

**2020 Mont. B.R. 107**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**MURRAY JOHN DIGHANS  
and DEANNA ANNE  
DIGHANS,**

Debtors.

Case No. **16-61076-11**

**ORDER**

At Butte in said District this 1<sup>st</sup> day of April, 2020.

Pending in this Chapter 11<sup>1</sup> bankruptcy is Debtors' Motion to Incur Secured Debt and for Sanctions ("Motion") filed January 22, 2020, at ECF No. 596. Allied World Specialty Insurance Company ("Allied") filed its Response to the Motion, and raised several arguments in opposition to the relief requested ("Response"). ECF No. 600. Having engaged in its own preparation for the hearing, (reviewing the claims register, docket, and briefing) the Court is dismayed by counsel and their clients' failure to resolve this issue. Although styled as a Motion to Incur Secured Debt<sup>2</sup>, the quarrel between Debtors and Allied World Specialty Insurance Company ("Allied") requires a determination of whether Allied has an interest as a lienholder in Debtors' crops.

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<sup>1</sup> Unless specified otherwise, 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.

<sup>2</sup> The Motion to Incur debt is likely subject to being denied because the Plan has been confirmed and property has reverted in Debtor. *See In re Hickey Properties Ltd.*, 181 B.R. 173, 174 (Bankr.D.Vt.1995).

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**A. Allied's Claim and Plan Treatment.**

While a request to incur debt is likely subject to being denied, pursuant to Debtors' confirmed Second Amended Plan ("Plan") this Court retained jurisdiction to, "re-examine any claim that has been allowed." Article IX(b), ECF No. 415. The dispute involves Allied's allowed claim and whether Allied has a security interest in Debtors' crops. Debtors' allege that post confirmation they sought a loan from Commodity Credit Corporation ("CCC"). As a condition of any loan, CCC requires completion of a lien waiver form by any creditor that holds a lien on commodities described in the form. Allied's Response seems to confirm these allegations. Allied refused to sign the form. Allied explained:

The lien waiver form, as Allied World explained to the Debtors' counsel, is not accurate. The lien waiver form requires Allied World to release a lien in the commodities described therein, e.g. crops. Allied World is uncomfortable signing the lien waiver form because the form makes implicit admissions about the scope and nature of Allied World's claim. Allied World disagrees with those implied admissions, particularly as the Debtors have yet to complete their plan repayment obligations necessary to discharge Allied World's claim. Indeed, the lien waiver form states that the information provided is subject to certain civil and criminal fraud statutes. Consequently, Allied World simply cannot sign the form.

Response ¶3 ECF No. 600.

Allied filed proof of claim 4-1 ("Claim"). At part 2, question 9, Allied indicated that the Claim was not secured. *Id.* Consistent with its representation that its Claim was not secured, the remainder of part 9 is blank (nature of property and basis for perfection). *Id.* There is no mention of a UCC financing treatment or other lien perfection document. *Id.* Pursuant to a Stipulation and Agreement ("Stipulation") between Debtors and Allied, creditors in Class X, including Allied, are to be paid as follows:

Debtors will pay the unsecured class (Class X – unsecured – impaired) \$100,000 for the year 2017, \$150,000 for the years 2018, 2019, 2025, and 2026, and \$125,000 for the years 2020 through 2024, to be distributed pro rata to those unsecured creditors with an allowed claim. Except as otherwise contained herein,

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Debtors specifically reserve the right to object to creditors' claims. Debtors will pay the above amounts through cashflow. Debtors will make the 2017 payment before the end of this year.

¶8, ECF No. 443. And, "Allied's Proof of Claim is allowed as filed." ¶10, ECF No. 443. The Stipulation was approved. ECF No. 446. Debtors' Plan was confirmed. ECF No. 467.

**B. Allied's Claim Post Confirmation.**

Allied makes quite a fuss about Debtors' request that it execute the lien waiver explaining it "is uncomfortable signing the lien waiver form because the form makes implicit admissions about the scope and nature of Allied World's claim." Allied is bound by the terms of the confirmed Plan. § 1141(a). The scope and nature of Allied's Claim can be readily determined by resort to the Court's docket. Allied filed its Claim as an unsecured claim, and the Claim was allowed as filed. Unless the Court has failed to consider a prior pleading or Order, Allied is an unsecured creditor with no interest in the crops per its Claim, the Stipulation and the confirmed Plan. This conclusion reflects the record as it exists today.

In its Response, Allied alleges, "Allied World filed a UCC-1 financing statement on June 26, 2016, with the Montana Secretary of State's Office." Despite more than 600 docket entries in this case, this appears to the Court to be the first mention by Allied of any alleged security interest. If Allied is for the first time asserting a security interest in crops attributable to a UCC Financing filed in June 2016, pre-petition, the Court has difficulty reconciling this new assertion with the res judicata effect of the Plan, and § 1141(c). First, the confirmation process may extinguish a lien.<sup>3</sup> More importantly, per the Stipulation, Allied's allowed Claim was unsecured,

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<sup>3</sup> In order for the confirmation process to extinguish a lien, some courts have applied a four-part test:

Four conditions must therefore be met for a lien to be voided under section 1141(c): (1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien.

*In re Omega Optical, Inc.*, 476 B.R. 157, 167 (Bankr.E.D.Pa.2012) citing *In re Ahern Enterprises, Inc.*, 507 F.3d

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not secured. Having filed its claim as unsecured, and stipulated to its treatment under the Plan as unsecured, the Court questions the legal basis and strength of Allied's contention now, that it is secured creditor. Notably, this was underdeveloped in their Response.

**C. The conduct of counsel.**

In this Court's experience when the bulk of the exhibits counsel intends to introduce are emails between counsel, the dispute often has far more to do with counsel than the clients or the law. In this case, Debtor's counsel sent an email that is at best snarky, and at worse an embarrassment to its author. In response to a request from Allied's counsel seeking additional information, counsel replied by cutting and pasting a Wikipedia entry, and retorted, "Easy to Google." ECF No. 609-2. Its difficult to imagine any circumstances under which such a reply would advance a client's interest.

Indeed, in this case it did not. Following the "Google" email, Allied only sought to leverage the request for its benefit. Allied may simply be unwilling to cooperate or otherwise provide the waiver requested by Debtors solely because they do not want to do so, even if it is clear there is no basis for Allied to assert an interest in crops. The Court would take a very dim view of such an approach, particularly if there is no factual basis to assert an interest in crops (Allied's pre-filed exhibits do not include a security agreement or UCC financing statement from 2016), and a compelling legal reason to justify Allied's position. To assist the Court at the hearing on Friday April 3, 2020<sup>4</sup>, the Parties shall consider the forgoing be prepared to address the Court's concerns, and:

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817, 822 (5th Cir.2007).

<sup>4</sup> The Court has previewed for the parties' its initial impressions of the issues because the current circumstances require that the hearing be conducted telephonically. The Court realizes its impressions are limited because it can only resort to the docket, the allegations in the Motion and Response and the pre-filed exhibits in forming these preliminary impressions and conclusions. This Order is intended to assist counsel and the Court with the hearing, so that it is conducted efficiently.

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1. Is there an agreement on the admission of exhibits;
2. To the extent there exists a factual basis for Allied to assert that it is a secured creditor with an interest in Debtors' crops, Allied shall present such evidence (including but not limited to attachment and perfection), at the hearing on Friday, April 3, 2020, and shall file any documents that support its position no later than April 2, 2020 at 5:00 p.m.;
3. To the extent there exists a legal basis for Allied to assert that it is a secured creditor with an interest in Debtors' crops with no obligation to provide the lien waiver, notwithstanding its Claim, the Stipulation, and confirmation, Allied shall be prepared to present such authority at the hearing on Friday, April 3, 2020;
4. Debtor shall be prepared to present any authority that explicitly addresses § 364 borrowing post confirmation at the hearing on Friday, April 3, 2020; and,
5. Debtors' shall file no later than April 2, 2020 at 5:00 p.m., a statement explicitly citing the authority that they are relying on for sanctions, against whom they seek sanctions (Allied, its counsel or both) and the specific sanctions requested (monetary, revocation of counsel's *pro hac vice* admission or other).

BY THE COURT:



Hon. Benjamin P. Hursh  
United States Bankruptcy Court  
District of Montana