United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 7, 2024 **Hearing Room 301**

9:30 AM

1: - **Chapter**

#0.00 All hearings on this calendar will be conducted in Courtroom 301 at 21041 Burbank Boulevard, Woodland Hills, California, 91367. All parties in interest, members of the public and the press may attend the hearings on this calendar in person.

Additionally, (except with respect to evidentiary hearings, or as otherwise ordered by the Court) parties in interest (and their counsel) may connect by ZoomGov audio and video free of charge, using the connection information provided below. Members of the public and the press may only connect to the zoom audio feed, and only by telephone. Access to the video feed by these individuals is prohibited.

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CONT... **Chapter**

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Docket 0

Tentative Ruling:

- NONE LISTED -

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 7, 2024 **Hearing Room 301**

9:30 AM
1:23-11082 Philip M. Lawrence, II **Chapter 7**

#1.00 Motion for relief stay [AN]

PATRIZIO MOI, MOI PRODUCTIONS INC. AND THE RECORD PLANT INC.
VS
DEBTOR

fr.11/1/23(stip); 11/29/23(stip); 12/20/23; 2/14/23(advanced)

Docket 95

Tentative Ruling:

Grant relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). Movants may proceed under applicable nonbankruptcy law to proceed to final judgment in the nonbankruptcy forum.

The causes of action in the complaint filed by the debtor and Philmar Studios, Inc., on July 22, 2021, in the Superior Court of the State of California for the County of Los Angeles (the "state court"), *Philip Lawrence et. al v. Patrizio Moi et. al,* Case No. 21STCV27084, which may be adjudicated to final judgment by the state court and any applicable appellate court, include (1) intentional misrepresentation; (2) false promise; (3) fraudulent inducement; (4) violation of Bus. & Prof. Code §§ 17200, et. seq.; (5) conversion; (6) trademark infringement; (7) unjust enrichment; (8) intentional interference with contractual relations; (9) rescission; and (10) declaratory relief. *See* Ex. 4 to the *Request for Judicial Notice in Support of Trustee's Opposition to Motion of Moi Parties for Relief from the Automatic Stay* [doc. 132].

The causes of action in the cross-complaint filed by Patrizio Moi, Moi Productions, Inc., and The Record Plant, Inc., in the state court, *Patrizio Moi et al. v. Philip Lawrence, et al.,* Case No. 21STCV27084, which may be adjudicated to final judgment by the state court and any applicable appellate court, include (1) declaratory relief; (2) breach of written contract; (3) promissory fraud; and (4) promissory estoppel. *See* Ex. 4 to the *Motion for Relief from the Automatic Stay* [doc. 95].

Notwithstanding the foregoing, this Court will retain jurisdiction with respect to

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CONT... Philip M. Lawrence, II **Chapter 7**

adjudicating any avoidance causes of action and related relief arising in the debtor's bankruptcy case under the Bankruptcy Code, based on 11 U.S.C. §§ 544, 546, 548, 550 and 551, which causes of action may not be adjudicated by the state court.

The 14-day stay prescribed by FRBP 4001(a)(3) is not waived.

Movants must submit the order within seven (7) days.

Party Information

Debtor(s):

Philip M. Lawrence II	Represented By Robert M Yaspan

Movant(s):

Patrizio Moi	Represented By Matthew D. Resnik

Trustee(s):

David Keith Gottlieb (TR)	Represented By Ron Bender Jeffrey S Kwong

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
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Wednesday, February 7, 2024 **Hearing Room 301**

9:30 AM
1:23-11318 Zara Militosyan **Chapter 13**

#2.00 Motion for relief from stay [PP]

JPMORGAN CHASE BANK, NA
VS
DEBTOR

Docket 24

Tentative Ruling:

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to repossess and sell the property.

The co-debtor stay of 11 U.S.C. § 1201(a) and § 1301(a) is terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the debtor.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit the order within seven (7) days.

Note: No response has been filed. Accordingly, no court appearance by movant is required. Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required and movant will be so notified.

Party Information

Debtor(s):

Zara Militosyan — Represented By Sevan Gorginian

9:30 AM
CONT... Zara Militosyan **Chapter 13**

Movant(s):

JPMorgan Chase Bank, N.A. Represented By
Jenelle C Arnold

Trustee(s):

Elizabeth (SV) F Rojas (TR) Pro Se

9:30 AM
1:23-10655 Juan Manuel Arguelles-Zambrano **Chapter 13**

#3.00 Motion for relief from stay [RP]

AJAX MORTGAGE LOAN TRUST 2021-C, MORTGAGE-BACKED SECURITIES, SERIES 2021-C, BY U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE
VS
DEBTOR

Docket 78

Tentative Ruling:

On January 15, 2024, the debtor filed a response to the motion, in which he states that he would like to enter into an adequate protection order [doc. 82]. Pursuant to Local Bankruptcy Rule 9013-1(f)(2), the response must be supported by a declaration and copies of all evidence on which the responding party intends to rely. The debtor did not attach to the response a declaration, signed under penalty of perjury, attesting to the facts stated in the response.

Grant relief from stay pursuant to 11 U.S.C. § 362(d)(1).

Movant (and any successors or assigns) may proceed under applicable nonbankruptcy law to enforce its remedies to foreclose upon and obtain possession of the property.

Movant, or its agents, may, at its option, offer, provide and enter into a potential forebearance agreement, loan modification, refinance agreement or other loan workout or loss mitigation agreement. Movant, through its servicing agent, may contact the debtor by telephone or written correspondence to offer such an agreement.

The co-debtor stay of 11 U.S.C. § 1201(a) or § 1301(a) is terminated, modified or annulled as to the co-debtor, on the same terms and conditions as to the debtor.

The 14-day stay prescribed by FRBP 4001(a)(3) is waived.

Movant must submit the order within seven (7) days.

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
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Wednesday, February 7, 2024 **Hearing Room 301**

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CONT... Juan Manuel Arguelles-Zambrano **Chapter 13**

Party Information

Debtor(s):

Juan Manuel Arguelles-Zambrano	Represented By Onyinye N Anyama

Movant(s):

Ajax Mortgage Loan Trust 2021-C,	Represented By Darlene C Vigil

Trustee(s):

Elizabeth (SV) F Rojas (TR)	Pro Se

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 7, 2024 **Hearing Room 301**

9:30 AM

1:23-11148 D'RIA Group Inc. and Jaime Blanco-Maciel **Chapter 11**

#4.00 Motion for relief from stay [AN]

JAIME BLANCO-MACIEL, ET AL
VS
DEBTOR

Docket 52

Tentative Ruling:

Unless an appearance is made at the hearing on February 7, 2024, the hearing is continued to March 6, 2024 at 9:30 a.m., and movant must cure the deficiencies noted below on or before February 9, 2024.

In accordance with Fed. R. Bankr. P. 4001(a)(1), movant must properly serve the motion and notice of the continued hearing and the deadline to file a written response on the creditors included on the list filed under Fed. R. Bankr. P. 1007(d). *See* doc. 15 [List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders].

Appearances on February 7, 2024 are excused.

Party Information

Debtor(s):

D'RIA Group Inc. Represented By
Michael Jay Berger

1:00 PM
1:20-11237 BGS WORKS, INC. **Chapter 11**

#4.01 Order To Show Cause Why, Pursuant to 11 U.S.C. §§ 105(a) And 1112(b), This Case Should Not Be Converted To One Under Chapter 7

Docket 265

Tentative Ruling:

Taking into account, among other things, the facts, the applicable legal standards and case law set forth below, the Court will decide the matter after hearing oral argument; the Court may set a schedule for additional briefing on issues noted below.

I. BACKGROUND

A. The First Bankruptcy Case and the Second Bankruptcy Case

On July 15, 2020, BGS Works, Inc., debtor and debtor-in-possession ("Debtor"), filed a chapter 11 petition, initiating this case. Jacob Sternlib is Debtor's CEO/President and sole shareholder.

Debtor owns the real property located at 5099 Llano Drive, Woodland Hills, CA 91364 (the "Property"). The Property, a single family residence, is the primary asset of the estate. *See* Debtor's schedule A/B [doc. 9]. In its schedule A/B, Debtor further described the Property and the filing of its chapter11 petition as follows:

> [T]he home is about 70% complete. The project was delayed and is over budget because the Los Angeles City inspector assigned to the job forced the Debtor to make further alleged "mandatory building requirements" that were not part of the original City approved plans and which the Debtor believes were unnecessary. This additional work cost the Debtor $250,000 and obviously affected the budget. The Debtor's goal is to secure Debtor-in-Possession financing to complete the contruction of the Debtor's real property by March 2021, then list it for sale; the sale will generate sufficient proceeds to pay all debts of the estate in full.

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CONT... BGS WORKS, INC. **Chapter 11**

In its schedule D, Debtor set forth the following secured claims: (1) claim of Danmor Investments, Inc. ["Danmor"], secured by a first trust deed against the Property, in the amount of $1,350,000; (2) claim of Nichols Lumber & Hardware, secured by a mechanic's lien against the Property, in the amount of $12,483.82 **[FN1]**; (3) claim of Rivera Hauling, Inc. ("Rivera"), secured by a mechanic's lien against the Property, in the amount of $71,525; and (4) claim of Sunbelt Rentals ("Sunbelt"), secured by a mechanic's lien against the Property, in the amount of $62,176.27. In its schedule E, Debtor listed nonpriority unsecured claims in the aggregate amount of $120,600.

On November 20, 2020, Danmor filed proof of a secured claim against the estate in the amount of $625,000 [Claim No. 6-1], and USTDS, Inc. ("USTDS") filed proof of a secured claim against the estate in the amount of $725,000 [Claim No. 7-1]. To their proofs of claim, Danmor and USTDS each attached an exhibit which stated:

> Danmor Investments, Inc., as to an undivided 625,000/1,350,000 interest, and USTDS, Inc., as to an undivided 725,000/1,350,000 interest are co-holders of a note secured by deed of trust. The total obligation under the deed of trust consists as follows:
>
> Principal: $1,350,000
> Accrued interest and late fees as of petition date and interest, late fees and attorney's fees accruing or incurred since the petition.

Claim No. 6-1, p. 4; Claim No. 7-1, p. 4. **[FN2]**

In July 2021, in order to complete the construction of the Property, the Debtor obtained Court approval to obtain postpetition financing from Danmor (the "Postpetition Financing"). Pertinent terms of the Postpetition Financing include: (1) loan from Danmor to Debtor in the amount of $760,000, fully funded at closing into reserves; (2) term of the *earlier* of 9 months from the closing or on the sale of the Property; (3) interest rate of 10%, paid in cash via draws on the reserve; (4) default interest rate of 13%; (4) a lien on the Property equal in priority to the existing deed of trust in favor of Danmor and senior in priority to all other liens; and (5) two extensions of the term, each for a period of 90 days on: (a) Debtor's payment of a 1% extension fee to Lender and (b) Debtor's payment into the reserve account of (i) three months additional interest on the Postpetition Financing, and (ii) three months

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CONT... BGS WORKS, INC. **Chapter 11**

additional "Adequate Protection Payments" in the amount of interest on $1,350,000 of the debt secured by the original deed of trust, at the nondefault rate of 10% per annum [docs. 110 and 130].

In May 2022, Debtor filed *Debtor's First Amended Chapter 11 Plan of Reorganization* (the "Plan") [doc. 185]. In July 2022, by which time the Postpetition Financing had not yet closed, the Court entered an amended order regarding the Postpetition Financing. That order explicitly states that the Postpetition Financing has super-priority status over all liens and interests, including the liens of USTDS, Rivera and Sunbelt.

On August 24, 2022, Debtor, Danmor and USTDS filed a joint status report regarding the Postpetition Financing, in which they represented that the loan documents for the Postpetition Financing had been finalized [doc. 221]. On August 31, 2022, Debtor filed the *Supplemental Declaration of Joseph Sternlib in Support of Debtor's Plan Confirmation Brief*. In that declaration, Mr. Sternlib represented that he had executed all required loan documents to complete the process for Debtor to obtain the Postpetition Financing. Mr. Sternlib further stated that "Debtor will resume construction within the weeks following the funding of the loan, which will occur in the next few days" and that "with this additional financing the Debtor will be able to complete the construction pursuant to the final budget and then market the property for sale. The potential sale proceeds will pay off all debts of the estate . . . ." [doc. 222].

In October 2022, the Court entered an *Order Confirming Debtor's First Amended Chapter 11 Plan of Reorganization* (the "Order Confirming Plan") [doc. 231]. Pursuant to the Order Confirming Plan, Debtor "shall distribute all property to be distributed pursuant to the terms of the Plan." Order Confirming Plan, p. 3. In addition, the Order Confirming Plan provides that "[u]pon the substantial consummation of the Plan, Debtor shall file an application for a final decree pursuant to Federal Rule of Bankruptcy Procedure 3022[.]" *Id*.

Pursuant to the Plan, Debtor's bankruptcy counsel is to be paid its approved fees in full, with $25,000 of the payment to be carved out of the Postpetition Financing, and the remaining approved fees to be paid from the sale of the Property. Similarly, the secured claim of Danmor, placed in Class 1, and the secured claim of USTDS, placed

in Class 2, are to be paid in full from the sale of the Property.

The Plan also provides for Debtor to litigate the validity of Rivera's secured claim, placed in Class 3, and Sunbelt's secured claim, placed in Class 4, in state court; if the state court enters judgments against Debtor, Rivera's and Sunbelt's claims are to be paid in full from the sale of the Property. *Id*., p. 8. [**FN3**] Finally, the Plan provides that general unsecured claims (placed in Class 7), in the estimated aggregate amount of $128,159, are to be paid in full, with 1.5% interest, from the sale of the Property. **[FN4]**

On January 5, 2023, Debtor filed the *Reorganized Debtor's Postconfirmation Status Report* (the "Status Report") [doc. 240]. To the Status Report, Debtor attached the declaration of Mr. Sternlib (the "January 2023 Sternlib Declaration") [doc. 270]. In his declaration, Mr. Sternlib stated, in relevant part, that "construction on the Property is proceeding on schedule and I believe that the Reorganized Debtor will meet the deadlines proposed to finish the construction and sell the Property in the confirmed Plan." January 2023 Sternlib Declaration, ¶ 14.

On June 14, 2023, the Court entered an *Order Granting Motion in Chapter 11 Case for the Entry of an Order Closing Case on an Interim Basis* [doc. 262]. Since then, Debtor has not filed an application for a final decree.

On January 22, 2024, Debtor filed another chapter 11 petition, initiating case no. 1:24-bk-10104-VK (the "Second Case"). On January 25, 2024, the Court entered an order reopening this case [doc. 266].

B. The Orders to Show Cause and Responses

On January 25, 2024, the Court issued the order to show cause why this case should not, in accordance with 11 U.S.C. §§ 105(a), 1112(b)(1), (b)(4)(M) and (b)(4)(N), be converted to one under chapter 7 for cause, including Debtor's apparent inability to effectuate substantial consummation of the Plan and material default by Debtor with respect to the Plan (the "OSC") [doc. 265]. The same day, the Court issued an order to show cause as to why it should not, in accordance with 11 U.S.C. §§ 105(a) and 1112(b)(1), dismiss the Second Case (the "Second Case OSC") [Second Case, doc. 7].

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CONT... BGS WORKS, INC. **Chapter 11**

On February 2, 2024, Debtor filed responses to the OSC and the Second Case OSC (the "Responses") and supporting declarations of Joseph Sternlib [*see* doc. 270]. In the Responses (but not in Mr. Sternlib's supporting declaration), Debtor states that the Property is encumbered by six liens. According to Debtor:

> The first two liens are mortgages held by an entity knowns as USTDS, Inc. and Danmor Investments, ("USTDS/Danmor"). The first mortgage has a current balance of $1,618,420.12 and the second mortgage has a current balance of $844,228.53. The third lien is the lien of Los Angeles County Tax Collector for current year taxes of $12,266. The fourth lien is the mechanic's lien of Valenzuela Ready Mix in the amount of $3,300. The fifth lien is the mechanic's lien of Crystal Clear Glass, Inc. in the amount of $9,500. The sixth lien is the mechanic's lien of Steve Barnoy in the amount of $15,000.

Responses, p. 2. **[FN3]** Debtor asserts that it would like to continue with its Second Case. Alternatively, if the Court dismisses the Second Case, the Debtor wants to stay in chapter 11 in this case, which the Court reopened, to complete the sale of the Property. Responses, p. 4.

To the Responses, Debtor attached the declaration of Mr. Sternlib (the "February 2024 Sternlib Declaration") [doc. 270]. In his declaration, Mr. Sternlib asserts, in pertinent part:

> Around May of 2023, USTDS/Dammor stopped giving the Debtor the last draw of $46,000 from the loan approved in the Second Finance Motion. Without the funds to finish the construction, the Debtor could not put the Llano Property on the market. The pool, pool equipment, pool deck, waterfall, and some of the railing was not ready and it was too risky to have open house. Also, because the Debtor's former counsel asked USTDS/Dammor to give them $25,000 to pay for their fees, the loan that the Debtor received from USTDS/Dammor was insufficient to finish construction.
>
> As a result, I got help from my friends and family to contribute the funds needed to complete the construction and to put the [Property] in

the market for sale around May 15, 2023.

> The Debtor was able to complete the construction and listed the [Property] for sale. The Debtor accepted an offer from a qualified buyer for $4,000,000 around September 22, 2023. See Exhibit A for copy of the sale contract. Unfortunately, . . . the transaction fell through, and the sale did not take place as the buyer could not get approval for financing. This placed the Debtor in a tough situation as the Debtor did not have a buyer and USTDS/Danmor had recorded a Notice of Trustee Sale ("TS Notice"), with a foreclosure sale on January 26, 2024. . . .
>
> Debtor currently owes Resnik Hayes Moradi, LLP, for attorney fees and expenses reimbursement of $156,521, per the order entered on February 16, 2023, see Dkt. no. 251. The Debtor did not believe that Resnik Hayes Moradi, LLP would have helped to stop the impending foreclosure set for January 24, 2024, with an outstanding balance.
> …
> Debtor relisted the [Property] around January 1, 2024 and reduced the listing price from $4,000,000 to $3,599,000. I held open house and there were few interested buyers. One of the interested buyers was going to make an offer, but her husband and son were involved in a major accident, and she has not made an offer.
>
> I am seventy-five years old and the [Property] is the only asset that my wife and I have for retirement. I am hoping to sell the [Property] as quickly as possible and to use the proceeds of the sale to finish my life with dignity after working for fifty five years.

February 2024 Sternlib Declaration, ¶¶ 3-7 and 9-10.

On February 2, 2024, Danmor and USTDS filed a response to the Second Case OSC and attached the declaration of Elise Dabby, the President of USTDS and a Trustee of the Danmor Investments, Inc. Profit Sharing Trust (the "Dabby Declaration") [Second Case, doc. 11] . In her declaration, Ms. Dabby asserts, in relevant part:

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CONT... BGS WORKS, INC. **Chapter 11**

In reliance on the Debtor's agreements contained in the Post-Petition Loan, approved by this Court in the prior case, and incorporated into the terms of the Confirmed Plan of Reorganization . . ., Secured Creditor made an additional advance to the Debtor in the sum of $760,000. . . . Secured Creditors [sic] advanced funds through a third party fund control, to the Debtor for the purposes set forth in the loan documents and the plan. The Debtor currently owes Secured Creditor in excess of $2.3 million.

During the plan negotiations, the Debtor's principal had estimated that he only needed three to six months to complete the construction of the [Property], and pay creditors, including Danmor. To give the Debtor more time, we agreed to three months more than the Debtor requested, resulting in a maturity date of June 30, 2023. In addition, we also agreed to provide the Debtor with the right to extend the loan term for an additional six months (i.e. December 30, 2023) on two conditions: (a) that the Debtor timely give written notice of the exercise of the option, (b) and that the Debtor pay into the existing Fund Control an amount equal to six months interest on the post-petition loan and six months of adequate assurance payments on the existing loan.

…

More than 8 months ago, in May of 2023, the Debtor informed me that he did not have enough funds to complete the construction and asked us to make a third loan, not provided for under the plan nor the approved post-petition loan. We declined to do so. We reminded the debtor of the June 30, 2023 due date for the loan, and asked the Debtor to provide information how he planned to resolve the matter. He did not respond.

The Debtor never gave notice of the exercise of an option to extend the loan, and never tendered the required additional interest reserves. We understood that construction had stopped. When we still had no answer from the Debtor how he intended to proceed, we caused notices of default to be recorded on the property in August of 2023. The Debtor still did not respond.

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CONT... BGS WORKS, INC. **Chapter 11**

> In December, we still had no response from the Debtor, and caused a Notices [sic] of Sales to be published. Two weeks before the sale date, the Debtor, through his prior bankruptcy counsel, asked us to continue the sale date. We asked if there was a pending sale in escrow, and was informed by the Debtor that there was not. We asked if the City inspectors had approved the work such that a Certificate of Occupancy ("Certificate") had been issued, and were informed that no Certificate had yet been issued. We declined to continue the sale.

Dabby Declaration, ¶¶ 3-4, 6-8.

C. Potential Distribution to Creditors from Sale of the Property

If the Property were to be sold imminently, at its currently listed sale price, it appears that the proceeds would be sufficient to pay Debtor's administrative expenses and secured claims in full and also to pay a significant portion of the claims of unsecured creditors.

Mr. Sternlib represents that the Property is currently listed for $3,599,000. Based on the six liens Debtor describes in the Response, and assuming the secured claims of Rivera and Sunbelt have not been invalidated in state court or already paid, encumbrances on the Property total approximately $2,621,415. After accounting for these encumbrances and 10% estimated costs of sale (including brokers' commissions), the net unencumbered proceeds from the Property's sale would be greater than $500,000. This would be sufficient to pay the allowed fees of Debtor's former bankruptcy counsel and to provide a significant payment to holders of unsecured claims.

II. APPLICABLE STATUTES AND AUTHORITIES

11 U.S.C. § 1112(b) provides, in pertinent part:

> (1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors

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CONT... BGS WORKS, INC. **Chapter 11**

and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that -
. . .

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A) -

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.
…
(4) For purposes of this subsection, the term 'cause' includes—
…
(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan[.]

"'Cause' is defined in § 1112(b)(4), but the list contained in § 1112(b)(4) is illustrative, not exhaustive.'" *In re Mense*, 509 B.R. 269, 277 (Bankr. C.D. Cal. 2014) (citing *In re Albany Partners*, *Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)). "The decision to convert the case to Chapter 7 is within the bankruptcy court's discretion." *In re Consolidated Pioneer Mortg. Entities*, 264 F.3d 803, 806 (9th Cir. 2001).

Motions to dismiss or convert a case under 11 U.S.C. § 1112(b) require a two-step analysis. "First, it must be determined that there is 'cause' to act. Second, once a

determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *In re Nelson*, 343 B.R. 671, 675 (9th Cir. B.A.P. 2006).

"Substantial consummation" is defined in § 1101(2) as:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

In re Caviata Attached Homes, LLC, 481 B.R. 34, 46 n.10 (9th Cir. B.A.P. 2012) (citing 11 U.S.C. § 1101(2)).

To complete the Property's construction, Debtor obtained the Postpetition Financing. According to Danmor, the maturity date for that financing was June 30, 2023. According to Debtor, in May 2023, the Property was listed for sale for $4 million. By June 2023, Debtor had not sold the Property. In September 2023, Debtor reportedly accepted an offer for a sale which did not close. Around January 1, 2024, Debtor allegedly reduced the listing price to approximately $3.6 million.

Under the Plan, Debtor is to sell the Property and use the sale proceeds to pay all of the estate's debts in full. Although Debtor allegedly has completed construction of the Property **[FN4]**, Debtor has not yet been able to sell the Property - at least at a sale price which Debtor is willing to accept. In addition, because Debtor has not sold the Property, Debtor apparently has paid almost nothing under the Plan to holders of allowed claims. Consequently, Debtor may not have effectuated substantial consummation of the Plan. *See* 11 U.S.C. § 1101(2); *In re Consolidated Pioneer Mortg. Entities*, 248 B.R. 368, 378-79 (9th Cir. B.A.P. 2000) (affirming bankruptcy court's implicit finding that plan was not substantially consummated when debtor's largest asset remained unliquidated). As of this time, the Court is uncertain whether Debtor is unable to substantially consummate the Plan, which requires the sale of the

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CONT... BGS WORKS, INC. **Chapter 11**

Property; Danmor's position appears to be that Debtor already has substantially consummated the Plan.

With respect to there being a material default under the Plan, Debtor has not complied with the terms of the Postpetition Financing, either by repaying Danmor's postpetition loan by its initial due date or by obtaining the possible extensions available in accordance with the Postpetition Financing. This may constitute a material default under the Plan.

FOOTNOTES

FN 1: In his declaration filed in June 2021, Mr. Sternlib represented that the mechanic's lien of Nichols Lumber & Hardware has been satisfied and discharged (referencing a recorded document in the County of Los Angeles on December 28, 2020, as Instrument No. 2021736702)[doc. 110].

FN 2: In its amended schedule D, Debtor separately listed the secured claims of Danmor and USTDS, in the amounts of $625,000 and $725,000, respectively, stating that both claims are based on a "First Trust Deed held by Danmor Investments, Inc. and USTDS, Inc. - undivided $625,000-/$1,350,000 interest held by Danmor and undivided $725,0000/$1,350,000 interest held by USTDS, Inc." [doc. 28].

FN 3: The Court does not know the current status of the prepetition mechanic's liens of Rivera and Sunbelt; these liens were listed in Debtor's initial and amended schedule D. Sunbelt also asserted the existence of its mechanic's lien in its proof of claim, filed on September 10, 2020 [Claim 5-1]. Apparently the liens of Los Angeles County (for property taxes), Valenzuela Ready Mix, Crystal Clear Glass, Inc. and Steve Barnoy were incurred postpetition, after Debtor obtained the Postpetition Financing to complete the construction of the Property.

FN 4: Danmor represents that it was informed that a Certificate of Occupancy for the Property has not yet been issued. Dabby Declaration, ¶ 8. To date, Debtor has not represented that it has obtained a Certificate of Occupancy for the Property.

Party Information

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 7, 2024 **Hearing Room 301**

1:00 PM

CONT... BGS WORKS, INC. **Chapter 11**

Debtor(s):

BGS WORKS, INC.

Represented By
Matthew D. Resnik
Roksana D. Moradi-Brovia

1:00 PM
1:24-10104 BGS Works, Inc. **Chapter 11**

#4.02 Order To Show Cause Why, Pursuant to 11 U.S.C. §§ 105(a) and 1112(b), This Case Should Not Be Dismissed

Docket 7

Tentative Ruling:

Taking into account, among other things, the applicable legal standards and case law set forth below, the Court will dismiss the case.

The parties should refer to cal. no. 4.01 for the relevant background in this matter. [**FN 1**]

I. APPLICABLE STATUTES AND AUTHORITIES

A. Dismissal Under 11 U.S.C. § 1112(b)

11 U.S.C. § 1112(b) provides, in pertinent part:

> (1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

"'Cause' is defined in § 1112(b)(4), but the list contained in § 1112(b)(4) is illustrative, not exhaustive.'" *In re Mense*, 509 B.R. 269, 277 (Bankr. C.D. Cal. 2014) (citing *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)). "Although section 1112(b) does not explicitly require that cases be filed in good faith, courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal." *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994).

"Because good faith is required in the commencement and prosecution of a chapter 11

case, the lack thereof constitutes cause for dismissal under § 1112(b)(1)." *In re Sullivan*, 522 B.R. 604, 614 (9th Cir. B.A.P. 2014). "Whether the good faith requirement has been satisfied is a fact intensive inquiry in which the court must examine the totality of facts and circumstances and determine where a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive." *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004).

B. Subsequent Chapter 11 Filing and Cause for Dismissal

"[T]he mere fact that a debtor has previously petitioned for bankruptcy relief does not render a subsequent Chapter 11 petition '*per se*' invalid." *Matter of Elmwood Development Co.*, 964 F.2d 508, 511 (5th Cir. 1992). If a second chapter 11 petition is filed in good faith, "serial Chapter 11 filings are permissible under the Code." *In re Jartran, Inc.*, 886 F.2d 859, 866–67 (7th Cir. 1989). However, "[t]he occurrence of ordinary, foreseeable risks of doing business should not relieve the debtor of the terms of its confirmed plan." *In re Adams*, 218 B.R. 597, 601 (Bankr. D. Kan. 1998); *see also In re Roxy Real Estate*, 170 B.R. 571, 576 (Bankr. E.D. Pa 1993) ("a change in market conditions for [real estate] in a particular locality is not viewed as justifying a second chapter 11 filing").

In *Elmwood*, the debtor filed a chapter 11 petition to prevent foreclosure of its primary asset, which was an office building. The debtor and a secured creditor later executed an agreement which provided a deadline for the debtor to satisfy the secured creditor's claim. The agreement also provided that the debtor would not propose any plan which would alter that creditor's rights under the agreement. The bankruptcy court approved the agreement and confirmed the debtor's chapter 11 plan of reorganization.

The debtor later defaulted under the plan and sought to modify it. The bankruptcy court held that the plan was substantially consummated and thus not subject to modification under 11 U.S.C. § 1127(b). The debtor then filed a second chapter 11 petition, listing the same 20 unsecured creditors as found in the first petition; no new assets were in the debtor's schedules. According to the debtor, changed circumstances justified the filing of its second chapter 11 petition, including, inter alia: (1) additional tenants; (2) a new settlement agreement with another creditor, which would benefit unsecured creditors; (3) pending litigation to resolve lien priority between two creditors; and (3) a national credit crunch which ostensibly occurred after the debtor's

plan was confirmed. The bankruptcy court dismissed the second case as not being filed in good faith.

When evaluating the bankruptcy court's dismissal of the *Elmwood* debtor's second chapter 11 case, the Court of Appeals explained:

> The good faith standard protects the integrity of the bankruptcy courts and prohibits a debtor's misuse of the process where the overriding motive is to delay creditors without any possible benefit, or to achieve a reprehensible purpose through manipulation of the bankruptcy laws. The good faith determination depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities. A collation of factors, rather than any single datum, controls resolution of this issue. In determining whether a petition was filed with the requisite good faith, the court must examine the facts and circumstances germane to each particular case.

Id. at 510. In addition, the Court of Appeals noted: "unanticipated changed circumstances may justify a valid successive request for Chapter 11 relief. In that instance, a second petition would not necessarily contradict the original proceedings because a legitimately varied and previously unknown factual scenario might require a different plan to accomplish the goals of bankruptcy relief." *Id*. at 511-12.

In consideration of those standards, the Court of Appeals affirmed the dismissal of the debtor's second chapter 11 case and held that the second case filing was "was an attempt to evade the Code's prohibition against modification of substantially consummated confirmed plans." *Id*. at 511. The Court of Appeals reasoned that the debtor:

> [B]argained for three years in which to sell or refinance its property, granting an absolute deadline after which [the foreclosing creditor] could proceed undisturbed with a foreclosure of [the office building]. After reaping the benefit of its bargain [the debtor] sought to avoid its solemn obligation by filing [the second case].

Id. at 511.

In *In re Casa Loma Associates*, 122 B.R. 814, 815-16 (Bankr. N.D. Ga. 1991), a debtor, who owned an all-adult apartment complex, obtained confirmation of a chapter 11 plan. Pursuant to the confirmed plan, the debtor executed new security documents. The debtor later defaulted on the required payments and filed a second chapter 11 petition. A creditor filed a motion to dismiss the second case, asserting that the debtor was attempting to modify the plan in the first case in contravention of 11 U.S.C. § 1127(b).

According to the debtor, the second filing was necessitated by certain changed circumstances which occurred after the plan was substantially consummated, including, among other things: (1) a federal law was enacted prohibiting discrimination against children as tenants, which increased vacancies in the apartment complex and increased the debtor's operating expenses as a result of the debtor's admission of children; (2) the debtor discovered concealed and unanticipated fire damage to the property which required substantial expenditures to repair; and (3) the debtor discovered undisclosed and unanticipated structural defects in one of its buildings, which necessitated substantial expenditure to repair and resulted in temporary reduction in income.

The *Casa Loma* court held that "a serial filing of two Chapter 11 cases is permissible if the second case is filed in good faith and as a result of unforeseen changed circumstances[.]" *Id*. at 818. The court reasoned:

> In the instant case, if Debtor relied merely on changed market conditions to support the second Chapter 11 filing…Debtor would have failed to show sufficiently changed circumstances to warrant a second filing. Debtor, however, has shown an unanticipated change in federal law and the discovery of fire damage and structural defects, which were unknown at the time of substantial consummation of the plan in [the first chapter 11 case], which substantially affected Debtor's ability to perform under the…plan [in the first chapter 11 case] ….Debtor appears to have a reasonable prospect of successful reorganization. Therefore, dismissal of Debtor's second Chapter 11 petition will be denied.

Id. at 818-19.

II. ANALYSIS

In its first chapter 11 case, Debtor bargained with secured creditor Danmor to obtain postpetition financing to complete construction of the single family residence being built by Debtor (the "Property"). In October 2022, in Debtor's first chapter 11 case, the Court confirmed *Debtor's First Amended Chapter 11 Plan of Reorganization* (the "Plan") [1:20-bk-11237-VK, doc. 185]. The Plan provides that Danmor's secured claim, and all other allowed claims, will be paid in full, with interest, from the sale of the Property; the Plan also incorporates the terms of Danmor's postpetition financing and the due date for Debtor to pay off Danmor's postpetition loan. *See* Plan, p. 7; *see also* 1:20-bk-11237-VK, doc. 231.

According to Danmor, the postpetition loan's maturity date is June 30, 2023. Although Debtor listed the Property for sale in May 2023, Debtor did not sell the Property, or pay off the postpetition secured loan provided by Danmor (which Debtor used to finish construction of the Property), by June 30, 2023. In September 2023, four months after Debtor listed the Property for sale, Debtor accepted an offer for a sale which ultimately fell through. Despite recently reducing the Property's listing price, Debtor still has not sold the Property or entered into escrow for any such sale.

Following completion of the Property's construction, i.e., allegedly more than eight months ago, Debtor's inability to sell the Property timely at the listing price is not an extraordinary or unforeseen circumstance that would justify the filing of its second chapter 11 petition. Rather, Debtor's filing of a second chapter 11 petition demonstrates its intent to deviate substantially from the terms of its confirmed plan and is indicative of Debtor's lack of good faith in filing this case. Consequently, there is cause to dismiss this case under 11 U.S.C. §§ 105(a) and 1112(b)(1).

CONCLUSION

The Court will dismiss this case.

The Court will prepare the order.

1:00 PM
CONT... BGS Works, Inc. **Chapter 11**

FOOTNOTES

FN 1: Capitalized terms not otherwise defined will have the same meaning as provided in the posted tentative ruling for cal. no. 4.01.

Party Information

Debtor(s):

BGS Works, Inc. Represented By
Kevin Tang

1:30 PM
1:21-10295 John Mario Peric **Chapter 7**
Adv#: 1:22-01024 United States Trustee (SV) v. Peric

#5.00 Pretrial conference re: complaint for revocation of discharge

fr. 7/27/22(advanced); 7/26/22; 3/15/23(stip); 8/23/23(stip); 11/15/23(stip)

Docket 1

Tentative Ruling:

Potential trial dates: **May 2, 3, 20, 21, 22 or 23, 2024**. The parties must confirm which of these dates is acceptable (if any) and be prepared to discuss alternative trial dates.

Prior to trial, **with the exception of hostile witnesses, the Court will require the parties to submit written declarations of all witnesses (including the defendant) providing direct testimony** ("Witness Declarations"), signed under penalty of perjury, otherwise admissible under the Federal Rules of Evidence. At the upcoming pre-trial conference, the parties should be prepared to address any issues they foresee in filing such written declarations.

Cross-examination, if requested, will take place on the scheduled trial date.

The following procedures are to be followed for the presentation of evidence to be offered at the trial.

A Witness Declaration will be admissible at trial, subject to timely objections, only if the declarant is present at trial, and subject to cross-examination, **unless cross-examination has been waived in writing, before trial, by the opposing party**.

If a portion of a Witness Declaration concerns an exhibit to be admitted into evidence at trial, the exhibit must be attached to the Witness Declaration.

TIME FOR FILING DECLARATIONS AND OBJECTIONS TO DECLARATIONS:

1:30 PM

CONT... John Mario Peric **Chapter 7**

Plaintiff(s) must serve and file its/their Witness Declaration(s) on or before **April 2, 2024**.

Defendant must serve and file his Witness Declaration(s) and any evidentiary objections he has to plaintiff's(s') declaration(s) on or before **April 9, 2024**.

Plaintiff(s) must serve and file its/their reply declaration(s) and any evidentiary objections it/they has/have to defendant's Witness Declaration(s) on or before **April 16, 2024**.

Defendant must serve and file any evidentiary objections to plaintiff's(s') reply Witness Declaration(s) on or before **April 23, 2024**.

TIME FOR FILING BRIEFS:

Plaintiff's(s') trial brief must be filed and served on or before **April 2, 2024**.

Defendant's trial brief must be filed and served on or before **April 9, 2024**.

Any reply brief by plaintiff(s) must be filed and served on or before **April 16, 2024**.

JUDGE'S COPIES:

Judge's copies of all Witness Declarations and briefs which exceed 25 pages must be delivered to Judge Victoria Kaufman.

EXHIBITS:

All trial exhibits must be numbered and marked as required by Local Bankruptcy Rule 9070-1(a). **By no later than April 23, 2024**, each party must deliver to the chambers of Judge Victoria Kaufman the original and one copy of a notebook containing all of that party's trial exhibits. **In addition, each party must bring two additional copies of their trial exhibits to the trial.**

The Court will issue an order incorporating its trial procedures, the related deadlines and the trial date.

United States Bankruptcy Court
Central District of California
San Fernando Valley
Victoria Kaufman, Presiding
Courtroom 301 Calendar

Wednesday, February 7, 2024 **Hearing Room 301**

1:30 PM
CONT... John Mario Peric **Chapter 7**

Party Information

Debtor(s):

John Mario Peric — Represented By Giovanni Orantes

Defendant(s):

John Mario Peric — Pro Se

Plaintiff(s):

United States Trustee (SV) — Represented By Kristin T Mihelic

Trustee(s):

Nancy J Zamora (TR) — Represented By David Seror

2:00 PM
1:20-10026 Joseph Wanamaker **Chapter 7**
Adv#: 1:22-01038 The Affiliati Network, LLC et al v. Wanamaker et al

#6.00 Plaintiff's Motion to Compel Compliance with Subpoena, for Order to Show Cause Re: Contempt, for Order Holding Stephen M. Goodman in Contempt, and for Monetary Sanctions

Docket 69

Tentative Ruling:

I. BACKGROUND

A. The Bankruptcy Case, Rule 2004 Exam and Adversary Proceeding

On January 7, 2020, the debtor Joseph Wanamaker ("Defendant") filed a chapter 7 petition, initiating bankruptcy case 1:20-bk-10026-VK (the "Bankruptcy Case"). In January 2020, Defendant filed his original schedules and statement of financial affairs [Bankruptcy Case, docs. 5-8, 20-26]. Defendant was represented by Stephen M. Goodman from the time the petition was filed until June 5, 2020, when Peter M. Lively was substituted in as attorney of record for Defendant. *See* Bankruptcy Case, doc. 71. From August 30, 2020, to May 2, 2022, Defendant filed several amendments to his schedules [docs. 126, 181, 197, 225, 290, and 504].

In April 2020, The Affiliati Network, LLC and Sanjay Palta (together, "Plaintiffs") began filing motions for examination under Fed. R. Bankr. P. 2004. In April 2020, the Court granted Plaintiffs' Motion for 2004 Exam as to Defendant [doc. 49].

At his Rule 2004 exam (the "2004 Exam"), Defendant was questioned about his schedules and statement of financial affairs. Declaration of Plaintiffs' counsel Daniel J. McCarthy (the "McCarthy Declaration"), ¶ 3 and Exh. A thereto [doc. 69]. At the 2004 Exam, the following exchanges occurred:

> Question:…[W]here did [sic] says, "Nature One Nutraceutical's," your [sic] a hundred-percent owner, Profactor USA, you're a hundred-percent owner, UR Media Group, Inc., it says you're a hundred-percent owner? Do you see that?... How did you determine those ownership

interests?

Answer [by Defendant]:…[T]his is all Mr. Goodman's work here. And there were some corrections that had to be made, which is why we terminated our relationship with Mr. Goodman and we moved over to Mr. Peter Live—Lally, so that he could fix all these mistakes that Mr. Goodman had made.

…

Question:…[D]id you advise the trustee at the continued 341(a) meeting with creditors on May 27th of 2020 that there were errors in the petition?

Answer [by Defendant]: I'm not so sure when we became aware of the errors, but, ultimately, that's why Mr. Goodman was fired and Mr. Lively was hired.

…

Question:…[Y]ou reviewed your petition before you signed it; correct?

Answer [by Defendant]:…I don't recall the procedure Mr. Goodman had me go through, which is more reasons why he was fired.

…

Question:…See where it says there, under paragraph 11, it's highlighted, "Mortgage paid by cousin, $13,313"?...Ms. Naud is your cousin you're referring to; correct?

Answer [by Defendant]: Yes.

Question:…From what source did she pay the—the $13,313 to you each month for the mortgage?

Answer [by Defendant]: Sir, this is an error on the part of Mr. Goodman, and this is why he was fired. And this is why Mr. Lively was hired. He came in and cleaned this up.

Question: So she didn't…give you $13,313 a month?

> Answer [by Defendant]:…It's a misinterpretation.
>
> Question:…It's a yes-or-no answer.
> …
> Answer [by Defendant]:…You're wanting me to…quote Mr. Goodman's work and…the legal advice that he gave me; okay? And I'm telling you he was subsequently fired because of that and we went to Mr. Lively; okay?...You're asking me to speak on…the work that Mr. Goodman advised me as my attorney, which I now acknowledge was inaccurate.…..That's all I can say to you.

Transcript of the 2004 Exam, Exh. A to the McCarthy Declaration, pp. 121-23, 127-30.

On July 30, 2022, Plaintiffs filed a complaint against Defendant initiating adversary proceeding no. 1:22-ap-01038-VK [doc. 1]. On March 20, 2023, Plaintiffs filed their first amended complaint against Defendant and UR Media Group, Inc. (the "FAC"), seeking, among other things, denial of discharge pursuant to 11 U.S.C. §§ 727(a)(4)(A) and (a)(4)(B) [doc. 49]. According to Plaintiffs, Defendant knowingly and fraudulently provided false information pertaining to his business dealings, assets of the bankruptcy estate and the disposition of his property in his original petition and amended schedules. See FAC, ¶¶ 60-61 and 111. Plaintiffs also allege that Defendant knowingly and fraudulently used false claims to hide his assets from creditors and the bankruptcy estate. *Id*, ¶¶ 55, 60-61, 78, 100-02, 106, 112 and 117-20.

On April 20, 2023, Defendant and UR Media Group, Inc. filed an answer [doc. 56]. On May 24, 2023, the Court entered a scheduling order setting September 1, 2023 as the deadline to complete discovery [doc. 60]. The parties subsequently extended the discovery deadline to January 30, 2024. *See* doc. 67.

B. Subpoenas Served by Plaintiffs on Mr. Goodman

On October 10, 2023, Plaintiffs served Mr. Goodman with a subpoena to testify at a deposition (the "October 10 Subpoena"). McCarthy Declaration, ¶¶ 10 and 14 and Exhs. D, E and L thereto. The October 10 Subpoena also stated that Mr. Goodman must bring certain documents or information to the deposition. Exh. D to the

McCarthy Declaration. On October 16, 2023, Mr. Goodman sent an email to Plaintiff's counsel and asserted:

> After a discussion with [Defendant's] attorney, I was informed that [Defendant] has not waived his Attorney-Client privilege. Secondly, my wife is suffering from Alzheimer's disease which requires constant care and attention by myself. I am the only person she recognizes or will listen to. Therefore, due to the reasons stated above, I will not be attending your scheduled deposition.

Id., ¶ 16 and Exh. G thereto; *see also* Goodman Declaration, ¶ 13. On October 19, 2023, Plaintiff's counsel responded to Mr. Goodman via email, and stated, in relevant part:

> I have communicated with [Defendant's] counsel, who is agreeable to a Zoom deposition for you, and I have cleared dates with him. So, are you agreeable to appearing for your Zoom deposition at 10:00 a.m. on one of the following dates: November 14, 15, 21 and 22. If so, are you agreeable to accepting service of the subpoena by email? Which dates work for you? If you choose not to cooperate again, I will pick the date for your Zoom deposition and serve you again.

McCarthy Declaration, ¶ 17 and Exh. G thereto. Mr. Goodman did not respond. *Id*., ¶ 18.

On October 27, 2023, Plaintiffs served Mr. Goodman with a subpoena to produce documents and a subpoena to testify at a deposition (together, the "October 27, 2023 Subpoenas"). *Id*., ¶ 22 and Exhs. L-N thereto. The same day, Plaintiffs served Defendant's counsel with an amended notice of deposition relating to the October 27, 2023 Subpoenas. *Id*., ¶ 23 and Exhs. O and L thereto.

On November 16, 2023, Mr. Goodman sent an email to Plaintiff's counsel and stated:

> After discussions with [Defendant]; he has informed me in no uncertain terms that he does NOT waive the Attorney- Client privilege. Therefore, I will not be producing documents on the 17th of

> November. Also, due to my wife's advanced dementia, I am unable to be deposed. This is in addition to not waiving the Attorney-Client privilege, as per [Defendant's] instructions.

Id., ¶ 26 and Exh. G thereto. Mr. Goodman did not produce documents or provide a privilege log that identified documents being withheld. *Id*., ¶ 28.

II. RELEVANT AUTHORITIES

A. Waiver of Objections to Discovery Requests

Pursuant to Fed. R. Civ. P. 45(d)(2)(B), an objection to a subpoena "must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." In addition, under Fed. R. Civ. P. 45(e)(2)(A):

> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information that is itself privileged or protected, will enable the parties to assess the claim.

"Under Rule 45, the nonparty served with the subpoena duces tecum must make objections to it within 14 days after service or before the time for compliance, if less than 14 days. Failure to serve timely objections waives all grounds for objection, including privilege." *In re Jafroodi*, 2023 WL 4289523, at *11 (Bankr. C.D. Cal. June 30, 2023)(internal quotation and citation omitted). *See also Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1473 (9th Cir. 1992)("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.")

Moreover, "a 'full privilege log' should follow an objection based on privilege 'within reasonable time.'" *Jafroodi*, 2023 WL 4289523, at *11 (quoting *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2nd Cir. 1998)).

B. Waiver of Attorney-Client Privilege Arising from Advice of Counsel Defense

"Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1163 (9th Cir. 1992). In *Chevron Corp.*, the Ninth Circuit Court of Appeals held that Pennzoil Co. ("Pennzoil") waived the attorney-client privilege with respect to its communications with counsel.

In this case, Chevron Corp. ("Chevron") contended that certain of Pennzoil's disclosures under securities law were materially misleading; Pennzoil defended its disclosures as being in accordance with advice provided by its counsel. As a result, Chevron sought to compel the disclosure of written materials that supported Pennzoil's belief that its position was reasonable and sound. However, Pennzoil refused to supply these documents, claiming that its decision was based upon advice from counsel and the relevant materials were protected by the attorney-client privilege. In response, Chevron argued that, when Pennzoil affirmatively put at issue the very information for which it was claiming the privilege, Pennzoil waived the attorney-client privilege.

The Court of Appeals explained that "[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield." *Id.* at 1162. When Pennzoil claimed that its position was reasonable because it was based on advice of counsel, Pennzoil put at issue the advice that it received. Consequently, Pennzoil could not invoke the attorney-client privilege to deny Chevron access to the information which Chevron had to refute, in order to demonstrate that Pennzoil's disclosures were materially misleading. As stated by the Court of Appeals, "[i]nsofar as Pennzoil relied upon the advice of counsel to support the reasonableness of its [disclosures], Pennzoil waived the attorney-client privilege with respect to those communications." *Id*. at 1163.

In the context of bankruptcy litigation, a debtor who raises an advice of counsel defense cannot invoke attorney-client privilege. *In re Cooke*, 2016 WL 4039699, at * 5 n.5 (9th Cir. BAP 2016) (because debtor raised advice of counsel defense in proceeding to deny debtor a discharge under section 727(a)(2)(A), debtor could not invoke attorney-client privilege)(citing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d at

1163). Therefore, when a party intends to assert advice of counsel as a defense, he must make full disclosure during discovery, and failure to do so constitutes a waiver of the advice of counsel defense. *In re Gonzalez*, 2019 WL 1770013, at *24 (Bankr. C.D. Cal. Mar. 27, 2019) (citing *In re Residential Capital, LLC*, 491 B.R. 63, 68-70 (Bankr. S.D.N.Y. 2013)(holding that "[t]he consequences of failing to make *full* disclosure of the [legal] advice that was given is that the Debtors are precluded from offering *any* evidence of the legal advice provided to the Debtors' officers and directors" about dispute at issue)(emphasis in original). **[FN 1]**

III. CONCLUSION

The Court will issue an order: (1) compelling Mr. Goodman to produce documents that are responsive to the subpoena to produce documents that was served on him on October 27, 2023, by February 21, 2024 or another date to which Mr. Goodman and Plaintiffs stipulate, which stipulation is approved by an order of the Court; and (2) compelling Mr. Goodman to appear for his deposition, in person or by videoconference, on February 28, 2024 or on another date to which Mr. Goodman and Plaintiffs stipulate, which stipulation is approved by an order of the Court. [**FN2]**

If Mr. Goodman does not comply with the Court's order on the motion, Plaintiffs may file a motion for order to show cause as to why Mr. Goodman should not be held in contempt and request appropriate sanctions at that time.

Plaintiffs must submit the order within seven (7) days.

FOOTNOTES

FN 1: "Asserting the attorney-client privilege in discovery automatically constitutes a waiver of the advice of counsel defense." *In re Gonzalez*, 2019 WL 1770013, at *24 (regarding proceeding to revoke debtor's discharge, when debtor would not allow his bankruptcy attorney to produce documents, based on debtor's assertion of attorney-client and attorney work product privileges, court ordered debtor not to present any evidence at trial regarding his advice of counsel defense, and excluded any testimony, evidence or argument presented by debtor at trial or in closing argument on his advice of counsel defense).

2:00 PM

CONT... Joseph Wanamaker **Chapter 7**

FN 2: In support of his position that Defendant has not waived the attorney-client privilege, Mr. Goodman has cited *Kleeberg v. Eber*, 2019 U.S. Dist. Lexis 80428 (S.D.N.Y. May 13, 2019). However, *Kleeberg* concerns the application of the law of the State of New York, and not federal law, regarding waiver of attorney-client privilege. Consequently, that case is inapposite.

Party Information

Debtor(s):

Joseph Wanamaker	Represented By Peter M Lively

Defendant(s):

Joseph Wanamaker	Represented By David P Reiner II
UR Media Group, Inc.	Represented By David P Reiner II

Plaintiff(s):

The Affiliati Network, LLC	Represented By Stella A Havkin Travis A Corder Daniel J McCarthy
Sanjay Palta	Represented By Stella A Havkin Travis A Corder Daniel J McCarthy

Trustee(s):

Amy L Goldman (TR)	Represented By Leonard Pena