UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

VICTOR P KEARNEY,

Appellant,

v. Civ. No. 18-888 JB/GJF

LOUIS ABRUZZO, et al.,

Appellees.

ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL

(Filed Oct. 19, 2018)

THIS MATTER comes before the Court on Appellant's Emergency Motion for Stay Pending Appeal [ECF No. 3]. Appellant seeks a stay of the Bankruptcy Court's order modifying the automatic bankruptcy stay pursuant to 11 U.S.C. § 362. Having reviewed the parties' submissions, the record, and applicable law, the Court will deny the motion.

I. PROCEDURAL BACKGROUND[1]

Appellant is the beneficiary of trusts established by his late wife, Mary Pat Abruzzo. ECF No. 6 at 56.

[1] The following background derives from the District Court record and the underlying Bankruptcy Court docket. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (courts have "discretion to take judicial notice of publicly-filed records in [their own] court and certain other courts concerning matters that bear directly upon the disposition of the case at hand"); *In re Schupbach*, 607 Fed. App'x 831, 838 (10th Cir. May 19, 2015) (unpublished) (holding the appellate court may take judicial notice of the underlying bankruptcy docket).

Appellees Louis and Benjamin Abruzzo are the contingent remainder beneficiaries of their sister's trusts. *Id.* In 2013, the Appellant and the Abruzzo brothers filed cross-claims in New Mexico's Second Judicial District Court (State Court) for breach of fiduciary duty, as they all functioned as co-trustees. *Id.* at 70. The State Court concluded Appellant breached his fiduciary duties and that "good cause . . . exists for modification of the Mary Pat Abruzzo Trust, including but not limited to appointment of a Successor Trustee. . . ." *Id.* at 71.

On September 1, 2017, before any trust modifications were made, Appellant filed a Chapter 11 bankruptcy case. *See* Case No. 17-12274-t11, Bankruptcy Docket No. ("BK No.") 1. The State Court action was automatically stayed pursuant to 11 U.S.C. § 362. About a week after the bankruptcy filing, the Abruzzo brothers filed a motion for relief from the automatic stay to resolve the remaining issues in the State Court litigation. BK No. 13. The Bankruptcy Court (Hon. David Thuma) heard the motion on November 22, 2017 and determined "all parties would be better served by attempting to mediate their differences and negotiate a plan of reorganization, rather than incurring attorney fees in further litigation." BK No. 111. Another Bankruptcy Judge, Hon. Robert Jacobvitz, agreed to act as mediator. *Id.* The Bankruptcy Court kept the stay motion under advisement but reserved the right to terminate the automatic stay "at any time it perceives that continuing the stay no longer benefits the [Abruzzo brothers] and the estate." *Id.* at 3.

Around the same period, the United States Trustee appointed an unsecured creditors' committee (UCC) in accordance with 11 U.S.C. § 1102. BK No. 103. The Abruzzo brothers are not members of the UCC, presumably because they may qualify as secured creditors by virtue of the trusts. *Id.* The UCC, Appellant, and the Abruzzo brothers participated in the mediation, but it was unsuccessful. BK No. 111. On August 13, 2018, the UCC proposed an amended Chapter 11 Plan of Reorganization (UCC Plan), which contemplates trust modifications. BK No. 360. The key points of the proposed UCC Plan are as follows:

1. The family business founded by the Abruzzos (ARCO) will pay $12,571,799 to Appellant's trusts in exchange for all ARCO stock held by the trusts.

2. The Abruzzo brothers will deliver a $3 million trust payment to Appellant, which would be delivered to creditors.[2]

3. Appellant's $350,890.55 priority tax debt will be paid from net income that would otherwise be distributable to Appellant from the trusts.

Id. at 6. Confirmation[3] of the UCC Plan is contingent upon State Court approval of these items, which are

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[2] It appears the $3 million payment to creditors will be deducted from the $12,571,799 figure. BK No. 360 at 6.

[3] Confirmation is a bankruptcy term of art. It occurs when the Bankruptcy Court approves a plan (either the debtor's plan or a creditor's plan) to repay all outstanding debts. 11 U.S.C. § 1129. Confirmation is typically the last step in a Chapter 11 bankruptcy case. The debtor then emerges from bankruptcy and repays

hereinafter referred to as the "Three Actions." ECF No. 3 at 1. Appellant proposed a competing Chapter 11 Plan of Reorganization (Debtor's Plan), which did not contemplate such trust modifications. BK No. 381.

On September 4, 2018, the Bankruptcy Court modified the automatic stay pursuant to 11 U.S.C. § 362 to allow the Abruzzo brothers to obtain a State Court hearing on the Three Actions. ECF No. 1 at 8. The Bankruptcy Court entered a second, substantive order modifying the automatic stay on September 18, 2018. *Id.* at 11-12. The second order permitted the Abruzzo brothers to pursue the Three Actions against Appellant in State Court. *Id.* Together, the orders are hereinafter referred to as the "Section 362 Orders."

Appellant filed the instant appeal challenging the Section 362 Orders on September 20, 2018. ECF. No. 1. He first sought a stay pending appeal in the Bankruptcy Court, as required by Bankruptcy Rule 8007(a)(1), which was denied. ECF No. 3 at 6. On the eve of the State Court hearing, Appellant removed the Three Actions to Federal District Court. ECF No. 1 in Case No. 18-cv-922 JCH/SCY. Appellees filed a motion to remand or abstain. ECF No. 4 in Case No. 18-cv-922 JCH/SCY. The Court (Hon. Judith Herrera) transferred the Three Actions to Bankruptcy Court in accordance with the standing referral of all bankruptcy jurisdiction. ECF No. 8 in Case No. 18-cv-922 JCH/SCY.

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creditors for the next five years or so in accordance with the plan terms.

Between October 8 and 9, 2018, Appellant filed three emergency motions. In the first two motions, filed in Case No. 18-cv-922 JCH/SCY, Appellant asked the Court to withdraw the standing reference of bankruptcy jurisdiction and/or to stay proceedings. The Court initially entered a text-only order advising that Appellant was not entitled to relief on an emergency basis. ECF No. 10 in Case No. 18-cv-922 JCH/SCY. Appellant filed a second emergency motion the next day, prompting the Court to deny both motions. ECF No. 10 in Case No. 18-cv-922 JCH/SCY.

Appellant filed the emergency motion for a stay pending appeal in this proceeding on October 9, 2018. ECF No. 4. He seeks an order staying the Section 362 Orders in accordance with Bankruptcy Rule 8007. *Id.* The Court set an expedited briefing schedule, and the matter is fully briefed. ECF No. 6, 7, and 8. Appellees advise that since the motion was filed: (1) the Bankruptcy Court remanded the Three Actions to State Court; and (2) a State Court hearing on the Three Actions is set for October 23, 2018. ECF No. 6 at 4; ECF No. 7 at 6.

II. DISCUSSION

Appellant contends a stay must issue for two reasons. First, he argues the appeal divested the Bankruptcy Court of all jurisdiction pertaining to the Chapter 11 Plan confirmation process and the removal/remand proceeding. ECF No. 3 at 5-6; 16-19. Alternatively, Appellant argues the traditional injunction

standards favor a stay. *Id.* at 6-16. For the reasons below, the Court is unpersuaded by either argument.

A. The Divestiture Doctrine Does Not Justify Relief

"The filing of a notice of appeal is an event of jurisdictional significance." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "[I]t confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Id.* A notice of appeal does not stay the Bankruptcy Court from all further action, however. *See* Fed. R. Bankr. P. 8001. In accordance with Bankruptcy Rule 8007(e)(1), all "other proceedings in the [bankruptcy] case" may continue unless and until the Bankruptcy Court suspends them.

Appellant argues the remand proceedings and Plan confirmation process constitute "aspects of the case involved in" the Section 362 appeal.[4] ECF No. 3. Appellee UCC contends they constitute other, unrelated proceedings. ECF No. 6. Having considered the interplay between different sections of the Bankruptcy Code, the Court agrees with Appellee UCC. Section 362 "give[s] a debtor a breathing spell from his creditors," who must obtain Bankruptcy Court approval before

[4] The remand issue appears moot, as the Bankruptcy Court already ruled, and Appellant's reply brief does not address the jurisdictional arguments. In the interest of thoroughness, and because it is unclear whether Appellant meant to abandon his jurisdiction arguments, the Court will address all matters raised in the Motion.

continuing any pre-bankruptcy state court lawsuit. *In re Calder*, 907 F.2d 953, 957 (10th Cir. 1990) (quotations omitted). A creditor who willfully continues a pre-bankruptcy lawsuit without Court approval is subject to monetary sanctions. 11 U.S.C. § 362(k). Thus, the Section 362 Orders allowed the Abruzzo brothers to continue to pursue the State Court "proceeding against the debtor" and/or attempt to "recover a [pre-bankruptcy] claim against the debtor" without risking sanctions. 11 U.S.C. § 362. The Section 362 Orders resolved a discrete "contested matter," which is a litigable issue generated by a motion in the main bankruptcy case. *See* Fed. R. Bankr. P. 9014(a) – (e) (specifying rules relating to motions, service, testimony, and attendance by witnesses in contested matters).

Remand and plan confirmation are distinct from stay proceedings. The remand resolved a separate "adversary proceeding," or bankruptcy lawsuit. *See* Fed. R. Bankr. P. 7014 (specifying rules relating to complaints, service, and evidentiary hearings in adversary proceedings). The ruling determined *where* the Three Actions should proceed, rather than *whether* the Abruzzos could sue. Similarly, the UCC Plan generated its own contested matter focused on whether, and to what extent, the UCC's proposed repayment scheme complies with the requirements of the Bankruptcy Code. *See* 11 U.S.C. § 1129 (setting forth the Chapter 11 plan confirmation requirements). Appellant is correct that the ruling on stay relief, and any subsequent State Court ruling, impacts whether the plan is confirmable. However, the same is true of most pre-confirmation

contested matters. The viability of a plan often depends on the allowance and liquidation of a creditor's claim under 11 U.S.C. § 503 and/or whether a tax debt has priority under 11 U.S.C. § 507. If appealing such matters automatically divested the Bankruptcy Court of jurisdiction over plan confirmation, obtaining a stay pending appeal would be unnecessary in most cases. Accordingly, the Court concludes that the appeal did not divest the Bankruptcy Court of jurisdiction over the remand or confirmation proceedings.

B. The Traditional Injunction Factors Do Not Warrant a Stay Pending Appeal

Before issuing a stay pending appeal, courts must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "[W]here the moving party has established that the three 'harm' factors tip decidedly in its favor, the probability of success" requirement is somewhat relaxed." *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (quotations omitted). However, the first two factors are the most critical, and require more than a mere possibility. *See Nken*, 556 U.S. at 434.

Whether to grant a stay pending appeal rests in the sound discretion of the Court. *Id.* As the Supreme Court explained:

> A stay is an intrusion into the ordinary processes of administration and judicial review and is not a matter of right, even if irreparable injury might otherwise result . . . It is instead an exercise of judicial discretion . . . dependent upon the circumstances of the case.

Id. at 433–34. The movant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*

1. *Likelihood of Success on the Merits*

The first factor requires Appellant to demonstrate "a reasonable probability that he will ultimately" prevail on appeal. *Autoskill v. Nat'l Educ. Support Sys.*, 994 F.2d 1476, 1487 (10th Cir. 1993). The appeal here turns on whether "cause" existed to lift the automatic stay under 11 U.S.C. § 362(d)(1). "[T]here is no clear definition of what constitutes 'cause,'" and "discretionary relief from the stay must be determined on a case by case basis." *Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir. 1987). The parties agree that the widely-cited, nonexclusive factors identified in *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984) are applicable. ECF No. 3 at 7; ECF No. 6 at 9; ECF No. 7 at 7. The twelve *Curtis* factors are:

> (1) whether the relief will result in partial or complete resolution of the issues;
> (2) the lack of any connection with or interference with the bankruptcy case;
> (3) whether the foreign proceedings involve the debtor as a fiduciary;
> (4) whether a specialized tribunal has been established to hear the case and whether it has the expertise to hear such cases;
> (5) whether the debtor's insurance carrier has assumed full financial responsibility for the defense;
> (6) whether the action essentially involves third parties;
> (7) whether the litigation would prejudice the interests of other creditors and interested parties;
> (8) whether any judgment in another forum is subject to equitable subordination under § 510(c);
> (9) whether the movant's success in a foreign proceeding would result in a judicial lien avoidable by debtor under § 522(f);
> (10) judicial economy;
> (11) the degree to which the parties are prepared for trial; and
> (12) the impact of the stay on the parties and the balance of the hurt.

Id. at 800-801.

The Bankruptcy Court weighed the relevant *Curtis* factors along with the factors set forth in *In re Crespin*, 581 B.R. 904 (Bankr. D.N.M. 2018)[5] and determined

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[5] The *Crespin* factors are: (a) the existence of a specialized tribunal; (b) impact on estate administration; (c) impact on the claims allowance process; (d) judicial economy; (e) prejudice to

cause existed to lift the stay. The ruling points out that: (a) disputes about testamentary trusts are typically heard by the state court; (b) stay relief would expedite administration of the estate; (c) judicial economy would be served by allowing Second Judicial District Judge Alan Malott, who has long presided over the state court litigation, to hear the matter before his retirement; (d) other creditors would benefit from stay relief; (e) the proposed trust modifications raised a serious, litigable dispute; and (f) the balance of the hurt weighed in favor of granting relief from the stay. ECF No. 1 at 21-22.

Given the discretionary nature of stay relief and the deferential standard of review, the Court cannot find a reasonable probability that Appellant will prevail on appeal. There is substantial overlap between the Bankruptcy Court's own *Crespin* factors and the widely-cited *Curtis* factors. The emergency nature of the ruling and the absence of concrete evidence regarding Judge Malott's retirement do not necessarily reflect due process violations, as Appellant contends. The Bankruptcy Court previously conducted a final hearing on stay relief, and the matter remained under advisement pending case progress. Further, Appellant's argument that Judge Malott may commit error relating to trust modification, pleading requirements, etc. does not demonstrate error by the Bankruptcy Court. Section 362 focuses on whether creditors may continue collection actions against the debtor; it does not

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other creditors; (f) likelihood of creditor's success; and (g) balance of the hurt. 581 B.R. at 909-910.

require bankruptcy judges to predict errors of law in another forum. *See* 11 U.S.C. § 362; *Pursifull*, 814 F.2d at 1506 (evaluating whether an issue would be "best decided by the [Texas] state court"). Accordingly, Appellant has not demonstrated a reasonable probability that he will succeed on the merits of the appeal.

2. *Irreparable Harm to Appellant*

To satisfy the second factor, Appellant must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 22 (2008). He contends that absent a stay: (1) he will be forced to litigate in multiple forums; (2) the UCC's gamesmanship regarding stay relief will go unaddressed, and the State Court trust modification could reduce his income by 84%; (3) the State Court will violate his rights by proceeding on limited notice and without a stock valuation expert; and (4) the appeal will be rendered moot. ECF No. 3 at 12-15; ECF No. 8 at 9-11. Beyond detailing such harm, Appellant also asks this Court to appoint an independent valuation expert to analyze the price of his ARCO stock. ECF No. 3 at 14.

Appellant's first three arguments clearly fail. He is litigating in four forums because he initiated actions in four forums.[6] Any wrongdoing by the UCC goes to

[6] Appellant initiated the original State Court lawsuit in 2013; the bankruptcy case; this appeal; the removed action in New Mexico's Federal District Court; and a lawsuit for breach of fiduciary duty in Nevada's Federal District Court.

the merits of the appeal. As discussed above, federal courts do not function to predict and police future error in another forum, even if that ruling could result in a reduction in income. Further, this Court has no authority to appoint expert witnesses in a matter pending before the State Court.

Appellant's argument regarding mootness is more complex, as he raises the adequacy of his legal remedies going forward. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1361 (10th Cir. 1989) (irreparable harm turns on the adequacy of the movant's legal remedies). Appellant points to a provision of the proposed UCC Plan that releases the Abruzzo/ARCO parties from all causes of action in exchange for a $3 million trust payment. ECF No. 8 at 9; BK No. 360 at 32. "Causes of action" is defined to include any appeal of the State Court ruling on trust modification. BK No. 360 at 13. Thus, Appellant contends that if the State Court modifies his trusts and the Bankruptcy Court subsequently confirms the UCC Plan, he will be unable to appeal any State Court ruling. At that point, it would be useless to appeal a ruling allowing the Abruzzos to litigate in State Court.

The Court is skeptical that the "irreparable harm" factor contemplates the attenuated domino-effect of several potential rulings by other courts, which theoretically at some point might render the appeal moot. Further, numerous courts have held that the "hazard of mootness, in and of itself, is not sufficient to show irreparable harm" in the bankruptcy context. *In re*

Sunflower Racing, Inc., 225 B.R. 225, 228 (D. Kan. 1998) (widely cited among trial courts in the Tenth Circuit). *See also In re Scrub Island Development Group Ltd.*, 523 B.R. 862, 878 (Bankr. M.D. Fla. 2015); *In re Red Mountain Mach. Co.*, 451 B.R. 897, 908–09 (Bankr. D. Ariz. 2011); *In re Irwin*, 338 B.R. 839, 853 (E.D. Cal. 2006); *In re Fullmer*, 323 B.R. 287, 304 (Bankr. D. Nev. 2005); *In re Convenience USA, Inc.*, 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003); *In re Shenandoah Realty Partners LP*, 248 B.R. 505, 510 (W.D. Va. 2000); *In re 203 North LaSalle St. Partnership*, 190 B.R. 595, 597 (N.D. Ill. 1995); *In re Moreau*, 135B.R. 209, 215 (N.D.N.Y. 1992); *In re Dakota Rail, Inc.*, 111 B.R. 818, 821 (Bankr. D. Minn. 1990); *In re Public Serv. Co. of New Hampshire*, 116 B.R. 347, 349–50 (Bankr. D. N.H. 1990).

Even if the potential rulings were considered, it is not clear the appeal would be moot absent a stay. The Bankruptcy Court does not intend to confirm the proposed UCC Plan until after the State Court rules. Appellant may appeal any adverse State Court ruling before the Bankruptcy Court holds a confirmation hearing, notwithstanding the proposed release/waiver of appeal rights in the UCC Plan. The existence of such appeal could impact the feasibility and confirmability of the UCC Plan, which Appellant is free to argue before the Bankruptcy Court. *See In re Paige*, 685 F.3d 1160, 1187 (10th Cir. 2012) ("A Chapter 11 plan cannot be confirmed unless it is feasible."). And if the Bankruptcy Court confirms the UCC Plan over Appellant's objection, such order is appealable until the Plan has

been "substantially consummated."[7] *In re Paige*, 584 F.3d 1327, 1338 (2009). For these reasons, Appellant has not demonstrated he will likely suffer irreparable harm absent a stay.

3. *Harm to Other Parties*

Appellant next contends the Abruzzo brothers will not be harmed by a stay. ECF No. 3 at 15. He argues they are merely seeking a comfort order from the State Court, and that approval of any trust modification is not necessary to effectuate the UCC Plan. *Id.* As Appellees point out, this is not a two-party dispute. ECF No. 7 at 13-14. Appellant has been litigating – and accruing debts – since at least 2013. The debtor's lawyers are typically paid on a priority basis from estate funds, which would otherwise be available to creditors. 11 U.S.C. §§ 327 and 1107. Unless and until a plan is confirmed, most creditors will not receive payment. Therefore, a stay will harm Appellees, who have a strong incentive to proceed towards confirmation.[8]

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[7] The UCC Plan does not become effective until ten business days after entry of any confirmation order, giving Appellant time to perfect his appeal and seek a stay. BK No. 360 at 15 ("Effective Date" means the date ten (10) business days after all of the following conditions have been satisfied: (i) the Confirmation Order shall have been entered and shall be a Final Order . . . ").

[8] Much has been made about the fact that Judge Malott is retiring on October 31, 2018. *Compare* ECF No. 3 *with* ECF No. 9. Appellees accuse Appellant of attempting to stall and obtain a new judge, while Appellant maintains any impending retirement did not justify emergency stay relief. The retirement is relevant, but not dispositive, to whether other parties will be harmed by a

4. *Public Interest*

According to Appellant, the public interest requires bankruptcy debtors to receive an adequate "breathing spell" and prohibits creditors from "ram-rod[ing] a . . . plan through" to confirmation. ECF No. 3 at 16. Appellant retained the benefit of the automatic bankruptcy stay for over a year, and the record reflects all parties have employed aggressive litigation methods. Therefore, the public interest does not favor a stay.

III. CONCLUSION

Having reviewed the parties' submissions, the relevant law, and the record, the Court orders that Appellant's Emergency Motion for Stay Pending Appeal [ECF No. 3] is **DENIED**.

IT IS SO ORDERED.

/s/ Gregory J. Fouratt
THE HONORABLE
GREGORY J. FOURATT
UNITED STATES
MAGISTRATE JUDGE

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stay pending appeal. Given how long the various matters have been pending, additional delay would be harmful regardless of who presided over the Three Actions.

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

VICTOR KEARNEY, as Beneficiary and Trustee of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C,
Plaintiff/CounterDefendant,

v. **No.: D-202-CV-2013-07676**

LOUIS ABRUZZO, Trustee of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C; and BENJAMIN ABRUZZO, Trustee of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C,
Defendants/CounterPlaintiffs,

and

MARY PAT ABRUZZO, and NANCY ABRUZZO as Guardian and Next Friend of RICO ABRUZZO,
Third-Party Counter-Claimants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER RELATED THERETO

(Filed Oct. 31, 2018)

THIS MATTER having come before the Court upon the Abruzzos' Request for Hearing and the Order of the United States Bankruptcy Court; the Court having conducted a hearing in open Court on October 23, 2018, at which counsel for all parties attended and each presented evidence and argument in support of their position; the Court having reviewed that

evidence and counsels' arguments and the parties' proposed Findings of Fact and Conclusions of Law; the Court having reviewed the file; and being sufficiently advised; enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Mr. Kearney commenced this litigation on September 23, 2013, alleging Defendants Abruzzo had breached their duties as Trustees of his late wife's testamentary Trust of which Mr. Kearney is the lifetime income beneficiary.

2. In his Amended Complaint filed October 9, 2014, Mr. Kearney sought, *inter alia,* "judicial termination of the Trusts and distribution of the assets based on the current fair market value of the Trusts and the life expectancy of Mr. Kearney." Amended Complaint, Para. 122.

3. After significant litigation including two (2) trials in 2015 and 2017 and adjudication of countless Motions, Mr. Kearney filed for Bankruptcy protection in early September 2017, and this matter has been stayed by the Bankruptcy proceeding since that time.

4. In recent weeks, the Bankruptcy Court partially lifted the stay on this proceeding for the specific and limited purposes of this Court's determining whether actions which would be required of the Trustees under a reorganization plan proffered by the Unsecured Creditors' Committee ("UCC") are appropriate

actions and are within the scope of the Trustees' powers, duties, and responsibilities.

5. The actions at issue have been characterized as "The Three Issues" and are more specifically:

   a. Alvarado Realty Co. ("ARCO") would repurchase its stock held by the Mary Pat Abruzzo Kearney Testamentary Trust for the sum of $12,571,799.00.

   b. The Trustees would pay $3,000,000.00 of that $12,571,799.00 to Mr. Kearney who would immediately deliver it to the Unsecured Creditors' Committee in full satisfaction of his unsecured debts of more than $5,000,000.00.

   c. The Trustees would pay off the IRS' priority claims of $350,890.55 against Mr. Kearney from future distributions of Trust income due Mr. Kearney over a five (5) year period.

6. While not specifically addressed in "The Three Issues," it was undisputed at the October 23, 2018, hearing that the balance of the $12,571,799.00 buyout, after distribution of the $3,000,000.00, and payment of applicable taxes, would make up the corpus of the MPK Testamentary Trust which would be reinvested for the benefit of Mr. Kearney and the remainder beneficiaries.

7. After applicable taxes and other deductions, that new corpus would be approximately

$8,000,000.00. Mr. Kearney would receive the income on that sum for his lifetime.

8. The actions contemplated in "The Three Issues" focus on the "distribution of the assets" of the MPK Testamentary Trust as requested by Mr. Kearney in his Amended Complaint.

9. The determination of "The Three Issues" currently before the Court is a continuation of the same disputes which have been pending before this Court since 2013 and is not a "new action."

10. The requested determination of "The Three Issues" seeks supplemental relief following previous decisions of this Court as embodied in, though not limited to, the Court's Findings of Fact and Conclusions of Law filed April 18, 2017, and July 7, 2017.

11. The Court's Findings of Fact and Conclusions of Law dated April 18, 2017, and July 7, 2017, are incorporated herein as though set forth in full.

12. In context of Motion hearings taking place prior to the June 2015 trial, this Court made the finding that Mr. Kearney had a good faith basis in the claims he asserted. This finding has been touted by Mr. Kearney multiple times as this litigation has unfolded. That finding was based upon what was before the Court at that time. In the intervening 3½ years, after two (2) trials and countless Motion proceedings, the Court is convinced that

finding was, at best, naïve and erroneous, and is now rescinded.

13. The evidence which has developed in this matter since June 2015 is clear and convincing that Mr. Kearney initiated this litigation with the purpose of damaging the Abruzzos individually and to foster his apparent plan to force a hostile takeover of the Abruzzo interests and the assets of ARCO by gaining access to financial and in-house information and documentation through discovery which he could not have accessed otherwise, and then disseminating such information to third parties in repeated violation of the Court's Orders and admonishments and in spite of significant monetary sanctions.

14. After this Court determined that modification of the MPK Testamentary Trust was appropriate, a hearing on the issue of appointing a successor trustee – one of several Trust modification issues that needed to be determined after the April and July 2017, Findings and Conclusions – was scheduled for the first week in September 2017. Due to the Bankruptcy, those determinations have been stayed until the recent rulings requesting this Court's determination of "The Three Issues."

15. The UCC in Mr. Kearney's Bankruptcy action includes Mr. Kearney's expert in this litigation, Mr. Tarlson, as well as Ms. Johnson, Mr. Kearney's former administrative assistant.

16. No one from ARCO or the Abruzzo family serves on the UCC. However, the plan

embodied by "The Three Issues" was developed by ARCO and later adopted by the UCC.

17. That UCC Plan is null and void if it is found that any of "The Three Actions" is not a proper function for the Trustees to perform.

18. The Trustees' powers stem from two (2) sources; first, the Trust document itself and, second, the Uniform Trust Code, NMSA 1978 Section 46A-8-801 (2003).

19. The MPK Testamentary Trust was created by The Last Will & Testament of Mary Pat Abnizzo Kearney, dated July 8, 1988.

20. Article XVI provides the Trustee with very broad powers "in its absolute discretion" to manage the Trust assets including the power "to sell or dispose of . . . any property, real or personal, constituting a part of . . . the Trust estate.. .upon such terms and conditions as it may deem best." Art. XVI Para 1, Sec. 3.

21. Article XVI further provides the Trustee may engage in the sale or disposition of Trust assets "irrespective of the occupancy by the same person of dual positions, to deal with itself in its separate, or any fiduciary, capacity."

22. The Trustee may also "compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims [involving] the Trust Estate as my . . . Trustee shall deem best." Article XV (17). The Trustee can, in general, exercise all powers in the management of . . . the Trust Estate which any individual could exercise in his own right, upon such

terms and conditions as it may deem best, and to do all acts which it may deem necessary or proper to carry out the purposes of this my Will." Article XVI (23).

23. Mr. Kearney has admitted the powers and discretion granted the Trustees could not be more broad than as stated in Mrs. Kearney's Will.

24. Notwithstanding the broad powers granted by Mrs. Kearney's Will, pertinent portions of The Uniform Trust Code provide that the Trustee Abruzzos' personal interests in ARCO raise a presumed conflict of interest vis-a-vis the transactions encompassed by "The Three Issues." NMSA 1978, Section 46A-8-802 (B), (C) (2007).

25. Notwithstanding the broad powers and discretion granted in the Trustees by Mrs. Kearney's Will, pertinent provisions of the Uniform Trust Code generally make transactions involving a conflict of interest voidable by the Trust beneficiaries unless: 1) the conflict is authorized by the terms of the trust; 2) the transaction was approved by the Court; 3) the beneficiary did not commence a [timely] judicial proceeding; 4) the beneficiary consented to or ratified the transaction; or 5) the transaction predates the Trustee's appointment. *See*, *id.*

26. In this case, the terms of the MPK Testamentary Trust specifically waive the Trustees' conflicts of interest which may exist regarding

"buying and selling assets" of the Trust. Article XVI (16).

27. Further, the Court approves the transactions contemplated by "The Three Issues," as more specifically detailed herein, because those actions, and each of them, are fair, reasonable, and proper under the totality of the circumstances and are ultimately in the best interests of all the beneficiaries.

28. The UCC Plan encompassing "The Three Issues" would fully liquidate Mr. Kearney's unsecured personal liabilities at approximately 60% of face value: $3,000,000 to clear more than $5,000,000 in liabilities. This is to Mr. Kearney's advantage.

29. The UCC Plan encompassing "The Three Issues" would also resolve the IRS' priority claims for Mr. Kearney's back taxes over a five (5) year period. This is to both Mr. Kearney's advantage as well as the benefit of the Trust and the remaindermen in that the IRS is entitled to simply attach the Trust assets to satisfy Mr. Kearney' s unpaid tax liabilities, which would adversely affect the Trust principal and the interest of all concerned with those assets.

30. The UCC Plan encompassing "The Three Issues" would also sever further relations between Mr. Kearney, the Abruzzo family, and ARCO, which relationships have become more than merely toxic, resulting in protracted, very expensive, and ever more desperate litigation that shows no sign of waning in view of

the list of Mr. Kearney's intended lawsuits filed in the Bankruptcy matter.

31. The United States Bankruptcy Judge has questioned whether Mr. Kearney is pursuing a vendetta. September 14, 2018 Memorandum Opinion, DKT 429, p. 16.

32. A portion of the list of "nonexclusive" additional claimed torts and violations that Kearney claims includes unfair practices acts, loan sharking, violations of protective order, aiding and abetting breach of fiduciary duty, fraud when Louis Abruzzo was not a trustee, numerous bankruptcy law violations, unjust enrichment, shareholder oppression, "statutory violations," quasi contract claims, constructive eviction, tortious interference, conversion, trade-secret misappropriation, breach of warranty claims, suit on sworn account, usury, libel, slander, malicious prosecution, premises liability, fraudulent transfers, conspiracy, aiding and abetting, defamation, improper assignment, unconscionability, wrongful set off, and violations of statutes and regulations "to name a few." To this partial list, Mr. Kearney adds "any claims or causes of action related to any matter." Kearney's Notice of Filing Exhibits, Exhibit 2018-F, DKT 365, filed 8/14/18 at pp. 2-4.

33. The list of additional Abruzzo family members, other individuals, and entities Mr. Kearney has identified for subsequent litigation exceeds fifty (50) more persons and entities. This nonexclusive list includes all

attorneys opposing Mr. Kearney in the bankruptcy proceeding and a cast of more than fifty. *Id.* The United States Bankruptcy Judge David Thuma deemed the proposed litigation rife with "difficulties and red flags relating to the potential claims and the Debtor's motivations." September 14, 2018 Memorandum Opinion, DKT 429, p. 17.

34. It takes no speculation to conclude that Mr. Kearney's litigious approach has an adverse effect on the Trust, the operations of ARCO – the stock of which is the Trust corpus – and the fair market value of ARCO stock. After all, who wouldn't want to buy stock in a small corporation facing protracted litigation – described by Bankruptcy Court Judge Thuma as rife with "difficulties and red flags" as to both the claims and Kearney's motivations in bringing them – with attendant expense and diversion of the corporation's energy and assets?

35. While it is clearly the purview of the Bankruptcy Court to determine what plan should be adopted, it appears to this Court in its role of determining the best interests of all the beneficiaries that the alternative plan submitted by Mr. Kearney is far less advantageous to him than the UCC Plan encompassing "The Three Issues" in that Mr. Kearney's plan calls for repayment of more than twice the amount borrowed and calls for sequestration of Trust disbursements to Mr. Kearney, which would not provide the protection afforded by a continued Trust arrangement.

Given Mr. Kearney's well-established inability to manage his funds, continued protection is clearly in his best interests.

36. Besides providing substantially more advantageous financial resolution of Mr. Kearney's unsecured debts and income tax liabilities, and providing better protection of his future income stream from the MPK Testamentary Trust, another significant difference between the competing approaches is that the UCC Plan encompassing "The Three Issues" would serve to reduce or even stem the tide of Mr. Kearney's continuing path of litigation rife with "difficulties and red flags relating to the potential claims and [Mr. Kearney's] motivations."

37. The Trustees are fulfilling their fiduciary duty in attempting to support the UCC Plan which provides a solution to Mr. Kearney's financial problems rather than exacerbating those problems as the Kearney Plan does.

38. The Trusts own approximately 18.5% of the outstanding stock of ARCO, so the stock is a minority interest.

39. ARCO shareholders have willingly sold, at arm's length, their shares to ARCO since ARCO's creation thirteen years ago. Sales by shareholders of ARCO's predecessors at arm's length date back many years before that. Presently, ARCO has bought from willing sellers their minority interests at $79,000.00 per share. $79,000.00 per share is the same

price that the UCC Plan proposes that ARCO purchase the ARCO shares from the Trusts.

40. Mr. Kearney and others (using confidential information) proposed purchasing a controlling interest of ARCO shares for $110,000.00 per share. A 35% discount ($110,000.00 – $38,500.00 = $71,500.00) is a reasonable discount for these minority shares because the ARCO shares held by the Trusts are a minority interest and restricted by the MPAK Trust and ARCO by-laws.

41. At the hearing on October 23, 2018, Mr. Kearney proffered without objection two (2) exhibits which he characterized as "Offers" to purchase ARCO' s stock from the Trust. These were not offers, but were indications of interest at most. However, they are illustrative of the fair market value of the ARCO stock at issue.

42. The September 24, 2018, letter of interest from MHR Fund Management LLC purports to offer $17,500,000.00 for the Trust's ARCO stock. However, in addition to numerous reservations and contingencies which might affect the ultimate price or the efficacy of the deal entirely, that letter goes on to demand "Stalking Horse" status for MHR which would impose fees, expenses, and related payments that would ultimately lower the net price of the stock significantly.

43. The September 24, 2018, letter of interest from Mexcap similarly contains significant contingencies and reservations which might

prevent the deal from ever occurring and also demands "Stalking Horse" status for Mexcap. While MHR's letter does not specify its fees, etc., Mexcap specifically requires, *inter alia*, $500.00 per hour professional and administrative fees, a "breakup fee" of $150,000.00, a "topping fee" of one-third of the difference between the ARCO offer of $12,571,799.00 and the amount Mexcap actually ultimately pays for the stock.

44. Assuming Mexcap's figure of $16,500,000 for the ARCO stock, those fees and expenses would significantly reduce the ultimate share price; the "breakout" and "topping fees" alone would account for some $1,500,000.00.

45. Given the contingencies, delays, and "stalking horse" fees, the price per share which might speculatively come from further arrangements with MHR or Mexcap is not substantially greater than the non-contingent, unencumbered and prompt purchase price offered by ARCO.

46. There have been no other expressions of interest.

47. There have been no actual offers to purchase except the pending offer from ARCO.

48. The proposed amount of $12,571,799.00 at $79,000.00 per share owned by the Trusts is the fair market value of the ARCO stock owned by the Trusts.

49. The payment by the Trustees of the priority tax claim over time as proposed by the UCC

Plan is proper and in the best interests of Mr. Kearney because the spendthrift trust provisions do not protect the Trusts' distributions from claims of the Internal Revenue Service. Therefore, it is to Mr. Kearney's interest to pay what are called the "priority tax claims" and receive a discharge for the balance of his federal tax obligations.

50. The ARCO re-purchase offer of $12,571,799.00 is fair and reasonable under the totality of the circumstances giving consideration to the minority nature of the stock interest, the restriction on sale due to ARC 0' s right of first refusal, and the negative effect on the attractiveness of investing in ARCO caused by Mr. Kearney's continuing litigation, and plans for further litigation.

51. To the extent the present value of the stock may be adversely affected by Mr. Kearney's past, present, and intended future litigation course, that diminution in value stems entirely from the "Karnage" he has created.

52. Mary Pat Abruzzo Kearney's first and foremost goal was the best possible relationship with her brothers, not endless litigation and strife: "1) MY FIRST AND MOST IMPORTANT GOAL WHILE MAINTAINING MY INTEREST IN THIS COMPANY IS TO HAVE THE BEST POSSIBLE RELATIONSHIP WITH ALL THREE OF YOU, MY BROTHERS." Exhibit 1, VK 02382 (EMPHASIS IN THE ORIGINAL) to Abruzzos'

Memorandum Regarding the "Three Issues" from the UCC Plan, filed 9/28/18.

53. Clear and convincing evidence exists that the settlor Mary Pat Abruzzo Kearney did not anticipate the level of discord, distrust, acrimony, damages, and potential damage that exists related to Mr. Kearney's distributions from the Trusts based upon the ARCO dividends paid to the Trusts.

54. Clear and convincing evidence exists that the continued retention by the Trusts of the ARCO stock will lead to further strife which is directly contrary to the anticipation of and desires of the settlor Mary Pat Abruzzo Kearney.

55. Because clear and convincing evidence exists that Mary Pat Abruzzo Kearney did not anticipate the retention of the ARCO stock in the Trusts would cause the foregoing, modification of the Trusts is appropriate under §46A-4-412.

56. The remaindermen beneficiaries Louis Abruzzo, Benjamin Abruzzo, Mary Pat Abruzzo, and Rico Abruzzo, through his guardian and next friend Nancy Abruzzo, consent to the Three Actions.

57. The payment by the Trustees of $3,000,000.00 from principal to Mr. Kearney, with him then being required to deliver it to the Creditor Trustee as proposed, is a proper action by the Trustees and is in accordance with their

fiduciary duties to Mr. Kearney and to all beneficiaries.

58. The Trusts should be modified to allow, on a one-time basis, the payment by the Trustees of the $3,000,000.00 from principal to Mr. Kearney as provided in the Three Actions.

59. The payment of the Allowed Priority Tax Claims of the IRS from the distributions otherwise payable to Mr. Kearney is in the best interests of the Trusts and all the beneficiaries, including but not limited to Mr. Kearney.

CONCLUSIONS OF LAW

1. There is jurisdiction over the parties and the subject matter.

2. The determination of the Court herein related to "The Three Issues" are a continuation of the issues first raised, and relief first requested, by Mr. Kearney in his October 2014 Amended Complaint and do not constitute a new action.

3. The transactions contemplated by "The Three Issues" are actions within the scope of the Trustees' powers and responsibilities as authorized by The MPK Testamentary Trust.

4. The transactions contemplated by "The Three Issues" are approved by the Court as appropriate and proper under the totality of the circumstances and are in the best interests of all the beneficiaries, including the remaindermen.

5. The transactions contemplated by "The Three Issues" are not voidable transactions under Section 46A-8-802.

6. The MPK Testamentary Trusts should be modified, and hereby are so modified, to allow the Trustees to make a one-time $3,000,000.00 distribution from principal to Mr. Kearney, but only upon approval of the pending UCC Plan by the Bankruptcy Court.

7. The Conclusions of Law entered July 7, 2017, and the April 18, 2017, Order are incorporated herein.

8. The actions of the Trustees contemplated in "The Three Issues" are within the powers and responsibilities of the Trustees under the terms of the trust document.

9. The sum of $12,571,799.00 is, under the totality of the circumstances, a fair and reasonable purchase price for the Trust's shares of ARCO stock. This amount constitutes "fair market value" for the stock given the totality of the circumstances as addressed above.

10. The Trustees' acceptance of ARCO' s offer would be in keeping with their fiduciary duties.

11. The Trusts are modified to permit the one-time distribution of $3,000,000.00 of principal to Mr. Kearney as contemplated by the UCC Plan.

12. The distribution of the $3,000,000.00 to Mr. Kearney by the Trustees is proper and not a breach of their fiduciary duty.

13. The Trustees distribution of $3,000,000.00 from Trust principal to be paid to Mr. Kearney and then

immediately over to the UCC is in keeping with the Trustee's powers and duties and is not a breach of same.

14. The Trustees' performance of the acts encompassed in "The Three Issues," and each of those actions, are proper and appropriate actions for them to take under the totality of the circumstances.

15. The Trusts are hereby modified to add a provision applicable to Trusts B and C which states as follows:

> The Trustees are authorized on a one-time basis to distribute $3 million of principal to Kearney if the UCC Plan is confirmed by a Final Order of the Bankruptcy Court.

16. Any Findings of Fact hereunder more appropriately characterized or equally characterized as a Conclusion of Law shall be so characterized. Any Conclusion of Law which may be appropriately designated a Finding of Fact may also be so designated.

17. Any proposed Findings of Fact or Conclusion of Law not addressed herein shall be deemed denied.

18. A true and correct copy of these Findings and Conclusions should be provided to The Honorable David Thuma of the United States Bankruptcy Court.

IT IS SO ORDERED.

/s/ Alan M. Malott
HON. ALAN M. MALOTT
District Court Judge
[10-31-18]

Copies of the foregoing were e-mailed
to the following on October 31, 2018

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In addition, a true and correct copy hereof was also mailed via USPS 1st Class to:

Hon David T. Thuma
United States Bankruptcy Court
333 Lomas Blvd NW, #360
Albuquerque, NM 87102-2275

/s/ Susan L. Gibson
Susan L. Gibson, TCAA
Division XV

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

VICTOR P. KEARNEY, No. 17-12274 t11

Debtor.

OPINION

(Filed Feb. 28, 2019)

Before the Court is confirmation of the Unsecured Creditor Committee's ("UCC's") Second Plan of Reorganization (the "UCC Plan"). The Court held a final hearing on confirmation on January 31 and February 1, 2019. Having considered the evidence in the record and the arguments of counsel, the Court finds and concludes that the UCC Plan complies with § 1129[1] and should be confirmed.

I. FACTS

The Court finds the following facts:[2]

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[1] Unless otherwise noted, all statutory references are to 11 U.S.C.

[2] The Court took judicial notice of the docket in the main case and all adversary proceedings. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (holding that a court may *sua sponte* take judicial notice of its docket); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 8 (1st Cir. 1999) (same).

Creation of the Mary Pat Kearney Trusts

Benjamin and Pat Abruzzo developed the Sandia Peak Ski Area and the Sandia Peak Tramway, both owned by their company Alvarado Realty Company ("ARCO"). The Abruzzos died in a plane crash in 1985, survived by their children Louis, Benny, Richard, and Mary Pat. The children took over management of ARCO after their parents' death.

Mary Pat Abruzzo married the Debtor in 1988, when she was 22 years old. She executed a last will and testament on July 8, 1988.

Mary Pat Kearney died in 1997, age 31. At the time of her death, she owned about 18.5% of ARCO's stock. Under her will, the stock was bequeathed to two testamentary trusts (together, the "MPK Trusts") for the benefit of the Debtor during his lifetime. Upon Debtor's death, the corpus of the trusts is to be distributed to Louis, Benny, and Rich Abruzzo or their children.[3] Ms. Kearney's will appointed Louis and Benny Abruzzo (the "Abruzzos") and Debtor as co-trustees of the MPK Trusts. Debtor has since resigned.

The State Court Action

Despite substantial distributions from the MPK Trusts (about $800,000 per year or $16,000,000 in total), relations between the Debtor and the Abruzzos soured. In 2013, the Debtor sued the Abruzzos in New Mexico state court, cause no. D-202-CV-2013-07676

[3] Richard Abruzzo died in December 2010.

(the "State Court Action"), alleging that they had breached their fiduciary duties by, inter alia, suppressing dividends paid by ARCO to the MPK Trusts.[4] The Abruzzos later filed a counterclaim for breach of fiduciary duty, to modify the trusts, and for other relief. The action was assigned to the Hon. Alan Malott.

Judge Malott presided over a five-day jury trial of Debtor's claims against the Abruzzos in June and July 2015. On July 6, 2015, Debtor rested his case[5] and the Abruzzos moved for a directed verdict.[6] Judge Malott directed a verdict dismissing Debtor's claims against the Abruzzos. Judge Malott made the following findings of fact in open court:

> There has been no substantial evidence that the Abruzzos in fact control ARCO. . . . . I see no evidence of actual control.
>
> I don't find that the Abruzzos misused any control they may have had in this circumstance. The totality on which the entire Plaintiff's case rests is if it's good for ARCO, it must be bad for Victor Kearney. That's not the law; that's not the evidence in this case.

---

[4] ARCO's policy was to dividend 70% of its profits and retain 30%.

[5] Debtor was scheduled to be cross examined on the afternoon of July 6, but failed to appear in court, complaining of medical problems.

[6] Part of the evidence upon which the Abruzzos relied, and which the Court finds significant, is that ARCO's dividend policy had been set before the Debtor married Mary Pat and had not changed after her death.

> . . . . [T]he Abruzzos' efforts on behalf of ARCO . . . have been . . . extremely successful. . . . The fact that the Abruzzos have run their company properly does not translate into a starvation or a partiality on behalf of . . . ARCO over and against the interest of either Mr. Kearney or the remainder beneficiaries. . . . The appropriate totality appears to be in this situation, a rising tide lifts all the boats.
>
> Kearney has made an increased distribution of over 800 percent through one of the worst recessions this country has ever seen. . . .
>
> The Abruzzos do not control the board. There is not a single incident in which it was shown they had their way or forced their agenda onto anyone else. . . .
>
> The fact that ARCO has grown as large over these last 15 years has . . . made the whole pie bigger and everybody's slice bigger. How that could translate to a reasonable jury into an award of damages of any particular amount, let along 7-some-odd million dollars, does not compute to the Court. . . .

The Abruzzos asked for attorney fees under N.M.S.A. § 46A-10-1004 ("In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award cost and expenses, including reasonable attorney fees, to any party. . . . "). On December 22, 2015, Judge Malott ruled that justice and equity required that the

Abruzzos recover $510,000 in fees, $35,700 in gross receipts tax, and $120,215.69 in costs. Judge Malott ordered the Debtor to pay 75% of these amounts, and the MPK Trusts to pay 25%.[7] The order contains the following:

> Plaintiff argues that Defendants should not be allowed to recover fees incurred in Defendants' opposition to his attempts to obtain corporate documents and information from ARCO, the separate, closely held, corporation involved in this matter but not a party hereto. A significant pillar of Plaintiff's case was his claim that his status as a Trustee and Life Income Beneficiary under his deceased wife's Trust entitled him to effect [sic] the management of ARCO from which the Trust's income flows. Another pillar was his claim that Defendants operated ARCO so as to profit ARCO more than the Trust and, therefore, to minimize income to Plaintiff. While Plaintiff was allowed to obtain some, but not all, the corporate information and documentation he sought, he was not successful in establishing his core charges that Defendants managed ARCO to his financial detriment. The fees incurred in context of the ARCO document discovery dispute are a reasonable and necessary part of this overall litigation.

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[7] Judge Malott clarified in a subsequent order entered on April 20, 2016, that the portion of fees paid by the MPK Trusts should "be paid to Defendants by the Trusts from its current principal holdings."

. . . .

> While there is no substantial evidence that Plaintiff brought this action without at least an honest belief in the merits of this argument, it is also indisputable that Plaintiff was, after two (2) years of litigation, not able to support his allegations with substantial evidence at trial. While Plaintiff believes he "had legitimate claims against the Defendants" which "survived vigorous summary judgment motions". . . . Plaintiff could not, and did not, prove those claims at trial.

On April 7, 2017, Judge Malott sanctioned Debtor $100,000, finding:

> Substantial evidence was adduced that Victor Kearney has engaged in significant dishonesty and made numerous false statements, both under oath and not, including but not limited to first claiming he and Mary Pat Abruzzo Kearney were domiciled in New Mexico at her death, then later claiming they were domiciled in Nevada; in his divorce proceedings, Mr. Kearney clearly falsely represented his income to gain an advantage in child support determination; in the first phase of trial in this case, Mr. Kearney testified that his obligations regarding state and federal income taxes were current when in fact he had not filed tax returns for a number of years.
>
> Substantial evidence was adduced that Mr. Kearney has also disobeyed and disregarded lawful Orders of this Court in this litigation including Orders directed at his

> discovery obligations as well as the specific Confidentiality Order, and verbal confidentiality instructions entered by the Court during the course of this litigation.
>
> Overall, Debtor has impressed the Court as an individual who bears no allegiance to the truth, but who will say whatever he thinks will achieve his goals. He has little or no credibility. Further, Debtor has repeatedly exhibited bad faith non-compliance with his discovery obligations throughout this litigation both generally and by failing to comply with specific discovery orders. In short, Debtor's conduct amounts to an affront to this particular Court and to the entire judicial process.

Judge Malott ordered that the sanction be deducted from distributions otherwise payable to Debtor from the MPK Trusts.

Over four days in April 2017, Judge Malott tried the Abruzzos' counterclaims. He issued extensive findings and conclusions on July 7, 2017, including:

> A trial on the merits was held on June 29, 30, July 1, 2, and 6, 2015.
>
> After testifying directly at trial, Mr. Kearney failed to appear for cross-examination and proffered a medical excuse which has never been substantiated in any manner.
>
> After the close of Mr. Kearney's case, the Court granted Defendants' motion for a judgment as a matter of law on [all claims].

The court granted the Defendants attorney's fees in the amount of $510,000 plus Gross Receipts Tax.

The court also awarded $120,215.69 in costs.

Mr. Kearney admitted that it is a violation of the Trusts' spendthrift clause to promise people payment from the Trusts.

Mr. Kearney's repeated violations of the Confidentiality Orders and attendant disclosure of both ARCO's discrete financial information as well as information about the Trust assets and operation was a breach of trust.

The record is replete with Kearney's repeated breaches of his duty as a trustee through self-dealing with third parties, improper disclosures of financial information, and attendant violations of the orders of this court, as well as the clear indication that future litigation will ensure [sic], notwithstanding his resignation as a trustee.

The court has already found that Mr. Kearney has significant credibility issues. Nothing at trial assuaged those issues.

Clear and convincing evidence exists that Mr. Kearney is unable to successfully manage his financial life on the trust distributions he receives, and is significantly in debt.

Mr. Kearney did not participate in a December 2016 mediation in good faith and should pay the full costs of the mediation.

The parties have reached a level of discord, distrust, and distaste such that it would be difficult or impossible for Louis Abruzzo or Benjamin Abruzzo to serve appropriately as Trustees, compensated or uncompensated, into the foreseeable future.

Kearney's conduct has resulted in a toxic relationship between the parties which adversely impacts the operation of the Trust and makes it difficult or impossible for Louis Abruzzo or Benjamin Abruzzo to effectively serve as Trustee.

Clear and convincing evidence exists that Mary Pat Abruzzo Kearney did not anticipate the facts and circumstances shown by the evidence of this case, and that modification of the Trust is appropriate under 46A-4-412 NMSA.

Good cause, upon clear and convincing evidence, exists for modification of the Mary Pat Abruzzo Kearney Trust, including but not limited to appointment of a Successor Trustee and establishment of directives for further administration of the Trust and its assets in a manner which will effectively protect all beneficiaries equally.

The Bankruptcy Case

Debtor filed this bankruptcy case on September 1, 2017, on the eve of a hearing in the State Court Action on a potential successor trustee for the MPK Trusts.

The United States Trustee's office appointed an unsecured creditors' committee ("UCC") on November 22, 2017. On December 21, 2017, the Court granted Debtor's motion to extend the "exclusivity" period of § 1121(c)(3) until June 12, 2018. Debtor and the UCC attempted over the next several months to agree on the terms of a plan.

On April 2, 2018, Debtor filed a plan of reorganization and a motion to further extend his exclusivity period. The UCC, unsuccessful in negotiations with the Debtor, objected. The Court denied the motion.[8]

The UCC filed a competing plan of reorganization on July 12, 2018.[9] The UCC Plan was premised on certain changes to the MPK Trusts, namely:

> 1. That ARCO pay the sum of $12,571,799 to the MPK Trusts in exchange for all ARCO shares held by the trusts;
>
> 2. That the Trustees pay $3,000,000 to Debtor, who then delivers it to the Creditor Trustee (as defined in the UCC Plan); and
>
> 3. The Allowed Priority Tax Claim of the IRS of $350,890.55 be paid over a period of five years from the Petition Date-on or before September 1, 2022-in February and August of

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[8] Debtor appealed the denial, the first of three appeals Debtor has filed in this case, in addition to appealing Judge Malott's rulings in the State Court Action, and the threatened appeal of this confirmation opinion and order.

[9] The Debtor also continued to file amended plans, the last of which, his seventh amended plan, was filed January 22, 2019.

> each year, from the net income that would otherwise be distributable to Mr. Kearney from the MPK Trusts.

(the "Trust Modifications"). The Trust Modifications required approval of the State Court. The UCC Plan settled all Debtor and estate claims against ARCO, the Abruzzos, and others in exchange for the $3,000,000.[10]

The Debtor reacted to the UCC Plan with outrage and threats. Debtor argued that the UCC, the Abruzzos, ARCO, and others were engaged in an illegal scheme to violate state trust law and deprive him of his rights under the MPK Trusts. He accused many people of breaching their fiduciary duties to him by pursuing the UCC Plan. He sued the Abruzzos for breach of duty. Debtor's response showed his mistaken belief that only he should be allowed to control the reorganization process, whatever the cost, delay, or acceptability of payment proposals.

On August 30, 2018, the Abruzzos filed a motion for relief from stay, seeking permission to ask Judge Malott for a hearing on the Trust Modifications. The Court granted the motion. Judge Malott provided an October 3, 2018, hearing date.[11] The Abruzzos then filed a supplemental stay relief motion so the hearing could proceed. The Court granted the stay motion on September 18, 2018, over Debtor's objection.

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[10] In contrast, the cornerstone of all Debtor's plans is pursuit of litigation against ARCO, the Abruzzos, and others.

[11] The original hearing date was September 27, 2018, but was moved at Debtor's request.

State Court Review of the Trust Modifications

On October 2, 2018, the Debtor removed the State Court Action to the United States District Court for the District of New Mexico, alleging diversity of citizenship. The action was assigned to Judge Judith C. Herrera. She promptly transferred the action to this Court, holding:

> Kearney's diversity allegations are frivolous. The notice of removal claims, for the first time, that Kearney is a Nevada citizen. However, he filed the original lawsuit against the Abruzzos in New Mexico's Second Judicial District Court in 2013 and the New Mexico bankruptcy case in 2017. . . . Kearney's attempt to remove the actions directly to this Federal District Court appears to be a sham litigation tactic to avoid a ruling by the Bankruptcy Court.[12]

The Court granted the Abruzzos' motion to abstain and remand on October 11, 2018. Judge Malott rescheduled the hearing on the Trust Modifications for October 23, 2018, and the hearing took place on that date. By an order entered October 31, 2018, Judge Malott approved the Trust Modifications, finding, inter alia:

> The evidence which has developed in this matter since June 2015 is clear and

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[12] Michelle Daskalos, Debtor's ex-wife, filed for divorce in 2015. In their November 18, 2015, marital settlement agreement, Debtor stated under oath that he had been a New Mexico resident more than six months before the petition was filed.

convincing that Mr. Kearney initiated this litigation with the purpose of damaging the Abruzzos individually and to foster his apparent plan to force a hostile takeover of the Abruzzo interests and the assets of ARCO by gaining access to financial and in-house information and documentation through discovery which he could not have accessed otherwise, and then disseminating such information to third parties in repeated violation of the Court's Orders and admonishments and in spite of significant monetary sanctions. . . .

Article XVI [of Mary Pat Kearney's will] . . . provides the Trustee may engage in the sale or disposition of Trust assets "irrespective of the occupancy by the same person of dual positions, to deal with itself in its separate, or any fiduciary, capacity."

. . . In this case, the terms of the MPK Testamentary Trust specifically waive the Trustees' conflicts of interest which may exist regarding "buying and selling assets" of the Trust. Article XVI (16).

Further, the Court approves the transactions contemplated by "The Three Issues," as more specifically detailed herein, because those actions, and each of them, are fair, reasonable, and proper under the totality of the circumstances and are ultimately in the best interests of all the beneficiaries.

It takes no speculation to conclude that Mr. Kearney's litigious approach has an adverse effect on the Trust, the operations of

ARCO – the stock of which is the Trust corpus – and the fair market value of ARCO stock. After all, who wouldn't [sic] want to buy stock in a small corporation facing protracted litigation – described by Bankruptcy Court Judge Thuma as rife with "difficulties and red flags" as to both the claims and Kearney's motivations in bringing them – with attendant expense and diversion of the corporation's energy and assets?

The Trustees are fulfilling their fiduciary duty in attempting to support the UCC Plan which provides a solution to Mr. Kearney's financial problems rather than exacerbating those problems as the Kearney Plan does.

ARCO shareholders have willingly sold, at arm's length, their shares to ARCO since ARCO's creation thirteen years ago. Sales by shareholders of ARCO's predecessors at arm's length date back many years before that. Presently, ARCO has bought from willing sellers their minority interests at $79,000.00 per share. $79,000.00 per share is the same price that the UCC Plan proposes that ARCO purchase the ARCO shares from the Trusts.

Mr. Kearney and others (using confidential information) proposed purchasing a controlling interest of ARCO shares for $110,000.00 per share. A 35% discount ($110,000.00 – $38,500.00 = $71,500.00) is a reasonable discount for these minority shares because the ARCO shares held by the Trusts

are a minority interest and restricted by the MPAK Trust and ARCO by-laws.

At the hearing on October 23, 2018, Mr. Kearney proffered without objection two (2) exhibits which he characterized as "Offers" to purchase ARCO's stock from the Trust. These were not offers, but were indications of interest at most. However, they are illustrative of the fair market value of the ARCO stock at issue.

The September 24, 2018, letter of interest from MHR Fund Management LLC purports to offer $17,500,000.00 for the Trust's ARCO stock. However, in addition to numerous reservations and contingencies which might affect the ultimate price or the efficacy of the deal entirely, that letter goes on to demand "Stalking Horse" status for MHR which would impose fees, expenses, and related payments that would ultimately lower the net price of the stock significantly.

The September 24, 2018, letter of interest from Mexcap similarly contains significant contingencies and reservations which might prevent the deal from ever occurring and also demands "Stalking Horse" status for Mexcap. While MHR's letter does not specify its fees, etc., Mexcap specifically requires, inter alia, $500.00 per hour professional and administrative fees, a "breakup fee" of $150,000.00, a "topping fee" of one-third of the difference between the ARCO offer of $12,571,799.00 and

the amount Mexcap actually ultimately pays for the stock.

Assuming Mexcap's figure of $16,500,000 for the ARCO stock, those fees and expenses would significantly reduce the ultimate share price; the "breakout" and "topping fees" alone would account for some $1,500,000.00.

Given the contingencies, delays, and "stalking horse" fees, the price per share which might speculatively come from further arrangements with MHR or Mexcap is not substantially greater than the non-contingent, unencumbered and prompt purchase price offered by ARCO.

There have been no other expressions of interest.

There have been no actual offers to purchase except the pending offer from ARCO. The proposed amount of $12,571,799.00 at $79,000.00 per share owned by the Trusts is the fair market value of the ARCO stock owned by the Trusts.

The ARCO re-purchase offer of $12,571,799.00 is fair and reasonable under the totality of the circumstances giving consideration to the minority nature of the stock interest, the restriction on sale due to ARCO's right of first refusal, and the negative effect on the attractiveness of investing in ARCO caused by Mr. Kearney's continuing litigation, and plans for further litigation.

Clear and convincing evidence exists that the settlor Mary Pat Abruzzo Kearney did not anticipate the level of discord, distrust, acrimony, damages, and potential damage that exists related to Mr. Kearney's distributions from the Trusts based upon the ARCO dividends paid to the Trusts.

Clear and convincing evidence exists that the continued retention by the Trusts of the ARCO stock will lead to further strife which is directly contrary to the anticipation of and desires of the settlor Mary Pat Abruzzo Kearney.

Because clear and convincing evidence exists that Mary Pat Abruzzo Kearney did not anticipate the retention of the ARCO stock in the Trusts would cause the foregoing, modification of the Trusts is appropriate under §46A-4-412.

The payment by the Trustees of $3,000,000.00 from principal to Mr. Kearney, with him then being required to deliver it to the Creditor Trustee as proposed, is a proper action by the Trustees and is in accordance with their fiduciary duties to Mr. Kearney and to all beneficiaries.

The Trusts should be modified to allow, on a one-time basis, the payment by the Trustees of the $3,000,000.00 from principal to Mr. Kearney as provided in the Trust Modifications.

The transactions contemplated by "The Three Issues" are actions within the scope of the Trustees' powers and responsibilities as authorized by The MPK Testamentary Trust.

The transactions contemplated by "The Three Issues" are approved by the Court as appropriate and proper under the totality of the circumstances and are in the best interests of all the beneficiaries, including the remaindermen.

The transactions contemplated by "The Three Issues" are not voidable transactions under Section 46A-8-802.

The MPK Testamentary Trusts should be modified, and hereby are so modified, to allow the Trustees to make a one-time $3,000,000.00 distribution from principal to Mr. Kearney, but only upon approval of the pending UCC Plan by the Bankruptcy Court.

The Confirmation Hearing

On November 13, 2018, the Court approved disclosure statements for the UCC Plan and the Debtor's sixth amended plan and set final confirmation hearings for both on January 31, 2019.

Plan voting ended on December 18, 2018. Unsecured creditors voted against Debtor's plan and in favor of the UCC Plan.[13]

Because general unsecured creditors voted against Debtor's plan, it appeared to violate the "absolute priority rule" of § 1129(b)(2)(B)(ii). *See In re Stephens*, 704 F.3d 1279, 1286-87 (10th Cir. 2013). The Court had asked Debtor's counsel about this potential problem for months. On January 22, 2019, Debtor filed a seventh amended plan which proposed, for the first time, to transfer all of Debtor's assets to a "plan administrator" and pay interest on unsecured claims. On January 23, 2019, the Court ruled that plan could not be considered for confirmation on January 31, 2019, because the changes were too significant.[14]

The Court held a confirmation hearing on the UCC Plan on January 31 and February 1, 2019. Objections were filed by the Debtor, Ms. Daskalos, Wells Fargo, the IRS, New Mexico Taxation and Revenue Department

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[13] Debtor plan: 71% of votes were against; 96% of dollars voted were against; UCC Plan: 84% of votes were in favor; 97% of dollars voted were in favor.

[14] Debtor's latest plan has serious problems. The main funding sources are litigation recovery and payments from the MPK Trusts. If the litigation has little or no net value, which to the Court appears likely, then it would take decades to repay unsecured creditors, if they were ever paid at all. Further, there would be no way for creditors to collect what they are owed because of the spendthrift provision of the trusts. Finally, the restrictions on Debtor's spending was loose and vague, leading to the possibility that he would not have to pay much to his creditors from trust distributions.

("NMTRD"), and U.S. Bank. By a stipulation reached just before the confirmation hearing but not filed until February 21, 2019 (the "Amendment Stipulation"), all objections except those of the Debtor and Ms. Daskalos were resolved.

Louis Abruzzo, ARCO's president, testified that ARCO would borrow $8.6 million and use $4.0 million of its own cash to buy the MPK Trusts' ARCO stock. Evidence showed that ARCO has excellent prospects of borrowing the money. Peter Generis, Vice President of CBRE Capital Markets, testified that ARCO would almost certainly qualify for the proposed loan and could easily borrow up to $9.85 million if it wanted to.[15]

The Abruzzos and ARCO are motivated to complete the Trust Modifications so their ties with Debtor are severed. They view the Trust Modifications as the only way to prevent Debtor from continuing to sue them *ad infinitum*. The Court finds that this view is reasonable. The Court further finds that once its confirmation order become final and non-appealable, ARCO and the Abruzzos will complete the Trust Modifications transactions diligently.

UCC members testified that they formulated the UCC Plan to try to pay unsecured creditors as much as possible. They testified that they did not view the Debtor's plan as providing any realistic prospect of payment. The Court finds the testimony of the UCC members credible. One testifying member, Betty

[15] ARCO applied for the loan before the confirmation hearing.

White, was or is a friend of the Debtor. The other testifying member, Nick Tarlson, was Debtor's expert witness in the State Court Action. The UCC Plan was not motivated by hostility toward the Debtor, but because it was the best deal they could get.

Ms. White and Mr. Tarlson testified that shortly before the confirmation hearing they received phone calls from someone interested in buying their claims. The purpose was to take control of the UCC and force the withdrawal of the UCC Plan. The Court finds that Debtor's bankruptcy counsel was not aware of this skullduggery and strongly advised against it when it was disclosed. The Court also finds, however, that Debtor must have been aware of the plan, and likely spearheaded it, adding to an already long list of questionable or improper actions he has taken in the State Court Action and this bankruptcy case.[16]

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[16] These actions include: 1. Claiming that Mary Pat Abruzzo was a Nevada resident when she died; 2. Divulging confidential information obtained in the State Court Action to third parties, in violation of court orders; 3. Mediating in bad faith; 4. Failing and refusing to pay professional fees incurred in this case; 5. Failing to alter his expensive lifestyle or spending habits while a bankruptcy debtor; 6. Failing to appear and testify under oath in this case; 7. Changing his position about his state of residence in the State Court Action, his divorce case, this case, and the lawsuit he brought in Nevada; 8. Responding to the Court's order to pay professional fees by emptying his bank account; 9. Paying his home mortgage in violation of the automatic stay; 10. Changing his position about the value of his intellectual property; 11. Removing the State Court Action on the eve of trial; and 12. Filing a lawsuit in Nevada against the Abruzzos, ARCO, and others

Administrative Expenses

Throughout the case, Debtor has declined to pay professional fees. Besides an original $15,000 retainer, UCC counsel was not paid until the Court ordered Debtor to make a payment. The same misfortune befell Debtor's counsel. UCC counsel filed a Motion to Compel Payment on November 14, 2018. On December 6, 2018, the Court ordered Debtor to pay UCC counsel and Debtor's counsel $5,000 within seven days.

Debtor refused, stating that he did not have enough money to do so. Evidence presented at a final hearing on the motion to compel payment showed that after the UCC motion was filed, Debtor transferred a $60,306.00 to his ex-wife, paid $31,692.24 on his mortgage, and paid $61,513.64 to the IRS. Between November 14 and December 7, 2018, Debtor's bank account went from $173,000 to $16,700.

Professional fee applications filed in December 2018 indicate the following:

NM Financial Law:	$ 16,663.09;
Foley Gardere:	$ 1,087,082.00;
Domenici Law:	$ 57,922.00;
Myrle Schwalm:	$ 5,000.00;
Lain Faulkner:	$ 197,385.83;
Reid Collins & Tsai:	$ 4,222.32;
Walker & Associates:	$ 271,444.08;
Total fees charged to the estate:	$ 1,639,719.32

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alleging breach of duty, on the eve of a hearing in state court that would determine that issue.

II. DISCUSSION

A. §1129(a)(1). The Court finds and concludes that the UCC Plan complies with the applicable provisions of the Code. The objections discussed below are overruled.

1. Settlement of estate claims against the Abruzzos, ARCO, etc. Debtor argues that the proposed settlement of all of Debtor's and the estate's claims against ARCO, the Abruzzos, and others is not fair and equitable and is not supported by adequate consideration.

Fed. R. Bankr. P. 9019 provides that, after a hearing on notice to creditors, the court may approve a compromise or settlement. Generally, the court must determine whether the settlement is fair and equitable and in the best interests of the estate. *Woodson v. Fireman's Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir.1988); *LaSalle Nat'l Bank v. Holland (In re American Reserve Corp.)*, 841 F.2d 159, 161 (7th Cir. 1987). "To make this determination, the court should consider the probable success of the litigation on the merits, any potential difficulty in collection of a judgment, the complexity and expense of the litigation and the interests of creditors in deference to their reasonable views." *In re Kaiser Steel Corp.*, 105 B.R. 971, 976–77 (D. Colo. 1989), citing *In re The Hermitage Inn, Inc.*, 66 B.R. 71, 72 (Bankr. D. Colo. 1986). In so doing, the Court need not decide the numerous issues of law and fact raised by a compromise or settlement, "but must only 'canvass the issues and see whether the

settlement falls below the lowest point in the range of reasonableness.'" *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 640–41 (Bankr. S.D.N.Y. 2012); *In re Adelphia Comm. Corp.*, 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005) (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)). The Court need not "conduct a 'mini-trial'" but rather "only need be apprised of those facts that are necessary to enable it to evaluate the settlement and to make a considered and independent judgment." *In re Dewey*, 478 B.R. at 640-41; *Adelphia*, 327 B.R. at 159.

In *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997), the Tenth Circuit Bankruptcy Appellate Panel adopted the following four-factor test for evaluating the proposed settlements: (1) the chance of success on the litigation on the merits; (2) possible problems in collecting the judgment; (3) the expense and complexity of the litigation; and (4) the interest of the creditors in deference to their reasonable views. *See In re Southern Medical Arts Cos., Inc.*, 343 B.R. 250, 256 (10th Cir. BAP 2006) (citing *Kopexa*). The Court evaluates the *Kopexa* factors as follows:

1. The chance of success of the litigation on the merits.	Favors the settlement. The Court finds the Debtor has little chance of obtaining any substantial net recovery through continued litigation. To date, his claims against the Abruzzos and ARCO have cost him nearly two million dollars in attorney fees, costs, and sanctions. He is not a sympathetic plaintiff. The evidence

	presented in his first trial supports Judge Malott's finding that neither ARCO nor the Abruzzos breached any duties to him, the MPK Trusts, or any other party. Debtor's first, best chance for a litigation recovery was in his first lawsuit; he lost badly.
2. Possible problems in collecting the judgment.	Does not favor the settlement. ARCO and the Abruzzos appear to be highly solvent and able to respond to an adverse judgment.
3. The expense and complexity of the litigation.	Favors the settlement. The litigation Debtor wishes to bring against the Abruzzos, ARCO, and others would be expensive, even though Debtor's new law firm would take the case on a contingent fee. In the State Court Action, Debtor had to pay his counsel (which he has yet to do), the Abruzzos' counsel, costs, and a $100,000 sanction.
4. The interest of the creditors.	Favors the settlement. The general unsecured creditors do not support further litigation. They voted overwhelmingly against Debtor's litigation plan, and overwhelming for the UCC settlement plan. If the Court were to allow Debtor to proceed with his wished-for

	litigation, it would be going against the considered choice of the creditor body.[17]

Overall, the *Kopexa* factors weigh heavily in favor of the settlement.

The Court finds that the proposed settlement is supported by adequate consideration. The litigation to be settled is of questionable value. It may be worth nothing or less than nothing. In exchange for the releases, ARCO is borrowing money, redeeming $12.6 million of its stock, and releasing its claim against the Debtor. The Abruzzos, including Nancy Abruzzo, are releasing their claims against the Debtor; lastly, remainder beneficiaries to the MPK Trusts are giving up $3,000,000 plus their pro rata share of taxes.

The Court finds that the proposed settlement is fair and equitable to the Debtor, his estate, and his creditors, and is supported by adequate consideration.

2. Treatment of Ms. Daskalos' Claim Complies With the Code's Priority Scheme. Debtor is obligated to pay his ex-wife Michelle Daskalos $16,000 a month in

[17] It is significant that several large creditors who support the UCC Plan and voted against the Debtor's plan were intimately involved in the State Court Action. Kevin Yearout, Debtor's biggest creditor, helped fund the litigation and paid some attorney fees. Creditor Nick Tarlson, a member of the UCC, was one of Debtor's expert witnesses. Both men are sophisticated and knowledgeable. They understand the nature and implications of Debtor's resounding defeat in the State Court Action and believe that more litigation is not in their best economic interests.

alimony and child support. The UCC Plan proposes to pay any pre-petition claim in full on the Effective Date.[18] Any post-petition amounts due would be a non-dischargeable obligation of Debtor.

Ms. Daskalos argues that the UCC Plan will not leave Debtor with enough income to pay her domestic support obligation. The Court overrules the objection. With the Trust Modifications, the MPK Trusts will have about $8,000,000 to invest. Assuming a 5% annual return, the trusts would be able to pay Debtor about $400,000 a year. The domestic support obligation to Ms. Daskalos is $192,000 per year. Priority tax claims total $436,000, or $109,000 per year for four years. The Debtor's domestic support obligation payments are tax deductible, so Debtor's annual taxable income would be about $208,000. At a 40% tax rate, Debtor's trust fund income would be enough to pay Ms. Daskalos and the taxing authorities, with about $16,000 left over. After four years, that amount will increase to about $125,000 per year. In the meantime, Debtor may have to ask the divorce court to reduce his support obligation, or he may have to get a job, or both. In any event, there will be enough money to pay Ms. Daskalos.

Ms. Daskalos fails to appreciate that Debtor's current financial situation is very poor. Debtor owes about $8,600,000 in pre-petition debt and $1,600,000 in post-petition debt. If the case were dismissed, creditors would soon get judgments and start garnishing

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[18] Ms. Daskalos did not file a proof of claim.

Debtor's bank accounts. Debtor squandered his fortune and owes more than he can repay. The UCC Plan benefits Ms. Daskalos because it discharges his debt, substantially increasing his ability to pay alimony and child support. Confirmation of the UCC Plan will benefit Ms. Daskalos, not harm her.

B. §1129(a)(2).

The Court finds and concludes that the proponent of the plan has complied with the applicable provisions of Title 11.

C. §1129(a)(3).

The Court finds and concludes that the UCC Plan has been proposed in good faith and not by any means forbidden by law. The objections discussed below are overruled.

1. The Plan Does Not Violate New Mexico Spendthrift Trust Law. Debtor argues that the Court cannot confirm a plan of reorganization that uses assets from a spendthrift trust in violation of state law and the Code. The argument misses the mark. The UCC Plan does not improperly reach assets protected by a spendthrift trust because the MPK Trusts were modified by Judge Malott. His approval of the Trust Modifications means that the proposed plan distributions do not violate state law, the spendthrift trust provisions, or the Code.

2. Good Fath; No Means Forbidden by Law. Debtor argues that the UCC Plan was not proposed in good faith and contains provisions forbidden by law. This argument has no merit. A strong argument can be made, and the Court believes, that the UCC Plan is in the Debtor's best interest. He will get a bankruptcy discharge. $3,000,000 will pay his debts of more than $8,600,000. He will no longer be able to waste time and money pursuing questionable litigation against his in-laws. He may be forced for a time into gainful employment, which might not be a bad thing. It is time for him to move on. While Debtor cannot see that, it is obvious to most others. After four years or so of reasonable belt-tightening, Debtor can live post-bankruptcy with a fresh start and the prospect of a healthy lifetime income most people would consider a godsend. The Plan was proposed and developed in good faith.

3. The Abruzzos Did Not Breach Their Duties by Proposing the Trust Modifications. Debtor also argue that the Abruzzos breached their fiduciary duties by promoting the UCC Plan. Judge Malott considered and overruled the argument. In his October 31, 2018, ruling he found:

> The Trustees are fulfilling their fiduciary duty in attempting to support the UCC Plan which provides a solution to Mr. Kearney's financial problems rather than exacerbating those problems as the Kearney Plan does.

The Court agrees with Judge Malott that the Abruzzos did not breach their duties to the Debtor by proposing and obtaining approval of the Trust Modifications.

D. §1129(a)(4)-(8).

The Court finds and concludes that the UCC Plan complies with this §§ 1129)(a)(4), (5), (7), and (8). The Court finds and concludes that § 1129(a)(6) does not apply. No party argued that the UCC Plan violated any of these subsections.

E. §1129(a)(9).

The Court finds and concludes that the UCC Plan complies with § 1129(a)(9), which deals with the payment of priority claims. The objections discussed below are overruled.

1. IRS Priority Tax Claim. Debtor argues that the Plan violates § 1129(a)(9) because it pays the IRS priority tax claim over five years while general unsecured claims get paid on the Effective Date. The argument fails because, inter alia, the IRS has agreed to its treatment. Section 1129(a)(9) provides: "Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim. . . . " The Amending Stipulation resolved this objection.

2. Wells Fargo. Wells Fargo objected to its treatment as the Class 3 creditor. The Amending Stipulation also resolves this objection, as well as the objection filed by U.S. Bank.

F. §1129(a)(10).

The UCC Plan complies with this Code section. Class 6 (general unsecured claims) is impaired and voted to accept the UCC Plan.

G. §1129(a)(11).

The Court finds and concludes that the UCC Plan complies with § 1129(a)(11). The Debtor's feasibility objections, discussed below, are overruled.

Section 1129(a)(11) requires that confirmation of a plan not be "likely to be followed by liquidation, or the need for further financial reorganization, of the debtor." 11 U.S.C. § 1129(a)(11); *In re Multiut Corp.*, 449 B.R. 323, 347 (Bankr. N.D. Ill. 2013). While the plan proponent need not demonstrate that a plan carries a guarantee of success, the plan proponent must offer concrete evidence of the plan's feasibility. *Id.* "The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promises creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *In re Pikes Peak Water Co.*, 779 F.2d 1456, 1460 (10th Cir. 1985). *See also In re D & G Investments of West Florida, Inc.*, 342 B.R. 882, 886 (Bankr. M.D. Fla. 2006); *In re Brandywine Townhouses, Inc.*, 524 B.R. 889, 892 (Bankr. N.D. Ga. 2014).

1. Likelihood of Judge Malott Being Reversed. The Debtor argues that the UCC Plan is a visionary scheme because Judge Malott's approval of the Trust

Modifications will be reversed on appeal. The Court will evaluate the possibility of a reversal. *See, e.g., In re Harbin*, 486 F.3d 510, 518-20 n.7 (9th Cir. 2007) (the bankruptcy court has an obligation under §1129(a)(11) to consider the likelihood of a pending appeal and the impact of a successful appeal on the plan of reorganization).

The Court finds and concludes that Judge Malott's ruling likely will be affirmed on appeal. His October 31, 2018, ruling was a continuation of, and in some ways a culmination of, years of litigation in the State Court Action. To consider the proposed Trust Modifications, Judge Malott took new evidence and reviewed evidence from earlier trials and hearings.

Debtor argues that "there is no law supporting the state court's findings and conclusion allowing the Trustees to modify the Trusts without the Debtor's consent . . . " That is not true. Judge Malott's decision rests on clear statutory authority, on a reasonable interpretation of Ms. Kearney's will, and upon well-grounded findings of fact.

Judge Malott held, and this Court agrees, that the "powers and discretion granted the Trustees could not be more broad than as stated in Mrs. Kearney's Will." The will provides the Trustee "absolute discretion" to manage the Trust assets including the power "to sell or dispose of . . . any property, real or personal, constituting a part of . . . the Trust estate . . . upon such terms and conditions as it may deem best."

A trustee's discretion is tempered by New Mexico's Uniform Trust Code,[19] which allows beneficiaries to avoid transactions involving conflicts of interest unless "the conflict is authorized by the terms of the trust." N.M.S.A. § 46A-8-802(B) and (C). Here, Ms. Kearney's will waived the Abruzzos' conflicts of interest regarding "buying and selling assets" of the Trust. The Court therefore agrees with Judge Malott that the MPK Trusts' sale of stock to ARCO is not a voidable conflict of interest. Approval of the transaction over a conflict of interest objection is likely to be affirmed on appeal.

Judge Malott's determination that the proposed sale price of ARCO stock for $79,000 per share is also likely to be affirmed. Malott noted evidence of a recent sale of ARCO stock from willing sellers for the exact same price. Further, the two "offers" proffered by the Debtor came with significant conditions that not only reduced the actual final value of the offers but made the offers non-binding. Given that ARCO's offer was the only binding one, combined with recent history of arms-length sales for the same price, the Court finds that Judge Malott's ruling that the price is fair is likely to be upheld on appeal.

Judge Malott's one-time modification of the MPK Trusts under N.M.S.A. § 46A-4-412 also is likely to be affirmed. § 46A-4-412 provides:

> A. The court may modify the administrative or dispositive terms of a trust or terminate the trust if it is established by clear and

[19] N.M.S.A. § 46A-1-101 et seq.

> convincing evidence that there are circumstances not anticipated by the settlor and modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
>
> B. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

There is support in the record for Judge Malott's finding that Ms. Kearney's foremost goal was preserving a good relationship with her brothers. There also is abundant evidence that Ms. Kearney could not have anticipated her husband's obsession with suing her brothers, nor that the trusts she created for his well-being would become his instruments to bludgeon them and the family business with endless, fruitless litigation.

The Trust Modifications will prevent further fighting while continuing the goal of providing economic protection for the Debtor that the spendthrift provision provides. The Court holds that Judge Malott's modification of the MPK Trusts is likely to be upheld on appeal.[20]

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[20] Judge Malott's decision is also consistent with § 46A-4-412(B). The level of acrimony, litigation, and expense generated by the MPK Trusts' ownership of ARCO stock, combined with Debtor's ceaseless desire for more litigation, would justify a modification. The status quo renders the Trusts impracticable and wasteful, and impair trust administration.

Debtor also argues that Judge Malott committed reversible error by hearing the proposed Trust Modifications in the State Court Action rather than a new proceeding. The Court disagrees with this argument. When the Abruzzos filed their counterclaim in the State Court Action on August 14, 2015, they sought significant modifications to the MPK Trusts. In their second amended counterclaim, filed November 30, 2016, the Abruzzos asked for the following relief:

> Defendant Co-Trustees request the modification or the termination for the existing Trusts and distribution of the assets based on Mr. Kearney's life expectancy and the appropriate Internal Revenue Service calculations. This Court should enter an order terminating or modifying the Trusts and creating a new trust for Mr. Kearney's interests with appropriate spendthrift, bankruptcy, and other restrictions on all amounts received by Mr. Kearney.

Judge Malott's July 7, 2017 Findings of Fact and Conclusions of Law, Conclusion #12, states: "Trust Modifications shall be determined in a separate proceeding scheduled for September 5, 2017." The hearing was stayed by Debtor's bankruptcy petition. Modification of the MPK Trusts has been a live issue in the State Court Action for years.

Further, there is no prejudice to the Debtor having the matter heard in the State Court Action rather than a new action. The judge was intimately familiar with the facts, had presided over eight or nine days of trial

and many hearings, and had taken a great deal of evidence. Hearing the proposed Trust Modifications in the State Court Action made every kind of sense.

2. Closing the Trust Modification Transactions. Debtor argues that the UCC Plan is not feasible because ARCO plans to borrow $8,500,000 to finance the stock redemption from the MPK Trusts, and there is no guarantee the financing will materialize. The Court overrules this argument. The uncontroverted testimony is that ARCO has $4,000,000 in cash on hand, can easily borrow $8,500,000 to close the proposed transactions. ARCO will not close the transaction until a confirmation order becomes final and non-appealable. That likely will cause delay. However, the Court understands ARCO's and the Abruzzos' wish for finality before closing the Trust Modifications, given the history of this case and the State Court Action. In addition, waiting until all appeals have been exhausted means that there will be no risk of equitable mootness, about which the Debtor apparently is concerned.[21]

3. Disclosure of ARCO's Intent to Borrow Money to Fund the Stock Purchase. Debtor argues that the UCC should have disclosed that ARCO intended to borrow $8.6 Million to fund the stock redemption, and that the failure to do so taints the confirmation process. The Court overrules this argument. The evidence is that ARCO is a very sound business with substantial

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[21] See Judge Fouratt's Order Denying Emergency Motion for Stay Pending Appeal, entered October 19, 2018 in 1:18-cv-00888-JB-GJF.

ability to borrow more than $8.6 million if necessary. Louis Abruzzo testified that ARCO could pay the entire purchase price in cash if necessary. Nick Tarlson testified that ARCO's creditworthiness stands in stark contrast to the Debtor's. All things considered, the Court does not find that ARCO's decision to borrow part of the purchase price rather than pay cash is material and needed to be disclosed.

H. § 1129(a)(12)-(16).

The Court finds and concludes that the UCC Plan complies with this §§ 1129(a)(12), (14), (15), and (16). The Court finds and concludes that § 1129(a)(13) does not apply. No party argued that the UCC Plan violated any of these subsections.

III. CONCLUSION

The UCC Plan complies with § 1129. The Debtor's and Ms. Daskalos' objections to the UCC plan lack merit and are overruled. The Court will enter a separate confirmation order.

/s/ David T. Thuma
Hon. David T. Thuma
United States Bankruptcy Judge

Entered: February 28, 2019

Copies to: counsel of record

NOT FOR PUBLICATION*

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE VICTOR P. KEARNEY, Debtor.	BAP No. NM-19-010 Bankr. No. 17-12274 Chapter 11
VICTOR P. KEARNEY, Appellant, v. KEVIN YEAROUT, UNSECURED CREDITORS COMMITTEE, UNITED STATES TRUSTEE, and LOUIS ABRUZZO and BENJAMIN ABRUZZO, Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C, Appellees.	OPINION (Filed Dec. 4, 2019)

Appeal from the United States Bankruptcy Court for the District of New Mexico

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8026-6.

Before **CORNISH**, **ROMERO**, and **LOYD**,** Bankruptcy Judges.

LOYD, Bankruptcy Judge.

Chapter 11 debtor Victor Kearney appeals the New Mexico Bankruptcy Court's order confirming the chapter 11 plan of reorganization proposed by the unsecured creditors' committee in his case. Determining the Bankruptcy Court did not err in confirming the plan of reorganization we AFFIRM.

I. Factual Background

Victor Kearney (the "Debtor") married Mary Pat Abruzzo in 1988. Mary Pat's parents developed and ran a ski resort and tramway near Albuquerque, New Mexico. The Abruzzo's operated the ski resort and tramway under a company called Alvarado Realty Company. Mary Pat and her three brothers, Louis, Benny, and Richard Abruzzo managed Alvarado Realty Company since their parents' deaths in 1985.

Mary Pat owned approximately 18.5 percent of Alvarado Realty Company's stock. Mary Pat died in 1997 at the age of 31. Her will set up two testamentary trusts for the benefit of her brothers and the Debtor

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** Honorable, U.S. Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

during his lifetime (the "Trusts"). The Trusts contained a spendthrift provision preventing the Debtor from assigning his interest in the Trusts' assets to creditors. Upon the Debtor's death, the remainder in the Trusts was to be divided between Louis, Benny, and Richard Abruzzo, or their surviving children. Richard died in 2010. Mary Pat's will appointed Louis, Benny (the "Brothers"), and the Debtor as co-trustees of the Trusts.

Over the years, the Trusts distributed approximately $800,000 per year or $16,000,000 total to the Debtor. However, the Debtor and the Brothers did not have a good relationship. Eventually in 2013, the Debtor sued the Brothers for breach of fiduciary duty as co-trustees of the Trusts in New Mexico state court. The Debtor alleged the Brothers suppressed Alvarado Realty Company's dividend payments to the Trusts to his detriment as a beneficiary. The Brothers counterclaimed, alleging the Debtor breached his fiduciary duty as a co-trustee and asked the state court to modify the Trusts to appoint a successor trustee to replace the Debtor.

At the conclusion of a trial on the Debtor's claims, the state court denied all of the Debtor's allegations and ordered him to pay the Brothers $510,000 in attorneys' fees and $155,915.60 in costs. The state court also sanctioned the Debtor $100,000, finding he lied under oath, failed to comply with discovery orders, and otherwise acted in a manner amounting to an affront to the entire judicial process.

The state court conducted a separate trial on the Brothers' counterclaims at which it determined the Debtor breached fiduciary duties owed to them as co-trustees and ordered that the Debtor be replaced as a co-trustee of the Trusts. The Debtor filed his chapter 11 bankruptcy petition on September 1, 2017, the day before the state court hearing on the appointment of a trustee to replace the Debtor.

The U.S. Trustee's office appointed an unsecured creditors' committee (the "Committee") on November 22, 2017. The Committee is made up of Brenda Johnson,[1] Nick Tarlson,[2] and Betty and Clayton White.[3] The Bankruptcy Court extended the Debtor's exclusivity period until June 12, 2018. The Debtor filed his third amended plan of reorganization on July 13, 2018. The Debtor then amended his plan of reorganization on August 13, 2018, August 29, 2018, November 16, 2018, and January 22, 2019.

When the Debtor filed his fifth amended plan of reorganization, he sought a further extension of the exclusivity period. The Bankruptcy Court denied the extension of the exclusivity period, opening the door for the Committee to file a competing plan of

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[1] Ms. Johnson is the Debtor's former assistant and is a creditor in the amount of $310,869 by way of two unsecured promissory notes.

[2] Mr. Tarlson is an accountant asserting a claim of $84,829 for professional fees.

[3] The Whites assert a claim of $123,476 by way of two promissory notes secured by a 10% interest in a now defunct limited liability company.

reorganization. The Committee filed a plan on July 12, 2018 and amended its plan on November 7, 2018. The Debtor proposed his seventh and final plan just nine days before the scheduled hearing on the Debtor's sixth amended plan and the Committee's amended plan.

The Committee's amended plan provided funding from the Trusts' assets pursuant to the state court's modification of the Trusts. The Committee's plan authorized Alvarado Realty Company[4] to purchase back shares of the company held by the Trusts for $12,571,799; paid a $3,000,000 distribution of the Trusts' assets to the Debtor, to be turned over to the bankruptcy estate in settlement of all claims held by the estate against the Brothers and Alvarado Realty Company; and paid the priority tax claim of the IRS over five years from net income otherwise distributable to the Debtor.[5]

The Bankruptcy Court granted relief from the automatic stay to pursue state court approval of the modification of the Trusts. One day before the state court was to hear the matter, the Debtor removed the action to federal district court for the District of New Mexico, alleging diversity of citizenship. The District of New

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[4] Alvarado Realty Company is a creditor in the bankruptcy case, asserting a claim of $184,503 for sanctions or compensatory losses for the Debtor's violation of a protective order in the state court matter.

[5] The Debtor refers to these three provisions of the plan and subsequent state court involvement as the "Three Actions." Appellant's Br. 8.

Mexico transferred the matter back to the Bankruptcy Court, concluding the attempt to remove the matter was a sham litigation tactic. The Bankruptcy Court determined it must abstain from issuing a ruling on modification of the Trusts and remanded the matter back to the state court. The state court approved the modification of the Trusts to allow for the sale of the Trusts' assets to Alvarado Realty Company and the $3,000,000 payment to the bankruptcy estate (the "Trust Modifications").

Upon the sale of the Trusts' assets to Alvarado Realty Company, the Committee's plan provided for the creation of a new trust, the trustee of which would hold and distribute payments to creditors. The Committee's plan provided that priority claims would be paid in full, all collateral encumbered by secured claims would be surrendered, and the unsecured claims would receive a pro rata distribution out of the $3,000,000 payment. Additionally, the Committee's plan provided the Debtor would release any claims he held against the Brothers, Alvarado Realty Company, and any other members of the Abruzzo family.

At the confirmation hearing, the Bankruptcy Court refused to allow the Debtor to go forward with his seventh amended plan, concluding creditors did not receive sufficient notice of the plan's amendments because it was filed on January 22, 2019, and the hearing occurred on January 31, 2019. The Committee and objecting creditors Wells Fargo Bank, N.A., the IRS, the New Mexico Taxation and Revenue Department, and US Bank resolved all objections to the Committee's

plan by stipulation. The Bankruptcy Court found the Committee's plan was proposed in good faith and was feasible, as the evidence suggested Alvarado Realty Company had sufficient funds and access to credit to complete the $12,600,000 purchase of the Trusts' shares in the company. The Committee members all testified they believed they would receive a higher pay-out on their claims under the Committee's plan than by any plan proposed by the Debtor. The Bankruptcy Court confirmed the Committee's plan over the Debtor and his ex-wife's objections. The Debtor filed a timely notice of appeal.

II. Jurisdiction & Standards of Review

"With the consent of the parties, this Court has jurisdiction to hear timely-filed appeals from 'final judgments, orders, and decrees' of Bankruptcy Courts within the Tenth Circuit."[6] An order confirming a chapter 11 plan of reorganization is final for the purposes of appeal.[7] Neither party in this case elected for this appeal to be heard by the United States District Court pursuant to 28 U.S.C. § 158(c). Accordingly, this Court has jurisdiction over this appeal.

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[6] *Straight v. Wyo. Dep't of Trans. (In re Straight)*, 248 B.R. 403, 409 (10th Cir. BAP 2000) (first quoting 28 U.S.C. § 158(a)(1), and then citing 28 U.S.C. § 158(b)(1), (c)(1) and Fed. R. Bankr. P. 8002).

[7] *In re Novinda Corp.*, 585 B.R. 145, 151 (10th Cir. BAP 2018) (citing *Interwest Bus. Equip., Inc.*, 23 F.3d 311, 315 (10th Cir. 1994)).

The Debtor argues the Bankruptcy Court deprived him of due process by denying review of his seventh amended plan and denying discovery related to the Committee's plan. Whether the Bankruptcy Court denied a party of his or her due process rights is a question of law reviewed *de novo*.[8] The Debtor also argues the Bankruptcy Court erred in confirming the Committee's plan as it lacked good faith and was not feasible and improperly settled the Debtor's claims against the Brothers. "Good faith for purposes of § 1129(a)(3) is ordinarily a finding of fact that we review for clear error."[9] A finding of fact is clearly erroneous if "it is without factual support in the record or if, after reviewing all of the evidence, [the court is] left with the definite and firm conviction that a mistake has been made."[10] Whether a plan is feasible pursuant to § 1129(a)(11) is also a finding of fact reviewed for clear error.[11]

Approval of a settlement agreement is reviewed for abuse of discretion.[12] The abuse of discretion standard requires the appellate court to give deference to the trial court's "evaluation of the salience and

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[8] *In re C.W. Mining Co.*, 625 F.3d 1240, 1244 (10th Cir. 2010) (citing *In re Gledhill*, 76 F.3d 1070, 1083 (10th Cir. 1996)).

[9] *In re Paige*, 685 F.3d 1160, 1178 (10th Cir. 2012) (citing *In re 203 N. LaSalle St. P'ship*, 126 F.3d 955, 969 (7th Cir. 1997)).

[10] *In re Ford*, 492 F.3d 1148, 1154 (10th Cir. 2007) (quoting *In re Miniscribe Corp.*, 309 F.3d 1234, 1240 (10th Cir. 2002)).

[11] *In re Paige*, 685 F.3d at 1187 (citing *In re Harbin*, 486 F.3d 510, 517 (9th Cir. 2007)).

[12] *In re Rich Glob., LLC*, 652 F. App'x 625, 630 (10th Cir. 2016) (unpublished) (quoting *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989)).

credibility of testimony, affidavits, and other evidence. We will not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record."[13]

III. Analysis

a. Whether the Bankruptcy Court violated the Debtor's due process rights

The Debtor argues the Bankruptcy Court denied him of his due process rights to make an argument and establish a record by (1) denying the Debtor's request to hold a confirmation hearing on his seventh amended plan; and (2) denying the Debtor the opportunity to conduct discovery on his objections to the Committee's plan.

"[D]ue process requires notice and a meaningful opportunity to be heard."[14] Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[15] The opportunity to be heard must be "at a *meaningful*

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[13] *United States v. Robinson*, 39 F.3d 1115, 1116 (10th Cir. 1994).

[14] *In re C.W. Mining Co.*, 625 F.3d 1240, 1244 (10th Cir. 2010) (citing multiple cases for this proposition).

[15] *In re Barton Indus.*, 104 F.3d 1241, 1245 (10th Cir. 1997) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

time and in a *meaningful* manner."[16] The Federal Rules of Bankruptcy Procedure[17] provide a party must provide creditors with twenty-eight days' notice of the time for filing objections to and date of the hearing on confirmation of a chapter 11 plan.[18]

The Debtor asserts the Bankruptcy Court erred by denying him the chance to proceed with his seventh amended plan at the January 31, 2019 confirmation hearing. However, the Debtor did not serve notice of his intent to file the seventh amended plan until January 22, 2019, only ten days before the confirmation hearing.[19] The Debtor failed to provide creditors and parties in interest with the required twenty-eight-days' notice of a confirmation hearing. While the Debtor argues the amendments to the plan were based on the Bankruptcy Court's concerns with his sixth amended plan, he was not excused from providing the required twenty-eight-days' notice.

The Debtor does not argue he lacked notice of the confirmation hearing or that the Bankruptcy Court deprived him of a meaningful opportunity to have his objections heard. Instead, the Debtor argues the Bankruptcy Court improperly limited the duration and scope of depositions of Alvarado Realty Company's

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[16] *In re C.W. Mining, Co.*, 625 F.3d at 1245 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).

[17] All references to Rule or Rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated.

[18] Fed. R. Bankr. P. 2002(b).

[19] *Notice of Debtor's Intent and Plan Amendment, in* Appellant's App. at 1662.

principals.[20] The Debtor argues the discovery rulings limited his ability to properly litigate objections to the Committee's plan. The Tenth Circuit provides

> an "inquiry into whether a party had a full and fair opportunity to litigate an issue often . . . will focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties."[21]

The Debtor's interest in the Trusts and discharge provided him with incentive to litigate, he was represented by counsel at the confirmation hearing and was able to call witnesses, cross-examine witnesses, and present other evidence.[22] Although the relationship between the Debtor and the Brothers was at the least strained at this point, the Bankruptcy Court did not prevent the Debtor from deposing Alvarado Realty Company's principals but only limited the scope to

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[20] The Debtor references the *Order Granting in Part and Denying in Part the Abruzzo Trustees' Motion for Protective Order and Motion to Quash Notice of Deposition* and the *Order on Debtor's Emergency Motion to Compel Deposition and Discovery Responses from ARCO*. Appellant's App. at 1493, 1722.

[21] *Salguero v. City of Colvis*, 366 F.3d 1168, 1174 (10th Cir. 2004) (quoting *Murdock v. Ute Indian Tribe of Unitah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992)).

[22] *See Atiya v. Salt Lake Cty.*, 988 F.2d 1013, 1019 (10th Cir. 1993) (holding a plaintiff had an opportunity to litigate at a hearing where she was represented by counsel, made opening and closing statements, called and cross-examined witnesses, and introduced evidence).

confirmation issues. The Debtor points to no other procedural limitations imposed by the Bankruptcy Court. Accordingly, he has failed to convince the Court that the Bankruptcy Court deprived him of the opportunity to litigate his confirmation objections or otherwise violated his due process rights.

b. The Committee's plan did not violate § 1129(a)(3)

The Committee's plan was proposed in good faith

The first requirement of § 1129(a)(3) mandates that a plan of reorganization be proposed in good faith. Recognizing the Bankruptcy Code does not define good faith, the Tenth Circuit advises "the test of good faith under § 1129(a)(3) focuses on whether a plan is likely to achieve its goals and whether those goals are consistent with the Code's purposes."[23] "[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a 'new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"[24]

The Debtor argues allowing the state court to consider the Trust Modifications in effect removed the issue of good faith from the Bankruptcy Court's purview.

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[23] *In re Paige*, 685 F.3d 1160, 1179 (10th Cir. 2012).

[24] *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

However, the Debtor does not assert the Bankruptcy Court erred in abstaining from considering the Brothers' requests to modify the Trusts and remanding the matter to the state court.[25] In its opinion and order remanding the Trust Modifications to the state court, the Bankruptcy Court delivered a lengthy analysis of the statutory framework regarding mandatory abstention.[26] The Bankruptcy Court concluded 28 U.S.C. § 1334 was the sole basis for federal jurisdiction but concluded it was required to abstain from hearing the modification issues pursuant to 28 U.S.C. § 1334(c)(2).[27] The Debtor does not contend the Bankruptcy Court erred in abstaining and we decline to address the issue.

The Bankruptcy Court found the Committee's plan to be in the Debtor's best interest as it discharged his liabilities, eliminating more than $8,600,000 in debt in exchange for payment of $3,000,000. The Bankruptcy Court's findings that the "Debtor can live post-bankruptcy with a fresh start" are in line with the

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[25] *Opinion, in* Appellant's App. at 3452.

[26] *Id.* at 3, *in* Appellant's App. at 3454 (quoting 28 U.S.C. § 1334(c)(2)).

[27] Although 28 U.S.C. § 1334(d) provides a decision to abstain is not reviewable by appeal to the court of appeals, this Court previously held it is not a "court of appeals" as referenced in 28 U.S.C. § 1334. *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997) ("[T]his Court is not the court of appeals referenced in sections 1334(c)(2) [the prior version of 1334(d)] and 1452(b)."). Thus, the Court is not automatically precluded from considering an appeal of a decision made under 28 U.S.C. § 1334(c).

central purposes of the Bankruptcy Code.[28] The Bankruptcy Court allowed the Debtor to propose at least six plans of reorganization in the year and a half since the petition date. The Debtor's proposed plans failed to garner enough creditor support to proceed with a confirmation hearing. Faced with the prospect of allowing the Debtor to further delay confirmation or confirm a plan proposed by the Committee, it does not appear the Bankruptcy Court erred in confirming the Committee's plan.

The Committee's plan was not proposed by means forbidden by law

The Debtor argues the Bankruptcy Court erred in finding the Committee's plan was proposed in good faith and not by means forbidden by law as required by § 1129(a)(3). The Debtor argues the Committee's plan violated § 541(c)(2)'s exclusion of spendthrift trusts from the bankruptcy estate; New Mexico law preventing creditors from accessing property held in spendthrift trusts; and the principle that property rights in bankruptcy should be the same as outside of bankruptcy.

The New Mexico Uniform Trust Code provides "a creditor . . . may not reach the interest or a distribution by the trustee before its receipt by the beneficiary."[29] The Bankruptcy Court concluded the Committee's plan did not violate the New Mexico Uniform Trust

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[28] *Opinion* at 17, *in* Appellant's App. at 367.

[29] N.M. Stat. § 46A-5-502 (1978).

Code because the Trusts were modified by the state court and the modification of the Trusts' terms allowed for bypassing the spendthrift provision.[30] The state court ordered that the language of the Trusts be modified to state: "The Trustees are authorized on a one-time basis to distribute $3 million of principle to Kearney if the [Committee's p]lan is confirmed by a Final Order of the Bankruptcy Court."[31] Based on the Trust Modifications, the Committee's plan complied with New Mexico law and the applicable provisions of the Bankruptcy Code. Accordingly, the Bankruptcy Court did not err in finding the Committee's plan was proposed in good faith and not by means forbidden by law.[32]

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[30] *Opinion* at 16, *in* Appellant's App. at 366. There was much litigation over the Trust Modifications. The Bankruptcy Court granted the Committee stay relief to have the state court consider the proposed modifications. The Debtor removed that proceeding to federal district court. The District of New Mexico court transferred the proceeding to the Bankruptcy Court, concluding the Debtor was employing gamesmanship to avoid a ruling by the Bankruptcy Court. *Opinion* at 7, *in* Appellant's App. at 3458. Once the proceeding was back before it, the Bankruptcy Court concluded the requirements for mandatory abstention were met and that it was required to abstain from ruling on the matter. *Id.*, *in* Appellant's App. at 3458.

[31] *Court's Findings of Fact and Conclusions of Law and Order Related Thereto* at 15, *in* Appellant's App. at 2931.

[32] Some caselaw suggests that § 1129(a)(3)'s "not by any means forbidden by law" language "bars confirmation of plans *proposed* in violation of law, not those that contain terms that may contravene law." *In re Ocean Shores Cmty. Club, Inc.*, 944 F.2d 909, 1991 WL 184827 at *2 (9th Cir. Sept. 19, 1991) (unpublished) (emphasis added) (citing *In re Sovereign Grp., 1984-12 Ltd.*, 88 B.R. 325, 328 (Bankr. D. Colo. 1988)); *In re 20 Bayard*

c. The Committee's plan did not violate § 1129(a)(11)

The Debtor argues that the Committee's plan is not feasible despite receiving the state court's approval to modify the Trusts because it is dependent on the state court's ruling, which is on appeal to the New Mexico Court of Appeals. The Debtor states that plans based on the outcome of speculative or uncertain litigation are not feasible.[33] The Debtor argues that if the state court's modification order is overturned on appeal, the Committee's Plan will never become effective.

A plan is feasible under § 1129(a)(11) "when it is not likely to be followed by liquidation or further financial reorganization."[34] "[A] feasible plan is not a guarantee of success but rather offers a reasonable assurance of success."[35] The feasibility analysis requires a Bankruptcy Court to "evaluate the possible

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Views, LLC, 445 B.R. 83, 96 (Bankr. E.D.N.Y. 2011) ("the requirement of Section 1129(a)(3) 'speaks more to the process of plan development than to the content of the plan.'" (quoting *In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010))). As the Debtor's argument pertains to the terms of the plan's violation of New Mexico trust law and the Committee's plan as confirmed did not violate state law, we do not address the issue.

[33] Appellant's Br. 37-38 (citing numerous cases for the proposition).

[34] *In re Gentry*, 807 F.3d 1222, 1225 (10th Cir. 2015) (citing *In re Inv. Co. of the S.W., Inc.*, 341 B.R. 298, 310 (10th Cir. BAP 2006)).

[35] *Id.* (citing *In re Ames*, 973 F.2d 849, 851 (10th Cir. 1992)).

impact of the debtor's ongoing civil litigation."[36] Indeed, "[a] plan will not be feasible if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely,"[37] However, this Court has held that where the primary source of funding of a plan is not contingent on speculative litigation, a Bankruptcy Court's finding of feasibility is not in error.[38]

In support of his argument, the Debtor cites numerous cases for the proposition that plans based on the uncertain outcome of litigation are not feasible. While the speculative outcome of potential litigation intended to fund plan payments may render a plan unfeasible, the Bankruptcy Court found the outcome of the state court litigation is not purely speculative in this case. The state court entered an order authorizing the $3,000,000 distribution from the trusts and the Bankruptcy Court found that decision was not likely to be reversed on appeal.

The Debtor asserts three issues with the Bankruptcy Court's findings. First, the Debtor argues the

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[36] *In re Am. Capital Equip., LLC*, 688 F.3d 145, 156 (3d Cir. 2012) (quoting *In re Harbin*, 486 F.3d 510, 519 (9th Cir. 2007)).

[37] *In re Am. Capital Equip., LLC*, 688 F.3d at 156 (finding plan that required asbestos tort plaintiffs to settle claims and consent to a surcharge of the debtor's insurance recovery for benefit of other creditors was not feasible because the asbestos plaintiffs were not required to consent to surcharge).

[38] *In re Novinda Corp.*, 585 B.R. 145, 160-61 (10th Cir. BAP 2018) (finding no error in approval of a plan of reorganization funded by $400,000 contribution, a portion of which would be used to finance potential litigation).

finding that the Trust Modifications were the culmination of years of litigation was clearly erroneous because the Debtor was not allowed to present evidence on this issue at confirmation. The record supports the Bankruptcy Court's findings as the Debtor admitted the state court litigation began in 2013 in his objection to confirmation.[39] Furthermore, the Bankruptcy Court is entitled to take judicial notice of state court proceedings.[40]

Second, the Debtor takes issue with the Bankruptcy Court's finding that the Trust Modifications were permissible pursuant to clear statutory authority, the will creating the Trusts, and well-grounded facts – mainly the state court's valuation of the Alvarado Realty Company's share price. However, in reviewing the probability of success on appeal, the Tenth Circuit instructs a Bankruptcy Court is "not required to 'decid[e] the numerous question[s] of law and fact.' Nor [is] it required to conduct a detailed analysis of the underlying law or a risk-adjusted value of continuing litigation."[41] As such, the Bankruptcy Court was not required to conduct a full inquiry into the state court's findings of the fair market value of Alvarado Realty

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[39] *Debtor's Objections to Second Amended Chapter 11 Plan of Reorganization of the Official Committee of Unsecured Creditors* at 5, *in* Appellant's App. at 315.

[40] *In re Agrawal*, 562 B.R. 510, 517 n.4 (Bankr. W.D. Okla. 2016) (citing Tenth Circuit authority allowing courts to take judicial notice of state court records).

[41] *In re Rich Glob., LLC*, 652 F. App'x 625, 631-32 (10th Cir. 2016) (unpublished) (internal citation omitted).

Company's shares or other facts addressed by the state court in ordering the Trust Modifications.

Finally, the Debtor asserts the Bankruptcy Court incorrectly found the state court actions were not procedurally defective because the requests for modification effectively related back to the Brothers' August 14, 2015 state court counterclaims against the Debtor. The Debtor argues the August 14, 2015 counterclaim issues were never litigated and were different than the issues raised in the Trust Modifications. This argument is immaterial to the Debtor's success on appeal of the Trust Modifications as the Debtor does not argue preclusive effect. Furthermore, the Bankruptcy Court found the state court's proceeding with the original state court action did not prejudice the Debtor as the counterclaims were substantially similar. We see no error in the Bankruptcy Court's findings as the Debtor was sufficiently aware the Brothers sought to modify the Trusts in their original counterclaims and the applicable statute of limitation had not run as of the filing of the second request to modify the Trusts.[42] Furthermore, any delay in pursuing the Trust Modification

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[42] *See* Arthur R. Miller, Mary Kay Kane, & A. Benjamin Spencer, 6A Fed. Prac. & Proc. Civ. § 1497 (3d ed. 2019) ("[A]n amendment alleging a claim or defense that arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading will relate back to the original pleading."); *see also Reagan v. Brown*, 285 P.2d 789, 792 (N.M. 1955) (holding the generally applicable four year statute of limitations applies to causes of actions relating to trusts except where the defendant has fraudulently concealed the cause of action).

was undoubtedly caused by the Debtor's litigation tactics.

d. The Bankruptcy Court did not abuse its discretion in approving the settlement agreement contained in the Committee's plan

The Committee's standing to pursue settlement of claims

The Debtor argues the Committee lacked standing to pursue the settlement of the Debtor's claims against the Brothers, Alvarado Realty Company, and members of the Abruzzo family. The Debtor asserts that under Rule 9019, only the trustee or a debtor-in-possession have authority to bring a motion for approval of settlement. Section 1121(c) provides "[a]ny party in interest, including the debtor, the trustee, [or] a creditors' committee . . . may file a plan."[43] A plan of reorganization may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[44] None of the authority the Debtor cites addresses § 1123(b)(3)(A)'s allowance of a creditors' committee to settle claims belonging to a debtor through a plan. Accordingly, the Bankruptcy Court did not err in allowing the Committee to propose a plan that settled claims belonging to the Debtor.

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[43] 11 U.S.C. § 1121(c).

[44] 11 U.S.C. § 1123(b)(3)(A).

The Bankruptcy Court did not abuse its discretion by approving the settlement of the Debtor's claims under Rule 9019

The Debtor argues the Bankruptcy Court erred in its application of factors evaluated upon reviewing a settlement as set out in *In re Kopexa Realty Venture Co.* (the "Kopexa Factors").[45] Because Rule 9019 does not contain a standard under which to evaluate a settlement agreement, the Tenth Circuit, although not in a published opinion, has stated: "[a] court's general charge is to determine whether the settlement is fair and equitable and in the best interests of the estate."[46] Over time, this Court accepted the Kopexa Factors as a means to evaluate Rule 9019 settlements consistent with the Tenth Circuit's standard.[47]

> [T]he *Kopexa* factors are: "[1] the probable success of the underlying litigation on the merits, [2] the possible difficulty in collection of a judgment, [3] the complexity and expense of the litigation, and [4] the interests of creditors in deference to their reasonable views."[48]

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[45] *Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020 (10th Cir. BAP 1997).

[46] *In re Velasquez*, No. NM-18-076, 2019 WL 2511557, at *4 (10th Cir. BAP June 18, 2019) (unpublished) (quoting *In re Rich Glob., LLC*, 652 F. App'x at 631).

[47] *Id.* at *5.

[48] *Id.* (quoting *In re Kopexa Realty Venture Co.*, 213 B.R. at 1022).

"'[T]he court need not resolve all of these issues, but must only identify them 'so that the reasonableness of the settlement may be evaluated.'"[49]

The Bankruptcy Court applied the Kopexa Factors and concluded the factors weighed heavily in favor of settlement of the Debtor's claims. The Debtor argues the Bankruptcy Court improperly evaluated the Kopexa Factors. First, the Debtor asserts the Bankruptcy Court incorrectly found the Debtor was not likely to succeed on the merits of his claims in light of his expert's testimony that the claims were meritorious and valuable. However, the record supports the Bankruptcy Court's findings the claims lacked merit as the Debtor did not prevail in the prior state court litigation and the state court issued $100,000 in sanctions against the Debtor for pursuing frivolous claims.[50]

As the Bankruptcy Court determined there would be no difficulty collecting on a judgment, the Debtor does not contest this factor. Next, the Debtor argues the Bankruptcy Court erred in assessing the complexity and expense of litigating the claims as his attorney had agreed to proceed on a contingency basis. The Bankruptcy Court noted that upon losing in the prior

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[49] *Id.* (quoting *In re W. Pac. Airlines, Inc.*, 219 B.R. 575, 579 (D. Colo. 1998)).

[50] The state court held the Debtor "could not, and did not, prove" his claims for breach of fiduciary duty and dividend suppression at trial and that the Debtor was "an individual who bears no allegiance to the truth, but who will say whatever he thinks will achieve his goals." *Opinion* at 4, *in* Appellant's App. at 354 (quoting the state court opinion without citation).

litigation, the Debtor was ordered to pay the opposing counsel's attorneys' fees and a $100,000 sanction on top of his attorneys' fees. We also note the contingency fee agreement provided counsel would seek reimbursement of costs and expenses from the Debtor's estate periodically during the litigation, requiring pre-judgment payment.[51] Accordingly, we agree this factor favored settlement.

The Debtor does not address the final factor, the interest of creditors, but argues public policy weighs against the settlement because the Committee's plan involved avoidance of spendthrift trust provisions. This argument fails as we previously explained the Committee's plan no longer violated New Mexico trust law based on the state court Trust Modifications. Furthermore, as the Bankruptcy Court pointed out, the unsecured creditors voted against the Debtor's prior plans and the Committee supported the settlement proposed in its plan. But for the Committee's plan, unsecured creditors would receive no distribution from the millions of dollars held in the Trusts for the Debtor's benefit. Accordingly, the Bankruptcy Court did not abuse its discretion in approving the settlement of the Debtor's claims against the Brothers, Alvarado Realty Company, or any other Abruzzo family members.

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[51] *Engagement Letter* at 3, *in* Appellant's App. at 2460.

IV. Conclusion

After failing to obtain enough votes to confirm his prior six plans, the Debtor objected to the Committee's proposed plan of reorganization. Upon review of this appeal, the Bankruptcy Court did not deny the Debtor due process, made no errors in its findings of fact, and did not abuse its discretion in approving the settlement of the Debtor's claims against Alvarado Realty Company and his deceased wife's family. Accordingly, we AFFIRM the Bankruptcy Court's *Order* and *Opinion* confirming the Committee's plan of reorganization.[52]

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[52] The Debtor filed the *Motion of Appellant for Leave to File Sealed Documents* (BAP ECF No. 15), seeking authority to file parts of his appendix under seal. This motion is GRANTED.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VICTOR P. KEARNEY, Appellant, v. UNSECURED CREDITORS COMMITTEE, KEVIN YEAROUT, UNITED STATES TRUSTEE, and LOUIS ABRUZZO and BENJAMIN ABRUZZO, Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C, Appellees.	No. 19-2209

Appeal from the Bankruptcy Appellate Panel
No. NM-19-010
(Bankr. No. 17-12274)

(Filed Feb. 24, 2021)

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Thomas D. Walker and Chris W. Pierce, Walker & Associates, P.C., Albuquerque, New Mexico, for Official Committee of Unsecured Creditors; Paul M. Fish and

Spencer L. Edelman, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, for Louis Abruzzo and Benjamin Abruzzo, as Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C; and James Askew, Askew& White, LLC, Albuquerque, New Mexico, for Kevin Yearout.

Before **KELLY**, **SEYMOUR**, and **MATHESON**, Circuit Judges.

SEYMOUR, Circuit Judge.

Victor P. Kearney was the lifetime income beneficiary of two spendthrift trusts when he filed for bankruptcy in 2017. The United States Trustee's office appointed an unsecured creditors committee ("UCC") which proposed a reorganization plan contemplating a one-time trust distribution to pay off Mr. Kearney's debts. After a New Mexico state court modified the trusts to authorize the distribution, the bankruptcy court approved the plan. Mr. Kearney appealed. The Bankruptcy Appellate Panel ("BAP") of the Tenth Circuit concluded that the bankruptcy court did not deny Mr. Kearney due process, made no errors in its findings of fact, and did not abuse its discretion in settling Mr. Kearney's claims. *See In re Kearney*, No. NM-19-010, 2019 WL 6523171 (10th Cir. BAP Dec. 4, 2019). Mr. Kearney appeals that decision, arguing that using spendthrift trust assets to fund the reorganization

plan violated the trusts' spendthrift provision and the law, and that approving the settlement of Mr. Kearney's claims amounted to an abuse of the bankruptcy court's discretion. Exercising jurisdiction pursuant to 28 U.S.C. § 158(d)(1), we affirm.

I.

Factual Background

A. The Trusts under Mary Pat Abruzzo's Last Will and Testament

The facts of this case were set out by the bankruptcy court and the BAP as follows. Alvarado Realty Company ("ARCO"), owned by Benjamin and Pat Abruzzo, developed the Sandia Peak Ski Area and the Sandia Peak Tramway. ARCO is a closely held company that also owns the Santa Fe Ski Area and other real estate investments in New Mexico, Colorado, and Arizona. Mr. and Mrs. Abruzzo died in a plane crash in 1985 and their children—Louis, Benny, Richard, and Mary Pat—took over the management of the company.

Mary Pat married Victor Kearney in 1988, at the age of twenty-two. She passed away in 1997. Mary Pat's last will and testament conveyed her 18.5% ownership interest in ARCO to two spendthrift trusts (the "MPK Trusts" or "Trusts"), of which Mr. Kearney is the income beneficiary during his life. After he dies, Mary Pat's will distributes the Trusts' corpus to her siblings,

Louis, Benny, and Richard, or their surviving issue.[1] Louis and Benny Abruzzo (the "Abruzzos") and Mr. Kearney were appointed as co-trustees ("Trustees").

B. The New Mexico State Court Action

Between 1997 and 2013, the Trusts' distributions to Mr. Kearney grew by 800% and totaled about $16 million. Wanting more, Mr. Kearney sued the Abruzzos in New Mexico state court in 2013, alleging that ARCO's long-standing policy of distributing only 70% of its income and retaining 30% amounted to an illegal suppression of dividends and the breach by the Abruzzos of their fiduciary duties.[2] The Abruzzos countersued for breach of fiduciary duty, for modification of the trusts, and for other relief.

The first trial commenced in June 2015. In that proceeding, Mr. Kearney made his case to the jury for over five days and asked for more than $7 million in damages. Once he rested, the Abruzzos moved for a directed verdict. In granting it, the court noted that the "Abruzzos' efforts on behalf of ARCO [had] been extremely successful" and concluded that their success did "not translate into a starvation or a partiality on behalf of ARCO over and against the interest of either Mr. Kearney or the remainder beneficiaries."

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[1] Richard Abruzzo passed away in December 2010 and left behind two minor children, Rico and Mary Pat, who are represented by their mother, Nancy Abruzzo.

[2] Notably, ARCO's dividend policy was set before Mr. Kearney married Mary Pat and did not change after her death.

Aplt. App., vol. XX at 41 (modifications omitted). The court concluded that a reasonable jury could not award Mr. Kearney "damages of any particular amount, let alon[e] 7-some-odd million dollars." *Id.* The court also granted the Abruzzos' motion for litigation costs, awarding them $510,000 in attorneys' fees and $155,915.60 in taxes and costs.[3]

Mr. Kearney resigned as trustee on December 6, 2016. On April 7, 2017, the state court imposed a $100,000 sanction against Mr. Kearney to address his "affront to the integrity and processes of the Court. . . ." Aplt. App., vol. XXIII at 51. The court admonished Mr. Kearney for his lack of "credibility when testifying" and for his repeated violation of the court's confidentiality order and his discovery obligations. *See id.* at 48-51.

The court then held a bench trial to adjudicate the Abruzzos' counterclaims. The evidence showed that Mr. Kearney's conduct had resulted in a toxic relationship between him and the Abruzzos that made it "difficult or impossible for Louis Abruzzo or Benjamin Abruzzo to effectively serve as Trustee," "and that modification of the trust is appropriate under 46A-4-412 NMSA." *Id.* at 229. The court accordingly scheduled an evidentiary hearing on September 5, 2017 to appoint a successor trustee and to establish "directives for further administration of the Trust and its assets in a

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[3] Under N.M.S.A. § 46A-10-1004 (1987), a court can award costs and expenses in a proceeding involving the administration of a trust, "as justice and equity may require."

manner which will effectively protect all beneficiaries equally." *Id.* Mr. Kearney filed for bankruptcy mere days before that hearing and the bankruptcy court stayed the state court proceeding.

C. The Bankruptcy Proceedings

Since 1997, the MPK Trusts have distributed about $800,000 a year to Mr. Kearney. Yet he managed to accumulate over $7 million in debts by the time he filed for Chapter 11 bankruptcy on September 1, 2017. It is apparent from the evidence in this case that Mr. Kearney's financial problems arise not from illness, accident, or bad luck, but from a pattern of his own bad choices. The UCC was appointed to negotiate with Mr. Kearney over the terms of a reorganization plan. Failing to agree on a joint plan, Mr. Kearney proposed the first of seven plans on June 12, 2018. The UCC's competing plan (the "UCC Plan" or "Plan"), filed on July 12, 2018, calls for the following actions:

> *First*, ARCO is to buy its shares from the Trusts for $12,571,799;
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> *Second*, the Trustees will then pay $3 million to Mr. Kearney to pay his creditors; and
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> *Third*, the Trusts will pay the IRS the $350,890.55 in taxes Mr. Kearney owes from his share of income.

Aplt. App., vol. XX at 44. These proposals have been called the "Three Actions" or the "Three Issues." Under the Plan, the remaining Trust corpus of approximately

$8 million will continue to generate income to Mr. Kearney for his lifetime, and Mr. Kearney's legal claims against the Abruzzos, ARCO, and others will be settled.

Mr. Kearney "reacted to the UCC Plan with outrage and threats," accusing many people of breaching their fiduciary duties to him by pursing the UCC Plan. *Id.* Once again he sued the Abruzzos in state court for breach of fiduciary duties.

On August 30, 2018, the Abruzzos filed a motion for relief from the bankruptcy stay, seeking the bankruptcy court's permission to ask the state court to determine whether the Trusts could be modified to allow the Three Actions. The bankruptcy court granted the motion.[4] The state court held an evidentiary hearing on October 23, 2018, and a week later ruled that the proposed Trusts' modifications were proper and consistent with New Mexico laws. *See generally*, Aplt. App., vol. XXIV at 265-80. The state court modified the Trusts "to allow the Trustees to make a one-time $3,000,000.00 distribution from principal to Mr. Kearney. . . ." in order to pay off his creditors.[5] *Id.* at 278.

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[4] Once the bankruptcy court granted the Abruzzos' motion and after the state court had set a hearing date, Mr. Kearney unsuccessfully tried to remove the action to the Federal District Court for the District of New Mexico.

[5] The state court denied Mr. Kearney's motion for reconsideration in an order filed on January 4, 2021. FRAP 28(j) Letter from Official Committee of Unsecured Creditors, et. al (Jan. 7, 2021).

Subsequently, the bankruptcy court moved forward with a vote by creditors on the plans: 71% of votes and 96% of the voting dollars voted against Mr. Kearney's plan, while 84% of votes and 97% of the voting dollars voted for the UCC Plan. Aplt. App., vol. XX at 48, n. 13. The bankruptcy court then confirmed the UCC Plan.

D. Appeals

Mr. Kearney appealed to the BAP. He first claimed the bankruptcy court denied him due process by rejecting his seventh amended plan. *In re Kearney*, 2019 WL 6523171 at *3. The BAP disagreed because Mr. Kearney had not served notice of intent to file that plan until ten days before the hearing, which was less than the required twenty-eight-days. *Id.* at *4.

The BAP next dismissed Mr. Kearney's claims that the UCC Plan was not proposed in good faith and that it was proposed by means forbidden by law. *Id.* at *5. It brushed aside the argument that "allowing the state court to consider the Trust Modifications in effect removed the issue of good faith from the Bankruptcy Court's purview" because, as the BAP explained, Mr. Kearney had not alleged that the bankruptcy court's decision was in error. *Id.* The BAP also rejected Mr. Kearney's argument that the Plan was proposed by means forbidden by law because, after the modifications, "the [UCC Plan] complied with New Mexico law and the applicable provisions of the Bankruptcy Code." *Id.*

Finally, the BAP dismissed Mr. Kearney's claim that the bankruptcy court erroneously analyzed the first and third of the four factors set forth in *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997), and abused its discretion in settling his legal claims. The *Kopexa* factors include the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views. *Id.* As to the first factor, the BAP held the record supported the finding that Mr. Kearney's causes of action lacked merit because he did not prevail in his 2013 state court litigation and he was sanctioned for $100,000. *In re Kearney*, 2019 WL 6523171 at *8. As to the third factor, the bankruptcy court did not err in assessing the complexity and expense of litigation even though Mr. Kearney's representation was on a contingency basis. Pursuing the claims could still be costly because (1) Mr. Kearney was previously ordered to pay the opposing counsel's attorneys' fees as a sanction and (2) the contingency fee agreement required prejudgment payments. *Id.*

On appeal before us, Mr. Kearney argues that the UCC Plan violates 11 U.S.C. § 1129(a)(3)'s requirements that a plan be "proposed in good faith and not by any means forbidden by law." He also maintains that the bankruptcy court abused its discretion by approving the settlement of Mr. Kearney's legal claims.

II.

Discussion

Although Mr. Kearney appeals the BAP's decision, "we do not rely on the substance of [BAP's] order and instead conduct a plenary review of the bankruptcy court's decision." *Amerson v. King (In re Amerson)*, 839 F.3d 1290, 1298 (10th Cir. 2016) (quoting *Mathai v. Warren*, 512 F.3d 1241, 1248 (10th Cir. 2008)). "[W]e treat the BAP as a subordinate appellate tribunal whose rulings are not entitled to any deference (although they certainly may be persuasive)." *Id.*

A. Violation of U.S.C. § 1129(a)(3)

Under 11 U.S.C. § 1129(a)(3), "[t]he court shall confirm a plan only if . . . [t]he plan has been proposed in good faith and not by any means forbidden by law." Mr. Kearney first contends the UCC Plan violates this provision, claiming the plan uses means forbidden by law and was not proposed in good faith. When reviewing confirmation of a settlement, we review the bankruptcy court's legal conclusions *de novo* and its underlying factual findings for clear error. *In re Paige*, 685 F.3d 1160, 1177 (10th Cir. 2012). A finding of fact is clearly erroneous if it lacks factual support in the record or if, after reviewing all the evidence, we are left with the firm conviction that a mistake has been made. *In re Ford*, 492 F.3d 1148, 1153 (10th Cir. 2007) (citation omitted).

1. The UCC Plan was not proposed by means forbidden by law

Mr. Kearney argues that the UCC Plan as proposed violates the law because it "uses trust assets to pay creditors of the estate, contrary to the trusts' spendthrift provisions," and because the New Mexico Uniform Trust Code § 46A-5-502 (1978) prohibits attachment by Mr. Kearney's creditors of his income or principal distributions from the spendthrift Trusts. Aplt. Br. at 19, 20-21. He reasons the $3 million distribution to pay off his creditors requires modifying the Trusts' spendthrift provision, which he claims the state court did not allow. *Id.* at 21. Under Mary Pat's last will and testament, the Trusts each include the following spendthrift provision:

> Except as otherwise provided herein, all payments of principal and income payable, or to become payable, to the beneficiary of any trust created hereunder shall not be subject to anticipation, assignment, pledge, sale or transfer in any manner, nor shall any said beneficiary have the power to anticipate or encumber such interest, nor shall such interest, while in the possession of my Executor or Trustee, be liable for, or subject to, the debts, contracts, obligations, liabilities or torts of any beneficiary.

Aplt. App., vol. XXIII at 73.

Section 541(a)(1) of the Bankruptcy Code incorporates into the bankruptcy estate, with some exceptions, "all legal or equitable interests of the debtor in

property as of the commencement of the case." One such exception is set forth in Section 541(c)(2) of the Code, which provides that "[a] restriction on a transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). "A beneficial interest in an ordinary spendthrift trust would clearly qualify for the exemption *if the state courts would hold that creditors could not reach the interest.*" *In re Harline*, 950 F.2d 669, 670 (10th Cir. 199 1) (emphasis added). "Thus, to determine whether the Debtor's interests in the Trusts were excluded from his estate, we must analyze the nature of that interest, under applicable state law. . . ." *In re Hilgers*, 279 F. App'x 662, 664-65 (10th Cir. 2008) (unpublished);[6] *see In re Neuton*, 922 F.2d 1379, 1383 (9th Cir. 1990) (including one-fourth of a spendthrift trust into a debtor's bankruptcy estate because state laws allowed payment out of a trust for which the debtor was a beneficiary, so long as the payment did not 'exceed[] 25% of the payment that otherwise would be made to . . . the beneficiary.'").

Here, Mr. Kearney contends the Three Actions at the heart of the UCC Plan violate section 541(c)(2)'s mandate to exclude his interest in the Trusts from his bankruptcy estate. We disagree because, according to the state court, the Three Actions were consistent with New Mexico laws.

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[6] We may cite unpublished opinions for their persuasive value pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

As an initial matter, we are not persuaded by Mr. Kearney's argument that the UCC Plan was *proposed* by means forbidden by law because the state court had not yet modified the Trusts. As the UCC points out, its plan as proposed and as amended recognized not only the Trusts' spendthrift provision but also the state court's exclusive jurisdiction to determine whether the Trusts could be changed to effectuate the Three Actions.[7]

We also reject Mr. Kearney's position that the UCC Plan violates the Trusts' spendthrift provision even after the modifications. He concedes that the state court ordered a one-time $3 million distribution but says that money remains out of the creditors' reach because the Trusts' spendthrift provision was not *explicitly* modified. But the sequence of the events leading up to the approval of the UCC Plan as well as the state and bankruptcy courts' findings show the futility of his argument.

The process concluding with the approval of the UCC Plan establishes that the state court approved a one-time circumvention of the Trusts' spendthrift

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[7] The first version of the UCC Plan, in pertinent parts, provided: "Upon Confirmation of the Plan, the automatic stay is modified to allow the State Court Litigation to proceed to permit the MPK Trustees to obtain approval of the ARCO Stock Redemption, approval of the Trust Payment, appointment of a Successor Trustee pursuant to the MPK Trust, approval of an amended Trust Agreement consistent with the foregoing. . . ." Aplt. App., vol. VII at 33. As amended, the Plan notes that the Abruzzos have obtained the state court's approval of the Three Actions. Aplt. App., vol. XV at 161.

provisions. First, the Plan was equipped with a mechanism to obtain the state court's approval of the $3 million distribution to pay Mr. Kearney's creditors; second, the bankruptcy court triggered that mechanism by lifting the stay on the state court action; third, the state court, which was intimately familiar with the case[8] exercised its exclusive jurisdiction over the Trusts[9] and modified them to facilitate a $3 million distribution to pay Mr. Kearney's creditors; and fourth, the bankruptcy court relied on the modifications to confirm the UCC Plan. As this sequence illustrates, inherent in the state court's endorsement of the Three Actions was its permission to bypass the Trusts' spendthrift provision.

Separately, the record belies Mr. Kearney's assertion that the $3 million distribution remains subject to the Trusts' spendthrift provision. When deciding the appropriateness of the Three Actions, the state court set forth the following facts:

> The payment by the Trustees of $3,000,000.00 from principal to Mr. Kearney,

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[8] As the bankruptcy court put it: "Judge Malott presided over the State Court Action for four years (2013-2017), took weeks of trial testimony, heard arguments of counsel, read many briefs and motions, and ruled on at least four motions for summary judgment. It is undisputed that Judge Malott has significant knowledge about and history with the parties, the MPK Trusts, and the disputes that were litigated in his court." Aplt. App., vol. XIII at 108.

[9] New Mexico law vests exclusive subject-matter jurisdiction in the state district courts for proceedings involving New Mexico trusts. *See* NMSA § 46A-2-203 (1978) ("The district court has exclusive jurisdiction of all proceedings involving a trust.").

> with him then being required to deliver it to the Creditor Trustee as proposed, is a proper action by the Trustees and is in accordance with their fiduciary duties to Mr. Kearney and to all beneficiaries.
>
> The Trusts should be modified to allow, on a one-time basis, the payment by the Trustees of the $3,000,000.00 from principal to Mr. Kearney as provided in the Three Actions.

Aplt. App., vol. XXIV at 277. The bankruptcy court adopted these facts. *See* Aplt. App., vol. XX at 47-48.

The state court also offered the following conclusions of law:

> *The transactions contemplated by "The Three Issues" are actions within the scope of the Trustees' powers and responsibilities as authorized by The MPK Testamentary Trust.*
>
> The transactions contemplated by "The Three Issues" are approved by the Court as appropriate and proper under the totality of the circumstances and are in the best interests of all the beneficiaries, including the remaindermen.
>
> The transactions contemplated by "The Three Issues" are not voidable transactions under Section 46A-8-802.
>
> *The MPK Testamentary Trusts should be modified, and hereby are so modified, to allow the Trustees to make a one-time $3, 000, 000.00 distribution from principal to Mr. Kearney, but*

only upon approval of the pending UCC Plan by the Bankruptcy Court.

. . .

The actions of the Trustees contemplated in "The Three Issues" are within the powers and responsibilities of the Trustees under the terms of the trust document.

. . .

The Trusts are modified to permit the one-time distribution of $3,000,000.00 of principal to Mr. Kearney as contemplated by the UCC Plan.

The distribution of the $3,000,000.00 to Mr. Kearney by the Trustees is proper and not a breach of their fiduciary duty.

The Trustees distribution of $3, 000, 000.00 from Trust principal to be paid to Mr. Kearney and then immediately over to the UCC is in keeping with the Trustee's powers and duties and is not a breach of same.

The Trustees' performance of the acts encompassed in "The Three Issues," and each of those actions, are proper and appropriate actions for them to take under the totality of the circumstances.

The Trusts are hereby modified to add a provision applicable to Trusts B and C which states as follows: The Trustees are authorized on a one-time basis to distribute $3 million of principal to Kearney if the UCC Plan is

> *confirmed by a Final Order of the Bankruptcy Court.*

Aplt. App., vol. XXIV at 278-79 (emphasis added).

Despite these clear pronouncements, Mr. Kearney contends the state court did not *really* authorize the Three Actions because it did not explicitly modify the Trusts' spendthrift clause. But Mr. Kearney does not explain how to reconcile this position with the state court's explicit license to the Trustees to effectively pay Mr. Kearney's creditors with the Trusts' assets. How can the "Trusts [be] modified to permit the one-time distribution of $3,000,000.00 of principal to Mr. Kearney as contemplated by the UCC Plan" if the Trusts' spendthrift provision blocks it? How could that distribution be "a proper action by the Trustees" and simultaneously a breach of the Trusts' spendthrift provision? Mr. Kearney does not suggest an answer. Agreeing with Mr. Kearney would require interpreting the state court's words to mean the opposite of what they say in plain English. That we will not do. Instead, we uphold the bankruptcy court's finding that the state court's modifications of the Trusts enabled the Three Actions, including the distribution to Mr. Kearney's creditors, and therefore they do not violate the Trusts' spendthrift provision.

In sum, the bankruptcy court understood the state court's extensive finding of facts and conclusions of law to authorize bypassing of the Trusts' spendthrift provision to effectuate the Three Actions. That finding is

amply supported by the record and therefore is not clearly erroneous.[10]

2. UCC Plan Was Proposed in Good Faith

Mr. Kearney next argues that the UCC Plan was not proposed in good faith as required by § 1129(a)(3). "Good faith for purposes of § 1129(a)(3) is ordinarily a finding of fact that we review for clear error." *In re Paige*, 685 F.3d at 1178.

Although the statute does not define good faith, "[c]ase law under the Code[] has tended to define the good-faith requirement as requiring only that there is a reasonable likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." *Id.* (citation omitted). The Supreme Court teaches that "a central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

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[10] It is noteworthy that despite Mr. Kearney's outrage about paying creditors from the Trusts, his own proposed chapter 11 plans envisioned a similar mechanism. *See, e.g.*, Aplt. App., vol. IV at 63 (stating "if [Kearney's] plan is approved, the Debtor may use a specified amount of money received from the MPK Trust to pay Allowed General Unsecured Claims. . . .").

Here, the bankruptcy court specifically found the Plan to be in Mr. Kearney's best interest:

> He will get a bankruptcy discharge. $3,000,000 will pay his debts of more than $8,600,000. He will no longer be able to waste time and money pursuing questionable litigation against his in-laws. He may be forced for a time into gainful employment, which might not be a bad thing. It is time for him to move on. While Debtor cannot see that, it is obvious to most others. After four years or so of reasonable belt-tightening, Debtor can live post-bankruptcy with a fresh start and the prospect of a healthy lifetime income most people would consider a godsend. The Plan was proposed and developed in good faith.

Aplt. App., vol. XX at 55. The bankruptcy court's finding of good faith is sound and complies with a central purpose of the Bankruptcy Code as explained in *Grogan*. As such, due deference to the court's well-reasoned conclusion compels us to affirm.[11]

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[11] We reject Mr. Kearney's argument that the UCC Plan was not proposed in good faith because it was "collusive," Aplt. Br. 42, and we do not share his concern that if we uphold the Plan "there is no limit to the schemes a creditor could concoct and employ in and out of bankruptcy to penetrate a spendthrift trust." *Id.* at 44. We do not foresee this funereal future because, as explained, inherent in the state court's changes to the Trusts was a license to bypass the Trusts' spendthrift provision. Accordingly, our decision here does not disturb this Circuit's precedent that generally exempt a spendthrift trust from a debtor's bankruptcy estate. *See In re Amerson*, 839 F.3d at 1300 ("a beneficial interest in a spendthrift trust that is recognized and protected by applicable state law, would generally qualify for the § 541(c)(2) exception. In other

In the final analysis, we are not persuaded that the UCC Plan was proposed in bad faith or by means prohibited by law. Mr. Kearney's arguments do not establish a clear error by the bankruptcy court but rather show "his mistaken belief that only he should be allowed to control the reorganization process, whatever the cost, delay, or acceptability of payment proposals." *Id.* at 79.

B. Approval of Settlement

Mr. Kearney next argues the bankruptcy court erred in approving the settlements in the UCC Plan because (1) some of the claims are not property of the estate, (2) the court did not form an independent judgment as to the claims' merits, (3) the Plan lacked adequate consideration, and (4) the expense and complexity of the litigation weigh against settlement. The parties agree that we review the bankruptcy court's approval of the settlements for abuse of discretion. We review de novo whether an asset is property of the estate. *See In re Wise*, 346 F.3d 1239, 1241 (10th Cir. 2003).

In evaluating the UCC Plan's proposed settlements, the bankruptcy court analyzed the four factors set forth in *In re Kopexa Realty Venture Co.*, 213 B.R. at 1022: (1) the chance of success on the merits; (2) possible problems in collecting judgment; (3) the expense and complexity of the litigation; and (4) the interest of

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words, it typically would not be considered part of the bankruptcy estate.").

the creditors. The court determined that every factor except the second favored settlement, compelling the conclusion that "[o]verall, the *Kopexa* factors weigh heavily in favor of the settlement." Aplt. App., vol. XX at 52-53. Mr. Kearney disagrees with the bankruptcy court's analysis of the first and third factors.

We begin by noting that settlements are favored in bankruptcy. *In re S. Med. Arts Co., Inc.*, 343 B.R. 250, 255 (10th Cir. BAP 2006). But settlement should be approved only based on the informed and objective assessment of the facts in their totality. *In re Kopexa Realty Venture Co.*, 213 B.R. at 1022 (citing *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989)). A mini-trial on the matters under consideration is unnecessary; it is enough for the court to "canvass . . . 'the issues and see whether the settlement falls below the lowest point in the range of reasonableness.'" *In re Dennett*, 449 B.R. 139, 145 (Bankr. D. Utah 2011). We affirm a bankruptcy court's approval of a settlement unless we find it either lacking in evidentiary support or disconnected to the evidence in the record. *Id.* at 144 (citations omitted).

1. The settled claims are property of the estate

As an initial matter, Mr. Kearney argues the bankruptcy court wrongly settled the following legal claims because they are not property of the estate: (1) his state court trust litigation and its appeal; (2) his lawsuit against the Abruzzos for breach of fiduciary duty in the

bankruptcy proceedings and their proposal of the UCC Plan; and (3) his proposed double derivative litigation against the Abruzzos and ARCO for minority shareholder suppression. He maintains these legal claims are related to the Trusts, are not estate property, and therefore cannot be settled under the Plan. We disagree.

As referenced above, section 541(a)(1) of the Bankruptcy Code includes in the bankruptcy estate, with some exceptions, a debtor's property at the start of the proceeding, including his causes of action. *Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996) (citations omitted). Subsection (c)(2) gives a debtor the choice as to whether to include in the bankruptcy estate the debtor's beneficial interest in a trust that cannot otherwise be transferred under applicable nonbankruptcy law. *In re Amerson*, 839 F.3d at 1299 ("the exception outlined in subsection (c)(2) is worded in permissive . . . fashion" and gives the debtor the choice of "whether or not to include such an interest in the bankruptcy estate.").

In *In re Amerson*, a Chapter 7 trustee sought approval of a settlement agreement related to a debtor's interest in a spendthrift trust under her father's will and her interest in a related probate contest. Although the debtor initially listed no assets under Schedule B to her petition, where she was required to list any interests in the estate of a decedent or a trust, she later amended that schedule to list her interest in the trust and the probate contest. *Id.* at 1293-94. The bankruptcy court approved the settlement over the debtor's

objections. The debtor appealed, arguing that under 11 U.S.C. § 541(c)(2), the bankruptcy court lacked subject matter jurisdiction over her interest in the spendthrift trust or its related litigation. We disagreed. While recognizing that a debtor's beneficial interest in a spendthrift trust generally qualifies for that exclusion, we affirmed because the debtor had effectively chosen to incorporate that interest into her bankruptcy estate by referencing it in her petition. *Id.* at 1299.

Here, Mr. Kearney's amended reorganization plan defines "Assets" as "all assets of the Estate, including, without limitation, all property of the Estate pursuant to § 541 of the Bankruptcy Code, Cash (including the Sale Proceeds), *Causes of Action*, ..." Aplt. App., vol. X at 12. It then defines "Causes of Action" as:

> any and all unliquidated and contingent rights, claims, and causes and rights of action of the Estate, direct or indirect, derivative or non-derivative, including Avoidance Actions, that exist or may have existed as of the Petition Date, including, without limitation, any related to Louis Abruzzo, Benjamin Abruzzo, Nancy Abruzzo, Rico Abruzzo, Mary Pat Abruzzo, Alvarado Realty Company, the Abruzzo Litigation, any such rights, claims, causes of action, suits, and proceedings that the Debtor may have as debtor and debtor-in-possession (exercising the rights and powers of a trustee pursuant to § 1107(a) of the Bankruptcy Code), whether or not brought by or on behalf of the Debtor and/or the Estate, and/or any holder of any Claim, ...

Id. at 12-13. Further, Appendix 5 to that plan incorporates "a non-exclusive list of the Causes of Action and other similar claims, counterclaims, rights, defenses, setoffs, recoupments, and actions in law or equity," including: Case No. D-202-CV-2013-07676, Mr. Kearney's lawsuit against the Abruzzos as trustees of the MPK Trusts; Adversary No. 18-01031-t, his lawsuit against the Abruzzos for "[a]voidance and recovery of preferential and fraudulent transfers, avoidance and recovery of unauthorized post-petition transfers, injunction against stay violations, [and] declaratory judgment"; and his potential lawsuit against ARCO and the Abruzzos for "shareholder oppression, breaches of controlling shareholders' fiduciary duties, unjust enrichment, and statutory violations." *Id.* at 64-66.

Mr. Kearney also demonstrated his belief that derivative claims against ARCO were property of the estate in his discovery motion before the bankruptcy court under Federal Rule of Bankruptcy Procedure 2004. In that motion, he sought to examine ARCO's corporate records. To justify the examination of those records, he argued that the "Debtor has the right to pursue these derivative claims on behalf of the Trusts in their role as ARCO shareholders" and "[a]ny recovery by the Trusts could ultimately benefit creditors in this case." Aplt. App., vol. III at 141. When ARCO objected to the motion, Mr. Kearney stated in response that "[t]he potential claims also belong to the Debtor's estate" because "Section 541 broadly defines the estate" and "[c]ourts have held that the right to bring a derivative claim is an asset of the estate." Supp. Aplt.

App., vol. II at 20. By arguing that potential claims against ARCO were property of the estate for purposes of his reorganization plans and the Rule 2004 motion, Mr. Kearney "effectively chose" to include the potential causes of action against ARCO as part of his estate. *See Amerson*, 839 F.3d at 1300.

The UCC suggests an additional reason why the legal claims are property of the bankruptcy estate. As we have discussed, section 541(a)(1) of the Bankruptcy Code incorporates into the bankruptcy estate, with some exceptions, a debtor's entire property at the commencement of a proceeding. *Sender v. Simon*, 84 F.3d at 1305. In 2005, Congress temporally expanded the definition of estate property to include "all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted. . . ." 11 U.S.C.A. § 1115(a)(1). Against this backdrop, Mr. Kearney's incorporation of the legal claims in his bankruptcy plans shows they were developed before the close of the bankruptcy proceeding and thus are the property of the estate. *See also In re Amerson*, 839 F.3d at 1300 (holding that a cause of action is a distinct asset of its own and is included in a debtor's bankruptcy estate) (citing *Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1001 (8th Cir. 2007), and *Sender v. Buchanan (In re Hedged–Invs. Assocs., Inc.)*, 84 F.3d 1281, 1285 (10th Cir. 1996)).

In sum, the bankruptcy court properly concluded that the legal claims are property of Mr. Kearney's bankruptcy estate.

2. Mr. Kearney is not likely to succeed on his claims

Mr. Kearney disagrees with the bankruptcy court's assessment of the first *Kopexa* factor: the chance of his various claims succeeding on the merits. In reaching its conclusion, the court recounted Mr. Kearney's failed litigations against the Abruzzos and ARCO that cost him millions in attorney fees, costs, and sanctions and concluded that Mr. Kearney is not a sympathetic plaintiff. Yet Mr. Kearney argues the court failed to "fulfill its duty to form an 'intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated'" instead of settled, asserting the court's conclusion is supported by "no evidence whatsoever." Aplt. Br. at 48-49. We disagree.

The bankruptcy court considered the vast universe of facts supporting the futility of Mr. Kearney's lawsuits. First, it quoted the state court's finding about the Trustees' proper conduct and Mr. Kearney's meritless theory of the case in his 2013 litigation:

> I don't find that the Abruzzos misused any control they may have had in this circumstance. The totality on which the entire Plaintiff's case rests is if it's good for ARCO, it must be bad for Victor Kearney. That's not the law; that's not the evidence in this case.
>
> The Abruzzos' efforts on behalf of ARCO have been extremely successful. The fact that the Abruzzos have run their company properly does not translate into a starvation or a partiality on behalf of ARCO over and

> against the interest of either Mr. Kearney or the remainder beneficiaries. The appropriate totality appears to be in this situation, a rising tide lifts all the boats.
>
> *Kearney has made an increased distribution of over 800 percent through one of the worst recessions this country has ever seen.* The Abruzzos do not control the board. There is not a single incident in which it was shown they had their way or forced their agenda onto anyone else.
>
> *The fact that ARCO has grown as large over these last 15 years has made the whole pie bigger and everybody's slice bigger. How that could translate to a reasonable jury into an award of damages of any particular amount, let alon[e] 7-some-odd million dollars, does not compute to the Court.*

Aplt. App., vol. XX at 40-41 (emphasis added) (modifications omitted).

The bankruptcy court also relied on the state court's opinion granting the Abruzzos' motion for attorney's fees and costs:

> Plaintiff argues that Defendants should not be allowed to recover fees incurred in Defendants' opposition to his attempts to obtain corporate documents and information from ARCO, the separate, closely held, corporation involved in this matter but not a party hereto. A *significant pillar of Plaintiff's case was his claim that his status as a Trustee and Life Income Beneficiary under his deceased wife's*

> *Trust entitled him to effect [sic] the management of ARCO from which the Trust's income flows. Another pillar was his claim that Defendants operated ARCO so as to profit ARCO more than the Trust and, therefore, to minimize income to Plaintiff . . . [H]e was not successful in establishing his core charges that Defendants managed ARCO to his financial detriment.* The fees incurred in context of the ARCO document discovery dispute are a reasonable and necessary part of this overall litigation.
>
> *[I]t is also indisputable that Plaintiff was, after two (2) years of litigation, not able to support his allegations with substantial evidence at trial. While Plaintiff believes he "had legitimate claims against the Defendants" which "survived vigorous summary judgment motions" Plaintiff could not, and did not, prove those claims at trial.*

Id. at 41-42 (emphasis added) (modifications omitted).

Finally, in sanctioning Mr. Kearney, the bankruptcy court quoted from the state court's "extensive findings and conclusions" that condemned Mr. Kearney for failing to appear for cross-examination after testifying at trial, for his repeated violation of the court's confidentiality orders, for his repeated breach of his trustee duties, for his "significant credibility issues," for his failure to mediate in good faith, and for poisoning his relationship with the Abruzzos. *Id.* at 42-43. The bankruptcy court concluded:

> The Court finds the Debtor has little chance of obtaining any substantial net recovery through continued litigation. To date, his claims against the Abruzzos and ARCO have cost him nearly two million dollars in attorney fees, costs, and sanctions. He is not a sympathetic plaintiff. The evidence presented in his first trial supports Judge Malott's finding that neither ARCO nor the Abruzzos breached any duties to him, the MPK Trusts, or any other party. Debtor's first, best chance for a litigation recovery was in his first lawsuit; he lost badly.

Id. at 52. The bankruptcy court's exhaustive explanations bely Mr. Kearney's accusation that its conclusion was based on "no evidence whatsoever."

Mr. Kearney also attacks the bankruptcy court's finding that "[h]e is not a sympathetic plaintiff," saying the court made this erroneous finding "[b]ecause it had no evidence before it that Kearney's claims are without merit. . . ." Aplt. Br. at 50-51. To the contrary, the record is replete with evidence of Mr. Kearney's obnoxious conduct supporting that finding, including his misconduct with respect to the Trusts, his credibility issues, his contempt for the courts and the judicial process, and his appalling litigation habits.

i.

Mr. Kearney has long complained that the Abruzzos breached their fiduciary duties to him and colluded with the UCC to harm the Trusts. Yet, the evidence

shows that his own wrongdoings, both as trustee and since his resignation, pose the most direct threat to the Trusts.

First, Mr. Kearney has time and again undermined the Trusts' spendthrift provision. For example, he promised to pay his largest creditor, Kevin Yearout, first from monies he receives from the Trusts. He also pledged to "take any necessary actions, including authorizing charging Orders against the Mary Pat Abruzzo Kearney Trust, to protect and further Yearout's security as Kearney's creditor. . . ." *Id.* Additionally, he repeatedly asked the Abruzzos to lend him money secured by his future distributions.[12] Aplt. App., vol. XXIII at 224.

Second, Mr. Kearney has acted in brazen contradiction to Mary Pat's ardent wish to keep the shares of ARCO with her family. For example, he conspired with third parties to forcefully take over ARCO and to liquidate its "Trophy Properties." *Id.* at 225-27. He provided ARCO's confidential financial and proprietary information to Mr. Yearout and others, who in turn distributed some or all that information to over two dozen other persons and entities. *Id.* at 225. Also, in violation of the state court's confidentiality order, Mr. Kearney gave his expert's classified report to Mr. Yearout to help negotiate for the sale of the Trusts' assets.[13] *Id.* He

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[12] For example, Mr. Kearney asked the Abruzzos for a $150,000 loan in 2005 and a $8,500,000 loan in 2011.

[13] While Mr. Kearney was conspiring to help third parties like Mr. Yearout to take over ARCO, Mr. Kearney was fully aware

then signed a series of documents to give the appearance that Mr. Yearout had control over the Trusts' shares of ARCO, including a document delegating Mr. Kearney's right to vote the Trusts' shares in ARCO.[14] *Id.* at 226. If successful, Mr. Kearney's $2 million debt to Mr. Yearout would have been converted to equity in ARCO. *Id.* at 227.

Third, Mr. Kearney has time and again reneged on his promises to pay income taxes despite knowing that nonpayment could force liabilities on the Trusts. *Id.* at 228. For example, despite his written pledges to file and pay the taxes, Mr. Kearney did not file any tax returns with New Mexico between 2008 and 2015, making him responsible for "$7 million in unreported income to answer for." *Id.* His tax liabilities posed a direct risk to the Trusts and the remainder beneficiaries' interests. *Id.* at 228-29.

This sampling of Mr. Kearney's unsavory conduct underscores his refusal to act responsibly and illustrates his contempt for the Trusts' governing provisions, Mary Pat's wishes, and the remainder beneficiaries' interest.

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of their plans to substantially change ARCO's operations and to liquidate its "Trophy Properties." Aplt. App., vol. XXIII at 227.

[14] The terms of the delegation obligated Mr. Yearout to act in Mr. Kearney's best interest, not those of all beneficiaries.

ii.

As previewed, Mr. Kearney also has significant credibility issues and seems comfortable lying under oath and otherwise. After conducting a 5-day jury trial, the state court found that Mr. Kearney "had little or no credibility" when testifying before the court. Aplt. App., vol. XXIII at 50.

Examples of Mr. Kearney's dishonesty include signing off on disclosure of protected information as "Trustee" a week after resigning from that position, *id.* at 49-50, and falsely alleging diversity of citizenship to remove the state action on Trust modifications to the federal district court, Aplt. App., vol. XXVI at 280-82. Furthermore, despite indicating in open court his willingness to mediate with the Abruzzos, Mr. Kearney secretly promised third parties not to resolve his legal disputes at that mediation in order to help them acquire the Trusts' ARCO shares. Aplt. App., vol. XXIII at 231.

As such, "Mr. Kearney has impressed the Court as an individual who bears no allegiance to the truth, but who will say whatever he thinks will achieve his goals." *Id.* at 50. Indeed, Mr. Kearney's many lies suggest that he has an ever-decreasing believability reserve that continues to dwindle at every encounter with the judicial system, making him an unsympathetic plaintiff and supporting the bankruptcy court's conclusion that he was not likely to succeed in further litigation.

iii.

Mr. Kearney also has a well-established disdain for courts and the judicial processes which, unsurprisingly, is not promising for his prospect as a plaintiff. As commented by the state court, "[b]oth the frequency and level of Mr. Kearney's misbehavior make [even] severe sanctions appear well deserved and appropriate." Aplt. App., vol. XXIII at 51. His actions have continued to be an affront to "the entire judicial process." *Id.* at 50.

In his first lawsuit against the Abruzzos, for example, Mr. Kearney "repeatedly exhibited bad faith noncompliance with his discovery obligations throughout [the] litigation both generally and by failing to comply with specific discovery orders." *Id.* He also regularly violated lawful state court orders by distributing ARCO's protected information to third parties. When confronted, he claimed his actions were allowed under the order, which the court "adamantly reject[ed]." *See id.* Instead, "Mr. Kearney released the protected confidential information . . . for the primary if not sole purpose of furthering his agenda to gain control of ARCO." *Id.*

Furthermore, as referenced above, after an unsuccessful mediation attempt in 2016 it was revealed that Mr. Kearney had entered the mediation having already promised third parties that he would not settle his claims against the Abruzzos. Because of his antics, he was ordered to bear the full costs of that failed mediation.

He also demonstrated his disrespect for the state court during his first trial when he testified in his case-in-chief but refused to show up for his scheduled cross-examination. Although he used the pretext of an unexpected medical condition, the court remained doubtful of his true motives because he never substantiated his excuse.

Moreover, after the bankruptcy court granted the Abruzzos' motion to allow the state court to determine the lawfulness of the Three Actions, and after the state court scheduled a hearing, Mr. Kearney removed the action to federal court, falsely claiming diversity of citizenship. The federal district court promptly remanded the action, explaining:

> Kearney's diversity allegations are frivolous. The notice of removal claims, for the first time, that Kearney is a Nevada citizen. However, he filed the original lawsuit against the Abruzzos in New Mexico's Second Judicial District Court in 2013 and the New Mexico bankruptcy case in 2017. . . .
>
> Kearney's attempt to remove the actions directly to this Federal District Court appears to be a sham litigation tactic to avoid a ruling by the Bankruptcy Court.

Aplt. App., vol. XXVI at 281-82. Mr. Kearney had also used an Albuquerque address when filing his then most recent monthly operating report in the bankruptcy proceeding.

There is more. Back at the bankruptcy court, Mr. Kearney spearheaded improper contacts with the UCC members to take control of the UCC and force the withdrawal of its Plan. Even his own counsel condemned this "skullduggery." Aplt. App., vol. XX at 84-85. Another time, the court expressed concern that Mr. Kearney filed a Bankruptcy Rule 2004 motion[15] to harass the Abruzzos and ARCO and surmised that Mr. Kearney's requests were "motivated by a vendetta." Aplt. App., vol. XIII at 14, 16.

Mr. Kearney's contempt for the judicial process reached its zenith when he tried to avoid complying with the bankruptcy court's order to pay professional fees by emptying his bank account. Because Mr. Kearney refused to pay professional fees throughout his bankruptcy proceeding, the UCC filed a motion on November 14, 2018 to order him to pay, which the court granted. Mr. Kearney refused to pay, claiming he did not have the money. But, evidence produced at a later hearing showed that immediately after the UCC filed its motion, Mr. Kearney transferred $153,511.88 out of his account—including a $60,306 transfer to his ex-wife. Aplt. App., vol. XX at 85. All told, in the three-week period between the UCC's motion and the Court's order, Mr. Kearney reduced his account balance from $173,000 to $16,700 to avoid paying his obligations. *Id.*

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[15] Federal Rules of Bankruptcy Procedure Rule 2004 allows any party in interest to ask the court to order the examination of any entity.

In sum, Mr. Kearney's established contempt for the judicial system and courts does not bode well for his litigations. His skullduggery not only diminishes his chances of future success as a plaintiff, but also exposes him and the Trusts to further sanctions.

iv.

Finally, Mr. Kearney's demonstrated litigious approach over the years undermines his claim that he is likely to succeed in his future litigation. The courts before us have commented on Mr. Kearney's seemingly obsessive desire to sue. His conduct compelled the state court to conclude that Mr. Kearney had brought that action without an honest belief in its merits:

> The evidence which has developed in this matter since June 2015 is clear and convincing that Mr. Kearney initiated this litigation with the purpose of damaging the Abruzzos individually and to foster his apparent plan to force a hostile takeover of the Abruzzo interests and the assets of ARCO by gaining access to financial and in-house information and documentation through discovery which he could not have accessed otherwise, and then disseminating such information to third parties in repeated violation of the Court's Orders and admonishments and in spite of significant monetary sanctions.

Aplt. App., vol. XV at 129.

The state court's final pretrial order reprimanded Mr. Kearney for his lawsuits, saying his "reckless and

unfair actions" have harmed the Trusts and the interests of the remainder beneficiaries. Aplt. App., vol. XXIII at 189. The court further noted that Mr. Kearney has engaged in "protracted, very expensive, and ever more desperate litigation that shows no sign of waning in view of the list of Mr. Kearney's intended lawsuits filed in the Bankruptcy matter." Aplt. App., vol. XXIV at 271.

Mr. Kearney's repeated failure to substantiate his numerous claims has not convinced him to stop; he wants to sue fifty persons and entities, including the Abruzzos, their family members, and the attorneys opposing Mr. Kearney in the bankruptcy proceeding. *Id.* at 272. The list of "nonexclusive" causes of action Mr. Kearney wants to prosecute includes:

> unfair practices acts, loan sharking, violations of protective order, aiding and abetting breach of fiduciary duty, fraud when Louis Abruzzo was not a trustee, numerous bankruptcy law violations, unjust enrichment, shareholder oppression, 'statutory violations,' quasi contract claims, constructive eviction, tortious interference, conversion, trade-secret misappropriation, breach of warranty claims, suit on sworn account, usury, libel, slander, malicious prosecution, premises liability, fraudulent transfers, conspiracy, aiding and abetting, defamation, improper assignment, unconscionability, wrongful set off, and violations of statutes and regulations 'to name a few.'

Id. at 271-72. To this partial list, Mr. Kearney has added "any claims or causes of action related to any matter." *Id.*

Against this backdrop, it is not surprising that Mr. Kearney has labeled proceeds from litigations his "bankruptcy estate's most valuable asset," saying they represent "the best opportunity for a meaningful recovery to creditors." Aplt. App., vol. XIII at 15. Indeed, the cornerstone of Mr. Kearney's reorganization plans appear to be endless litigations.

In sum, Mr. Kearney has shown a tendency to exploit the judicial system as a club to beleaguer anyone who stands in his way. His litigiousness threatens the integrity of the courts and undermine his chances of success in pursuing future litigations. *See Gharb v. Mitsubishi Elec. Corp.*, 148 F. Supp. 3d 44, 55 (D.D.C. 2015) (discussing injunctive remedies against a litigious plaintiff to "protect the integrity of the courts and the orderly and expeditious administration of justice."); *Bradshaw v. Zoological* Soc'y *of San Diego*, 844 F.2d 791 (9th Cir. 1988) (unpublished) (describing the financial burden of a defendant's successful defense against the meritless claims of a litigious plaintiff as "miscarriage of justice."); *Pondexter v. Allegheny Cnty.*, C.A. No. 11-857, 2011 WL 5328562 at *4 (W.D. Pa. Nov. 4, 2011) (explaining that some courts "have enjoined overly litigious plaintiffs from filing actions involving 'groundless and vexatious litigation.'").

v.

Although any one of the above-referenced facets of Mr. Kearney's conduct—his abuse of the Trusts, his incessant lies, his mockery of the judicial system, or his litigious approach—may be enough to render him unsympathetic, their collective force surely depicts Mr. Kearney as a plaintiff interested only in his own short-term gains. They give ample support for the bankruptcy court's finding that Mr. Kearney "is not a sympathetic plaintiff."[16]

3. The settlements are backed by consideration

Mr. Kearney says the bankruptcy court's finding that the proposed settlement is supported by adequate consideration is clearly erroneous because "ARCO suffers no detriment on account of this transaction." Aplt. Br. at 52. We are not persuaded.

The bankruptcy court found enough consideration to approve the Plan because, among other things, in "exchange for the releases, ARCO is borrowing money, redeeming $12.6 million of its stock, and releasing its claim against [Mr. Kearney]." Aplt. App., vol. XX at 88. As the UCC points out, ARCO must pay interest on any money it borrows and paying the Trusts $12.6 million

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[16] We note, in the abundance of caution, that our analysis here is not a comment on the merits of any future lawsuits. It is intended to demonstrate only that the bankruptcy court's finding that Mr. Kearney is not a sympathetic plaintiff is supported by the record.

to purchase its stock precludes ARCO from engaging in other investment opportunities. Therefore, the bankruptcy court's finding of adequate consideration is not clearly erroneous.

4. The expense and complexity of litigations favor settlement

Mr. Kearney next disagrees with the bankruptcy court's finding that the third *Kopexa* factor, expense and complexity of litigation, weighs in favor of settlement. On that issue, the bankruptcy court offered the following analysis:

> The litigation Debtor wishes to bring against the Abruzzos, ARCO, and others would be expensive, even though Debtor's new law firm would take the case on a contingent fee. In the State Court Action, Debtor had to pay his counsel (which he has yet to do), the Abruzzos' counsel, costs, and a $100,000 sanction.

Id. at 87.

Mr. Kearney does not contend that his litigations will be simple or inexpensive. Instead, he relies on *In re C.R. Stone Concrete Contractors*, 346 B.R. 32 (Bankr. D. Mass. 2006), to argue that the court conducted its analysis incorrectly given the contingency nature of his legal representation. Commenting on the court's decision, he says "[t]he law is to the contrary." Aplt. Br. at 55.

In re C.R. Stone Concrete Contractors is factually inapposite and is not even persuasive. In that case, the bankruptcy court relied on the fact that the contingent basis of representation "remove[d] any burden upon the estate." 346 B.R. at 50. But here, Mr. Kearney has not pointed to any evidence that litigation will not impose "any" burden on the bankruptcy estate. To the contrary, as the BAP noted, Mr. Kearney's "contingency fee agreement provided counsel would seek reimbursement of costs and expenses from [Mr. Kearney] periodically during the litigation, requiring prejudgment payment." *In re Kearney*, 2019 WL 6523171 at *8.

Moreover, the record supports the conclusion that Mr. Kearney's lawsuits are likely to be expensive regardless of his contingency representation. As the bankruptcy court noted, Mr. Kearney has so far had to pay not only his opponents' litigation costs, but also a six-figure sanction. And nothing in the record suggests that Mr. Kearney has changed his litigious approach or his less-than-honest tactics that resulted in sanctions. For these reasons, the bankruptcy court's finding that the expense and complexity of the litigation favor settlement is amply supported by the record.

C. Public Policy

Mr. Kearney's final argument is that public policy militates against approving the settlement because "The UCC Plan settlement—an agreement between creditors and trustees designed to avoid spendthrift trust restrictions—contravenes public policy." Aplt. Br.

at 56. Here again, Mr. Kearney taps into his brief's underlying theme that the UCC Plan violates the Trusts' spendthrift provisions. Having debunked that myth at length, we are unpersuaded.

D. Conclusion

The UCC Plan was sufficiently considered and properly confirmed by the bankruptcy court. Accordingly, we affirm.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: VICTOR P. KEARNEY, Debtor, ---------- VICTOR P. KEARNEY, Appellant, v. KEVIN YEAROUT; UNSECURED CREDITORS COMMITTEE; UNITED STATES TRUSTEE; LOUIS ABRUZZO and BENJAMIN ABRUZZO, Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C, Appellees.	No. 19-2209 (BAP No. 19-010-NM) (Bankruptcy Appellate Panel)

JUDGMENT

(Filed Feb. 24, 2021)

Before **MATHESON**, **SEYMOUR**, and **KELLY**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: VICTOR P. KEARNEY, Debtor, --- VICTOR P. KEARNEY, Appellant, v. KEVIN YEAROUT; UNSECURED CREDITORS COMMITTEE; UNITED STATES TRUSTEE; LOUIS ABRUZZO and BENJAMIN ABRUZZO, Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C, Appellees.	No. 19-2209 (BAP No. 19-010-NM) (Bankruptcy Appellate Panel)

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: VICTOR P. KEARNEY, Debtor, --- VICTOR P. KEARNEY, Appellant, v. KEVIN YEAROUT; UNSECURED CREDITORS COMMITTEE; UNITED STATES TRUSTEE; LOUIS ABRUZZO and BENJAMIN ABRUZZO, Trustees of the Mary Pat Abruzzo Kearney Testamentary Trusts B and C, Appellees.	No. 19-2209 (BAP No. 19-010-NM) (Bankruptcy Appellate Panel)

ORDER

(Filed Apr. 6, 2021)

Before **MATHESON**, **SEYMOUR**, and **KELLY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellant's motion to file a supplemental appendix is denied as moot.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

VICTOR KEARNEY, as
Beneficiary and Trustee of the
Mary Pat Abruzzo Kearney
Testamentary Trusts B and C,

Plaintiff/Counterdefendant-
Appellant,

v.

LOUSI ABRUZZO, Trustee of
the Mary Pat Abruzzo Kearney
Testamentary Trusts B and C;
and BENJAMIN ABRUZZO,
Trustee of the Mary Pat Abruzzo
Kearney Testamentary Trusts
B and C,

Defendants/Counterplaintiffs-
Appellees,

and

MARY PAT ABRUZZO;
and NANCY ABRUZZO, as
Guardian and Next Friend
of RICO ABRUZZO,

Third-Party Counterclaimants./

No. A-1-CA-37793

ORDER STAYING APPEAL

(Filed Mar. 4, 2021)

This matter comes before the Court on its own motion. This appeal is related to other appeals presently

before this Court, Cause Nos. A-1-CA-39504 and A-1-CA-38847. This Court has reviewed the record and the order entered by the Bankruptcy Court modifying the automatic stay in Plaintiff's bankruptcy action. The order states, in pertinent part, that the automatic stay imposed under 11 U.S.C. § 362(a) is modified to allow the Abruzzo Trustees to seek a hearing in the district court case on certain specific issues requiring state court approval raised by the Unsecured Creditors Committee's First Amended Plan of Reorganization (the Three Actions). The order did not expressly include a modification of the automatic stay to apply to appeals or any proceedings in the New Mexico Court of Appeals or the New Mexico Supreme Court. As such, until and unless this Court is supplied with either an express order from the Bankruptcy Court modifying the automatic stay for this Court to address any and all appeals from the underlying case pertaining to the Three Actions, ***or*** an order of discharge of Plaintiff's bankruptcy, this appeal shall be stayed. Plaintiff is further ordered to file status reports every ninety (90) days informing this Court of the status of the bankruptcy case.

THE COURT THEREFORE ORDERS that the matter is **HEREBY STAYED** pending either an express order from the Bankruptcy Court lifting the automatic stay for this Court to address any and all appeals from the underlying case pertaining to the Three Actions, ***or*** an order of discharge of Plaintiff's

bankruptcy. Status reports are due from Plaintiff every ninety (90) days.

/s/ J. Miles Hanisee
J. MILES HANISEE, Chief Judge

/s/ Kristina Bogardus
KRISTINA BOGARDUS, Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: Victor P. Kearney, Debtor.	§ § §	No. 17-12274

DEBTOR'S MOTION FOR INSTRUCTION TO COURT OF APPEALS OF THE STATE OF NEW MEXICO

(Filed Mar. 22, 2021)

Debtor Victor P. Kearney asks this Court to issue an order clarifying that the automatic stay in this case pursuant to 11 U.S.C. § 362(a) does not stay the proceedings in the New Mexico Court of Appeals docketed as No. A-1-CA-37793, No. A-1-CA-39504, and No. A-1-CA-38847; confirming that this Court's order lifting the stay to allow the state court approval of the "Three Actions" contemplated that an appeal would follow; and formally lifting the stay so as to satisfy the request by the Court of Appeals of New Mexico in its *Order Staying Appeal* issued March 4, 2021, this Court should nevertheless issue an order "lifting" the automatic stay.

BACKGROUND

Kearney filed this Chapter 11 case (Doc. 1). The Unsecured Creditors Committee ("UCC") proposed a plan of reorganization (Doc 360).

Because implementing that UCC plan purportedly required a New Mexico state court's approval of

three matters the so-called "Three Actions" to modify the spendthrift trusts at issue and approve the trustees' actions in implementing the UCC plan Louis Abruzzo and Benjamin Abruzzo, as trustees of the trusts, asked this Court for relief from the automatic stay pursuant to 11 U.S.C. § 362(a) in order to have the Three Actions approved by the New Mexico district court presiding over a lawsuit Kearney had filed against the trustees (Doc. 386 at1-2). This Court granted that motion (Doc. 395).

The Abruzzo trustees later filed a supplement to that motion (Doc. 421). In an order issued to "modify" the stay, this Court granted that motion, stating:

> The automatic stay imposed under 11 U.S.C. 362(a) is hereby modified, effective immediately, to allow the Trustees to proceed in the State Court Action (as defined in the memorandum opinion) to determine whether the [Three Actions] would be proper actions of the Trustees.

(Doc. 446). The New Mexico state court issued a ruling approving the Three Actions (Doc. 524). Kearney has appealed that ruling and the appeal is docketed in the Court of Appeals of New Mexico as No. A-1-CA-37793, No. A-1-CA-39504, and No. A-1-CA-38847.

That appeal is fully briefed, and after a lengthy wait, was finally, on February 1, 2021, submitted to a panel for decision. But on March 4, 2021—and without ruling on the merits of the appeal—the Court of Appeals of New Mexico issued its *Order Staying Appeal*

(**Exhibit A**). That order declared that the automatic stay under 11 U.S.C. 362(a) stayed the appeal—even though the court had allowed the parties to file the record and fully brief the merits—because this Court's order "modifying" the stay "did not expressly include a modification of the automatic stay to apply to appeals or any proceedings in the New Mexico Court of Appeals or the New Mexico Supreme Court" (Exhibit A at 1-2). The court of appeals' order explained that the appeal would not proceed unless and until the court of appeals receives either an order from this Court "modifying the automatic stay for this Court to address any and all appeals from the underlying case pertaining to the Three Actions" or "an order of discharge of Plaintiff's bankruptcy." (**Exhibit A** at 1-2).

For the following reasons, this Court should issue an order clarifying that the appeal may proceed and that, to the extent necessary, the automatic stay is lifted so the New Mexico appellate courts may review the state court approval of the Three Actions: (a) the automatic stay does not apply to the appeal; (b) the plan of reorganization contemplates resolving the appeal; (c) the appeal is not moot because the Court of Appeals of New Mexico can rule before the confirmation order is final; and (d) this Court has power to grant this relief in to implement the confirmation order.

ARGUMENT

A. The Automatic Stay Does Not Stay The Appeal.

The order from the Court of Appeals of New Mexico assumes that the automatic stay prevents that court from proceeding with the subject appeals. The stay does not prevent proceeding with those appeals. Section 362(a)'s automatic stay only stays proceedings brought against the debtor. *See Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984) ("The language of [§ 362] extends stay proceedings only to actions against the debtor.") (internal quote marks omitted). [1]The stay does not apply to judicial proceedings initiated by the debtor. *See, e.g.*, *Brown v. Armstrong*, 949 F.2d 1007, 1009–10 (8th Cir. 1991); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (explaining that "within one case, actions *against* a debtor will be suspended even though closely related claims asserted *by* the debtor may continue").

Deciding whether an action is "against the debtor" within Section 362 "must be determined at its

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[1] Eight of the remaining eleven circuit courts agree with the Tenth Circuit. *See In re Berry Estates*, 812 F.2d 67, 71 (2d Cir. 1987); *Ass'n of St. Croix Condominium Owners.*, 682 F.2d at 448; *Freeman v. Comm'r*, 799 F.2d 1091, 1092 93 (5th Cir. 1986); *Cathey v. Johns–Manville Sales Corp.*, 711 F.2d 60, 61 (6th Cir. 1983); *Martin–Trigona v. Champion Federal Savs. & Loan Ass'n*, 892 F.2d 575 (7th Cir. 1989); *Brown v. Armstrong*, 949 F.2d 1007, 1009–10; *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1426–27 (9th Cir. 1987); *Carley Capital Group v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989).

inception . . . regardless of whether the debtor is the appellant or appellee . . . [or] the particular stage of the litigation at which the filing of the petition in bankruptcy occurs." *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011); *see also Freeman v. Comm'r*, 799 F.2d 1091, 1093 (5th Cir. 1986) ("[W]hether a proceeding is against the debtor within the meaning of Section 362(a)(1) is determined from an examination of the posture of the case at the initial proceeding"). Kearney initiated the State Court Action in the New Mexico district court (Doc. 845 at 2, 6 n.8), and so it is not "against" the debtor, so Section 362(a) does not stay it.

In addition, section 362(a) "automatically stays the commencement or continuation of a judicial proceeding against the debtor **that was or could have been initiated before the filing of a bankruptcy petition**." *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 496 (10th Cir. 2011) (emphasis added). The Trustees could not have petitioned the New Mexico district court to approve the Three Actions before Kearney's bankruptcy petition (filed September 1, 2017) because the three Actions are the product of – and allegedly required to confirm – the amended UCC plan filed on July 2018 (Doc. 320) and later amended in November 2018 (Doc. 536).

To be sure, trust amendments and approvals of fiduciary action could have occurred before Kearney filed for bankruptcy—but not these trust amendments or fiduciary action, because they are expressly conditioned on the bankruptcy proceedings. It was not until

the bankruptcy plan was submitted for approval that any grounds for this particular modification arose.

The state trial court approved the Three Actions using this explicit language:

> 6. The MPK Testamentary Trusts should be modified, and hereby are so modified, to allow the Trustees to make a one-time $3,000,000.00 distribution from principal to Mr. Kearney, but only upon approval of the pending UCC Plan by the Bankruptcy Court.
>
> . . . .
>
> 11. The Trusts are modified to permit the one-time distribution of $3,000,000.00 of principal to Mr. Kearney as contemplated by the UCC Plan.

(Doc. 524-1 at 14-15). Approval of the Three Actions was thus integral to the proposed plan, not independent of it. The state trial court could not approve, before the bankruptcy, actions that were expressly conditioned upon approval of a bankruptcy plan of reorganization.

B. The Plan of Reorganization Requires Resolving the Merits of the Appeal.

In order to implement the plan of reorganization this Court has confirmed, this Court must allow the New Mexico appellate courts to review the state trial court's action approving the Three Actions. The reason is that state trial court decisions are not binding on

matters of state law that are implicated by federal statutes; rather, federal courts must consider appellate court decisions in determining whether a state trial court has acted within the bounds of state law. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-66 (1967); *Johnson v. Riddle*, 305 F.3d 1107, 1119 (10th Cir. 2002). Lifting the stay will allow the Court of Appeals to rule on those state law issues before the Tenth Circuit issues its ruling on Kearney's petition for rehearing and any further review by the Supreme Court. Accordingly, this Court should issue the instruction to facilitate a full and accurate review consistent with Tenth Circuit case law. *See, e.g., In re Trust D Created Under the Last Will and Testament of Darby*, 290 Kan. 785, 787, 234 P.3d 793, 796 (20 10) (citing *Bosch* and explaining that "we must decide the propriety of the district court's order approving modifications to an irrevocable testamentary trust. . . . because the Internal Revenue Service (IRS) is not bound by such modifications unless approved by the highest court of the state").

This is consistent with this Court's ruling confirming the plan of reorganization (Doc. 845). In that ruling, this Court addressed the plan's compliance with 11 U.S.C. § 1129(a)(11) and therein *expressly contemplated an appeal from the state trial court ruling*, stating:

> Likelihood of Judge Malott Being Reversed. The Debtor argues that the UCC Plan is a visionary scheme because Judge Malott's approval of the Trust Modifications will be

> reversed on appeal. The Court will evaluate the possibility of a reversal. . . . The Court finds and concludes that Judge Malott's ruling likely will be affirmed on appeal. . . . Judge Malott's determination that the proposed sale price of ARCO stock for $79,000 per share is also likely to be affirmed. . . . the Court finds that Judge Malott's ruling that the price is fair is likely to be upheld on appeal. . . . Judge Malott's one-time modification of the MPK Trusts under N.M. S.A. § 46A-4-412 also is likely to be affirmed. . . . The Court holds that Judge Malott's modification of the MPK Trusts is likely to be upheld on appeal. . . .

(Doc. 845 at 19-20). Although on appeal Kearney has challenged whether this is true, that ruling at least aligns with *Estate of Bosch* and *Johnson v. Riddle*. A ruling by this Court that the stay was lifted only to allow a state *trial court* order, but not review by the state *appellate courts* (e.g., as in the manner of *In re Trust D* above), would confirm Kearney's challenge. Thus an order confirming that the state appellate court proceedings continue is required by the order confirming the plan.

C. The Confirmation Order Will Not Be Final For Many Months.

The Court of Appeals of New Mexico will have ample time to determine the appeal on the merits. The case is fully briefed and has been submitted to a panel for decision. The plan of reorganization will not be "final" and thus subject to consummation until the

appeal of the order confirming that plan has run its course. According to the UCC plan, the plan is not effective until "the Confirmation Order shall have been entered and shall be a Final Order" (Doc. 536 at 36) and this is how the plan defines "Final Order":

> "Final Order" means an order of the Bankruptcy Court that has not been stayed by order of a court of competent jurisdiction and does not remain subject to further appeal.

(Doc. 536 at 16). Although on February 24, 2021, the U.S. Court of Appeals for the Tenth Circuit issued a judgment confirming the plan (Doc. 1106), that court has ordered that Kearney has until March 24, 2021, to file a petition for rehearing (**Exhibit B**). Moreover, if the petition for rehearing is overruled, Kearney believes he has grounds for a petition for certiorari and would file such a petition. Kearney will have 150 days from that date to file a petition for certiorari in the U.S. Supreme Court (**Exhibit C**) and the UCC Plan will not become "final" until after the U.S. Supreme Court rules on the petition.

The U.S. Supreme Court would not likely rule on the petition for certiorari until at least a month or so after that date. For that reason, there is no sound reason for the Court of Appeals of New Mexico not to proceed with the fully briefed appeal that this Court has always contemplated would occur with regard to the state court order approving the Three Actions. Indeed, this Court noted in its February 28, 2019, order confirming the UCC plan that "Judge Malott's ruling [in

New Mexico District Court] likely will be affirmed on appeal" (Doc. 845 at 19).

D. Section 105(x) Authorizes This Request For Relief.

This Court has express authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). But in exercising those statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions. *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194, 188 L. Ed. 2d 146 (2014). That concern is not present here. Indeed, bankruptcy courts with jurisdiction over a debtor's case have the power to lift the automatic stay imposed by 11 U.S.C. §362. *See, e.g.*, *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1203 (3d Cir. 1991); *Cathey v. Johns–Manville Sales Corp.*, 711 F.2d 60, 62–63 (6th Cir.1983), *cert. denied*, 478 U.S. 1021, 92 L.Ed.2d 740 (1986). Accordingly, this Court can, and should, use its statutory authority to instruct the Court of Appeals of New Mexico to lift the improper stay on Kearney's Appeal.

REQUEST FOR RELIEF

This Court should issue an order: (1) that the automatic stay pursuant to 11 U.S.C. § 362(a) does not apply to the subject appeal of the order approving the Three Actions (Doc. 524-1) now pending in the New Mexico state court system; (2) that the automatic stay

is lifted to the extent necessary to satisfy the Court of Appeals of New Mexico that those appellate proceedings do not violate the stay or bankruptcy law; and (3) that Kearney have any other relief in this regard to which he may be justly entitled.

Dated: March 22, 2021

Respectfully submitted,

/s/ Debbie E. Green

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CERTIFICATE OF CONFERENCE

I certify that on March 22, 2021, I conferred with counsel for all other parties in this proceeding via email with regard to the relief requested in this Motion. Counsel for the Abruzzo Trustees indicated that they are opposed to the Motion. Counsel for the UCC requested a draft of the proposed order but did not

respond after it was provided to him. And counsel for Kevin Yearout did not respond at all.

/s/ Debbie E. Green
Debbie E. Green

CERTIFICATE OF SERVICE

I certify that on March 22, 2021, a copy of this document was served electronically by the Court's PACER system.

/s/ Debbie E. Green
Debbie E. Green

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: Victor P. Kearney,	§	
Debtor.	§	**Case No.: 17-12274**
	§	

DEBTOR'S MOTION TO SHORTEN DEADLINE FOR FILING OBJECTIONS TO DEBTOR'S MOTION FOR INSTRUCTION TO COURT OF APPEALS OF THE STATE OF NEW MEXICO

(Filed Mar. 22, 2021)

Victor P. Kearney, the debtor and debtor-in-possession (the "**Debtor**"), respectfully requests that the Court enter an order shortening the deadline for objections to be timely filed to *Debtor's Motion for Instruction to Court of Appeals of the State of New Mexico* (the "**Motion**").

1. On September 1, 2017 (the "**Petition Date**"), Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "**Bankruptcy Code**"), commencing the Bankruptcy Case.

2. The Court has jurisdiction to consider the Motion pursuant to 128 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b).

3. On March 22, 2021, the Debtor filed the Motion [Dkt. #1115].

4. The Motion requests an order confirming that this Court's order lifting the stay to allow the state court approval of the "Three Actions" contemplated that an appeal would follow; and formally lifting the stay so as to satisfy the request by the Court of Appeals of New Mexico in its Order Staying Appeal issued March 4, 2021.

5. The Debtor believes that the shortened notice period is in the best interest of the estate.

6. The appeal pending in the New Mexico Court of Appeals is fully briefed and has been submitted to a panel for a ruling on the merits.

7. Expediting a resolution of the Motion will expedite a ruling in that appeal.

8. Therefore, the Debtor respectfully requests that the Court shorten the notice period for objections to the Motion to 7 days from March 22, 2021 so that objections are due ON OR BEFORE Monday, March 29, 2021, at 5:00 p.m. MDT, pursuant to the Order of the Court.

WHEREFORE, the Debtor respectfully requests that the Court shorten the period for objections to be

timely filed as set forth above, and for such other relief as the Court deems just.

Dated: March 22, 2021

Respectfully submitted,

/s/ Debbie E. Green

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CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2021, a true and correct copy of the foregoing document was served electronically by the Court's PACER system.

/s/ Debbie E. Green
Debbie E. Green