UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Michael Robert Wigley, BKY 14-40541

Debtor. Chapter 11

ORDER DENYING MOTION TO DISMISS OR CONVERT, DENYING CONFIRMATION, AND SETTING DEADLINES

This case is before the court on the motion of creditor Lariat Companies, Inc. ("Lariat") for dismissal or conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b) [docket entry 122], and on Lariat's objection to confirmation of the debtor's Second Modified Plan of Reorganization dated February 4, 2015 [docket entry 115] (the "Plan").[1] Appearances for Lariat and the debtor are noted in the trial record. There were also appearances by Barbara Wigley by her counsel, and by creditor Indianhead Foodservice Distributor, Inc., both in support of the debtor. Counsel for the United States Trustee appeared and took no position. Supplemental briefing was filed after the trial. Based on the file, including all of the pleadings, the arguments of counsel and the evidence received at trial, the court makes the following:[2]

FINDINGS OF FACT

1. In September 2008, Baja Sol Cantina EP, LLC ("BSC") was established by the debtor, as 90% member and chief manager, and David Franze, as 10% member and manager. BSC entered into a franchise agreement with Baja Sol Restaurant Group.

2. In October 2008, BSC and Lariat entered into a ten year Lease Agreement (the "Lease") for premises known as Lariat Center IV. The debtor executed the Lease on behalf of BSC in his capacity as its president, and he also executed an unconditional and continuing personal guaranty in connection with the Lease (the "Guaranty").

3. On November 4, 2008, the debtor and Franze guaranteed BSC liabilities to Indianhead Food Service Distributors, Inc. ("Indianhead").

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[1]At the conclusion of Lariat's case in chief on its motion to dismiss, the debtor moved for judgment on partial findings. Judgment was deferred. For clarity of the record, that motion is denied as moot.

[2]While finalizing the writing of this decision, I realized that one of the entities in which the debtor asserts an interest in and note receivable from, is National Pork Production II ("NPPII"). NPPII is a debtor in a case pending in the Southern District of Iowa and I acted as a mediator in that case. I have determined that the mediation has no impact on my qualification to resolve this matter.

4. BSC failed to operate profitably, and made its last Lease payment in May 2010. Lariat sought eviction. On July 1, 2010, judgment was entered against BSC and the debtor. BSC was ordered to vacate the premises, and did vacate the premises, by July 6, 2010.

5. On August 31, 2010, Bremer Bank commenced an action against the debtor.

6. On October 28, 2010, Lariat commenced an action against BSC and the debtor in state court, seeking damages under the Lease and Guaranty (the "Lease Action"). On November 29, 2010, BSC and the debtor served a joint answer and third-party complaint in the Lease Action.

7. On March 1, 2011, the debtor entered into assignment and assumption agreements transferring his interests in Spell Capital Funds II and III to his wife, Barbara Wigley. Those funds, respectively, distributed $412,258 and $358,533 to Barbara Wigley.

8. On May 16 and June 6, 2011, Bremer Bank obtained state court judgments against the debtor in the amounts of $681,733.93 and $16,280.52.

9. On June 20, 2011, summary judgment was granted in the Lease Action against BSC and the debtor, jointly and severally, in the amount of $2,224,237, plus interest, costs, and attorney's fees. The judgment (the "Lease Judgment") in the amount of $2,238,064.18 was entered on July 19, 2011, and docketed on August 2, 2011 by the state court.

10. On September 23, 2011, Indianhead commenced a lawsuit against the debtor, David Franze, and BSC to recover $116,452.20, plus late fees, collection costs and attorney fees, for products provided to BSC (the "Indianhead Action").

11. On November 21, 2011, Lariat, Home Federal, and Bremer Bank filed an involuntary Chapter 7 petition against the debtor. The next day, Lariat, Home Federal, and Bremer Bank commenced an action against Barbara Wigley (the "Fraudulent Transfer Action").

12. On December 16, 2011, the debtor filed an answer to the involuntary Chapter 7 petition alleging that he was "generally paying his debts as they come due and is solvent," and that "[t]he interests of Mr. Wigley and all of his creditors would be best served by dismissal of this case or a suspension of all proceedings so Mr. Wigley has time to propose resolution of the petitioning creditors' claims outside of bankruptcy."

13. On February 10, 2012, the debtor moved for dismissal of the involuntary case, stating that the petitioning creditors had agreed to dismissal based on the following agreements:

    a. The debtor would pay Home Federal $272,500 to settle all Home Federal claims.
    b. The debtor would pay Bremer Bank $400,000 to settle all Bremer Bank claims.
    c. Home Federal and Bremer Bank would stipulate to dismiss their claims in the Fraudulent Transfer Action.

d. Lariat would be entitled to seek to collect on its judgment, subject to the debtor's rights to seek relief from or appeal Lariat's judgment.[3]

The motion for dismissal was granted by the bankruptcy court.

14. On March 29, 2012, the debtor satisfied the Home Federal judgment.[4]

15. On April 3, 2012, the debtor filed a motion to vacate the Lease Judgment. On July 17, 2012, the debtor's motion to vacate was denied by the state court.

16. On August 8, 2012, the debtor was added as a defendant in the Fraudulent Transfer Action, and Lariat filed its amended complaint on September 28, 2012.

17. On October 22, 2012, final judgment was entered in the Lease Action. On December 7, 2012, the debtor appealed to the Minnesota Court of Appeals.

18. On March 7, 2013, the debtor filed an action (the "Independent Action") in state court against Lariat seeking relief from the judgment in the Lease Action. Lariat brought motions to dismiss the Independent Action, and the motions to dismiss were granted on July 12, 2013.

19. In July 2013, a court trial was held in the Fraudulent Transfer Action. On October 23, 2013, judgment was entered in favor of Lariat, jointly and severally against the debtor and Barbara Wigley, in the amount of $795,098, plus interest, costs and disbursements (the "Fraudulent Transfer Judgment") by the state court.

20. On August 8, 2013, the debtor filed a notice of appeal in the Independent Action.

21. On August 19, 2013, the Minnesota Court of Appeals affirmed the final judgment entered in the Lease Action.

22. On October 30, 2013, the Indianhead Action was settled.

23. On November 22, 2013, the debtor and Barbara Wigley moved for amended findings in the Fraudulent Transfer Action, noticing a hearing to be held January 2, 2014. (The record is unclear beyond this date but the approved disclosure statement in the present bankruptcy case provides that on the date this bankruptcy case was filed, this motion for amended findings was under advisement and that further proceedings in the Fraudulent

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[3] "Lariat's judgment" is not defined by the parties in the stipulation of facts, from which this finding is derived, with more specificity than indicated here.

[4] "Home Federal judgment" is not defined by the parties in the stipulation of facts, from which this finding is derived, with more specificity than indicated here.

Transfer Action were stayed.)

24. On November 26, 2013, Lariat filed a motion in the Lease Action for Application of Assets to Judgment and Postjudgment Relief (the "Assets Motion"). The hearing on the Assets Motion was scheduled for hearing on December 17, 2013. The debtor requested a continuance of the Assets Motion and the hearing date was changed to January 13, 2014.

25. On January 3, 2014, the debtor caused BSC to file a Chapter 11 bankruptcy petition [BKY 14-40026] and on January 6th, BSC commenced an adversary proceeding seeking to enjoin Lariat from enforcing the Lease Judgment [ADV 14-4008] against the debtor. On January 6, 2014, the debtor also sought a stay of the Assets Motion in the Lease Action pending the outcome of the adversary proceeding.

26. On January 13, 2014, the state court deferred ruling on the Assets Motion in the Lease Action pending the outcome of the adversary proceeding. On January 22, 2014, the bankruptcy court denied BSC's motion for a preliminary injunction. On January 31, 2014, the state court entered an order granting the Assets Motion (the "Assets Order").

27. On February 4, 2014, Lariat moved to dismiss BSC's adversary proceeding.

28. On February 10, 2014, the debtor filed the present individual Chapter 11 case.

29. On February 21st, 2014, the debtor sent a letter to the Bacchus interest holders. (The debtor states an equity interest in Bacchus Partners, LLC). Among other things, this letter discloses the filing of this case, and is offered by Lariat in support of its arguments.

30. On February 21, 2014, the BSC v. Lariat adversary proceeding was dismissed by stipulation. On June 11, 2014, the bankruptcy court dismissed the BSC Chapter 11 bankruptcy case on motion of the United States Trustee.

31. On March 13, 2014, the Minnesota Court of Appeals stayed the appeal in the Independent Action.

32. On June 3, 2014, Lariat filed a proof of claim in this case in the amount of $1,734,539. On August 18, 2014, Lariat filed an amended proof of claim in the amount of $1,610,787.

33. On July 3, 2014, the debtor objected to Lariat's claim. The debtor asserted the claim exceeds the cap on landlord's claims under section 502(b)(6) of the Bankruptcy Code and that certain claimed amounts are duplicative of and subject to certain limitations. On November 10, 2014, this court entered an order capping Lariat's claim in the amount of $445,272.93. Lariat appealed. On July 7, 2015, the Bankruptcy Appellate Panel (the "BAP") affirmed in part, reversed in part, and remanded for further proceedings. The matters on remand are pending but the ultimate allowed claim will be reduced by more than 50% from the filed claim pursuant to the affirmance of the BAP.

34. On February 4, 2015, the debtor filed the Plan. The Plan proposes, among other things, to settle the claim of Barbara Wigley with respect to the Fraudulent Transfer Judgment and to release her from all claims held against her by the debtor or by the estate. Specifically, the Plan provides:

> I. DEFINED TERMS
> "Barbara Wigley Settlement Payment" means the sum of $350,000.00, to be paid pursuant to Section 4.3(A) of the Plan.
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> 4.3. Plan Performance
> A. Plan Funding.
> In exchange for the release provided for in Section 4.4 of the Plan, on or before the Effective Date, Barbara Wigley shall remit the Barbara Wigley Settlement Payment to the Debtor, and the Debtor shall distribute one hundred percent of such funds to the holders of Class 1 [general unsecured] claims pursuant to the terms of the Plan. The Debtor shall be responsible for payment of all other amounts due and payable under the Plan.
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> 4.4. Settlement and Release of Claims Against Barbara Wigley
> Confirmation of the Plan shall constitute approval of a settlement agreement under which all claims that the Debtor or any other representative of the estate could have asserted against Barbara Wigley as of the Confirmation Date, including but not limited to Avoidance Actions, shall be released in exchange for payment of the Barbara Wigley Settlement Payment, which shall be due no later than the Effective Date. The settlement and release provided for herein shall be binding on all creditors and other parties [sic] interest, whether or not entitled to receive payments or other distributions under the Plan.

35. On February 17, 2015, Lariat filed this renewed motion to dismiss or convert, specifying a preference for dismissal over conversion (reversing its original motion), arguing bad faith including lack of financial distress.

36. When the state court entered the Assets Order at the end of January 2014, the debtor reasonably believed that seeking relief by filing a personal chapter 11 bankruptcy case was the only means to preserve and maximize the value of his assets, both for his own benefit and for the benefit of all of his creditors, and to protect the partners and other parties, including employees, involved in the entities in which he held interests.

37. The Assets Order required the debtor to provide an updated accounting of assets and, on Lariat's request, required the debtor or any other person in possession, custody, or control of the debtor's non-exempt property to surrender and deliver that property to Lariat.

38. The Assets Order authorized Lariat to liquidate the debtor's non-exempt property or to seek liquidation by sheriff's execution sale to satisfy the Lease Judgment.

39. The Assets Order also ordered, upon request by Lariat, all persons and entities owing money to the debtor to pay to Lariat any and all of their debts owed to the debtor.

40. At the time of a complete filing this case on February 21, 2014, the debtor scheduled assets of $4,622,725.19 and debt of $4,072,181.66. Of that debt, $566,658.83 constituted debt to two family members and $957,917.15 constituted contingent liabilities under guaranties of performing loans. The remaining debt of $2,547,605.40 constituted non-contingent debt to non-insiders, $2,238,064.18 of which was the amount due under the Lease Judgment. Since the debtor's assets exceeded his liabilities by $550,543.00, the debtor was solvent at the time of filing.

41. However, the majority of the debtor's assets (approximately $3,732,276) are partnership, stock, or other investment or receivable interests in various entities and generally not subject to typical or easily identifiable markets for liquidation purposes. The debtor reasonably believed that the liquidation value of those assets would be both less than the amount necessary to satisfy the Lease Judgment and less than the equity or receivable interests in those entities.

42. The debtor reasonably believed that a liquidation of his assets by Lariat pursuant to the Assets Order, or by any forced liquidation, would render him insolvent, unable to satisfy the Lease Judgment in full, and unable to satisfy his other creditors, and that the devaluation of certain entities by liquidating his interests in those entities could force those entities into bankruptcy. By filing this case, the debtor reasonably hoped to access the safe haven of bankruptcy in order to maximize the value of his assets and avert financial crisis for himself and for the entities in which he held partnership and other interests, and their creditors, employees, customers and vendors.

43. Pursuant to the Assets Order, Lariat had authority to demand the surrender of assets and to liquidate assets, and the debtor reasonably believed that Lariat intended to immediately undertake to do so to the extent necessary to satisfy the Lease Judgment.

44. Since the outset of this case, the debtor has proposed, and continues to propose, to pay Lariat's allowed claim (and all allowed claims in Class 1, of which Lariat is a member) in full with post-petition interest at the federal judgment rate "or such other rate as the Bankruptcy Court determines is necessary for a determination that Class 1 is unimpaired." The Plan also provides that its other classes are not impaired.

45. At the time of filing this case, the debtor was in financial distress. He did not have the ability to satisfy the Lease Judgment without liquidating assets leading to his own insolvency, and without extending the financial distress to other entities. He had been ordered to turn over all nonexempt assets to Lariat to the extent necessary to satisfy the

Lease Judgment, and he reasonably believed that Lariat's liquidation would not maximize the value of his assets and would imperil beyond sustainability the entities in which he has an interest. The debtor reasonably believed that Lariat would immediately undertake all available actions to fully enforce the Assets Order, and that a personal bankruptcy was the best and only way to mitigate his financial distress to maximum benefit for all parties involved and affected.

46. The money to be paid to the debtor by Barbara Wigley pursuant to section 4.3A of the Plan is not necessary to fund the payments provided by the Plan. It is undisputed that the debtor has adequate resources to fully fund the Plan without the Barbara Wigley Settlement Payment.

47. The release of Barbara Wigley pursuant to section 4.4 of the Plan is not a necessary provision of the Plan. With no need of funds from Barbara Wigley to fund the Plan payments or to make the Plan feasible, the only purpose of the section 4.4 settlement and release is to eliminate the Fraudulent Transfer Judgment and any other claims that the debtor could assert against Barbara Wigley. Releasing Barbara Wigley from liability on the Fraudulent Transfer Judgment serves no other purpose than to benefit Barbara Wigley at the sole expense of and while causing harm to Lariat.

48. Barbara Wigley is "credit worthy."

CONCLUSIONS OF LAW

Lariat's Motion to Dismiss:

1. Section 1112(b)(1) of the Bankruptcy Code provides that the court shall dismiss a case under chapter 11 "for cause" and if dismissal is in the best interest of creditors and the estate. See 11 U.S.C. § 1112(b)(1). A nonexclusive list of what constitutes "cause" is provided by § 1112(b)(4), but "[t]he statutory list is not exhaustive and ... a court may consider other factors and equitable considerations in order to reach an appropriate result in the individual case." In re Hatcher, 218 B.R. 441, 448 (BAP 8th Cir. 1998) aff'd, 175 F.3d 1024 (8th Cir. 1999) (citations omitted).

2. "Section 1112(b) does not explicitly require that cases be filed in 'good faith,'" but it is recognized in this jurisdiction "that a bad faith filing can be cause for dismissal." In re Cedar Shore Resort, Inc., 235 F.3d 375, 379 (8th Cir. 2000), citing In re Kerr, 908 F.2d 400, 404 (8th Cir.1990) (affirming dismissal of petition on grounds that violation of court orders, self-dealing, and evasive conduct indicated bad faith and "improper motive" in debtor's Chapter 11 filing). "Other circuits have similarly held that the Code contains an implicit good faith requirement." Cedar Shore Resort, 235 F.3d at 379, citing In re SGL Carbon Corp., 200 F.3d 154, 162 (3d Cir.1999); In re Trident Assocs. Ltd. Partnership, 52 F.3d 127, 130–31 (6th Cir.1995); In re Marsch, 36 F.3d 825, 828 (9th Cir.1994); Carolin Corp. v. Miller, 886 F.2d 693, 700 (4th Cir.1989); In re Phoenix Piccadilly, Ltd.,

849 F.2d 1393, 1394 (11th Cir.1988); In re Little Creek Devel. Co., 779 F.2d 1068, 1071–72 (5th Cir.1986).

3. "[G]ood faith implies an honest intent and genuine desire on the part of the petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose." Cedar Shore Resort, 235 F.3d at 379, quoting In re Metropolitan Realty Corp., 433 F.2d 676, 678 (5th Cir.1970).

4. "[A] Chapter 11 petition may be dismissed for bad faith alone where the circumstances warrant." Cedar Shore Resort, 235 F.3d at 381. "[B]ad faith alone is sufficient to warrant dismissal, regardless of the possibility of reorganization." Id., citing Phoenix Piccadilly, 849 F.2d at 1393–94; In re ACI Sunbow, LLC, 206 B.R. 213, 217–21 (Bankr.S.D.Cal.1997). "Under this view, 'the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal,' and 'the possibility of a successful reorganization cannot transform a bad faith filing into one undertaken in good faith.'" Cedar Shore Resort, 235 F.3d at 381, citing Phoenix Piccadilly, 849 F.2d at 1395.

5. "There is no single test for determining when a debtor has filed in bad faith." Cedar Shore Resort, 235 F.3d at 379. "Rather, courts consider the totality of the circumstances, including the court's evaluation of the debtor's financial condition, motives, and the local financial realities." Id., citing Little Creek, 779 F.2d at 1072.

6. The following factors are among those recognized as evidence of bad faith and potentially relevant in this matter: the case is a two-party dispute; the debtor has few unsecured creditors; the bankruptcy allows the debtor to evade state court orders; the debtor has no ongoing business to reorganize; and the bankruptcy evidences intent to delay or frustrate legitimate efforts of the debtor's secured creditor to enforce its rights. See Stage I Land Co. v. United States, 71 B.R. 225, 230 (D.Minn.1986); Hatcher, 218 B.R. at 448.

7. Reviewing the above factors, in this case the largest and most significant creditor is Lariat, but Lariat is not the debtor's only meaningful creditor and this is not what is generally considered to be a two party dispute.[5] Moreover, the disputes between the

[5] The typical two-party dispute "involves a debtor with a single asset, no meaningful unsecured debts, and there has been an ongoing controversy between two parties, i.e., the secured creditor and the debtor." In re Marion St. P'ship, 108 B.R. 218, 222 (Bankr. D. Minn. 1989), citing Stage I Land Co. 71 B.R. at 229–30 (D.Minn.1986); In re One Fourth Street North, Ltd., 105 B.R. 106 (Bktcy.M.D.Fla.1989); In re Mill Place Ltd. Partnership, 94 B.R. 139 (Bktcy.D.Minn.1988). This case does not involve a single-asset and there is not an absence of meaningful unsecured debt. This case is not what is generally understood as a two-party dispute notwithstanding the lengthy and significant ongoing controversy between the debtor and Lariat. See also In re Mid-Valley Aggregates, Inc., 49 B.R. 498, 501 (Bankr. D.N.D. 1985) (holding that proceeding could not be characterized as a two-party dispute because the debtor had obligations to many creditors in addition to creditor moving for dismissal based on bad faith); In re C-TC 9th Ave. P'ship, 113 F.3d 1304, 1311 (2d Cir. 1997), quoting Pleasant Pointe Apartments, Ltd. v. Kentucky Hous. Corp., 139 B.R. 828 (W.D.Ky.1992) ("[T]he debtor's financial condition is, in essence, a two party dispute

debtor and Lariat must be included and tended in this bankruptcy case under the provisions of the Bankruptcy Code.[6] Likewise, the bankruptcy does not allow the debtor to evade state court orders, but requires the debtor to acknowledge the state court judgments and properly provide for those debts in his plan. While the debtor in this case is an individual without a primary ongoing business to reorganize in this case, he is a partner or investor in many ongoing businesses not subject to this bankruptcy, and his liability to Lariat has imperiled those entities. Finally, the debtor's bankruptcy filing does not evidence intent to frustrate Lariat's efforts to enforce its rights, even though that is an inherent effect of a bankruptcy. Instead, the debtor's intent in filing was to shelter and maximize his assets to the extent permitted by the Code.

8. In the Kerr case, the Court of Appeals for the Eighth Circuit explained:

> "Determining bad faith ... requires a difficult distinction between permissible and impermissible motives. Debtors often wish to shelter whatever assets they can from their creditors, and the Bankruptcy Code permits them to do so. We therefore must require a pattern of concealment, evasion, and direct violations of the Code or court order which clearly establishes an improper motive before allowing dismissals for bad faith." Kerr, 908 F.2d at 404, citing In re Johnson, 880 F.2d 78, 79–80 (8th Cir.1989).

9. At the time of filing this bankruptcy case, the debtor was not engaging in evasive conduct. The transfers to his wife that are the subject of the Fraudulent Transfer Judgment were made almost three years before filing this case and were reduced to judgment pre-petition. To the extent that the proposed Plan in this case attempts to compromise the Fraudulent Transfer Judgment, that is a confirmation issue, as discussed and disallowed, as set forth below. Moreover, the debtor's pursuit of relief to cap Lariat's claim as allowed in a bankruptcy case reflects a proper and permissible motive in support of filing the case.

10. In the SGL Carbon case, the Court of Appeals for the Third Circuit noted that "a Chapter

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between the debtor and secured creditors which can be resolved in the pending state foreclosure action") and citing Phoenix Piccadilly, 849 F.2d at 1394–95 and Little Creek, 779 F.2d at 1072–73.

[6] "Where the proposed reorganization is an apparent two-party dispute and the major secured creditor is being frustrated from enforcement of its right to foreclose, the invocation of bankruptcy court protection is improper and in bad faith." Stage I Land Co., 71 B.R. at 230, citing In re Corporation Deja Vu, 34 B.R. 845 (Bankr.D.Md.1983). The case at bar is distinguishable because Lariat is not a secured creditor seeking to foreclose, the prospect of the debtor's reorganization is not hopeless, and the debtor's other creditors have realized meaningful protection on account of the debtor's bankruptcy filing. Moreover, in the Stage I Land Co. case, "there was no equity cushion in assets; there was [no] ... potential for positive cash flow, [and the debtor's] course of conduct in delaying foreclosure and in mismanagement of the project" contributed to the determination of lack of good faith in seeking bankruptcy relief. Stage I Land Co., 71 B.R. at 231, citing In re Chesmid Park Corp., 45 B.R. 153, 157 (Bankr.E.D.Va.1984).

11 petition is not filed in good faith unless it serves a valid reorganizational purpose." SGL Carbon, 200 F.3d at 165 (citations omitted). The SGL Carbon court "ruled that the debtor had filed in bad faith and dismissed the petition because Chapter 11 is intended for valid reorganization of 'financially troubled businesses,' not to permit financially solvent companies to 'rapidly conclude litigation to enable a continuation of their business.'" Cedar Shore Resort, 235 F.3d at 380, citing SGL Carbon, 200 F.3d at 169.

11. "To be sure, a debtor need not be insolvent before filing for bankruptcy protection." In re Integrated Telecom Express, Inc., 384 F.3d 108, 121 (3rd Cir. 2004), citing SGL Carbon, 200 F.3d at 163-64. However, "[a]t its most basic level, the Bankruptcy Code maximizes value by alleviating the problem of financial distress." Integrated Telecom, 384 F.3d 108, 121 (3rd Cir. 2004), citing Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 10 (1986) ("The basic problem that bankruptcy law is designed to handle ... is that the system of individual creditor remedies may be bad for the creditors as a group when there are not enough assets to go around.").

12. "[G]ood faith necessarily requires some degree of financial distress on the part of a debtor." Integrated Telecom, 384 F.3d at 121, citing SGL Carbon, 200 F.3d at 166; Coastal Cable, 709 F.2d at 765; In re Cohoes Indus. Terminal, Inc., 931 F.2d 222, 228 (2nd Cir.1991) ("Although a debtor need not be in extremis in order to file ... a petition, it must, at least, face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future."); In re Dixie Broad., Inc., 871 F.2d 1023, 1027 (11th Cir.1989) (recognizing that one factor relevant to good faith is "whether the debtor is 'financially distressed' " and affirming dismissal of petition for, inter alia, use of bankruptcy proceedings despite the apparent good financial health of the debtor"); Little Creek, 779 F.2d at 1072 ("Determining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities.").

13. The debtor in this case was not "a financially healthy debtor," and did not file the case "with no intention of reorganizing or liquidating as a going concern, with no reasonable expectation that Chapter 11 proceedings will maximize the value of the debtor's estate for creditors, and solely to take advantage of a provision in the Bankruptcy Code that limits claims on long-term leases...." See Integrated Telecom, 384 F.3d at 112.

14. This case "serves a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing the value of the debtor's estate," and this case was not "filed merely to obtain a tactical litigation advantage." See Integrated Telecom, 384 F.3d at 120.[7]

[7]The SGL Carbon case also addressed cases filed merely for tactical advantage and stated, "because filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within 'the legitimate scope of the bankruptcy laws,' courts have typically dismissed Chapter 11 petitions under these circumstances as well." Id., citing Marsch, 36 F.3d at 828; In re Coastal Cable T.V., Inc., 709 F.2d 762, 764 (1st Cir. 1983); In re Argus Group 1700, Inc., 206 B.R. 757, 765-66 (E.D.Pa.1997); Furness v. Lilienfield, 35 B.R. 1006, 1013 (D.Md.1983) ("The

15. Lariat argues that, like the debtor in SGL Carbon, a case cited with approval by the Eighth Circuit Court of Appeals in Cedar Shores Resort, the debtor in this case is "financially healthy" and "filed bankruptcy in order to escape potentially crippling effects of a pending civil ... judgment." Cedar Shore Resort, 235 F.3d at 380, citing SGL Carbon, 200 F.3d 154. But for the Lariat judgments against the debtor and his wife, the debtor would have been a financially healthy debtor, but he did not file to escape the Lariat judgments; he filed to maximize the value of his assets for the benefit of himself and all of his creditors including Lariat, and to avail himself of the protections of the Bankruptcy Code with respect to limiting Lariat's claim as provided and allowed by the Code and in a bankruptcy case. Consistent with this legitimate motive, the BAP affirmed this court's limitation of Lariat's claim arising from the Lease Judgment, subject to the pending remand noted above.

16. "Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liabilities." SGL Carbon, 200 F.3d at 166, quoting Furness v. Lilienfield, 35 B.R. at 1009. The debtor in this case was, on account of the Lariat judgments and Asset Order, teetering on the verge of a fatal financial plummet, especially as his assets were mostly tied up in certain other entities put at risk of financial distress without the debtor obtaining relief and protection in bankruptcy and the opportunity to reorganize his financial situation.

17. The motion to dismiss will be denied. In addition, for the reasons discussed and because the court does not find any purpose to be served by converting this case, the alternative motion to convert will also be denied.

Lariat's Objection to Plan Confirmation:

18. The "principle of too much"[8] sometimes arises in the context of bankruptcy estate planning with available exemptions in mind, but it also lends a meaningful perspective to evaluating the intentions and purposes of a particular bankruptcy case and in consideration of the use, or abuse, of the Bankruptcy Code provisions.

Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation.") In this case, as stated, the filing was not "merely to obtain a tactical litigation advantage."

[8] "It might be argued that a debtor should be free to pass assets through the process of 'bankruptcy estate planning' without jeopardy to his right to discharge, subject to some value limitation which the Bankruptcy Court should fix." In re Johnson, 80 B.R. 953, 961 (Bankr. D. Minn. 1987) *aff'd* sub nom. Panuska v. Johnson, 101 B.R. 997 (D. Minn. 1988). Or, "at some level of value, such transfers automatically become so offensive that denial of discharge is mandated." Id. This is the "principle of too much" also known by the metaphor of "when a pig becomes a hog it is slaughtered." Id. at 961 n.9.

19. In this case, the principle of too much does not adhere to the analysis of Lariat's motion to dismiss. As already discussed, the filing in this case was in good faith and does not offend the "twin concerns of humanitarianism and utilitarianism." See In re Johnson, 80 B.R. 953, 962 (Bankr. D. Minn. 1987) aff'd sub nom. Panuska v. Johnson, 101 B.R. 997 (D. Minn. 1988).

20. But, the principle of too much is persuasive in this case with respect to the settlement and release of Barbara Wigley proposed by the Plan. The Plan's provision to settle Barbara Wigley's claim and to release her from liability for the Fraudulent Transfer Judgment is too much.

21. Lariat's objections to confirmation are many[9], but this order focuses on Lariat's objection to the Plan's proposed settlement and release of Barbara Wigley in section 4.4 of the Plan. This objection emphasized the settlement's lack of fairness and it is indeed a determinative confirmation issue in this case.

22. Section 1129 of the Bankruptcy Code sets forth the requirements for confirmation of a plan. Relevant here, subsection 1129(a)(1) of the Code provides that a plan must comply with the applicable provisions of title 11. Section 1129(a)(1) incorporates by reference section 1123(b)(3)(A) which provides that "a plan may provide for the settlement … of any claim … belonging to the debtor or to the estate". Section 1129(a)(1) also incorporates section 524(e) which addresses nondebtor liabilities. Section 524(e) will be discussed further below.

23. Although section 1123(b)(3)(A) allows settlements in a plan, a determination of the fairness of that settlement should be made. See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S. Ct. 1157, 20 L. Ed. 2d1 (1968). It is "the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable". Id. See also In re G-1 Holdings, Inc., 420 B.R. 216, 256-57 (Bankr. D.M.J. 2009).

24. "The standards for approval of a settlement under section 1123 are generally the same as those under Rule 9019, though the court should consider all factors relevant to a 'full and fair assessment of the wisdom of the proposed compromise.'" In re Coram Healthcare Corp., 315 B.R. 321, 334-35 (Bankr. D. Del. 2004) quoting Protective Comm. for Indep. Stockholders at 424.

25. In determining whether the settlement is fair and equitable, and ultimately denying Plan

[9] The debtor challenged Lariat's standing to assert certain plan objections. To the extent it is procedurally necessary and not obvious, the debtor's standing objection is overruled for the reasons argued by Lariat.

confirmation, the court relies upon the factors which are asserted by the parties as controlling the outcome of this objection and which are set forth by the Eighth Circuit Court of Appeals in the Flight Transportation case:

> "The approval of a settlement under Fed.R.Civ.P. 23(e) as fair, reasonable, and adequate 'is committed to the sound discretion of the trial judge.'" In re Flight Transportation Corporation Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984) (citations omitted). "In exercising its discretion, the District Court must consider all factors bearing on the fairness of the settlement, including
>
> > (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir.1929); Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–25, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). Drexel and Anderson involve approval of settlement in bankruptcy cases.... Grunin, supra, 513 F.2d at 124."
>
> In re Flight Transp. Corp. at 1135-1136 (1984).[10]

26. The application of the first three factors does not favor approving this settlement. This is so because the litigation phase of the Fraudulent Transfer Action is over subject only perhaps to a pending motion for amended findings and a potential appeal, and there should not be any collection difficulties. Regardless, in this case the fourth factor is critical and determinative. Perhaps recognizing this, the parties focused their arguments on this significant consideration, that is, "the paramount interest of the creditors and a proper deference to their reasonable views" with respect to the proposed settlement and release of Barbara Wigley. This settlement would eliminate the Fraudulent Transfer Judgment by releasing her for a discounted payment to the debtor and harm Lariat, the only entity other than Barbara Wigley affected by this proposed Plan provision. No other entities are affected as the Barbara Wigley Settlement Payment is unnecessary to fund the Plan.

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[10] These factors are also listed in the Tri-State Financial case. See Tri-State Financial, LLC v. Lovald, 525 F.3d 649, 654 (8th Cir. 2008).

27. The debtor states in his disclosure statement, however, that this settlement is reasonable "for the simple reason that no creditor will in any way be prejudiced by it." But, while Lariat will be paid under the Plan in full on its allowed claim against the debtor, Lariat's interests are broader than the confines of this case and this Plan. And this Plan prejudices those interests. By including the release provision, the debtor is attempting to control the ultimate outcome of claims beyond the allowed claim in this case against the debtor; the debtor is attempting to control the ultimate outcome of claims between a nondebtor, Barbara Wigley, and her judgment creditor, Lariat, in a state court action.

28. The debtor argues that Lariat's interests alone cannot reflect the paramount interests of creditors. The Flight Transportation case recognized that a settlement may be approved "over the objection of some parties" but continued by stating "so long as a settlement is in the best interests of the estate as a whole." See Flight Transp. Corp. at 1138; Tri-State Financial at 654 (8th Cir. 2008). The debtor also has a fiduciary duty to maximize distributions through his reorganization to all of his creditors. See In re Cowan, 235 B.R. 922, 924 (Bankr. W.D.MO 1992); In re Brook Valley VII, Joint Venture, 496 F.3d 892, 901 (8th Cir. 2007). But, the proposed settlement in the Plan only benefits Barbara Wigley, a nondebtor insider, and the only entity harmed is Lariat. All of the debtor's other creditors will be fully satisfied or are unaffected by the Plan regardless of whether the settlement and release provision is included or excluded from the Plan. With respect to the proposed settlement in the Plan, because of the specific facts at play and within the realities of this particular case, no benefit to the estate obtains and the debtor's argument is misguided.

29. The infusion of cash into an estate typically results in a benefit to the estate. But this is not a typical case and a cash infusion, such as proposed here, does not always signify such a benefit. As discussed, here there is no benefit to the estate; the benefit is to Barbara Wigley alone, the wife of the debtor and an insider.

30. Without even delving into the unique financial relationship between Barbara Wigley and the debtor, her insider status based solely on marital status may require the proposed settlement and release transaction to be reviewed under a standard of heightened scrutiny. See In re Innkeepers USA Trust, 442 B.R. 227 (Bankr. S.D.N.Y 2010). It is of no moment as the outcome here is the same regardless of whether heightened scrutiny or the less stringent business judgment test is applied.

31. Simply stated, the settlement does not meet any of the applicable requirements; it is not fair, reasonable, adequate, equitable or in the best interests of the estate.

32. Moreover, as noted above, section 524(e) of the Bankruptcy Code must also be considered in determining whether the confirmation requirements of section 1129(a)(1) are met. Section 524(e) provides: "[e]xcept as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Whether the release of Barbara Wigley is permissable in light of section 524(e) must be reviewed in order to determine whether the confirmation requirements of section 1129(a)(1) are met.

33. There are opposing minority and majority interpretations of section 524(e)[11] regarding whether nonconsensual nondebtor releases are permissible as part of a plan.[12] In this case, whether the majority or minority rule governs, the outcome is the same: Barbara Wigley cannot be released pursuant to this Plan. If the minority view applies, the per se rule prohibits the release.[13] If the majority rule applies, a plan may include a non-consensual release of a nondebtor only if the release is appropriate, and generally they are appropriate only in "unusual circumstances." See In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002).[14] A release may be appropriate when it is necessary for the reorganization and appropriately tailored. See In re Airadigm Communications, Inc., 519 F.3d 640, 657 (7th Cir. 2008).

34. In this case the release is neither necessary for the reorganization nor appropriately

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[11] The minority view is held by the Fifth, Ninth and Tenth Circuits. See In re Seaside Engineering & Surveying, Inc., 780 F.3d 1070, 1077 (11th Cir. 2015). The majority view is held by the Second, Fourth, Sixth, and Seventh Circuits. Id. at 1078. The First, Eleventh and D.C. Circuits indicate they agree with the majority view. See Id. Although the Third Circuit is considered by some to hold the majority view, the court in the relevant case did not make a blanket rule. See In re Continental Airlines, 203 F.3d 203, 213-214 (3rd Cir. 2000); In re Seaside, at 1078 n.7. There does not appear to be a position taken by the Eighth Circuit.

[12] Generally, sections 1123(b)(6) and 105(a) are invoked to support the majority view. See, e.g., In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002). Section 1123(b)(6) provides: "Subject to subsection (a) of this section, a plan may– (6) include any other *appropriate* provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6) (emphasis added). Section 105(a) provides: "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a).

[13] The per se rule provides that nonconsensual, nondebtor releases are impermissble.

[14] There is a seven factor test applied by many courts in determining whether there are the requisite "unusual circumstances" such that enjoining a non-consenting creditor's claim is appropriate. See, e.g., In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002). The question of whether the release is essential to the reorganization is one of those factors. The release is not essential in this case.

narrow or limited. Unlike in the Airadigm case or other cases allowing the liabilities of nondebtors to be affected, the release in this case is not narrow but broadly releases all claims the debtor could assert against Barbara Wigley as of the potential confirmation date and it binds all parties in interest. Also, and critically, it is not necessary to "provide the requisite financing, which was itself essential to the reorganization." See Airadigm at 657 (7th Cir. 2008). The Plan can be fully funded without the Barbara Wigley Settlement Payment. Neither the necessary circumstances nor the standard of appropriateness are present and met in this Plan. The proposed release in the Plan is not appropriately tailored, and it is not necessary for feasibility of the Plan.

35. Although the Eighth Circuit has not addressed this issue arising from section 524(e) of the Bankruptcy Code, the analysis by other circuits and a review of the applicable provisions of the Code (including section 1123(b)(b) regarding other "appropriate" provisions) compel the conclusion that the Plan is not confirmable. In this case the release is not appropriate.

36. Based on the court's denial of confirmation pursuant to the above discussion, all of Lariat's other objections to confirmation are denied as moot but without prejudice.

SUMMARY

At the time the debtor decided to file this case, Lariat had authority under the Assets Order to liquidate the debtor's non-exempt assets. Such a liquidation would have been inadequate to satisfy the Lease Judgment, and would almost certainly have created financial distress, and possibly bankruptcy, for unrelated operating entities in which the debtor held assets as a partner, or investor, or creditor. The debtor faced the strong likelihood of being rendered insolvent as a result of Lariat's collection efforts, and unable to satisfy his other creditors. At the time of filing, the debtor was in financial distress.

In response to that financial distress and the near certainty of its escalation, the debtor sought bankruptcy protection. The bankruptcy option provided a way to cap Lariat's allowable claim on the Lease Judgment and provided the breathing room necessary to formulate a plan that would maximize asset values, protect numerous entities, and satisfy not only Lariat's allowed claim in full but also fully satisfy the claims of all creditors. The debtor's election to file for relief under Chapter 11 was not in bad faith.

While Lariat complains that the debtor's resort to bankruptcy was to frustrate Lariat's collection efforts, the debtor's purpose was not so singular. Although this bankruptcy case

necessarily impeded Lariat's ability to collect and satisfy the Lease Judgment, this case was filed only after all other viable avenues had been exhausted and, significantly, for the primary purposes of maximizing and preserving assets for the benefit of all creditors and to avoid unnecessarily imposing financial distress on entities unrelated to the Lease, the Lease Action, and the Lease Judgment. His resort to bankruptcy was a last resort.

"Dismissal of a bankruptcy case is the ultimate sanction; it should be used with caution." Marion St. P'ship, 108 B.R. at 223, citing Mill Place Ltd. Partnership, 94 B.R. at 141. Dismissal of this case is not appropriate at this time and the motion to dismiss, and alternative motion to convert, will be denied.

The debtor testified unequivocally that the contribution from his wife, Barbara Wigley, to fund the Plan in exchange for the release, was not necessary to fund the Plan. As such, and because of the prejudice to Lariat, and for the reasons discussed in the analysis of the release issue, the court cannot determine the release to be appropriate under the circumstances of this case, and therefore the Plan as proposed is not confirmable. While the facts involved here indicate good faith on the part of the debtor in filing this case, they also demonstrate the debtor's wherewithal to fund a plan that will fully satisfy all of his creditors including Lariat's allowed claim against him and that the proposed release is unnecessary, not in the best interest of creditors, and not appropriate.

Section 1112 includes as cause for dismissal the failure to file or confirm a plan by a date ordered by the court. This case has been pending for almost two years. The debtor has not proposed a confirmable plan. It is appropriate in this case to impose such deadlines. If the debtor fails to meet these deadlines or fails to obtain an order extending these deadlines, the court will consider a motion to dismiss based upon cause pursuant to 11 U.S.C. § 1112(b)(4)(J) or other causes pleaded.

Accordingly, IT IS ORDERED:

1. The motion to dismiss or convert is denied without prejudice.

2. Confirmation of the Debtor's Second Modified Plan of Reorganization, dated February 4, 2015, is denied.

3. The debtor's deadline to file a modified proposed plan of reorganization is on or before December 31, 2015.

4. The debtor's deadline to obtain confirmation of a plan of reorganization is on or before March 31, 2016.

BY THE COURT:

DATED: 11/18/2015

/e/ Katherine A. Constantine
Hon. Katherine A. Constantine
United States Bankruptcy Judge

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on ***11/18/2015***
Lori Vosejpka, Clerk, by AAR