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DEC 22 2009

CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:

Automated Finance Corporation,

Debtor(s).

Case No: 1:08-bk-14339-MT

Chapter: 7

MEMORANDUM OF LAW

**Re: Flagstar Bank's Motion for Reconsideration
of Order Approving Settlement Agreement**

Date: November 18, 2009

Time: 10:00 AM

Location: Courtroom 302

I. Issue

Flagstar bank's ("Flagstar") motion presents the issue should the court clarify an order approving a settlement agreement or should the court reconsider the order approving the settlement agreement. As discussed below, clarification and/or reconsideration is not proper in this case.

II. Background

In July of 2008, a number of creditors filed an involuntary petition against Automated Finance Corporation ("debtor" or "Automated Finance"). Automated Finance was in the home loan business: investing in properties, lending money to borrowers, selling loans and deeds of trust to lending institutions. The petitioning creditors alleged that Automated Finance failed to repay loans made to the company. Debtor stipulated to relief and the court subsequently appointed David Seror ("trustee") as trustee for the estate. Trustee Seror almost immediately filed an adversary proceeding to bring Automated Finance's principal, Nurit Petri, into the

1 estate. Ms. Petri heavily contested this proceeding. The parties eventually stipulated to bring
2 Ms. Petri and other related companies into the estate. The settlement came up for court
3 approval on September 16, 2009.

4 The settlement had many provisions. As part of the settlement, Ms. Petri would pay the
5 trustee \$150,000 plus proceeds from the sale of liquor licensees. Trustee did not require that
6 Ms. Petri file schedules, the trustee agreed not to object to discharge, and Ms. Petri exempted
7 partially disclosed interests in income, clothes, cars, jewelry. Paragraph 7(e) of the agreement
8 states that the order approving the agreement shall be controlling regarding the exemptions to
9 the exempt property and shall be binding on the trustee, any successor trustee, as well as on
10 all creditors and interested parties of the Debtor and consolidated parties.

11 Many parties objected to the agreement. Flagstar did not object. One party, the Dalpes,
12 objected to the exemptions. The Dalpes objected to the amount of property that the trustee
13 agreed to exempt and to the limited disclosure of what property Ms. Petri retained. No party
14 brought up the issue of whether the exemptions would prevent creditors with non-
15 dischargeable judgments from collecting against exempt property. The court considered the
16 objections but determined that the trustee met the test laid out in *A&C Properties*. In approving
17 the settlement, the court made sure that creditors could file non-dischargeability actions and
18 could object to Ms. Petri's discharge. The court made clear that the proposed settlement
19 settled claims between the trustee and Ms. Petri. On October 9, 2009, the court issued the
20 order approving the settlement. The order did not mention the exemptions and the issue of
21 whether creditors could object to the exemptions in the future was never directly ruled on.

22 On October 15, 2009, Flagstar Bank filed a motion to reconsider/clarify the order
23 approving the settlement agreement.

24 **III. Clarification**

25 Flagstar argues that the court must clarify the order, because the settlement and order
26 are ambiguous as to the scope of the allowed exemptions. Flagstar argues that at the time the
27 court considered the settlement Flagstar believed that Section 7 of the settlement only
28 exempted property for purposes of the bankruptcy case, and creditors with non-
dischargeability judgments could collect against the exempt property. Flagstar argues that it

1 later became aware of another potential interpretation -- that the settlement terms prevent all
2 collection efforts against the exempted property. Flagstar argues that the court must clarify the
3 order to make clear what interpretation applies. Flagstar argues that it needs an immediate
4 decision because it must decide whether to file a non-dischargeability action against Ms. Petri.
5 Flagstar further argues that this interpretation will influence its decision as to whether to appeal
6 the order approving the settlement. The trustee takes the position that Flagstar does not have
7 standing to request reconsideration or clarification because it is not party to the settlement.
8 The trustee further argues that clarifying this order amounts to an unconstitutional advisory
9 opinion because there is no attempt, at present, to collect on exempt property. Ms. Petri
10 argues that the order does not need clarification because it is clear that the settlement
11 exempts the property in all future proceedings.

12 The parties do not reference cases that lay out a standard for when the court should
13 clarify its own order and the court on its own can find few cases that provide any guidance for
14 when a court should or must clarify its own order. The cases that do exist suggest that a court
15 should not interpret a settlement or decree before there is an actual controversy before the
16 court. *See United States of America V. Western Electric Co., Inc.* 846 F.2d 1422, 1431, 1435
17 (D.C. Cir. 1988)(Majority and dissenting opinions agreed that the district court, in the absence
18 of an actual controversy, should not provide an interpretation of a consent decree).¹ These
19 cases suggest that a court evaluating a motion to clarify should determine if such clarification
20 is ripe for adjudication. A court evaluating ripeness must evaluate the fitness of the issues for
21 judicial decision and the hardship to the parties of withholding judicial consideration. *Colwell v.*
22 *HHS*, 558 F.3d 1112, 1123-1124 (9th Cir. 2008).

23 Clarification is not appropriate here because Flagstar does not have a judgment, non-
24 dischargeable or otherwise, and Flagstar has not attempted to collect on Ms. Petri's assets.
25 Thus, if the court attempted to clarify the order it would be doing so in a vacuum. According to
26 the submitted papers, more than ten creditors have expressed interest in filing non-

27
28 ¹ The trustee's arguments that Flagstar lacks standing reaches too far. A creditor has standing to object to a settlement or request clarification of an order. A creditor has standing to contest or appeal an order if it is a "person aggrieved" by the bankruptcy court's order. *In re P.R.T.C., Inc.*, 177 F.3d 774, 777 (9th Cir. 1999). Flagstar bank is likely a creditor to the estate and was affected by the settlement.

1 dischargeability actions against Ms. Petri. If the court were to interpret the settlement as to
2 creditors holding non-dischargeable judgments it would have to delve into the settlement
3 language and possibly look at the circumstances surrounding all ten potential non-
4 dischargeability actions.² In effect, the court would be ruling on an affirmative defense to
5 collection efforts that Flagstar may attempt once it obtains a judgment that it may be entitled
6 too. This is not an issue properly before the court.

7 Further Flagstar will not be prejudiced by waiting for an actual dispute to arise. If
8 Flagstar obtains a non-dischargeable judgment against Ms. Petri and attempts to collect
9 against assets declared exempt, the issue will be properly before the court. At that time,
10 parties can argue whether the language of the settlement precludes collection against the
11 assets listed in section 7 of the settlement agreement. Parties can argue, in the alternative,
12 that the trustee lacked the authority to enter into a settlement barring creditor collection or the
13 court lacked authority to shield such assets against non-dischargeable judgments, preventing
14 Ms. Petri's interpretation of the settlement agreement.

15 If Flagstar chose to object to the approval of the settlement or at least note for the court
16 that it did not object if section 7 had no implications for creditors with non-dischargeability
17 judgments, then the court could have looked at the issue and determined whether further
18 clarification was necessary or whether the settlement should be approved. Flagstar, however,
19 remained silent. Clarification at this juncture, for the reasons described above, is not
20 appropriate. If and when a dispute arises, the court will interpret the settlement's legal effect.

21 **IV. Reconsideration**

22 Reconsideration, under Federal Rule of Civil Procedure 59, is appropriate if the court (1)
23 is presented with newly discovered evidence, (2) committed clear error or the initial decision
24 was manifestly unjust, or (3) if there is an intervening change in controlling law. *School District*
25 *No. 1J, Moltnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993). Federal Rule
26

27
28 ² Flagstar argues that issuing a definitive ruling would be a simple matter of interpreting the legal effect of the settlement. It is unclear that the issue is that simple. The matter may require further factual analysis and the settlement might impact non-dischargeable creditors differently. While this appears unlikely given the nature of the potential non-dischargeability actions, it is a reasonable possibility.

1 of Civil Procedure 60(b) allows the court to relieve a party or its legal representative from a
2 final judgment, order proceeding for the following reasons:

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4 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
5 evidence that, with reasonable diligence, could not have been discovered in time
6 to move for a new trial under Rule 59(b); (3) fraud; (4) the judgment is void; (5)
7 the judgment has been satisfied, released or discharged; judgment has been
8 reversed or vacated; or applying it prospectively is no longer equitable; or (6) any
9 other reason that justifies relief.

10
11 None of those factors are present in this case. Flagstar presents no newly discovered
12 evidence. Flagstar argues that reconsideration is appropriate in this case because, post-
13 hearing, Flagstar found out from trustee that the settlement might bar a creditor, with a non-
14 dischargeable claim, from ever collecting against Ms. Petri's exempt assets. Flagstar argues
15 that the trustee's statement is similar to newly discovered evidence.

16 This argument is not persuasive. A party's statements as to how the settlement should
17 be interpreted do not amount to new evidence. Prior to the hearing, Flagstar's counsel could
18 and should have considered all potential interpretations of the agreement and objected to the
19 agreement if he believed that the settlement could prejudice Flagstar.

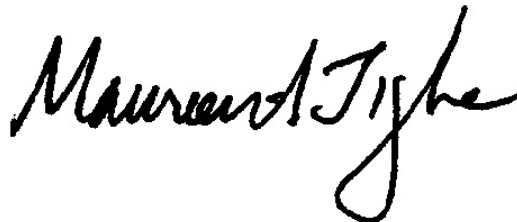
20 Flagstar next argues that the settlement is invalid because the trustee and Ms. Petri had
21 different ideas about what actions the settlement entails. Flagstar indicates that the trustee
22 believes that the settlement does not preclude a creditor, with a claim excepted from
23 discharge, from pursuing the property exempted in the settlement agreement. Flagstar
24 indicates that Ms. Petri's counsel believes that the bankruptcy exemptions preclude collection
25 against any exempt asset. This is the first time that this issue has been raised. There is no
26 evidence that Flagstar bank made an effort, before the settlement hearing, to determine if the
27 trustee and Ms. Petri had a meeting of the minds. Flagstar relies on *In re Trism*, for the
28 proposition that a court should not approve the compromise where there has been no meeting
of the minds. 286 B.R. 744 (Bankr. W.D.MO 2002). *Trism*, however, differs significantly from

1 the instant case. The *Trism* court refused to approve the settlement because there was not a
2 real conflict of the debtor and the creditor, the parties did not consider the impact on the other
3 creditors, the debtor did not look at the creditor's claimed liens, and the creditor and the debtor
4 argued that the settlement would have fundamentally different effects. *Id.* at 752-753. In this
5 case, there was a very real conflict between Ms. Petri and the trustee. The parties litigated the
6 substantive consolidation issue for more than a year; the trustee explicitly considered the
7 impact that the agreement would have on other parties; and the trustee evaluated Ms. Petri's
8 claims. Parties, post settlement, having different positions on how the settlement will apply in a
9 hypothetical situation, are not grounds to overturn the settlement agreement or find that minds
10 never met.

11 Flagstar further argues the court should not have approved the settlement because it
12 does not meet the fair and equitable requirement. The settlement, with its increased
13 exemptions, impinges on the rights of the creditors that have potentially non-dischargeable
14 claims. The court, in approving the settlement, considered the rights of unsecured creditors
15 and found it fair and equitable. Specifically, without this settlement Ms. Petri would not be a
16 debtor before this court. The trustee would not have authority to avoid fraudulent transactions,
17 the trustee would not have the significant amount of real estate that the settlement brought into
18 the case, and the estate would still be expending money to bring Ms. Petri into the estate. The
19 avoidance powers and real estate could bring money into the estate, leading to a possible
20 dividend for unsecured creditors. Liens on the real estate might be avoided, leading to equity
21 for unsecured creditors. Given the situation, the settlement was fair and equitable for the entire
22 creditor body. Flagstar presents no new evidence to have the court reconsider this decision.

23 For the above reasons, Flagstar's motion is DENIED.

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DATED: December 22, 2009

United States Bankruptcy Judge

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- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM OF LAW**
Re: Flagstar Bank's Motion for Reconsideration of Order Approving Settlement Agreement

was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of _____, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

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II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

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