UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re **CVAH, Inc.,** **Debtor.**	**Bankruptcy Case No. 14-00888-JDP**

MEMORANDUM OF DECISION

Introduction

Wells Fargo Bank ("Wells Fargo") filed a Motion to Dismiss ("the Motion") this bankruptcy case. Dkt. No. 80. Wells Fargo is a defendant in one of several fraudulent transfer adversary proceedings being prosecuted against various parties by the chapter 7[1] trustee, Noah Hillen ("Trustee"), in connection with this case. Several other adversary proceeding

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 – 9037.

defendants have joined in the Motion.[2] Trustee objected to the Motion, and creditors the Internal Revenue Service and the Idaho State Tax Commission (collectively, "the tax creditors") joined in opposing dismissal. Dkt. Nos. 130; 131; 135. The Court conducted a hearing concerning the Motion on September 15, 2015, at which the parties submitted oral arguments, and at the conclusion of which, the Court took the issues under advisement. Dkt. No. 139.

The Court has considered the record, the parties' briefs and oral arguments, as well as the applicable law. This Memorandum constitutes the Court's findings and conclusions, and disposes of the Motion. Fed. R. Bankr. P. 7052; 9014.

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[2] The parties joining the Motion were: Alfredo Ruelas, Dkt. No. 86; Idaho Athletic Club, Dkt. No. 87; Sterling Landscape, LLC, Dkt No. 91; DIRECTV, Dkt. No. 92; Life Church, Inc., Dkt. No 93; CITIMORTGAGE, INC., Dkt. No. 104; Bengoechea Law Office PLLC, Dkt. No. 108; Citibank, N.A., Dkt. No. 112, Hilton Grand Vacations Company, LLC, Dkt. No. 118; Target Motors, Inc., Dkt. No. 123; Idaho Power Company, Dkt. No. 124; City of Meridian, Dkt. No. 126; Cellco Partnership dba Verizon Wireless, Dkt. No. 127; Barclays Bank PLC, Dkt. No. 129; Scott Koritansky, Dkt. No 136; Kormanik, Hallam & Sneed, Dkt. No. 137; Muse Dairy Strategies, LLC, Dkt. No. 138.

Facts[3]

This is not a typical chapter 7 case. CVAH ("Debtor") is a subchapter C corporation organized to provide veterinary services to its customers. The sole stockholder of the company, and the only licensed veterinarian employed by Debtor, was Richard Koritansky. Debtor also occasionally employed and compensated other members of Koritansky's family to perform various office tasks.

On May 27, 2014, Debtor filed the chapter 7 petition and commenced this case. Dkt. No. 1. Debtor's schedules A and B list no real or personal property assets aside from a few items of office equipment. *Id.* at 6-9. The schedules of creditors list only the tax creditors. The proofs of claim filed by the tax creditors are for unpaid corporate income taxes due from the years 2009-2013, total roughly $1,700,000. Claims Reg. Nos. 1, 2. There have been no objections to these claims at this time.

During his tenure, Trustee has filed about 40 adversary proceedings

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[3] The parties offered no evidence or testimony to support their positions. They seem to agree that none of the facts recited herein, taken mostly from the schedules and pleadings in the Court's record, are disputed.

against parties (collectively, "Defendants") to recover payments made to them by Debtor, which Trustee alleges were constructively fraudulent transfers. Taken together, in these actions Trustee seeks to recover over $4,000,000 for the bankruptcy estate and the tax creditors.

Apparently in an effort to derail Trustee's litigation strategy, Defendants filed the Motion and joinders seeking dismissal of the bankruptcy case pursuant to § 305(a) and § 707(a). Dkt. Nos. 80, 119. In support of their motion, Defendants argue that the transfer avoidance actions can and should be prosecuted by the tax creditors in state or federal district court and that this case is not a "good fit" for the bankruptcy system. They contend that Trustee's primary incentive in pursuing the adversary proceedings is not to benefit creditors, but to generate a significant award of compensation calculated under § 326(a) as a percentage of the funds he recovers. Defendants insist, that given the unique facts of this bankruptcy case, they are being unfairly targeted, having merely received payment for the legitimate debts owed to them for the goods and services provided to Debtor's owner, Koritansky, and his

family members. As further evidence that Trustee ’s actions are misguided, they contend that Trustee has not fulfilled his duty to object to the tax creditors’ claims, and instead, is attempting to recover amounts far in excess of what is currently owed by the estate to those creditors.

Defendants also characterize this case as, essentially, a two-party dispute between the tax creditors and Debtor. They claim that, having Trustee pursue the avoidance claims on their behalf, unnecessarily adds to the administrative costs of the process. Finally, Defendants warn the Court that, should this bankruptcy case be allowed to continue, it will give rise to a “tornado of activity” that will consume judicial resources for years to come.

In response, Trustee points out that, in pursuing the adversary proceeding, he is advancing the traditional goals of bankruptcy, which in a liquidation case, require him to marshal the assets for the benefit of creditors. He reminds the Court that in doing so, his beneficiaries, the tax creditors, support his efforts. He notes that, at this point, a substantial amount of funds that have already been procured for the estate through

settlements in some of the adversary proceedings, and that default judgments have already been entered in others.

Concerning Defendants' contentions that he is unfairly targeting them, Trustee argues that they are not innocent as they suggest, in that many willingly accepted payments from a party (*i.e.*, Debtor) which owed them nothing, to the potential prejudice of the tax creditors. Furthermore, in response to arguments concerning his alleged jaded incentives, Trustee explains that he has indeed conducted a preliminary investigation into the validity of the tax creditors' claims and has as yet discovered no reason to object to them. Concerning the number of avoidance claims, and the amounts he is seeking to recover, Trustee responds that he is simply pursuing those claims in the manner and for the amount prescribed by the Code, and that it is simply too early to predict whether his recoveries will exceed that necessary to pay the tax creditors in full.

Addressing the argument that the tax creditors should be expected to pursue any avoidance claims outside of bankruptcy, Trustee and the tax creditors both argue that, realistically, the creditors lack the resources to

do so effectively. The tax creditors acknowledge that they are aware of the potential amount of Trustee's fees, and have no objection to it.

Trustee also contends that, regardless of the forum in which these actions are prosecuted, judicial resources will be expended, and, that dismissing this case and requiring the tax creditors to begin anew in a different forum, would be inefficient and wasteful. The tax creditors and Trustee also insist that this Court, as opposed to the state or federal district court, can more expeditiously process the actions. As a result of these factors, Trustee contends that allowing this case to continue would actually decrease the cost to the tax creditors.

Finally, Trustee reminds the Court that through this voluntary bankruptcy filing, Debtor and its principal have expressed their interest in a bankruptcy solution to its debt problems, and that, in contrast, Defendant's interests should not even be considered as they are not, and will not become, creditors of the estate.

Analysis and Disposition

As can be seen, the Motion arises in an interesting context. No party

has alleged that Debtor filed the bankruptcy case in bad faith or to abuse the bankruptcy system. Moreover, the parties requesting dismissal are not Debtor's creditors, but instead, are the targets of Trustee's fraudulent transfer claims. Indeed, while the general theme of Defendants' argument is that this case is not a "good fit" for the bankruptcy system, their primary objective is not to protect or promote the integrity of that system, but rather, to avoid the liability to Debtor's creditors for any avoidable transfers they may have received.

While the facts here are unusual, the Court's charge in disposing of the Motion and joinders is a traditional one: deciding whether the two provisions of the Code relied upon by Defendants in seeking dismissal, § 305(a) and § 707(a), offer them any relief. The Court concludes that Defendants have not adequately demonstrated that this bankruptcy case should be dismissed.

I.

A. Dismissal under § 305(a)

"Dismissal pursuant to § 305(a) is an extraordinary remedy, in part

because it is generally not appealable beyond the level of the District Court or, in the Ninth Circuit, the Bankruptcy Appellate Panel." *In re Marciano*, 459 B.R. 27, 46 (9th Cir. BAP 2011) aff'd, 708 F.3d 1123 (9th Cir. 2013) (citing *In re Orchards Village Invs., LLC*, 405 B.R. 341, 351 (Bankr. D. Or. 2009)). As such, it should "only be utilized in extraordinary circumstances." *Id.*

Section 305, entitled "Abstention," provides in relevant part that:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
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> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; . . .

According to the BAP, "[d]ismissal under § 305(a) is appropriate 'only in the situation where the court finds that both "creditors and the debtor" would be "better served" by a dismissal.'" *Marciano*, 459 B.R. at 46 (citing *Eastman v. Eastman (In re Eastman)*, 188 B.R. 621, 624 (9th Cir. BAP 1995)). And, importantly, "[b]efore a court may refrain from exercising jurisdiction over an otherwise proper [bankruptcy] case, it must make *specific and substantiated findings* that the interests of the creditors and the

debtor will be better served by dismissal or suspension." *Id.* (citing *Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.)*, 370 B.R. 236, 247 (9th Cir. BAP 2007) (emphasis added)). Commenting on the sorts of circumstances warranting dismissal under § 305(a), the BAP explained:

> The legislative history of § 305(a) indicates: The court may dismiss or suspend under the first paragraph, for example, if an arrangement is being worked out by creditors and the debtor out of court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment.
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> Typical circumstances for dismissing under § 305(a)(1) include the pendency of proceedings such as assignments for the benefit of creditors, state court receiverships, or bulk sale agreements. Another consideration is where there are few, if any, valuable nonexempt assets and the administrative expenses would likely consume the entire estate.

Macke Int'l Trade, Inc., 370 B.R. at 247 (citations omitted).

In deciding when dismissal was appropriate under § 305(a), in the past, this Court consulted five factors. *In re Ethanol Pac., Inc.*, 166 B.R. 928, 931 (Bankr. D. Idaho 1994). However, the BAP has more recently assembled a list of seven proper factors in making a § 305(a) determination. *Marciano*, 459 B.R. at 46-47; *see also In re Gelb*, 2013 WL 1296790, at *4 (9th

Cir. BAP Mar. 29, 2013). Those factors are:

> (1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

Marciano, 459 B.R. at 46-47. In weighing these factors, the Court must consider the totality of the circumstances. *Id.* at 48. Furthermore, "a bankruptcy court's decision to abstain under § 305(a) is "discretionary and must be made on a case-by-case basis." *In re Efron*, 529 B.R. 396, 405 (1st Cir. BAP 2015).

B. Application of § 305(a) Factors in this Case

To reiterate, in order to dismiss this case under § 305(a), the Court "must make specific and substantiated findings that the interests of the creditors and the debtor will be better served by dismissal." *Maricano*, 459

B.R. at 46. In considering the totality of circumstances presented here, the Court is unable to do so. Indeed, all things considered, it is likely that the interests of Debtor and its creditors, both current and potential,[4] will be better served by allowing this bankruptcy case to continue to a conclusion.

1. Economy and efficiency of administration

The Court must consider both the economy and efficiency of the administration of a bankruptcy case. *See In re Marciano*, 446 B.R. 407, 433 (Bankr. C.D. Cal. 2010) (noting that movant had considered only one of the two prongs of this factor) *aff'd*, 459 B.R. 27 (9th Cir. BAP 2011) *aff'd*, 708 F.3d 1123 (9th Cir. 2013). Defendants contend that, unless this case is dismissed, a "tornado of activity" will burden this District's bankruptcy and federal district court dockets for years to come. As a result, they

[4] Of course, it is as yet unclear whether any Defendants will be required to disgorge to Trustee any of the transfers they allegedly received from Debtor. The Court here expresses no opinion concerning whether, if Trustee does recover from them, the impacted Defendants will then hold claims in this bankruptcy case. However, this analysis will assume that Defendants are indeed potential creditors, and will therefore consider their interests as well. However, whether or not Defendants may eventually share in distributions from this bankruptcy case, the Court's conclusion concerning dismissal under § 305(a) is the same.

suggest it makes more sense from an economy perspective for the tax creditors to pursue similar claims on their own, outside of bankruptcy. The Court disagrees.

To the Court, it makes more sense that Trustee prosecute the fraudulent transfer actions on behalf of the tax creditors than it does to require the tax creditors to do so individually. Allowing the bankruptcy case to proceed avoids the obvious duplicity of actions required if both IRS and ISTC were to pursue such actions individually in state or federal district courts. In addition to resolving the avoidance claims, any issues raised by Defendants regarding the validity and amount of the tax creditors' claims can also be centrally resolved in the bankruptcy court instead of possibly requiring other courts to make such determinations within each of the actions that the tax creditors might prosecute.

It should also be noted that if the bankruptcy case is dismissed, the considerable effort Trustee has invested in this case thus far would be lost. Not only has Trustee apparently expended significant time and resources to discover and investigate the transfers, he has already recovered a

substantial sum through settlement agreements with some parties, and has secured several default judgments with others. Dkt. No. 130, pp. 6-7.

The only plausible economies of administration arising from dismissal would result from the reality that, if the tax creditors were required to proceed on their own against Defendants, as they admit, they would be inclined to do so more selectively, which could possibly reduce the total number of fraudulent transfer actions they would pursue. But while having fewer lawsuits could arguably promote judicial economy, it comes at a cost to the tax creditors. The Court is not persuaded that this cost will be significantly less than any gain resulting from fewer lawsuits.

Finally, the Court finds unpersuasive Defendants' argument that dismissal will reduce the overall cost of these proceedings by eliminating the Trustee's fees. As the tax creditors point out, whether it be payment to the Trustee, the cost of expending their own resources to prosecute fraudulent transfer litigation against Defendants, or the expense of retaining an agent to do so, there is going to be an unavoidable cost to pursuing these actions inside or outside of

bankruptcy.

On balance, the Court concludes that interests of economy and efficiency of administration do not weigh in favor of dismissal of the bankruptcy case.

2. Whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court

While the fraudulent transfer claims could also be brought by the tax creditors in federal district or state court, no such actions currently exists. Despite the existence of other forums, the Court finds it is unlikely that requiring the parties to litigate elsewhere will confer any benefit to the tax creditors, Defendants, or Debtor. Thus, the mere existence of another forum that does not confer any potential benefit to the parties does not weigh in favor of dismissal.

Some bankruptcy courts have abstained from processing bankruptcy cases despite the absence of a pending proceeding in another forum when the parties have had access to a state court forum that has greater expertise on the key issues impacting the bankruptcy case. *In re*

Efron, 529 B.R. at 406-07 (citing *In re T.D.M.A., Inc.*, 66 B.R. 992, 995 (Bankr.E.D.Pa.1986)). But, this Court likely has as much, perhaps even more, experience than Idaho courts when it comes to adjudicating actions under federal fraudulent transfer laws. This factor does not support dismissal.

3/4. Whether federal proceedings are necessary to reach a just and equitable solution and whether there is an alternative means of achieving an equitable distribution of assets

The absence of an alternative forum which can protect the creditors' rights to equality of distribution can weigh heavily in favor of denying dismissal. *Marciano*, 459 B.R. at 47 (explaining that the "bankruptcy court found paramount the fact that while Mr. Marciano could pursue the state court appeals inside or outside of a Chapter 11 case, there was no alternate forum to a bankruptcy case which would protect the creditors' rights to equality of distribution.").

At the hearing, counsel for ISTC explained that, were it forced to pursue these claims outside of bankruptcy, as a practical and tactical matter, the agency would be inclined to pursue the least sophisticated

Defendants with the least amount of resources to defend themselves. In other words, outside of bankruptcy, the more sophisticated and resourceful Defendants may fare better than others. At this point, the Court understands that Trustee has sued all Defendants receiving allegedly fraudulent transfers from Debtor. While the Court will not speculate about Trustee's strategy going forward, from the Court's perspective, all Defendants in all of the adversary proceedings will be afforded a fair and equal opportunity to defend against Trustee's claims. In this sense, the Court is confident that these federal proceedings are better suited to secure a just and equitable resolution of the avoidance claims and an equitable distribution of any recoveries.

Defendants assert that Trustee's claims are inherently unfair in that their sole sin was to accept payment from Debtor for the legitimate debts owed by Debtor's principal. While the Court understands their frustration with their circumstances, if any Defendants received constructively fraudulent transfers of Debtor's assets, they did so at the expense of the tax creditors. Put another way, in including constructive

fraudulent transfer avoidance rules in the Code, Congress sought to address what it felt to be an unjust result.

All things considered, and as contemplated in the Code, it seems the bankruptcy case would provide a just and equitable result for all concerned, as well as an equitable system for distribution of any of Debtor's assets. This factor weighs in favor of denying Defendant's motion to dismiss.

5. Whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case

As of yet, no global out-of-court agreement has been reached that better serves all impacted interests in the case, nor has any such option been brought to the attention of the Court. Instead, any resolution of Trustee's claims against Defendants will require case-by-case negotiation or litigation. As such this factor does not favor dismissal.

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6. Whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time

consuming to start afresh with the federal bankruptcy process

There is no non-federal insolvency proceeding pending, nor any contemplated as far as the Court can tell. This factor weighs in favor of continuing the bankruptcy case.

7. The purpose for which bankruptcy jurisdiction has been sought

Little has been said concerning Debtor's purpose in filing this bankruptcy petition. As noted above, Defendants have not attempted to show that Debtor, or its principal, acted in bad faith or with improper motives in commencing the bankruptcy case. Even so, in some circumstances in which allegations of misconduct were absent, courts have dismissed voluntary petitions pursuant to § 305(a)(1) for lack of a proper bankruptcy purpose.[5] While this case is somewhat unique in its

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[5] *See e.g. In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 464 (Bankr. S.D.N.Y. 2008) (finding that while reasons for abstaining may be less common in voluntary cases than in involuntary, this does not foreclose the possibility that a § 305(a)(1) motion will be granted in a voluntary case; and, listing examples of cases where courts have abstained pursuant to § 305(a)(1) based on the absence of a proper purpose for filing a bankruptcy, including: where the petition was filed to affect the outcome of a two-party dispute between the debtor and one

circumstances, the Court finds that a proper bankruptcy purpose for the filing was evident.

In the case of a corporation, the primary purpose of chapter 7 bankruptcy is the marshaling and orderly distribution of its assets. *Ethanol Pac., Inc.*, 166 B.R. at 931; *In re Cypress Fin. Trading Co., L.P.*, 2015 WL 4747363, at *1 (5th Cir. Aug. 12, 2015) (stating "A corporate Chapter 7 bankruptcy has one purpose: to allow an entity breathing space to marshal assets for orderly distribution to creditors."). Here, Debtor lacks any significant "hard assets" to liquidate. However, in one sense, a classic bankruptcy purpose will be fulfilled through the Trustee's prosecution of the very avoidance actions that Defendants are trying to defeat. Debtor could not, acting alone, pursue recovery from Defendants its own voluntary

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creditor in state court, and where resolution of the bankruptcy depended entirely on the outcome of the state court proceeding; where questions of state law needed to be resolved by the district court before a bankruptcy could proceed; and where a bankruptcy was filed in response to a two-party dispute between a debtor and a single creditor. (Citations omitted). *See also In re Pac. Rollforming, LLC*, 415 B.R. 750 (Bankr. N.C. Cal. 2009) (finding it was in the best interests of creditors and debtors to abstain when the involuntary petition was a mere litigation tactic).

transfers to them. However, a bankruptcy trustee, acting as a representative of the bankruptcy estate, not the debtor, is empowered to recover those payments. Simply put, here Trustee is marshaling assets of the bankruptcy estate through prosecution of the fraudulent transfer actions, which in turn will provide the means for an orderly distribution to Debtors' creditors, a classic goal of a bankruptcy case.

Defendants have suggested that this case should be dismissed because it presents a "narrow dispute," or a "two-party dispute." While dismissal or suspension of a bankruptcy case may be appropriate when the debtor is engaged in a two-party dispute with a single creditor, here Debtor has at least two significant and substantial creditors. In addition, there are roughly 40 adversary proceeding defendants that allegedly received avoidable transfers. Under these facts, the Court declines to characterize the issues in this case as either "narrow", or the disputes implicated in the bankruptcy filing as involving only two parties.

Defendants are concerned with what they characterize as the possible adverse incentives motivating Trustee and his attorney to pursue the target

transfers. However, Defendants must recall that, under § 330(a), it is the Court, not Trustee or his counsel, that will ultimately review and fix the amount of compensation to be received by these estate officers. Given the Court's oversight, the Court presumes it unlikely Trustee or his lawyer will attempt to overreach in making decisions about how best to pursue the avoidance litigation.

Defendants also criticize Trustee's decision, at least at this time, to not to object to the tax creditors' claims. While Trustee acknowledges his duty to examine proofs of claim and to object to the allowance of a claim that is improper, § 707(a)(5), Trustee has represented to the Court that, through his standard investigation, no reason to object has yet been shown to exist. Furthermore, if Defendants are persuaded that the tax claims should be contested, assuming they can establish they are parties in interest,[6] they

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[6] The Court expresses no opinion concerning whether Defendants have the requisite standing to object to a claim in the bankruptcy case based solely upon Trustee's assertion that they received avoidable transfers from Debtor. Absent such standing, Defendants would likely have no basis to criticize Trustee's inaction, or to litigate about the parties entitled to share in distributions from the estate.

may object to the claims in their own names. *See* § 502(b). If it turns out that the claims are disallowed, the Court can revisit whether the bankruptcy case should continue at that time.

Concerning Defendants' concerns that Trustee is seeking to recover amounts from them in excess of what is currently claimed by the tax creditors, Defendants must again rely upon the Court to guard against any improprieties. The Court may "disallow fees of a trustee and his or her professional when their administrative efforts will only benefit themselves." *In re Kaur*, 510 B.R. 281, 287 (Bankr. E.D. Cal. 2014) (citing *Estes & Hoyt v. Crake (In re Riverside-Linden Inv. Co.)*, 925 F.2d 320, 322 (9th Cir. 1991); *Roberts, Sheridan, & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108-109 (9th Cir. BAP 2000)). As a result, the Court doubts Trustee will seek to recover more than what is necessary to pay administrative expenses and the claims of the tax creditors. Furthermore, reality suggests that Trustee will likely realize a less-than-full recovery from Defendants, as is evidenced by the amount for which some claims have

already been settled.[7]

For these and other reasons, the Court concludes that dismissal of this bankruptcy case under § 305(a) is not appropriate. All things considered, the Court declines to find that dismissal will be beneficial to both Debtor and creditors. Instead, the relevant factors weigh in favor of denying dismissal.

II.

Section 707(a) provides that a "court may dismiss a case under this chapter only after notice and a hearing and only for cause." While § 707(a) enumerates three possible causes (unreasonable delay prejudicial to creditors, nonpayment of filing fees, and not filing schedules), none of them are alleged to exist in this case, and they are intended to be "illustrative and not exhaustive." *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000), *partially superseded by statute on other grounds*, Bankruptcy Abuse Prevention and

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[7] *See e.g.*, Adv. Case No. 15-06022-JDP, Dkt. No. 1, pp. 11-12, where Trustee was seeking up to $9,017, yet settled for $7,200, Dkt. No. 130, p. 7; and, Adv. Case No. 15-0613-JDP, Dkt. No. 1 pp. 13-14, where Trustee was seeking up to $28,344, yet settled for $17,000, Dkt. No. 130, p. 6.

Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23; *see also* § 102(3) (stating that "including" for purposes of the Code is "not limiting").

When the asserted cause for dismissal is not one of the three enumerated in § 707(a), courts must undertake a two-part inquiry to determine whether particular circumstances constitute "cause" to dismiss under § 707(a):

> First, we must consider whether the circumstances asserted to constitute "cause" are "contemplated by any specific Code provision applicable to Chapter 7 petitions." If the asserted "cause" is contemplated by a specific Code provision, then it does not constitute "cause" under § 707(a). If, however, the asserted "cause" is not contemplated by a specific Code provision, then we must further consider whether the circumstances asserted otherwise meet the criteria for "cause" for discharge under § 707(a).

In re Sherman, 491 F.3d 948, 970 (9th Cir. 2007) (citing *Padilla*, 222 F.3d at 1193–94).

The first inquiry is premised on the cannon of statutory construction instructing that "[w]here both a specific and a general statue address the same subject mater, the specific one takes precedence regardless of the sequence of the enactment, and must be applied first." *Padilla*, 222 F.3d, at

1192 (citations omitted). Under the first inquiry, courts must define what circumstances are alleged to constitute "cause" for dismissal, and to then determine if "other specific Code provisions address the *type* of misconduct alleged". *Sherman*, 491 F.3d at 970 (emphasis in original). If another Code provision does so, dismissal under § 707(a) is improper. *Padilla*, 222 F.3d, at 1194 (holding dismissal under § 707(a) was improper because the type of misconduct was contemplated by § 707(b)). If no Code provision specifically addresses the type of misconduct alleged, courts must proceed to the second inquiry and determine whether the totality of the circumstances amount to § 707(a) "cause." *In re Hickman*, 384 B.R. 832, 840 (9th Cir. BAP 2008) (citing *Sherman*, 491 F.3d at 970); *see also In re Leach*, 130 B.R. 855, 856 (9th Cir. BAP 1991). Ultimately, the decision to dismiss pursuant to § 707(a) rests within the sound discretion of the court and is reversible only for abuse of discretion. *Id.* (citing *Schroeder v. Int'l Airport Inn P'ship (In re Int'l Airport Inn P'ship)*, 517 F.2d 510, 511 (9th Cir. 1975)).

"[T]he Bankruptcy Code contains two separate provisions [*i.e.*, §707(a) and § 305(a)] under which a court may dismiss a pending Chapter 7

case involving a non-consumer debtor, notwithstanding the debtor's eligibility for relief." *Eastman*, 188 B.R. at 624. And, in comparing these two sections, while under § 707(a) a court may dismiss a bad faith filing, § 305(a)) is the "narrower provision." *Id.*

Here, as explained above, it is not the conduct of any party, but whether it is appropriate for the Court to maintain its jurisdiction over this bankruptcy case, that Defendants target as the reason for dismissal. As discussed above, this sort of argument is more properly addressed to the relief offered in § 305(a), a narrower provision than § 707(a). So, in the Court's view, dismissal pursuant to § 707(a) would be inappropriate here.

This conclusion is supported by the illustrative examples of "cause" listed within § 707(a), which amount to "technical and procedural" violations of the Bankruptcy Code. *Padilla*, 222 F.3d at 1192. Once again, since Defendant's arguments focus on whether the bankruptcy court is a "good fit" for these proceedings, and not the conduct of Debtor or its principal, § 305(a) is the more appropriate vehicle to determine dismissal.

But, even if this Court were to engage in the second inquiry of the

Padilla § 707(a) test, for the same reasons outlined in the § 305(a) analysis above, under the totality of the circumstances, "cause" for dismissal does not exist in this case. At bottom, Debtor sought lawful relief under chapter 7, and none of Defendants argue that it was bad faith for Debtor to do so. A trustee was appointed to administer the bankruptcy estate created by that filing, and is now pursuing his statutory duty to collect the assets for distribution to Debtor's two significant creditors. That those assets consist of avoidance claims he must litigate against Defendants, as opposed to more traditional "hard assets" that a trustee could sell, is of no consequence. Put simply, Defendants have not demonstrated cause exists requiring dismissal of this bankruptcy case.

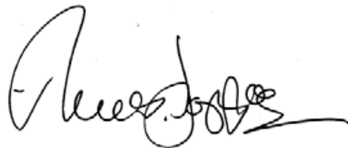
Conclusion

Defendants' Motion will be denied. Dismissal pursuant to § 305(a) is not appropriate because the Court cannot make the required findings that the interests of the tax creditors and Debtor would be better served through dismissal. Dismissal under § 707(a) is also not proper. The type of circumstances relied upon by Defendants to show "cause" for a dismissal

are more properly examined under § 305(a), not § 707(a). But even considering the totality of circumstances, no good "cause" for dismissal was shown to exist.

A separate order will be entered.

Dated: October 7, 2015



Honorable Jim D. Pappas
United States Bankruptcy Judge