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**NOT FOR PUBLICATION**  
**UNITED STATES BANKRUPTCY COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**LOS ANGELES DIVISION**

In re:  
GABRIEL SERIOSA.  
  
Debtor.

Case No. 2:16-bk-14276-RK  
Chapter 7

**ORDER DISAPPROVING WITHOUT  
PREJUDICE STIPULATION FOR  
RETROACTIVE RELIEF FROM THE  
AUTOMATIC STAY AND FROM THE  
DISCHARGE INJUNCTION TO ALLOW  
POST-PETITION SETOFF**

The “Stipulation for Retroactive Relief from the Automatic Stay and the Discharge Injunction to Allow Post-Petition Setoff” (“Stipulation”), ECF 9, executed by and between Debtor Gabriel Seriosa (“Debtor”), on the one hand, and the Army and Air Force Exchange Service, a joint command of the U.S. Department of Army and Air Force (“AAFES”), is pending before this court. Elan S. Levey, Assistant United States Attorney, signed the Stipulation for AAFES, and Julie J. Villalobos, of Oaktree Law, signed the Stipulation for Debtor. The Chapter 7 Trustee was not a signatory to the Stipulation.

The Stipulation between AAFES and Debtor seeks court approval of relief, among other things, including relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1),

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1 retroactive to the date on which the bankruptcy petition was filed in this bankruptcy case on  
2 April 4, 2016 (“Petition Date”); post-petition setoff relief to allow AAFES as creditor to set  
3 off its claim against Debtor against a debt it owes to Debtor pursuant to 11 U.S.C. § 553(a);  
4 and relief from the discharge injunction pursuant to 11 U.S.C. § 524(a)(2). Having read  
5 and considered the Stipulation, the court disapproves the Stipulation and denies the  
6 requested relief without prejudice for the following reasons.

7 “Stipulations lifting or agreeing to relief from the stay are enforceable so long as they  
8 are *properly noticed* to creditors and *approved by the court*” pursuant to Rule 4001(d) of  
9 the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rule(s)” or “FRBP”). 2 March,  
10 Ahart & Shapiro, *California Practice Guide: Bankruptcy*, ¶ 8:2326 at 8(II)-123 (2015)  
11 (emphasis in original), *citing*, Bankruptcy Rule 4001(d). “The noticed motion requirement  
12 was added to the FRBP ‘to remedy what was perceived as a growing problem of  
13 ‘sweetheart’ deals’ between the debtor and powerful secured creditors who would exact  
14 favorable ‘adequate protection’ for the continued use of collateral, often to the detriment of  
15 the estate or other creditors.” *Id.*, ¶ 8:2327 at 8(II)-123, *citing inter alia*, *In re Manchester*  
16 *Center*, 123 B.R. 378, 381 (Bankr. C.D. Cal. 1991). However, “[a] noticed motion for court  
17 approval of a stipulation to lift the stay or to pay adequate protection is *not* required where  
18 the movant files a proper motion for relief from the stay and *thereafter settles* the motion  
19 with an agreement to lift the stay or pay adequate protection.” *Id.*, ¶ 8:2328 at 8(II)-123  
20 (emphasis in original). But this is not the situation here because there is no pending  
21 motion for relief from stay.

22 “A motion to approve a stipulation to lift the stay/pay adequate protection (often  
23 referred to as a ‘4001(d)’ motion must be accompanied by a *copy of the proposed*  
24 *stipulation.*” *Id.*, ¶ 8:2340 at 8(II)-124 (emphasis in original). “Also, the motion should be  
25 accompanied by a *supporting declaration* demonstrating that the agreed-upon terms are  
26 within the sound business judgment of the debtor (or trustee).” *Id.* (emphasis in original;  
27 citation omitted). The 4001(d) motion must be served on the debtor, debtor’s counsel, the  
28 United States Trustee and such other parties as the court directs. *Id.*, ¶ 8:2342 at 8(II)-

1 124, *citing*, Bankruptcy Rule 4001(d)(1) and Local Bankruptcy Rule 2002-2(a)(1). The  
2 court notes that Bankruptcy Rule 4001(d) does not specifically reference the creditors or  
3 the trustee in a Chapter 7 bankruptcy case, but provides the court with discretion that it  
4 may direct that service be made on any other entity, presumably to assure that notice is  
5 given to those parties who may be affected by an agreement or stipulation relating to stay  
6 relief, so that such parties have an opportunity to scrutinize the agreement or stipulation for  
7 themselves.

8       Because the 4001(d) stipulation affects the property of the bankruptcy estate in this  
9 case since the debt owed by AAFES to Debtor is estate property and the administration of  
10 the bankruptcy estate since AAFES has a claim against Debtor, the court further directs  
11 that the Chapter 7 Trustee, who is the administrator of the bankruptcy estate pursuant to  
12 11 U.S.C. § 704, be served with any 4001(d) motion for approval of the Stipulation and the  
13 relief requested therein. While, in this case, the parties listed the Chapter 7 Trustee as a  
14 service party on the proof of service of the Stipulation to be served by the court via Notice  
15 of Electronic Filing (NEF), the required 4001(d) motion with supporting evidence was not  
16 filed, which under Local Bankruptcy Rule 9013-1 provides for notice of motion with an  
17 opportunity for response and hearing. As indicated by the Stipulation, the amount of  
18 Debtor's debt to AAFES was \$13,672.32, and the amount of the post-petition setoff of this  
19 debt from Debtor's federal tax overpayment was \$1,079.00, which amounts are relatively  
20 minimal. In this case, the Chapter 7 Trustee filed a report of no distribution, and it is  
21 unlikely that the amount of the postpetition setoff in this particular case would lead the  
22 trustee to change his report, but it could be different if the setoff amount were much larger.  
23 *See, e.g.*, 11 U.S.C. § 724 (providing for subordinated treatment of secured tax claims).  
24 Nonetheless, there does not seem to be a *de minimis* exception to the notice requirements  
25 of Bankruptcy Rule 4001(d) to excuse the parties from giving notice to the trustee of the  
26 Stipulation and an opportunity to object and be heard or having the trustee sign off on the  
27 Stipulation as the administrator of the bankruptcy estate. Given the modest amount of the  
28 postpetition setoff for which stay relief is sought and the recitation of the facts indicating an

1 inadvertent postpetition setoff by AAFES as set forth in the Stipulation, the court may have  
2 well under the circumstances would have restricted notice of the stipulation for stay relief  
3 under Bankruptcy Rule 4001(d) to the trustee as the representative of the bankruptcy  
4 estate.

5         Additionally, the court notes with respect to relief for retroactive annulment of the  
6 automatic stay arising in this bankruptcy case that as stated by the Bankruptcy Appellate  
7 Panel of the Ninth Circuit, “In deciding whether to annul the stay, a bankruptcy court should  
8 examine the circumstances of the specific case and balance the equities of the parties’  
9 respective positions.” *In re Gasprom, Inc.*, 500 B.R. 598, 607 (9<sup>th</sup> Cir. BAP 2013) (holding  
10 the bankruptcy court abused its discretion in annulling the automatic stay without weighing  
11 the evidence and balancing the equities), *citing inter alia*, *In re National Environmental*  
12 *Waste Corp.*, 129 F.3d 1052, 1054-1056 (9<sup>th</sup> Cir. 1997) and *In re Fjeldsted*, 293 B.R. 12,  
13 24-25 (9<sup>th</sup> Cir. BAP 2003). In balancing the equities for whether to grant stay annulment,  
14 according to the Bankruptcy Appellate Panel, the court may consider a number of different  
15 factors “as a general guideline or framework for assessing the equities,” including: “1.  
16 Number of filings; 2. Whether, in a repeat filing case, the circumstances indicate an  
17 intention to delay and hinder creditors; 3. A weighing of the extent of prejudice to creditors  
18 or third parties if the stay relief is not made retroactive, including whether harm exists to a  
19 bona fide purchaser; 4. The Debtor's overall good faith (totality of circumstances test); 5.  
20 Whether creditors knew of the stay but nonetheless took action, thus compounding the  
21 problem; 6. Whether the debtor has complied, and is otherwise complying, with the  
22 Bankruptcy Code and Rules; 7. The relative ease of restoring parties to the status quo  
23 ante; 8. The costs of annulment to debtors and creditors; 9. How quickly creditors moved  
24 for annulment, or how quickly debtors moved to set aside the sale or violative conduct; 10.  
25 Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued  
26 violation of the stay, or whether they moved expeditiously to gain relief; 11. Whether  
27 annulment of the stay will cause irreparable injury to the debtor; 12. Whether stay relief will

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1 promote judicial economy or other efficiencies.” *In re Gasprom, Inc.*, 500 B.R. at 607,  
2 *citing and quoting, In re Fjeldsted*, 293 B.R. at 25.

3 The Stipulation is problematic because the applicable procedures and standards of  
4 the Bankruptcy Code and Rules have not been satisfied, which warrants disapproval of the  
5 Stipulation by the court at this time. First, the court notes that the Stipulation is  
6 procedurally deficient because the parties did not bring the required 4001(d) motion to  
7 approve the Stipulation. Second, AAFES failed to make any evidentiary showing that it is  
8 entitled to annulment of the automatic stay based on a balancing of the equities as  
9 required by *National Environmental Waste Corp. and Gasprom*. The Stipulation is not  
10 supported by evidence required for a motion for relief from the automatic stay under Local  
11 Bankruptcy Rule 4001-1(a) and 9013-1(i), and there does not appear to be any *de minimis*  
12 exception to obviate the making some evidentiary showing of the balancing of the equities  
13 to warrant stay annulment, given the relatively minimal amount of the postpetition setoff  
14 here. Third, it is unclear why AAFES seeks relief from a discharge injunction under 11  
15 U.S.C. § 524(a)(2), which has not yet been entered in this case, and such relief should be  
16 explained in further briefing if the parties intend to proceed with a motion for approval of the  
17 relief sought in the Stipulation.

18 Accordingly, based on the foregoing,

19 IT IS HEREBY ORDERED that:

- 20 1. The Stipulation and the relief requested therein are denied without prejudice.
- 21 2. The parties are required to file and serve a motion to approve the Stipulation  
22 pursuant to Bankruptcy Rule 4001(d) as discussed herein, including service  
23 of such a motion on the Chapter 7 Trustee, if they still seek court approval of  
24 the relief requested in the Stipulation. Alternatively, the parties could

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resubmit the Stipulation with the joinder of the Chapter 7 Trustee to satisfy  
the notice requirements of Bankruptcy Rule 4001(d) under the particular  
circumstances of this case.

**IT IS SO ORDERED.**

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Date: June 20, 2016



Robert Kwan  
United States Bankruptcy Judge