

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM
2:00-00000

Chapter

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

Thursday, December 5, 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**

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:24-18457 Los Angeles Korean 1st Presbyterian Church Corpora

Chapter 11

#1.00 U.S. Trustee's Motion Under 11 U.S.C. § 1112(b) to Dismiss, Convert, or Direct the Appointment of a Chapter 11 trustee

Docket 22

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

Debtor did not serve the notice of status conference or file a status report as directed by the court's order setting status conference.

According to the US Trustee's reply, as of November 29, 2024, the debtor still had not filed any of the missing documents. The debtor's opposition says little more than the debtor's deficiencies will be cured by the hearing date or a reasonable time thereafter. The bottomline appears to be that the debtor has merely parked this case in chapter 11 and done little else. Debtor has not even filed an application to employ counsel. This case appears to be an abuse of the bankruptcy process.

Grant motion and dismiss case.

Party Information

Debtor(s):

Los Angeles Korean 1st Presbyterian

Represented By
Matthew Harrison

Movant(s):

United States Trustee (LA)

Represented By
David Samuel Shevitz

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:24-18457 Los Angeles Korean 1st Presbyterian Church Corpora

Chapter 11

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

fr: 12-4-24

Docket 1

Courtroom Deputy:

ZoomGov Appearance by:

11/22/2024 - Marina Fineman

12/3/24 - David Shevitz

Tentative Ruling:

Did debtor serve order setting scheduling and case management conference as required by terms of order? Did debtor file required case status report?

Continue case status conference to December 6, 2024 at 10:00 a.m. to be heard concurrently with US Trustee's motion to dismiss or convert.

APPEARANCES WAIVED ON DECEMBER 4, 2024.

Party Information

Debtor(s):

Los Angeles Korean 1st Presbyterian

Represented By
Matthew Harrison

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:24-18458 3160 8th LLC

Chapter 11

#2.00 U.S. Trustee's Motion Under 11 U.S.C. § 1112(b) to Dismiss, Convert, or Direct the Appointment of a Chapter 11 Trustee

Docket 17

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

Debtor did not serve the notice of status conference or file a status report as directed by the court's order setting status conference.

According to the US Trustee's reply, as of November 29, 2024, the debtor still had not filed any of the missing documents. The debtor's opposition says little more than the debtor's deficiencies will be cured by the hearing date or a reasonable time thereafter. The bottomline appears to be that the debtor has merely parked this case in chapter 11 and done little else. Debtor has not even filed an application to employ counsel. This case appears to be an abuse of the bankruptcy process.

Grant motion and dismiss case.

Party Information

Debtor(s):

3160 8th LLC

Represented By
Matthew Harrison

Movant(s):

United States Trustee (LA)

Represented By
David Samuel Shevitz

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:24-18458 3160 8th LLC

Chapter 11

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

fr: 12-4-24

Docket 1

Courtroom Deputy:

ZoomGov Appearance by:

11/22/2024 - Marina Fineman

12/3/24 - David Shevitz

Tentative Ruling:

Did debtor serve order setting scheduling and case management conference as required by terms of order? Did debtor file required case status report?

Continue case status conference to December 6, 2024 at 10:00 a.m. to be heard concurrently with US Trustee's motion to dismiss or convert.

APPEARANCES WAIVED ON DECEMBER 4, 2024.

Party Information

Debtor(s):

3160 8th LLC

Represented By
Matthew Harrison

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:22-13785 Marine Wholesale & Warehouse Co.

Chapter 11

#3.00 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; 7-16-24; 8-13-24; 10-10-24; 10-17-24

Docket 90

Courtroom Deputy:

ZoomGov Appearance by:

10/15/24 - David Shevitz

10/16/24 - Jolene Tanner

10/16/24 - Laura Hils

10/16/24 Brian Wissman

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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

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 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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.
response to the debtor's proposal?

Chapter 11

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 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:

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

Chapter 11

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 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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

these issues.

Tentative Ruling for April 2, 2024:

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

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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

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 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. (Hartry 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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

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 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).

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

Chapter 11

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 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**

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT...

Marine Wholesale & Warehouse Co.

Chapter 11

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).

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

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT...

Marine Wholesale & Warehouse Co.

Chapter 11

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

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.**

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

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.

Tentative Ruling for August 13, 2024:

Finalize with parties the issues to be resolved in Phase II of this litigation and determine whether it will be necessary to give the parties an opportunity to conduct discovery at this juncture. Hearing required.

Tentative Ruling for October 17, 2024:

Both parties overlook and misstate the relevant issues to some extent. The debtor places too much emphasis on the TTB's admission that it had a bond in place throughout the relevant period. This is not the issue. The question is whether the debtor qualifies as a "bonded internal revenue warehouse" or an "export warehouse proprietor" even though it no longer had a valid permit during the relevant time period. The TTB argues that the debtor cannot be an "export warehouse proprietor" because 27 CFR section 44.82 requires it to have a permit. This is an inaccurate reading of section 44.82.

27 CFR section 44.11 defines as "export warehouse" as "A bonded internal revenue warehouse [which term is not defined in the statute] for the storage of tobacco products or cigarette papers or tubes or any processed tobacco, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States."

27 CFR section 44.82 says (emphasis added):

Every person, before commencing business as an export warehouse proprietor, must apply on TTB form 2093 (5200.3) and obtain the permit provided for in section 44.93. All documents required under this part to be furnished with such application shall be made a part thereof.

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

It does not appear that anyone disputes that, before it commenced business as an export warehouse proprietor, the debtor applied for and obtained the required permit. The issue is whether one remains an "export warehouse proprietor" if the permit that it once had is terminated.

Debtor also provides a misleading discussion of 26 U.S.C. section 5761(c). That section provides as follows (emphasis added):

(c) Sale of tobacco products and cigarette papers and tubes for export
Except as provided in subsections (b) and (d) of section 5704—

(1) every person who sells, relands, or receives within the jurisdiction of the United States any tobacco products or cigarette papers or tubes which have been labeled or shipped for exportation under this chapter,

(2) every person who sells or receives such relanded tobacco products or cigarette papers or tubes, and

(3) every person who aids or abets in such selling, relanding, or receiving, shall, in addition to the tax and any other penalty provided in this title, be liable for a penalty *equal to the greater of \$1,000 or 5 times the amount of the tax imposed by this chapter*. All tobacco products and cigarette papers and tubes relanded within the jurisdiction of the United States shall be forfeited to the United States and destroyed. All vessels, vehicles, and aircraft used in such relanding or in removing such products, papers, and tubes from the place where relanded, shall be forfeited to the United States. This subsection and section 5754 shall not apply to any person who relands or receives tobacco products in the quantity allowed entry free of tax and duty under subchapter IV of chapter 98 of the Harmonized Tariff Schedule of the United States. No quantity of tobacco products other than the quantity referred to in the preceding sentence may be relanded or received as a personal use quantity.

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

Chapter 11

The \$1,000 penalty described in section 5761(a) is limited to \$1,000 (in addition to any other penalty imposed by the chapter) for anyone who willfully omits, neglects or refuses to comply with any duty imposed upon him by the chapter, etc., but this willfulness requirement does not appear in section 5761(c). And subsection (c) does not merely impose a penalty of \$1,000 (in addition to other penalties imposed by the chapter). The penalty is the *greater* of \$1,000 and five times the amount of the tax.

The TTB says that, if section 5761(c) applies, then the exemption of section 5704(b) does not apply. (See docket no. 277 at lines 23 through 24.) Why would this be the case? Section 5761(c) is expressly subject in the introductory language to the exceptions set forth in section 5704(b) and (d). The issue here is again whether the debtor, having lost its permit, still falls within the definition of an "export warehouse proprietor" that appears in section 5704(b).

Section 5704(b) provides as follows:

(b) Tobacco products and cigarette papers and tubes transferred or removed in bond from domestic factories and export warehouses

A manufacturer or *export warehouse proprietor* may transfer tobacco products and cigarette papers and tubes, without payment of tax, to the bonded premises of another manufacturer or *export warehouse proprietor*, or remove such articles, without payment of tax, for shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States; and manufacturers may similarly remove such articles for use of the United States; in accordance with such regulations and under such bonds as the Secretary shall prescribe. Tobacco products and cigarette papers and tubes may not be transferred or removed under this subsection unless such products or papers and tubes bear such marks, labels, or notices as the Secretary shall by regulations prescribe.

So it appears to be true that, if the debtor no longer qualified as an export warehouse proprietor after its permit terminated, that it would not be able to transfer product without tax liability under 5704(b), but would it have liability in the first place? Perhaps it has its own liability under section 5761, but the manufacturer's liability

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

Chapter 11

would not be transferred to it under section.

Section 5703(a) provides as follows:

(a) Liability for tax

(1) Original liability

The manufacturer or importer of tobacco products and cigarette papers and tubes shall be liable for the taxes imposed thereon by section 5701.

(2) Transfer of liability

When tobacco products and cigarette papers and tubes are transferred, without payment of tax, pursuant to section 5704, the liability for tax shall be transferred in accordance with the provisions of this paragraph. When tobacco products and cigarette papers and tubes are transferred **between the bonded premises of manufacturers and export warehouse proprietors, the transferee shall become liable for the tax upon receipt by him of such articles, and the transferor shall thereupon be relieved of his liability for such tax.** When tobacco products and cigarette papers and tubes are released in bond from customs custody for transfer to the bonded premises of a manufacturer of tobacco products or cigarette papers and tubes, the transferee shall become liable for the tax on such articles upon release from customs custody, and the importer shall thereupon be relieved of his liability for such tax. All provisions of this chapter applicable to tobacco products and cigarette papers and tubes in bond shall be applicable to such articles returned to bond upon withdrawal from the market or returned to bond after previous removal for a tax-exempt purpose.

Perversely, does this mean that, if the debtor is not an "export warehouse proprietor," liability for the unpaid taxes never transfers from the manufacturer to the warehouse proprietor and the manufacturer is never relieved of the liability for this tax? The debtor may have acknowledged that it has liability under section 5703, but that is because the debtor contends that it is an "export warehouse proprietor" within the meaning of these sections. If, as the TTB contends, the debtor no longer qualified as an "export warehouse proprietor" after its permit terminated, then the debtor would not have liability as the transferee of tobacco products under this section (although it may well have liability under section 5761(c) that it could not then transfer away

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... **Marine Wholesale & Warehouse Co.**
under section 5703).

Chapter 11

In any event, this is a long-winded way of saying that the issue the Court needs to focus on for Phase II is whether the debtor still qualifies as an "export warehouse proprietor" for the purpose of these sections if its permit has terminated by the time it is receiving and transferring product on which the taxes have not been paid. Once we have the answer to this question, the Court should be able to apply the relevant code sections and determine whether they impose liability upon the debtor in the first place and whether they permit the debtor to transfer that liability on to another.

Rather than adopt either party's "decision tree," the Court would like to focus on the answer to this question. This appears to be a pure issue of law as to which there are no relevant factual disputes. Is this correct?

Hearing required.

Final Ruling for October 17, 2024:

Continue hearing to December 5, 2024 at 10:00 a.m. Parties have agreed that the following are legal issues only that can be resolved by the court without the need for an evidentiary hearing at that time. Parties are to file simultaneous briefs concerning these issues not later than November 6, 2024 and replies not later than November 20, 2024.

The issues to be decided at the December 5, 2024 hearing are as follows:

1. Whether, when 26 U.S.C. § 5704(b) says that an export warehouse proprietor may remove tobacco products and cigarette papers and tubes for shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States (or for consumption beyond the jurisdiction of the internal revenue laws of the United States) without the payment of tax, **“in accordance with such regulations . . . as the Secretary shall prescribe”** (provided that the removed items bear such marks, labels or notices as the Secretary by regulations prescribes), the quoted and highlighted language includes:

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

a. the requirement that the export warehouse proprietor have a valid permit in effect at the time of such removal (because of the language of 26 U.S.C. § 5713(a), 27 C.F.R. 44.81 and/or 27 C.F.R. 44.93); and/or

b. the requirement that the export warehouse proprietor have fulfilled its obligation to notify the TTB in a timely manner of any change of control pursuant to 27 C.F.R. 44.107.

2. Whether the Debtor still qualifies as an “export warehouse proprietor” as defined in 27 C.F.R. 44.11 after its permit has terminated.

Tentative Ruling for December 5, 2024:

26 U.S.C. section 5713(a) reads:

(a) Issuance. A person shall not engage in business as a manufacturer or importer of tobacco products or processed tobacco or as an export warehouse proprietor without a permit to engage in such business. Such permit, conditioned upon compliance with this chapter and regulations issued thereunder, shall be issued in such form and in such manner as the Secretary shall by regulation prescribe, to every person properly qualified under sections 5711 and 5712. A new permit may be required at such other time as the Secretary shall by regulation prescribe.

27 C.F.R. section 44.81 reads as follows:

Persons required to qualify. Every person who intends to engage in business as an export warehouse proprietor, as defined in this part, shall qualify as such in accordance with the provisions of this part.

27 C.F.R. section 44.93 reads as follows:

Issuance of Permit. After the application for permit, bond, and supporting documents, as required under this part, has been approved, the appropriate TTB officer will issue a permit to the export warehouse proprietor. The proprietor must keep such permit at the export warehouse and make it available for inspection by an appropriate TTB officer.

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

27 C.F.R. section 44.11 reads, in pertinent part, as follows:

Export warehouse. A bonded internal revenue warehouse for the storage of tobacco products or cigarette papers or tubes or any processed tobacco, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States.

Export warehouse proprietor: Any person who operates an export warehouse.

27 C.F.R. section 44.107 reads as follows:

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. [Emphasis added.]

The debtor argues that, even though, as this Court has already found, its export warehouse permit expired automatically by operation of law 30 days after the change of control that occurred on December 15, 2012, due to its failure to report the change of control, it is still able to rely on the tax exemption created by 26 U.S.C. section 5704(b) so long as it operated its business during the relevant time period in accordance with the regulations that govern its day-to-day operations (such as labelling requirements), and that the regulations referenced in section 5704(b) do not include the requirement that it maintain a valid permit. The Court rejects this analysis.

It is true that the definitions of export warehouse and export warehouse proprietor that appear in 27 CFR section 44.11 do not specifically make reference to the need for a

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

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

Chapter 11

permit, but, read in their entirety, the applicable statutes and regulations make clear that no one is permitted to operate as an export warehouse proprietor without a valid permit in effect. Section 5713(a) says as much: A person shall not engage in business as a manufacturer or importer of tobacco products or processed tobacco **or as an export warehouse proprietor without a permit to engage in such business.**

Before starting business as an export warehouse proprietor, persons need to apply for and obtain a permit. 27 CFR section 44.82. And, following an automatic termination of a permit due to a failure to report a change of control, unless it promptly applies for a new permit (which did not happen here), the proprietor is required to windup its export warehouse business and stop operating as such. See 27 C.F.R. section 44.107 (quoted above) (requiring proprietor to "dispose of all cigars, cigarettes, and cigarette papers and tubes on hand, in accordance with this part, make a closing inventory and closing report . . . and surrender his permit with such inventory and report"). The applicable statutes and regulations do not permit the continued operation of an export warehouse after termination of the required permits.

Although the opinions cited by the TTB were cases in which courts ultimately dismissed the relevant actions for lack of jurisdiction (as they were attempts to enjoin the collection of taxes in violation of the Anti-Injunction Act), all of these cases assume or expressly state that, once the proprietor's permit terminates automatically due to a failure to report a change of control, the proprietor becomes liable for any taxes and penalties not paid by the manufacturer: "Export warehouse permits . . . afford tobacco exporters an exemption from federal excise taxes." Gulf Coast Mar. Supply, Inc. v. United States, 867 F.3d 123, 126 (D.C. Cir. 2017) (per curiam); "Without valid permits, export warehouse proprietors are liable for the unpaid excise taxes and penalties that would otherwise apply" to such products. Marine Wholesale & Warehouse Co. v. United States, 315 F. Supp. 3d 498, 502 (D. D.C. 2018) (citing 26 U.S.C. §§ 5703(a)(2), 5704(b), (d), 5761(c)); Gulf Coast Mar. Supply, 867 F.3d at 125 (export warehouse permits "immunize" their holders "from penalties—and in the case of tobacco, taxes as well—on the unauthorized sale of tobacco"); Gulf Coast Mar. Supply, Inc. v. United States, 218 F. Supp. 3d 92, 94-95 (D. D.C. 2016) ("Export warehouse proprietors must operate with a permit issued by TTB. . . . Without such a permit, they may become liable for the excise tax and penalties if they receive tobacco products that did not have the excise tax paid by the manufacturer. 26 U.S.C. §§

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.
5703(a)(2), 5704(b), 5761(c).”).

Chapter 11

The Court finds that, at a minimum, CFR section 44.107 is one of the regulations that govern how an export warehouse proprietor must operate in order to qualify for the tax exemption available under 26 U.S.C. section 5704(b). That regulation requires the proprietor to dispose of its tobacco products, make a closing inventory and a closing report after an automatic termination occurs (unless the proprietor timely applies for a new permit). That is, the proprietor is supposed to close up its tobacco sales operation and stop operating as an export warehouse proprietor of tobacco products. There is no dispute that the debtor did not do that and, instead, continued to operate its tobacco business (until it received a cease and desist letter sometime in 2017). Therefore, even if the debtor still fell within the definition of an export warehouse proprietor after the termination of its permit, it did not comply with the regulations that govern the operation of its business, and the tax exemption created by section 5704(b) ceased to be available to the debtor after the automatic termination of its permit.

Party Information

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**

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

2:22-13785 Marine Wholesale & Warehouse Co.

Chapter 11

#4.00 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; 7-16-24; 8-13-24; 10-10-24; 10-17-24

Docket 1

Courtroom Deputy:

ZoomGov Appearance by:

10/15/24 - David Shevitz

10/16/24 - Jolene Tanner

10/16/24 - Laura Hills

10/16/24 Brian Wissman

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.

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

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.)

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:

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

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.

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.

Tentative Ruling for December 5, 2024:

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

Party Information

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

Thursday, December 5, 2024

Hearing Room 1539

10:00 AM

CONT... Marine Wholesale & Warehouse Co.

Chapter 11

Debtor(s):

Marine Wholesale & Warehouse Co.

Represented By

David R Haberbush

Vanessa M Haberbush

Lane K Bogard