

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Sacramento Federal Courthouse  
501 I Street, 7<sup>th</sup> Floor  
Courtroom 28, Department A  
Sacramento, California

**DAY: TUESDAY**  
**DATE: AUGUST 3, 2021**  
**CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS**

**RULINGS**

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

**"No Ruling"** means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

**"Tentative Ruling"** means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

**"Final Ruling"** means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

**CHANGES TO PREVIOUSLY PUBLISHED RULINGS**

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

**ERRORS IN RULINGS**

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [21-21520](#)-A-7     **IN RE: EVELYNDA UDOWSKI**  
[21-2032](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT  
5-13-2021    [[1](#)]

TRAVIS CREDIT UNION V. UDOWSKI  
JOHN MENDONZA/ATTY. FOR PL.

**Final Ruling**

Judgment having been entered, the status conference is concluded. A civil minute order will issue.

2. [19-23637](#)-A-7     **IN RE: MARK/TERRI COOK**  
[19-2105](#)     [BLF-2](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL  
6-26-2021    [[35](#)]

MONIZ V. COOK  
SANAZ BERELIANI/ATTY. FOR MV.

**Final Ruling**

The motion is granted and the adversary proceeding will be dismissed. The status conference is concluded. A civil minute order will issue.

3. [19-23452](#)-A-7     **IN RE: CIAO RESTAURANTS, LLC**  
[20-2110](#)     [SLB-2](#)

MOTION FOR ENTRY OF DEFAULT JUDGMENT  
7-2-2021    [[98](#)]

HUSTED V. OLD REPUBLIC TITLE  
COMPANY  
EDWARD SMITH/ATTY. FOR MV.

**Final Ruling**

The motion is granted. The movant shall upload a judgment consistent with the terms of the stipulation, July 2, 2021, ECF No. 103.

4. [20-23457](#)-A-7     **IN RE: ERNESTO/MARILYN PATACSIL**  
[20-2167](#)     [CLH-1](#)

CONTINUED MOTION TO QUASH  
6-17-2021     [\[16\]](#)

CABARDO ET AL V. PATACSIL ET  
AL  
CHARLES HASTINGS/ATTY. FOR MV.  
RESPONSIVE PLEADING

### **Tentative Ruling**

**Motion:** Quash or, in the Alternative, for Protective Order

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by moving party

This is a motion to quash. Plaintiff/respondents have served a shotgun style Rule 45 subpoena seeking 25 categories of documents. Defendant/movant seek to quash it or a protective order.

### **FACTS**

Ernesto Patacsil and Marilyn Patacsil ("Patacsils") filed a Chapter 7 bankruptcy. Prior to filing bankruptcy, the Patacsils owned and operated residential care facilities known as Patacsil Care Homes.

In 2012, eight employees and/or former employees ("former employees"), acting under the Private Attorney General Act of 2004, brought an action in District Court for wage and hour violations. In June 2020, the District Court entered judgment for the employees in the amount of \$893,815.62.

Predictably, on July 14, 2020, the Patacsils filed for Chapter 7 bankruptcy protection. Their petition avers that their debts are primarily business, and not primarily consumer debts. Voluntary Petition Item No. 16, July 14, 2020, ECF No. 1.

On November 2, 2020, the former employees filed an adversary proceeding seeking to except their debt from discharge. 11 U.S.C. § 523(a)(6), (7). The Patacsils have filed an answer to the adversary proceeding.

Patacsils received their discharge on November 9, 2020.

In June 2021, the plaintiffs served Raymond Young, CPA, a subpoena. Young is Patacsils' accountant. Plaintiffs seek 25 categories of documents.

### **LAW**

#### Exceptions to Discharge

This adversary proceeding is narrowly drawn. As it now stands, the adversary proceeding only has two bases: 11 U.S.C. § 523(a) (willful

and malicious injuries) and 11 U.S.C. § 523(a)(7) (fines and penalties).

Section 523 excepts from discharge the following debts:  
(a) A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

.....

(6) for *willful and malicious injury* by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is *for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty*--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition...

11 U.S.C. § 523(a)(6), (a)(7) (emphasis added).

Plaintiffs have standing to assert § 523(a)(7) under the California Private Attorney General Act of 2004, Labor Code §§ 2699 et seq. *Medina v. Vander Poel*, 523 B.R. 820, 823 (2015).

### Scope of Discovery

Rule 26(b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26(c)(1) authorizes protective order for overly broad discovery requests:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a

certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...

#### Rule 45: Subpoenas and Quashing Them

Non-parties may be required to produce documents under Rule 45. Fed. R. Civ. P. 34(c), *incorporated by* Fed. R. Bankr. P. 7034, 9014. *Holland v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 2:12-CV-1983 TLN AC, 2013 WL 5934309, at \*2 (E.D. Cal. Nov. 1, 2013) ("A nonparty may also be compelled to produce documents and tangible things via a Rule 45 subpoena. Fed.R.Civ.P. 34(c)."

As the *Holland* court articulated it:

[T]he court that issued the subpoena ... can entertain a motion to quash or modify a subpoena." *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 832 (9th Cir.2011). The issuing court must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person-except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
- (iii) requires disclosure of privileged or other protected matter if no exception or waiver applies; or
- (iv) *subjects a person to undue burden.*

Fed. R. Civ. P. 45(c)(3)(A) (emphasis added).

Additionally, the issuing court may quash or modify a subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information;
- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

- (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

Fed. R. Civ. P. 45(c)(3)(B).

*Holland v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 2:12-CV-1983 TLN AC, 2013 WL 5934309, at \*3 (E.D. Cal. Nov. 1, 2013).

## **DISCUSSION**

### Standing

Standing on the part of the movant is frequently an issue.

The Ninth Circuit has yet to address the question of whether a party may bring a motion to quash a subpoena served on a third party. The general consensus of other courts is that, while a motion to quash a subpoena is normally to be made by the person or entity to which the subpoena is directed, an exception applies "where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter requested in the subpoena." (citations omitted). Accordingly, plaintiff may move to quash the subpoenas to the extent his personal rights or privileges are implicated.

*Holland v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 2:12-CV-1983 TLN AC, 2013 WL 5934309, at \*3 (E.D. Cal. Nov. 1, 2013)

Here, the records sought, largely financial and related records, and are sufficiently personal to the Patacsils that the movants have standing to move to quash the subpoena.

### Rule 26(b)(1)

The party moving to quash or modify the subpoena bears the burden of proof. *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir.1966).

There are two problems here. First, the subpoena seeks information with respect to the now dismissed claim that the Patacsils' Chapter 7 filing was in bad faith and should be dismissed. 11 U.S.C. § 707(a). As a result, the subpoena only seeks information no longer at issue in the present adversary complaint.

Second, the subpoena is apparently overbroad with respect to time. The adversary complaint does not specify the timeframe in which the wage and hour violations occurred. See Compl., November 2, 2020, ECF No. 1. What is clear is that the District Court action was filed in 2012. *Id.* at 7:21-28. So, the violations must have occurred before that date. But when they occurred prior to 2012, is unspecified. This spawns two time problems. On one hand, many of the requests are not restricted by time whatsoever. For example,

the fourth request is for "All documents related to correspondence to and/or from any former representative or employee of the Patacsil Care Homes, including but not limited to emails, letters, faxes, memorandums, notes, text messages, social media messages." Exhibits to Motion to Quash, Subpoena to Produce Documents No. 4, June 17, 2021, ECF No. 19. Read literally, it includes all records from the beginning of time to today, notwithstanding that the wage and hour violations that form the basis of the § 523(a)(6), (a)(7) appear to be far more narrow in time.

On the other hand, those requests that are restricted by time seek records after the wage and hour violations occurred and the causes of action under 11 U.S.C. § 523(a)(6), (a)(7) had accrued. For example, request number one seeks "All documents related to the formation of any businesses owned by Marilyn Embry Patacsil...during THE RELEVANT TIME PERIOD." *Id.* at No. 1. The relevant time period is a defined term. It includes the "time period from June 26, 2012[,] to the present." *Id.* at p. 1. Since the District Court complaint was filed June 26, 2012, the court fails to see how these documents could be relevant to or lead to the discovery of admissible evidence for cause of actions that had already accrued.

Here, given the lack of information as to the period in which these wage and hours violations occurred, there is no principled way to limit the subpoena to relevant time periods. As a result, the court will quash it, without prejudice to the plaintiffs' right to reissue a more narrowly crafted request.

#### Sanctions

Sanctions may be imposed in limited circumstances: (1) where the subpoenaing party has not taken reasonable steps to avoid undue burden on the subpoenaed person; (2) facially defective subpoena; or (3) bad faith on the part of the requesting party. *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 429 (9th Cir. 2012).

Here, none of these three conditions exist and sanctions are not appropriate.

In summary, the motion to quash will be granted in toto but without prejudice to future, more narrowly drawn subpoenas and the motion for sanctions will be denied. The movant shall prepare and lodge an order consistent with the ruling herein and will lodge it not later than August 10, 2021.

5. [20-23457](#)-A-7     **IN RE: ERNESTO/MARILYN PATACSIL**  
[20-2167](#)     [FEC-1](#)

ORDER TO SHOW CAUSE  
7-2-2021     [\[36\]](#)

CABARDO ET AL V. PATACSIL ET  
AL

### **Tentative Ruling**

**Proceeding:** Order to Show Cause

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Sustained, § 707 causes of action dismissed

**Order:** Civil minute order

May a creditor seek dismissal of a Chapter 7 case for bad faith under § 707(a)? Answer: no.

### **FACTS**

Ernesto Patacsil and Marilyn Patacsil ("Patacsils") filed a Chapter 7 bankruptcy. Prior to filing bankruptcy, the Patacsils owned and operated residential care facilities known as Patacsil Care Homes.

In 2012, eight employees and/or former employees ("former employees"), acting under the Private Attorney General Act of 2004, brought an action in District Court for wage and hour violations. In June 2020, the District Court entered judgment for the employees in the amount of \$893,815.62.

Predictably, on July 14, 2020, the Patacsils filed for Chapter 7 bankruptcy protection. Their petition avers that their debts are primarily business, and not primarily consumer debts. Voluntary Petition Item No. 16, July 14, 2020, ECF No. 1.

On November 2, 2020, the former employees filed an adversary proceeding seeking to except their debt from discharge. 11 U.S.C. § 523(a)(6), (7). Buried in the complaint is a cause of action that seeks to deny confirmation of Patacsils' "Chapter 7 plan (sic) for cause under § 707(a)." Complaint 7:24-10:27, November 2, 2020, ECF No. 1. The complaint was served on the Patacsils and their Chapter 7 attorney, but not on all creditors. The Patacsils have filed an answer to the adversary proceeding.

At the time of the status conference the court did not appreciate that the former employees sought relief other than that under 11 U.S.C. § 523(a)(6), (a)(7), and issued a Scheduling Order, January 8, 2021, ECF No. 13.

Patacsils received their discharge on November 9, 2020.

Later, in conjunction with discovery motions, the court appreciated that the former employees had sought relief under 11 U.S.C. § 707(a). In response and believing such relief is not supported by the bankruptcy code, the court issued this order to show cause for



dismissal of the § 707 cause of action. Order, July 2, 2021, ECF No. 36. The former employees oppose the order to show cause.

## **LAW**

Dismissal of a Chapter 7 case is governed by § 707. It has two main subparts. Subdivision (a) deals with all Chapter 7 cases; subdivision (b) deals only with Chapter 7 cases filed by an individual "whose debts are primarily consumer debts." Subdivision (a) provides:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including-

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. § 707(a).

Subdivision (b) starts with the general authority of a court to dismiss a Chapter 7, and limits that to those cases that involve primarily consumer debts.

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter *whose debts are primarily consumer debts*, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter....

11 U.S.C. § 707(emphasis added).

"Consumer debts" are a defined term. "The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). "[D]ebt incurred for business ventures or other profit-seeking activities is plainly not consumer debt." *Kelly*, 841 F.2d at 913. Courts determine the debtor's purpose as of the time the debt was incurred. See *Bushkin v. Singer (In re Bushkin)*, BAP No. CC-15-1285-KiKuF, 2016 WL 4040679, at \*7 (B.A.P. 9th Cir. July 22, 2016)." *In re Cherrett*, 873 F.3d 1060, 1067 (9th Cir. 2017)

Subdivision (b) itself has two parts: (1) the means test, 11 U.S.C. § 707(b)(2); and (2) a catch for cases where the debtor filed the petition in "bad faith" or "the totality of the circumstances...of

the debtor's financial situation demonstrates abuse." 11 U.S.C. § 707(b) (3).

"The moving party bears the burden of proof to support a § 707(b) motion by a preponderance of the evidence." *In re Miller*, No. 2:13-BK-35116-RK, 2016 WL 5957270, at \*6 (B.A.P. 9th Cir. Oct. 13, 2016), aff'd, 708 F. App'x 395 (9th Cir. 2017), citing *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 523 B.R. 660, 669 (9th Cir. BAP 2014).

## **DISCUSSION**

### Procedural Irregularities

The plaintiff former employees' adversary proceeding suffers procedural problems. First, parties in interest seeking dismissal under § 707 must do so by motion. "Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b)." Fed. R. Bankr. P. 1017(f)(1). Rule 9014 governs contested matters. This was filed as an adversary proceeding.

Second, and more importantly, the former employees have not given notice to those entitled to it.

(a) Except as provided in subdivisions (h), (i), (l), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

...

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) or is on dismissal of the case for failure to pay the filing fee...

Fed. R. Bankr. P. 2002(a)(4).

Neither § 707(a)(3), nor § 707(b) or dismissal for failure to pay the filing fee is applicable here. As a consequence, notice must have been given to all creditors. It was not. Certificate of Service, November 4, 2020, ECF No. 6-7.

### 11 U.S.C. § 707(a)

Section 707(a) authorizes this court to dismiss a Chapter 7 for "cause" including unreasonable delay, non-payment of fees, and failure to file the information required by 11 U.S.C. § 521(a). 11 U.S.C. § 707(a).

The Ninth Circuit has held that bad faith is not "cause" of dismissal under § 707(a). *In re Padilla*, 222 F.3d 1184, 1191 (9th

Cir. 2000); see also, *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994). As one second source put it, "The Eighth and Ninth Circuits have determined that "bad faith" is not cause for dismissal of a debtor's case under § 707(a). Instead, "bad faith" is properly addressed under § 707(b)." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Dismissal §5:2166 (Rutter Group 2020).

The former employees have attempted to cabin *Padilla* to the facts of that case and argue that the majority position is to recognize bad faith as cause under § 707(a). This court disagrees. At the outset the court notes that both *Padilla* and *California Practice Guide: Bankruptcy*, Dismissal §5:2166, both suggest a broad, even blanket, prohibition against inclusion of bad faith as cause under § 707(a). Moreover, the "majority" cases cited by the former employees are directly contrary to the position adopted by *Padilla*. The same source, i.e., *California Bankruptcy Guide: Bankruptcy*, states it as follows:

But the Third, Fourth, Fifth, Seventh and Eleventh Circuits permit bad faith dismissals under § 707(a), reasoning that good faith is implicitly required in all bankruptcy proceedings. [*Janvey v. Romero* (4th Cir. 2018) 883 F3d 406, 412 (dismissal for bad faith under § 707(a) limited to "cases of real misconduct"); *Matter of Krueger* (5th Cir. 2016) 812 F3d 365, 370-371; *In re Schwartz* (7th Cir. 2015) 799 F3d 760, 763-§ 707(a) "for cause" dismissal provision embraces conduct that avoids repayment of debt without adequate reason (failure to take steps to alter lavish lifestyle); *In re Piazza* (11th Cir. 2013) 719 F3d 1253, 1265 (§ 707(a) dismissal based on prepetition bad faith conduct); *In re Tamecki* (3rd Cir. 2000) 229 F3d 205, 207].

*California Practice Guide: Bankruptcy* § 5:2166.

As a consequence, bad faith may not form the basis of a dismissal under § 707(a).

#### 11 U.S.C. § 707(b)

Unquestionably, bad faith is cause for dismissal under § 707(b). The statute so provides:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider--

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b) (3) .

But § 707(b) (3) is specifically limited to those an individual Chapter 7 case where the "debts are primarily consumer debts." 11 U.S.C. § 707(b) (1), (b) (3). And the commentators agree.

Dismissal based on consumer debtor's "bad faith" or where "totality of circumstances" test demonstrates "abuse" (§ 707(b) (3)): No presumption of abuse arises where an individual Chapter 7 consumer debtor passes or rebuts the "means test" (§ 5:277 *ff.*). Even so, the debtor's case may still be dismissed as an "abuse" of Chapter 7 where: [1] the debtor filed the petition in bad faith; or [2] the "totality of the circumstances" of the debtor's financial situation demonstrates "abuse." [11 USC § 707(b) (3) (A) & (B); see also *In re Reed* (CD CA 2009) 422 BR 214, 229-230; *In re dePellegrini* (BC SD OH 2007) 365 BR 830, 833—passing "means test" no defense to § 707(b) (3) dismissal motion]

[5:2216.1] Limited to consumer debtors: *Because § 707(b) only applies to consumer debtors, as a matter of statutory construction it follows that cases filed by nonconsumer debtors cannot be dismissed for "bad faith" under that provision: "The only mention of 'bad faith' in all of Chapter 7 is in Section 707(b) (3) (A). Its location indicates that the analysis for bad faith arises only in a consumer debtor case ... If Congress intended 'bad faith' to be a reason for dismissal of any Chapter 7 case, it would have added that term to section 707(a) which applies to all chapter 7 cases. It did not."* [*In re Lobera* (BC D NM 2011) 454 BR 824, 838 (emphasis added); see also Tsang, Pamela C., "The Case Against 'Bad Faith' Dismissals of Bankruptcy Petitions under 11 U.S.C. § 707(a) " 59 American Univ. Law Review 685 (February 2010)]

[5:2216.2] Contra view: Not all courts agree. Some have held that § 707(a) does permit bankruptcy courts to dismiss a *nonconsumer* debtor's Chapter 7 petition for bad faith. [*In re Zick* (6th Cir. 1991) 931 F2d 1124, 1127—§ 707(a) dismissal for bad faith where debtor filed bankruptcy solely to discharge large mediation award for breach of business nonsolicitation contract; *Matter of Tallman* (ND IN 2009) 417 BR 568, 574-575, fn. 2—dismissing nonconsumer debtor's case for bad faith under § 707(a) (citing *Zick*, *supra*)]

*California Practice Guide: Bankruptcy* § 5:2166 et seq. (emphasis added).

The parties agree that Patacsils' debt is not primarily consumer debt. Voluntary Petition Item No. 16, July 14, 2020, ECF No. 1; Plaintiff's Response 7:10-11, July 20, 2021, ECF No. 41.

As a consequence, § 707(b) offers no basis for dismissal and the motion will be denied.

**CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Having considered the order to show cause oppositions, and replies, if any, and having heard oral argument presented at the hearing,

IT IS ORDERED that the order to show cause is sustained;

IT IS FURTHER ORDERED that all causes of action, except those expressly excepted here from, of the complaint, ECF No. 1 are dismissed; and

IT IS FURTHER ORDERED that the plaintiff's causes of action under 11 U.S.C. § 523(a)(6), (a)(7) are not dismissed and shall be governed by the Scheduling Order, January 8, 2021, ECF No. 13.

6. [11-17165](#)-A-11     **IN RE: OAKHURST LODGE, INC., A CALIFORNIA CORPORATION**

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION  
6-22-2011     [\[1\]](#)

DONNA STANDARD/ATTY. FOR DBT.

**No Ruling**

7. [11-17165](#)-A-11      **IN RE: OAKHURST LODGE, INC., A CALIFORNIA**  
CORPORATION  
[DMS-79](#)

MOTION FOR DISTRIBUTION OF ADMINISTRATIVE EXPENSES AND  
RELEASE OF FUNDS HELD IN TRUST  
7-6-2021    [\[893\]](#)

DONNA STANDARD/ATTY. FOR DBT.

### **Tentative Ruling**

**Motion:** Motion for Distribution of Administrative Funds and Release of Funds Held in Trust

**Notice:** LBR 9014-1(f)(1); written opposition filed

**Disposition:** Granted in part, denied in part

**Order:** Chambers order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### **MOTION FOR DISTRIBUTION OF ADMINISTRATIVE FUNDS**

In a chapter 11 case, the plan controls post-confirmation activities, 11 U.S.C. § 1141(a). The debtor's chapter 11 plan provides for payment of administrative expenses. Plan Article IV, ECF No. 79.

Here the debtor failed to comply with the terms of the plan. The creditor First Citizens Bank filed a Notice of Material Default and Total Lender Solutions conducted the foreclosure sale. The debtor ultimately purchased the property and sued First Citizens Bank in state court and in this court. Subsequently, First Citizens Bank, Steve Marshall, Total Lenders Solutions and the debtor entered into a Settlement Agreement that calls for liquidation (rather than reorganization of the debtor), elimination of the Bank's claims against the estate, and dismissal of both the Bankruptcy Court Action and the State Court Action. The Settlement Agreement does not modify the terms of the plan.

The court approved the Settlement Agreement and ordered that the debtor's attorney open an interest-bearing blocked account. Amended Order Regarding Motion to Approve Settlement, para. 6(A), ECF No. 502. The court further ordered that "funds [from the approved settlement motion] shall be paid directly from the blocked account to creditors entitled under the confirmed plan and post-petition creditors upon order of this court after the debtor's noticed motion." *Id.* at para. 8(A).

The debtor has filed this instant motion for an order of distribution and release of funds from amounts presently held in trust at Wells Fargo Bank as a result of the Settlement Agreement. The motion calls for administrative funds to be distributed to the U.S. Trustee and Steve Marshall.

As to the U.S. Trustee

§ 4.03 of the Chapter 11 plan states, "All fees required to be paid by 28 U.S.C. § 1930(a)(6) (U.S. Trustee Fees) will accrue and be timely paid until the case is closed. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date." ECF No. 79 Here, U.S. Trustee Fees are due for the 2nd Quarter 2021 in the amount of \$975.00. This motion calls for distributing \$975.00 to the U.S. Trustee. This motion will be granted as to the U.S. Trustee.

As to Steve Marshall

Law

"A money judgment is enforced by writ of execution, unless the court directs otherwise. The procedure on execution...must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. Proc. 69(a), *incorporated by* Fed. R. Bankr. Proc. 7069. Therefore, California law governs the procedure on execution to enforce the money judgment in this case. Here, Cal. Civ. Proc. § 708.410 applies.

A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien under this article, to the extent required to satisfy the judgment creditor's money judgment, on both of the following:

- (1) Any cause of action of such judgment debtor for money or property that is the subject of the action or proceeding.
- (2) The rights of such judgment debtor to money or property under any judgment subsequently procured in the action or proceeding.

Cal. Civ. Proc. § 708.410(a).

"A legal proceeding that, under the common law and equity practice, was not an action at law or a suit in equity, is a special proceeding." 3 Witkin, Cal. Proc. 5th Actions § 64 (2020). Bankruptcy and insolvency proceedings are special proceedings. *See In re Daley*, 584 B.R. 911 (Bankr. C.D. Cal. 2018); *see also In re First Korean Christian Church of San Jose ("FKCC")*, 567 B.R. 575 (Bankr. N.D. Cal. 2017).

"To obtain a lien under this article, the judgment creditor shall file a notice of lien and an abstract or certified copy of the judgment creditor's money judgment in the pending action or special proceeding." Cal. Civ. Proc. § 708.410(b). "At the time of the filing under subdivision (b) or promptly thereafter, the judgment

creditor shall serve on all parties who, prior thereto, have made an appearance in the action or special proceeding a copy of the notice of lien and a statement of the date when the notice of lien was filed in the action or special proceeding " Cal. Civ. Proc. § 708.410(c).

#### *Analysis*

The court approved Steve Marshall's Motion for Approval of Loans, ECF No. 891, and thus approved of an administrative expense claim of \$96,287.67 to be paid to Steve Marshall directly from the blocked account pursuant to the Order Regarding Motion to Approve Settlement, ECF No. 502.

Shantilal and Sushila Desai are judgment creditors who filed a lien in the main bankruptcy case. ECF No. 749. They are parties to a special proceeding, as they are interested parties in the debtor's bankruptcy case. Under § 708.410(a)(2), the judgment debtor Steve Marshall has a right to money under the debtor's plan. Plan § 6.01, ECF No. 79.

The Desais filed a notice of lien in this proceeding in compliance with § 708.410(b). ECF No. 749. They timely served all interested parties a copy of the notice of lien and a statement of the date when the notice of lien was filed in this action in compliance with § 708.410(c). ECF Nos. 755-757. The court finds that the Desais fulfilled all the requirements under § 708.410 to obtain a lien on the administrative expense claim approved to be paid to Steve Marshall.

The court concludes that Shantilal and Sushila Desai have a proper lien under § 708.410 on the funds approved to be paid to Steve Marshall, ECF No. 891. For the foregoing reasons, the motion will be denied as to Steve Marshall.

8. [19-24685](#)-A-13    **IN RE: EMILIA ARDELEAN**  
[19-2135](#)    [FEC-4](#)

CONTINUED ORDER TO SHOW CAUSE  
6-25-2021    [\[81\]](#)

MASSIOUI V. ARDELEAN

#### **Final Ruling**

The order to show cause was resolved by previous order, July 23, 2021, ECF No. 108, the matter is dropped from calendar.



9. [21-20688](#)-A-7     **IN RE: BRADLEY BRIDGES**  
[21-2042](#)

STATUS CONFERENCE RE: COMPLAINT  
6-7-2021    [[1](#)]

LOVE ET AL V. BRIDGES, JR.  
QUINN CHEVALIER/ATTY. FOR PL.

**Final Ruling**

The status conference is continued to August 17, 2021, at 1:30 p.m.,  
to coincide with the defendant's motion to dismiss.