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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

In re:  
NIKOLAY MACHEVSKY,  
  
Debtor.

Case No. 2:14-bk-29611-RK

Chapter 7

**STATEMENT OF DECISION RE ORDER DENYING DATA LEVERAGE’S MOTION UNDER F.R.C.P. RULE 60(B)(1), (3) AND (6) TO SET ASIDE ONE PORTION OF ENTERED ORDER (1) APPROVING COMPROMISE; (2) AUTHORIZING TRUSTEE TO TRANSFER REAL PROPERTY FREE AND CLEAR OF LIENS AND INTERESTS; (3) REQUIRING DEBTOR TO TURN OVER REAL PROPERTY OF THE ESTATE; AND (4) AUTHORIZING TRUSTEE TO UTILIZE U.S. MARSHAL AND OTHER LAW ENFORCEMENT**

[ECF no. 73]

**CONTINUED HEARING**  
**DATE: December 9, 2020**  
**TIME: 3:30 p.m.**  
**CTRM:1675**

On December 9, 2020 the motion of Data Leverage, LLC (“Movant”), for reconsideration of the court’s order approving the Chapter 7 trustee’s motion to approve

1 compromise with, and transfer of real property to, Binafard, (the “Motion for  
2 Reconsideration”), ECF No. 73, came on for hearing. The court orally announced its  
3 ruling on the Motion for Reconsideration at the conclusion of the December 9, 2020  
4 hearing. The court had issued a tentative ruling on the Motion for Reconsideration posted  
5 on the court’s website shortly before the hearing, but the tentative ruling is not reflected on  
6 the case docket. The court issues this separate statement of decision which largely  
7 incorporates its tentative ruling to explain its reasons for denying the Motion for  
8 Reconsideration.

9 In considering whether the court should exercise its equitable discretion to grant  
10 relief from judgment under Federal Rule of Civil Procedure (“FRCP”) 60(b), the court  
11 determines that this situation falls under excusable neglect pursuant to FRCP 60(b)(1).  
12 Here, movant failed to respond timely to the trustee’s compromise/sale motion, ECF No.  
13 47 (the “Compromise/Sale Motion”), due to excusable neglect. See also Federal Rules of  
14 Bankruptcy Procedure (“FRBP”) 9024 and 9014, applying FRCP 60(b) to contested  
15 matters. In considering relief from judgment based on excusable neglect, the court should  
16 take account all relevant circumstances surrounding the party's omission. See *Pioneer*  
17 *Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 395 (1993). The  
18 court should consider factors including the danger of prejudice to the estate, the length of  
19 the delay and its potential impact on judicial proceedings, the reason for the delay,  
20 including whether it was within the reasonable control of the movant, and whether the  
21 movant acted in good faith. *Id.* Having conducted an evidentiary hearing on November  
22 19, 2020 regarding alleged service of the trustee’s Compromise/Sale Motion and the  
23 alleged lack of receipt by movant through counsel, the court finds that the factors support  
24 relief to allow movant to be heard on the merits of the Compromise/Sale Motion with the  
25 Binafard party, who had a specific performance claim against debtor’s mother, to whom  
26 debtor had transferred the subject property before filing his bankruptcy petition.

26 The court finds the testimony of Movant’s former counsel, Sment, and its  
27 representative, Linton, that they did not receive copies of the Compromise/Sale Motion  
28 before mid-September when the court entered the order granting the Compromise/Sale

1 Motion, and thus, Movant was not able to timely respond to the motion, sincere and  
2 credible. Sment was the notice party for Movant as reflected on its proof of claim filed in  
3 this case, and Linton was the client representative for Movant, which is interested in  
4 buying the subject property. There is no reason why Movant by Linton would not have  
5 responded to the Compromise/Sale Motion if she had known about the motion when it  
6 was being considered by the court in August and September 2020. It is possible that  
7 Sment, as notice party for Movant, did not get the mailed motion because he did not go  
8 into his office in light of the pandemic, or because his suite mate might have picked it up  
9 by mistake, or the postal service perhaps failed to deliver it. It is more plausible that the  
10 Compromise/Sale Motion was not properly served.

11 As indicated on the original proof of service of the Compromise/Sale Motion,  
12 Movant was not listed, which indicates lack of service. When Movant notified trustee's  
13 counsel that it did not receive the Compromise/Sale Motion and it was not on the service  
14 list for the motion, trustee's counsel filed a "corrected proof of service" not under  
15 declaration of penalty of perjury that the wrong service list was attached and that the  
16 Compromise/Sale Motion was served along with the related compromise motion with the  
17 bankruptcy estate of Kleemoff, debtor's mother. The court heard the testimony of  
18 trustee's counsel, Zamora, and her legal assistant, Casas, who testified at the hearing that  
19 they discovered their mistake in attaching an incorrect service list, that the correct service  
20 list including Movant was attached to the related Kleemoff estate compromise motion (the  
21 "Kleemoff Motion") and that both motions were served in one envelope using mailing  
22 labels printed off the correct list. The court found the testimony of Zamora and Casas  
23 also to be sincere and credible, but the circumstances here indicate that Zamora and Casas  
24 may have made an honest mistake in serving the Compromise/Sale Motion with the  
25 Kleemoff Motion in the same envelope, but they may have used the wrong list to print out  
26 the mailing labels. The circumstances here support such a finding that: (1) Movant was  
27 not on the original service list of the trustee's Compromise/Sale Motion with Binafard; (2)  
28 the trustee's two motions served together had two different service lists in their proofs of  
service, one of which was used to generate mailing labels for the service; and (3) Sment

1 as Movant's notice party did not receive the Compromise/Sale Motion. The court does not  
2 see anything nefarious about service of the trustee's Compromise/Sale Motion with  
3 Binafard and the preparation of a "corrected proof of service" seven weeks after service,  
4 and the circumstances indicate an honest mistaken belief that Zamora and Casas  
5 properly served the Compromise/Sale Motion on Movant.

6 The factors of the reason for the delay, including whether it was within the  
7 reasonable control of the movant, and whether the movant acted in good faith, support a  
8 finding of excusable neglect because the reason for the delay was the lack of receipt of  
9 the Compromise/Sale Motion in order to timely respond, which is not within the  
10 reasonable control of Movant and indicates that it acted in good faith in seeking  
11 reconsideration. Considering the other factors of the danger of prejudice to the estate and  
12 the length of the delay and its potential impact on judicial proceedings, the court  
13 determines that there is no danger of prejudice to the estate to allow Movant to be heard  
14 on the merits of the trustee's Compromise/Sale Motion.

15 The court also finds that the length of delay is also not a risk factor because  
16 Movant acted relatively promptly in filing the motion in October 2020, six weeks after the  
17 court entered the order approving the trustee's Compromise/Sale Motion, and because  
18 escrow from the approved sale is still pending. The counterparty, Binafard, is willing to  
19 wait to consummate the compromise/sale, having waited four or five years to resolve its  
20 specific performance claim regarding the subject property. However, continued delay  
21 would potentially prejudice the estate because the property may be lost to the estate  
22 based on imminent foreclosure of liens held by debtor's homeowners' association  
23 ("HOA"), Crown Towers, which has a secured claim of \$250,000 on the property, having  
24 been granted stay relief to proceed with foreclosure. Crown Towers is apparently willing  
25 to wait a short period of time to be paid through the pending sale through the estate's  
26 compromise with Binafard. Based on these circumstances, relief from judgment under  
27 FRCP 60(b)(1) should be granted to the limited extent that Movant's opposition to the  
28 trustee's Compromise/Sale Motion with Binafard may be heard and considered on the  
merits.

1           Because the court determines that relief is appropriate under FRCP 60(b)(1), there  
2 is no need to address Movant's claims under FRCP 60(b)(3) or (6), and in any event,  
3 there is no fraud or misconduct by the opposing party to warrant the application of FRCP  
4 60(b)(3).

5           Movant seeks reconsideration of the court's order approving the trustee's motion to  
6 compromise a dispute with Binafard regarding his claim to the property and to allow the  
7 sale of the property to him without overbidding. Movant wishes to modify the court's order  
8 to allow it to overbid on the property to acquire it through a public sale. The trustee has  
9 argued that overbidding is not required to approve the compromise with Binafard because  
10 the sale is integral with the compromise. The court had granted the trustee's motion for  
11 the reasons stated in the moving papers and for lack of timely written opposition. ECF  
12 No. 54.

13           In order for the court to approve a compromise by the trustee with Binafard  
14 pursuant to FRBP 9019, it must find that the trustee has met his burden of proving that the  
15 compromise is fair and equitable and should be approved. *In re A & C Properties*, 784  
16 F.2d 1377, 1381 (9th Cir. 1986). The factors that the court must consider in evaluating  
17 whether a compromise is fair and equitable are: (1) the probability of success in the  
18 litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the  
19 complexity of the litigation involved, and the expense; and (4) the paramount interest of  
20 creditors and a proper deference to their reasonable views in the premises. *Id.* These  
21 factors are known as the *A & C* factors.

22           With respect to the paramount interest of creditors in the case, the court notes that  
23 the creditors are: (1) Crown Towers Homeowners Association, filing a proof of claim for a  
24 secured claim of \$214,115.06, which is now estimated to be currently \$250,000 due to  
25 postpetition accruals; (2) the Kleemoff bankruptcy estate with a secured claim of \$20,000  
26 and a general unsecured claim of \$66,000 as determined by the court in an order  
27 approving a compromise between the estate and that creditor, ECF No. 53; (3) Los  
28 Angeles County Tax Collector, filing a proof of claim for a secured claim of \$76,936.06  
relating to property taxes on the subject property, which is probably higher due to

1 postpetition accruals; and (4) Data Leverage, LLC, filing a proof of claim for secured and  
2 priority claims totaling \$293,694.87, now characterized as an administrative expense  
3 claim, which is disputed by the trustee.

4 The court had granted the trustee's Compromise/Sale Motion since the motion  
5 indicated litigation risks to the estate based on Binafard's specific performance claim in  
6 state court regarding the property, and the motion was not then opposed. As discussed  
7 above, Data Leverage has requested reconsideration under FRCP 60(b), which the court  
8 is inclined to grant in part to allow it to argue against the approval of the compromise and  
9 sale to Binafard without overbidding.

10 Based on the papers filed so far, the court believes that the trustee has made a  
11 prima facie showing of the A & C factors:

12 (1) the probability of success in the litigation – the estate's asset is the subject  
13 property, the two condominium units, and the estate's title is based on the validity of  
14 debtor's default judgment in state court as res judicata and collateral estoppel against  
15 Binafard's specific performance claim in another lawsuit in state court, and while the  
16 trustee believes he would prevail against Binafard as to the property, *Miller v. Dyer*, 20  
17 Cal.2d 526, 528-529 (1942), there are substantial risks that the default judgment is valid  
18 due to Binafard's arguments, as stated in his papers filed in this case, that the default  
19 judgment is not effective as to him because he was not named as a party in debtor's  
20 lawsuit, but was an indispensable party in debtor's lawsuit over the property pursuant to  
21 California Code of Civil Procedure 389(a) where debtor was a defendant in Binafard's  
22 specific performance lawsuit filed before debtor's state court lawsuit, both lawsuits having  
23 the same subject matter and the same transaction or occurrence, and debtor's default  
24 judgment may be void because he did not comply with the requirements of California  
25 Government Code 68634(g) in timely making good payment of filing fees for his complaint  
26 on which he got default judgment after denial of his request for fee waiver, see *Hu v.*  
27 *Silgan Containers Corp.*, 70 Cal.App.4th 1261 (1999) (interpreting similar provision under  
28 California Code of Civil Procedure 411.2); these issues present substantial litigation risks

1 to the estate because if Binafard prevailed on his state court complaint, the estate would  
2 not have ownership of the property;

3 (2) the difficulties, if any, to be encountered in the matter of collection – the estate  
4 may not be able to sell the property if title is not clear based on Binafard’s claim to the  
5 property;

6 (3) the complexity of the litigation involved, and the expense – the litigation of title  
7 involving the validity of debtor’s default judgment and the determination of Binafard’s  
8 specific performance claim in state court, and the application of the doctrines of res  
9 judicata and/or collateral estoppel would be complex and expensive, and time-consuming,  
10 and the estate would be at severe risk of loss of the property through foreclosure of the  
11 HOA liens of Crown Towers Homeowners Association, which has obtained relief from the  
12 automatic stay to foreclose on its liens, but has not done so if there would be a prompt  
13 sale to pay off its liens, or foreclosure of the property tax liens held by the county; and

14 (4) the paramount interest of creditors and a proper deference to their reasonable views in  
15 the premises - the creditor body is generally in favor of the compromise, specifically,  
16 Crown Towers and the Kleemoff bankruptcy estate, and presumably, the county, since the  
17 compromise and sale to Binafard would pay off all of these claims as well as other  
18 administrative claims of the estate, including the fees of trustee and his professionals, but  
19 Data Leverage opposes the compromise and sale to Binafard because it seeks to  
20 purchase the property for itself, though its claim would be paid off through the compromise  
21 and sale.

22 The trustee argues that the sale to Binafard may be approved as part of the  
23 compromise without overbidding because the sale is integral to the compromise. The  
24 court determines that the trustee has made a prima facie showing that the compromise  
25 with sale to Binafard does not require overbidding. Despite the argument of several  
26 parties that a compromise with a sale of assets always requires overbidding, that  
27 argument is not correct, as the court has discretion to determine whether to apply the sale  
28 procedures of 11 U.S.C. § 363 to a motion to approve compromise under FRBP 9019. *In*  
*re Berkeley Delaware Court, LLC*, 834 F.3d 1036, 1039-1041 (9th Cir. 2016); *In re Mickey*

1 *Thompson Entertainment Group, Inc.*, 292 B.R. 415, 422 and n. 7 (9th Cir. BAP 2003)  
2 (“Whether to impose formal sales procedures is ultimately a matter of discretion that  
3 depends upon the dynamics of the particular situation.”); *In re Douglas J. Roger, M.D.,*  
4 *Inc., APC*, 383 F.Supp.3d 940 (C.D. Cal. 2019). The litigation risks are substantial here  
5 with respect to the estate having to litigate the Binafard specific performance claim in state  
6 court, which will involve great expense and delay as well as risk of loss.

7 The facts as indicated by the evidence and other information in the record,  
8 including the moving and opposing papers, are convoluted. Before debtor filed this  
9 Chapter 7 bankruptcy case in 2014, he transferred the property to Kleemoff, his mother,  
10 one unit by gift deed in 2000 and one unit by quitclaim deed in 2013 and gave her a  
11 general power of attorney. Kleemoff having title to the property entered into a contract  
12 with Binafard to sell him the property in February 2015. Apparently, learning of the  
13 contract to sell the property to Binafard, debtor sued Kleemoff in March 2015 to recover  
14 the property for fraud, constructive trust and cancellation of instrument. Because  
15 Kleemoff did not perform on the contract to sell the property, Binafard filed his specific  
16 performance lawsuit in July 2015 against Kleemoff and named debtor as an additional  
17 defendant. Binafard also recorded a notice of lis pendens on the property in July 2015.  
18 Binafard obtained a default judgment against debtor, but debtor successfully moved to set  
19 the default aside. Subsequently, debtor in his lawsuit against Kleemoff obtained a default  
20 judgment which confirmed his title to the property through cancellation of the deeds to  
21 Kleemoff. Despite knowing of Binafard’s contractual claim for sale and purchase of the  
22 property and specific performance claim, debtor never named Binafard as a party to his  
23 lawsuit to recover title to the property.

24 These convoluted facts indicate a difficult situation for the trustee of debtor’s  
25 bankruptcy estate in trying to sell the property with a cloud on title from the Binafard  
26 specific performance lawsuit in state court. Binafard recorded a notice of lis pendens in  
27 2015 before debtor obtained his default judgment recovering the property from his mother  
28 in 2016. The trustee could not have sold the property free and clear of liens,  
encumbrances and interests under 11 U.S.C. § 363(f), specifically, Binafard’s specific



1 performance claim and any claim of the Kleemoff estate to the property, which limited the  
2 marketability of the property. Given these difficulties, the trustee chose to negotiate  
3 compromises with Binafard and the bankruptcy estate of Kleemoff, who had filed her own  
4 bankruptcy case, in order to resolve the cloud on title from Binafard's specific performance  
5 claim and any claim that the Kleemoff bankruptcy estate might have based on debtor's  
6 transfer of the property to her and the possibility that the default judgment in debtor's  
7 lawsuit might be set aside as void.

8           It seems to the court that Binafard has a substantial case to argue that the debtor's  
9 default judgment should not stand because Binafard should have been named as an  
10 indispensable party in debtor's lawsuit. Debtor was aware of the Binafard suit, having  
11 been sued as a party, and debtor's state court lawsuit involves the same subject matter,  
12 the title to the property, and Binafard recorded a notice of lis pendens on the property.  
13 Moreover, having to litigate title to the property in the Binafard suit would involve delay of  
14 any sale or disposition of the property, which involves immediate risk to the estate  
15 because of the threatened foreclosure by the HOA which has been granted stay relief.  
16 Compromise with Binafard including the sale to him is the only way of eliminating such  
17 litigation risk to the estate and allows the estate to sell the property now. Allowing  
18 overbidding and a sale to another party without the compromise with Binafard does not  
19 avoid the litigation of title to the property with Binafard, which is a risk to the estate  
20 regarding whether the estate can sell the property without resolving the title issue. One of  
21 the arguments that movant makes against the compromise and sale is that the court  
22 should not engage in a de facto state court appeal in considering the dispute between  
23 debtor and Binafard, and the court rejects this argument because the court would not be  
24 engaging in any litigation of the appeal, but the court is simply evaluating the risks posed  
25 by such litigation as *A & C Properties* directs.


25           Further, the trustee had to resolve any potential claim to the property from the  
26 Kleemoff bankruptcy estate given that based on debtor's transfer of the property to  
27 Kleemoff, she had title to the property when she contracted to sell the property to  
28 Binafard. If the debtor's default judgment against Kleemoff was set aside as void, the

1 Kleemoff estate would have a claim to the property or the sale proceeds if Binafard was  
2 able to purchase the property based on his contractual claim. Thus, it was reasonable for  
3 the trustee to resolve the claim of the Kleemoff estate as part of an integrated strategy to  
4 resolve the claims of Binafard and the Kleemoff estate against the property and to realize  
5 value from the property based on the litigation risks through the proposed compromises  
6 with these parties and the sale of the property to Binafard. Therefore, the court concluded  
7 that the compromises by the trustee with both Binafard and the Kleemoff estate and sale  
8 of the property to Binafard without a public sale and overbidding were fair and reasonable  
9 and within the business judgment of the trustee. Data Leverage argues that the sale to  
10 Binafard without overbidding was not a proper exercise of the business judgment of the  
11 trustee because it is willing to purchase the property through overbidding and assume the  
12 burden of litigating the cloud on title presented by Binafard's claim. The court disagrees  
13 and concludes that it was commercially reasonable to enter into a compromise with a  
14 litigation party by a sale to that party where there would not have been a general market  
15 for sale of the property with a cloud on title, and without the ability to sell free and clear of  
16 liens, encumbrances and interests, such as the claims here.

17 IT IS SO ORDERED.

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24 Date: December 16, 2020

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27 Robert Kwan  
28 United States Bankruptcy Judge