control of the operations of the corporation." 27 C.F.R. § 44.107

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

This Court agrees on both counts. The manner in which family members are to be counted for the purpose of determining whether an S Corp has more than 100 shareholders has no bearing on the determination of whether or not there has been a change of actual or legal control for the purpose of section 44.107. And the December 2012 transaction did result in a change in the identity of the principal stockholders exercising legal control over the operations of the corporation. Therefore, this change should have been reported to the TTB.

And this should not come as news to the debtor. It had previously failed to report changes in ownership and had had its permits automatically terminated. It then applied for new permits and, in conjunction with those applications, reiterated its obligation to notify the TTB of changes in ownership. Notice should have been given here as well.

Discuss with parties how best to proceed with the balance of this litigation. Do the parties want an opportunity to return to mediation?

Final Ruling for April 2, 2024:

Court adopted tentative ruling. Continue hearing to May 7, 2024 at 2:00 p.m. Court waived the requirement of a written status report. Parties should be prepared to discuss how best to proceed with the balance of the issues in this action.

Tentative Ruling for May 7, 2024:

Court held that the December 15, 2012 transfer of shares constituted a change of legal control within the meaning of 27 CFR section 44.107. Discuss with parties how to proceed with the next phase of this litigation.

6/7/24 -- Court approved stipulation continuing hearing to **July 16, 2024 at 2:00 p.m.**
OFF CALENDAR FOR JUNE 20, 2024.

7/2/24 -- Court approved stipulation continuing hearing to August 13, **2024 at 2:00 p.m.** OFF CALENDAR FOR JULY 16, 2024.

Party Information

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

Debtor(s):

Marine Wholesale & Warehouse Co.

Represented By

David R Haberbush

Vanessa M Haberbush

Lane K Bogard

Movant(s):

Marine Wholesale & Warehouse Co.

Represented By

David R Haberbush

Vanessa M Haberbush

Lane K Bogard

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

2:22-13785 Marine Wholesale & Warehouse Co.

Chapter 11

#205.00 Scheduling and Case Management Conference in a Chapter 11 Case

fr: 9-7-22; 9-13-22; 12-14-22; 2-7-23; 6-13-23; 7-18-23; 8-15-23; 10-17-23;
12-5-23; 1-30-24; 4-2-24; 5-7-24; 6-20-24

Docket 1

***** VACATED *** REASON: CONTINUED TO 8-13-24 AT 2PM**

Courtroom Deputy:

Tentative Ruling:

7/28/22 -- Court granted motion to set bar date, setting bar date of October 3, 2022. Notice of bar date must be served by August 5, 2022.

Tentative Ruling for September 7, 2022

Continue case status conference to September 13, 2022 at 10:30 a.m. to be heard concurrently with motion for continued use of cash collateral. No updated status report required. APPEARANCES WAIVED ON SEPTEMBER 7, 2022.

Tentative Ruling for September 13, 2022:

Has the debtor made any progress on the remaining compliance issues since its status report was filed? Has debtor filed an objection to the TTB's claim yet? If not, why not and when does debtor anticipate being in a position to file this objection? Hearing required.

Tentative Ruling for December 14, 2022:

Has the debtor provided updated insurance declarations and proof of renewed licenses/certificates to the U.S. Trustee?

Were there any surprises in the claims filed prior to the October 3, 2022 bar date? Court is not inclined to set a deadline for the filing of objections to claims at this time. (Debtor has already filed an objection to the claim of the TTB.)

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

Continue case status conference to February 7, 2023 at 2:00 pm to coincide with continued hearing on objection to TTB claim. Waive requirement of updated status report for that status conference.

Tentative Ruling for February 7, 2023:

Court waived requirement of updated status report for this status conference, but how are the debtor's operations doing? Is the debtor currently in compliance with US Trustee requirements? Are there any significant developments that should be brought to the court's attention? Hearing required.

Tentative Ruling for June 13, 2023:

Continue case status conference to July 18, 2023 at 2:00 p.m. to coincide with continued status conference on claim objection. Debtor need not file updated status report for this status conference. APPEARANCES WAIVED ON JUNE 13, 2023.

Tentative Ruling for July 18, 2023:

Continue case status conference to August 15, 2023 at 2:00 p.m. to coincide with continued status conference on claim objection. Debtor need not file updated status report for this status conference. APPEARANCES WAIVED ON JULY 18, 2023.

Tentative Ruling for August 15, 2023:

Revisit status of case after conclusion of related matter on calendar. Continue case status conference to date of continued hearing on claim objection.

10/16/23 -- Court added language to parties' stipulation re continuance of hearing on claim objection continuing case status conference to December 5, 2023. OFF CALENDAR FOR OCTOBER 17, 2023.

**United States Bankruptcy Court
Central District of California
Los Angeles
Sheri Bluebond, Presiding
Courtroom 1539 Calendar**

Tuesday, July 16, 2024

Hearing Room 1539

2:00 PM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

Tentative Ruling for December 5, 2023:

Revisit status of case after conclusion of hearing on claim objection.

Final Ruling for December 5, 2023:

Continue case status conference to January 30, 2024 at 2:00 p.m. Waive requirement of updated status report.

Tentative Ruling for April 2, 2024:

Revisit status of case after conclusion of hearing on claim objection.

Tentative Ruling for May 7, 2024:

Continue case status conference to next hearing date scheduled in related adversary proceeding.

6/7/24 -- Court approved stipulation continuing hearing to **July 16, 2024 at 2:00 p.m.**
OFF CALENDAR FOR JUNE 20, 2024.

7/2/24 -- Court approved stipulation continuing hearing to August 13, **2024 at 2:00 p.m.**
OFF CALENDAR FOR JULY 16, 2024.

Party Information

Debtor(s):

Marine Wholesale & Warehouse Co.

Represented By

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Lane K Bogard