

  
Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
April 12, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re:	)	Case No. 12-12349-MKN
	)	Chapter 11
AMERICAN WEST DEVELOPMENT,	)	
INC.,	)	Date: March 21, 2018
	)	Time: 9:30 a.m.
Debtor.	)	

**ORDER ON REORGANIZED DEBTOR’S MOTION (I) TO REOPEN CHAPTER 11 CASE; AND (II) FOR AN ORDER TO SHOW CAUSE WHY SCOTT LYLE GRAVES CANARELLI AND HIS COUNSEL SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING PLAN DISCHARGE, EXCULPATION, RELEASE AND INJUNCTIVE PROVISIONS<sup>1</sup>**

On March 21, 2018, the court heard the Reorganized Debtor’s Motion (I) to Reopen Chapter 11 Case; and (II) for an Order to Show Cause Why Scott Lyle Graves Canarelli and His Counsel Should Not Be Held in Contempt for Violating Plan Discharge, Exculpation, Release and Injunctive Provisions (“OSC Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On March 1, 2012, American West Development, Inc. (“AWD”) commenced a voluntary Chapter 11 proceeding.

On October 26, 2012, AWD filed its proposed First Amended Chapter 11 Plan of Reorganization (“Plan”). (ECF No. 714).

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 On February 14, 2013, an order was entered confirming its Plan. (ECF No. 853).

2 On March 15, 2013, a notice was filed that the confirmed Plan was effective as of March  
3 15, 2013. (ECF No. 868).

4 On September 5, 2013, an order was entered for a final decree closing the case. (ECF  
5 No. 1039).

6 On June 1, 2015, a motion was filed by Zurich American Insurance Company (“Zurich”)  
7 for a declaration that the bankruptcy discharge received by AWD did not apply to certain non-  
8 debtor parties, or, in the alternative, to modify the discharge injunction. (ECF No. 1056).

9 On July 24, 2015, an order was entered denying the Zurich motion (“Zurich Order”).  
10 (ECF No. 1071).

11 On February 8, 2018, AWD, as the reorganized debtor, filed the instant OSC Motion.  
12 (ECF No. 1081).<sup>2</sup> The OSC Motion was noticed to be heard on March 21, 2018. (ECF No.  
13 1087).

14 On March 7, 2018, opposition (“Opposition”) to the OSC Motion was filed on behalf of  
15 Scott Lyle Graves Canarelli (“Scott Canarelli”). (ECF No. 1093).<sup>3</sup> On the same date, a joinder  
16 in the Opposition was filed on behalf of the law firm of Solomon Dwiggin & Freer, Ltd. (“SDF  
17 Firm”). (ECF Nos. 1095, 1096).

18 On March 14, 2018, AWD filed a reply (“Reply”) to the Opposition. (ECF No. 1098).

19 On March 15, 2018, Scott Canarelli filed a motion to strike portions of the Reply (“Strike  
20 Motion”). (ECF No. 1100).<sup>4</sup>

21 On March 16, 2018, an order shortening time was entered allowing the Strike Motion to  
22 be heard at the same time as the underlying OSC Motion. (ECF No. 1104).

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24 <sup>2</sup> The OSC Motion is accompanied by supporting declarations from Robert M. Evans,  
25 Edward C. Lubbers (“Lubbers Declaration”), Lawrence D. Canarelli, Katina Brountzas, and  
26 Jennifer L. Braster (“Braster Declaration”). (ECF Nos. 1082, 1083, 1084, 1085, 1086).

27 <sup>3</sup> The Opposition is accompanied by the declaration of attorney Dana Dwiggin  
28 (“Dwiggin Declaration”). (ECF No. 1094).

<sup>4</sup> Attached to the Strike Motion are two exhibits consisting of the declaration of attorney  
Candace C. Carlyon (“Carlyon Declaration”) and another declaration from Ms. Dwiggin.

1 On March 16, 2018, the SDF Firm filed a joinder in the Strike Motion. (ECF No. 1108).

2 On March 20, 2018, AWD filed an objection (“Strike Objection”) to the Strike Motion.  
3 (ECF No. 1111).<sup>5</sup>

#### 4 DISCUSSION

5 By the instant OSC Motion,<sup>6</sup> AWD seeks to reopen the Chapter 11 proceeding so that the  
6 court can issue an order to show cause (“OSC”) “why Scott Canarelli and the [SDF] Firm should  
7 not be held in contempt for violating the discharge, exculpation, release and injunctive  
8 provisions of the Plan.” See OSC Motion at 17:4-6. The acts constituting the alleged violations  
9 relate to a probate matter pending in the Eighth Judicial District Court, Clark County, Nevada  
10 (“Probate Court”), styled as In the Matter of The Scott Lyle Graves Canarelli Irrevocable Trust,  
11 dated February 24, 1998 (“SLGC Trust”), denominated Case No. P-13-078912-T (“Probate  
12 Proceeding”).<sup>7</sup> That proceeding was commenced on September 30, 2013, after the effective date  
13 of the confirmed Plan. The Probate Proceeding was initiated through the filing of a “Petition to  
14 Assume Jurisdiction over the Scott Lyle Graves Canarelli Irrevocable Trust; to Confirm Edward  
15 C. Lubbers as Family and Independent Trustee; for an Inventory and Accounting; to Compel an  
16 Independent Valuation of the Trust Assets Subject to the Purchase Agreement Dated May 31,  
17 2013; and to Authorize and Direct the Trustee and Former Trustees to Provide  
18 Settlor/Beneficiary with Any and All Information and Documents Concerning the Sale of the  
19 Trust’s Assets Under Such Purchase Agreement” (hereafter “the Petition”).<sup>8</sup>

20 The Petition references three documents of importance to that dispute: (1) a “Purchase  
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22 <sup>5</sup> The Strike Objection is accompanied by a declaration from Nathan Schultz (“Schultz  
23 Declaration”). (ECF No. 1112).

24 <sup>6</sup> The Strike Motion is the subject of a separate order entered concurrently with this  
25 Order.

26 <sup>7</sup> The court takes judicial notice of the docket in the Probate Action (“Probate Docket”) pursuant to FRE 201(b). See Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower), 755  
27 F.3d 1130, 1142 (9th Cir. 2014)(judicial notice may be taken of “court filings and other matters  
28 of public record . . . .”)(quotations and citations omitted).

<sup>8</sup> A copy of the Petition is attached as Exhibit “1” to the Lubbers Declaration.

1 Agreement” apparently dated May 31, 2013, (2) an unsecured “LLC Note” executed in  
2 connection with the Purchase Agreement, with payments commencing April 1, 2013, and (3) an  
3 unsecured “Corporation Note” executed in connection with the Purchase Agreement, with  
4 payments commencing April 1, 2013. See Petition at ¶¶ A.18, A.22, and A.23.<sup>9</sup> The Petition  
5 was filed by Scott Canarelli through his attorneys, the SDF Firm.

6 The prayer of the Petition requests the Probate Court to: (1) assume in rem jurisdiction  
7 over the SLGC Trust, (2) confirm the trustee status of Edward Lubbers, (3) compel Lubbers to  
8 provide an inventory and accounting, (4) compel Lawrence and Heidi Canarelli, as former  
9 co-trustees, to assist Lubbers with the inventory and accounting, (5) appoint an independent  
10 valuation expert to value certain assets encompassed by the Purchase Agreement, and (6)  
11 authorize and direct the current and former trustees to provide the petitioner with all information  
12 and documents concerning assets sold under the Purchase Agreement. See Petition at 14:24 to  
13 15:15.

14 On or about October 24, 2013, an order was entered by the Probate Court granting, *inter*  
15 *alia*, the relief requested in the Petition. See Order Granting Petition to Assume Jurisdiction  
16 over the Scott Lyle Graves Canarelli Irrevocable Trust, etc., attached as Exhibit “2” to the  
17 Opposition.<sup>10</sup> As a result, the Probate Court has jurisdiction over the matters asserted and parties  
18 against whom relief is sought in the Probate Proceeding.

19 On June 27, 2017, Scott Canarelli, through the SDF Firm, filed in the Probate Proceeding  
20 a “Petition to Surcharge Trustee and Former Trustees for Breach of Fiduciary Duties, Conspiracy  
21 and Aiding and Abetting; Petition for Breach of Fiduciary Duty for Failure to Properly Account;  
22 Petition to Compel Trustee to Enforce Rights of Trust Under Purchase Agreement, Promissory  
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24 <sup>9</sup> The copy of the Petition attached to the Lubbers Declaration is incomplete. The  
25 Petition itself references up to 17 attached exhibits, including the Purchase Agreement as exhibit  
26 4. The LLC Note and the Corporation Note are supposed to be exhibits to the Purchase  
27 Agreement. Unfortunately, none of exhibits are attached to the copy of the Petition  
28 accompanying the Lubbers Declaration.

<sup>10</sup> Authentication of that exhibit is offered in Paragraph 3 of the Dwiggin Declaration,  
although the court may also take notice of the same. See note 7, supra.

1 Note and Guaranty; Petition to Accelerate Promissory Notes; Declaration of Principal and  
2 Interests (sic) Payments Due and Owing Under Purchase Agreement; Petition for Constructive  
3 Trust; Petition to Remove Trustee and Appoint Independent Trustee; Petition Precluding the  
4 Trustee and Former Trustees From Paying Attorneys' Fees and Costs From the Trust; Petition  
5 Directing Trustee to Immediately Seek Full Reimbursement of Retainer Paid to Dickinson  
6 Wright; and Petition for an Award of Attorney Fees, Accountant Fees and Costs" (hereafter the  
7 "Surcharge Petition").<sup>11</sup>

8 The prayer of the Surcharge Petition seeks to compel Edward Lubbers, as current trustee  
9 of the SLGC Trust, to enforce the trust's rights under the Purchase Agreement, the LLC Note,  
10 and the Corporation Note. See Surcharge Petition at 37:21 to 38:23. The prayer also seeks to  
11 surcharge the former trustees and current trustee of the SLGC Trust for entering into and failing  
12 to account for the proceeds of the Purchase Agreement. Imposition of a constructive trust also is  
13 sought for monetary benefits from the Purchase Agreement in the possession of other parties.  
14 Finally, the prayer seeks reimbursement of Scott Canarelli's legal and accounting expenses paid  
15 by the SLGC Trust, and disgorgement of the fees paid to attorneys representing the trustees. Id.  
16 at 38:24 to 39:13.

17 On or about October 17, 2017, Scott Canarelli, through the SDF Firm, propounded a first  
18 request for production of documents ("RPD") to Lawrence Canarelli and Heidi Canarelli  
19 individually and in their capacities as trustees of the SLGC Trust.<sup>12</sup> He also subpoenaed  
20 documents from various entities, including Lawrence Canarelli and Heidi Canarelli as trustees of  
21 trusts in favor of various siblings, AWD, AWH Ventures, Inc., CanFam Holdings, LLC and  
22 related entities, and SJA Acquisitions, LLC.<sup>13</sup> The RPD as well as the various subpoenas seek  
23 documents and information concerning events and activities that took place before the March 15,  
24 2013, effective date of the confirmed Plan as well as before the March 1, 2012, bankruptcy

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26 <sup>11</sup> A copy of the Surcharge Petition is attached as Exhibit "2" to the Lubbers Declaration.

27 <sup>12</sup> A copy of the RPD is attached as Exhibit "4" to the Lubbers Declaration.

28 <sup>13</sup> Copies of subpoenas encompassing these entities are attached as Exhibit "1" to the  
Braster Declaration.

1 petition filed by AWD.<sup>14</sup>

2 AWD asserts that the conduct of Scott Canarelli and his counsel, the SDF Firm, violates  
3 the discharge provided by Section 1141(d), as well as separate exculpation, release and discharge  
4 provisions of the Plan. On that asserted basis, AWD seeks an order requiring Scott Canarelli and  
5 the SDF Firm to show cause why they should not be held in contempt. See OSC Motion at ¶ 58.  
6 If they are found in contempt for violation of the discharge, AWD apparently would seek  
7 compensatory damages, attorneys' fees, and possibly noncompensatory damages. See id. at ¶  
8 56.<sup>15</sup>

9 In their response, Scott Canarelli and the SDF Firm state that "the Plan does not  
10 discharge the claims raised in the Surcharge Petition because (1) they arose post-effective date;  
11 (2) they are against non-debtors; and (3) they are not within the scope of Claims which are  
12 subject to the Plan release provisions." Opposition at 3:1-3. Scott Canarelli and the SDF Firm  
13 primarily maintain that none of the relief sought by the Surcharge Petition imperils the  
14 bankruptcy discharge of prepetition claims obtained by AWD through confirmation of the Plan.  
15 See Opposition at 11:26 to 12:8, 15:10 to 16:25, 18:20 to 19:4. They also argue that their actions  
16 in the Probate Proceeding also do not implicate the exculpation, release and injunction  
17 provisions of the confirmed Plan. Id. at 13:13 to 15:8, 18:19 to 19:15. Scott Canarelli and the  
18 SDF Firm further argue that any protection afforded by the discharge injunction or the Plan  
19 provisions would not, in any event, excuse AWD from responding to any discovery undertaken  
20 in the Probate Proceeding. Id. at 20:8-18. Finally, Scott Canarelli and the SDF Firm assert that  
21 the bankruptcy court lacks jurisdiction over the claims raised by the Surcharge Petition. Id. at  
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23 <sup>14</sup> According to the docket in the Probate Proceeding, on February 26, 2018, an  
24 emergency motion was filed to stay the Probate Proceeding pending the outcome of the instant  
25 OSC Motion.

26 <sup>15</sup> A high bar exists for contempt sanctions to be imposed. The underlying facts must be  
27 established through clear and convincing evidence. See Marino v. Ocwen Loan Serv., LLC (In  
28 re Marino), 577 B.R. 772, 782-83 (B.A.P. 9th Cir. 2017). For a discharge violation, the moving  
party must demonstrate that the respondent knew the discharge injunction was applicable to the  
respondent's claim and that the respondent intended the action that violated the injunction. See  
Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 (B.A.P. 9th Cir. 2016).

1 21-22.

2 In its Reply, AWD primarily expresses frustration that Scott Canarelli and the SDF Firm  
3 are allegedly unwilling to enter into a stipulation expressly limiting the relief sought by the  
4 Surcharge Petition to matters excluded by the bankruptcy discharge and the Plan provisions.  
5 See Reply at 2:8 to 3:9. A proposed order drafted by AWD’s counsel is included as an exhibit to  
6 the Reply.<sup>16</sup>

7 In this case, the Plan was confirmed on February 14, 2013, and the confirmed Plan was  
8 effective on March 15, 2013. Under Section 1141(d)(1)(A), AWD received its discharge of any  
9 of its prepetition debts no later than the effective date. That discharge applied to any prepetition  
10 debt regardless of whether the claimant accepted the Plan, see 11 U.S.C. § 1141(a), and  
11 regardless of whether the claimant filed a proof of claim, see 11 U.S.C. § 1141(d)(1).

12 Under Section 524(a), the effect of a bankruptcy discharge is to void any judgment  
13 obtained at any time to the extent the judgment is a determination of the personal liability of the  
14 debtor with respect to a discharged debt. See 11 U.S.C. § 524(a)(1). Another effect of a  
15 bankruptcy discharge is that it operates as an injunction against the commencement or  
16 continuation of any action or any act to collect, recover or offset any discharged debt as a  
17 personal liability of the debtor (“Discharge Injunction”). See 11 U.S.C. § 524(a)(2).<sup>17</sup> The  
18 discharge of a bankruptcy debtor’s personal liability for a debt, however, does not alter the

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20 <sup>16</sup> The events leading to the proposed order are the bases for the Strike Motion.

21 <sup>17</sup> The effect of Section 524(a) after a discharge is received is similar to the effect of the  
22 automatic stay under Section 362(a) prior to entry of a discharge. Section 524(a)(2) enjoins,  
23 among other things, any “act” to collect a discharged debt as a personal liability of the debtor.  
24 Section 524(a)(1) expressly voids any judgment that determines the personal liability of the  
25 debtor on a discharged debt. Section 362(a)(6) automatically stays “any act” to recover a claim  
26 against the debtor that arose before the commencement of the case. Similarly, Sections  
27 362(a)(4) and (6) automatically stay any acts to obtain possession of estate property, or, to  
28 create, perfect or enforce a lien against property. Nothing in Section 362(a) expressly states that  
an act in violation of the automatic stay is void as a matter of law. In most circuits, however,  
acts in violation of the automatic stay are considered to be void ab initio, and without any force  
or effect. See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). In  
this circuit, any acts to collect a discharged debt as a personal liability of the debtor are similarly  
considered to be void an initio. See Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola), 320  
B.R. 158, 175 (B.A.P. 9th Cir. 2005).

1 liability of any other entity for the same debt. See 11 U.S.C. § 524(e).

2 The exculpation, release, and injunction provisions raised by AWD in the OSC Motion  
3 appear in Article XII of the confirmed Plan. The exculpation provision states as follows:

4 12.3 Exculpation. None of the Exculpated Parties shall have or incur any  
5 liability to any Holder of a Claim against or Interest in Debtor, or any other party-  
6 in-interest, or any of their successors or assigns, for any act, omission, transaction  
7 or other occurrence in connection with, relating to, or arising out of the Chapter  
8 11 Case, the pursuit of confirmation of this Plan, or the Consummation of this  
9 Plan, except and solely to the extent such liability is based on fraud, gross  
10 negligence or willful misconduct. The Exculpated Parties shall be entitled to  
11 reasonably rely upon the advice of counsel with respect to any of their duties and  
12 responsibilities under this Plan or in the context of the Chapter 11 Case. No  
13 Holder of a Claim against or Interest in Debtor, or any other party-in-interest,  
14 shall have any right of action against the Exculpated Parties, for any act,  
15 omission, transaction or other occurrence in connection with, relating to, or  
16 arising out of, the Chapter 11 Case, the pursuit of confirmation of this Plan, the  
17 Consummation of this Plan or the administration of this Plan, except to the extent  
18 arising from fraud. The Reorganized Debtor shall indemnify the Futures  
19 Representative for any liability that the Futures Representative incurs as a result  
20 of the performance of his duties in such capacity, except and solely to the extent  
21 such liability is based on fraud, gross negligence or willful misconduct.

22 Plan, § 12.3 (emphasis added).<sup>18</sup> The release provision states in pertinent part as follows:

23 12.4 Releases.

24 (a) Releases by Debtor and Estate. Effective as of the Effective Date,  
25 for good and valuable consideration provided by each of the Released Parties, the  
26 adequacy of which is hereby confirmed, to the fullest extent permissible under  
27 applicable law, Debtor, in its individual capacity and as debtor-in-possession, as  
28 the case may be, Debtor's Estate, and each of its Related Persons (collectively,  
the "Releasing Parties") shall, and shall be deemed to, completely, conclusively,  
absolutely, unconditionally, irrevocably, and forever release, waive, void,  
extinguish and discharge each and all of the released parties (and each such  
Released Party so released shall be deemed forever released, waived and  
discharged by the Releasing Parties) and each Released Party's respective assets  
and Related Persons, of and from any and all claims, causes of action, litigation  
claims, avoidance actions and any other debts, obligations, rights, suits, damages,  
actions, remedies, judgments and liabilities whatsoever, whether known or  
unknown, foreseen or unforeseen, liquidated or unliquidated, fixed or contingent,  
matured or unmatured, existing as of the Effective Date or thereafter arising, in  
law, at equity, whether for tort, contract, or otherwise, based in whole or in part  
upon any act or omission, transaction, event or other occurrence or circumstances  
existing or taking place prior to or on the Effective Date arising from or related in

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26 <sup>18</sup> A "Glossary of Defined Terms" is attached to the Plan ("Glossary"). It provides that  
27 "Exculpated Party" means each of: (a) Debtor and its Estate; (b) the Secured Lenders; (c)  
28 Reorganized Debtor; (d) the DIP Lender; (e) the Distribution Agent; (f) the Construction Defect  
Trustee; (g) the Futures Representative; and (h) Professionals." Glossary, ¶ 69 (emphasis  
added).



1 any way in whole or in part to Debtor, Reorganized Debtor or their respective  
 2 assets and estate, the Chapter 11 Case, the Disclosure Statement, this Plan or the  
 3 solicitation of votes on this Plan that such Releasing Party would have been  
 4 legally entitled to assert (whether individually or collectively) or that any Holder  
 5 of a Claim or Equity Interest or other Entity would have been legally entitled to  
 6 assert for or on behalf of Debtor or its estate (whether directly or derivatively)  
 7 against any of the Released Parties; provided, however, that the foregoing  
 8 provisions of this release shall not operate to waive or release (i) any causes of  
 9 action expressly set forth in and preserved by this Plan; (ii) any causes of action  
 10 arising from actual or intentional fraud or willful misconduct as determined by  
 11 final order of the Bankruptcy Court or any other court of competent jurisdiction;  
 12 and/or (iii) the rights of such Releasing Party to enforce this Plan and the  
 13 contracts, instruments, releases, and other agreements or documents delivered  
 14 under or in connection with this Plan or assumed pursuant to this Plan or assumed  
 15 pursuant to final order of the Bankruptcy Court. The foregoing release shall be  
 16 effective as of the Effective Date without further notice to or order of the  
 17 Bankruptcy Court, act or action under applicable law, regulation, order or rule or  
 18 the vote, consent, authorization or approval of any person.

19 Plan, § 12.4(a) (emphasis added).<sup>19</sup> The injunction provision states in pertinent part as follows:

20 12.5 Injunctions.

21 (a) Injunction Against Releasors. All of the Releasors, along with any of  
 22 their successors or assigns, are permanently enjoined, from and after the Effective  
 23 Date, from (i) commencing or continuing in any manner any action or other  
 24 proceeding of any kind against the Released Parties in respect of any Released  
 25 Liabilities, (ii) enforcing, attaching, collecting or recovering by any manner or  
 26 means of any judgment, award, decree or order against the Released Parties in  
 27 respect of any Released Liabilities, (iii) creating, perfecting or enforcing any  
 28 encumbrance of any kind against the Released Parties or their respective assets in  
 respect of any Released Liabilities, or (iv) asserting any right of setoff,  
 subrogation or recoupment of any kind against any obligation due from the  
Released Parties or against the property or interests in property of the Released  
Parties, in respect of any Released Liabilities; provided, however, that nothing  
 contained herein shall preclude such Releasors from exercising their rights  
 pursuant to and consistent with the terms hereof and the contracts, instruments,  
 releases and other agreements and documents delivered under or in connection  
 with this Plan; provided, further, that nothing contained herein shall be deemed to  
 enjoin any Releasor from taking any action against any Released Party based on  
 the release exceptions contained in Section 12.4 of this Plan.

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23 <sup>19</sup> “‘Released Party’ means each of: (a) Debtor and its Estate; (b) Reorganized Debtor; (c)  
 24 the DIP Lender; (d) the Distribution Agent; (e) the Futures Representative; (f) Professionals; (g)  
 25 the Secured Lenders; and (h) the respective Related Persons of each of the foregoing.” Glossary,  
 26 ¶ 120 (emphasis added). “‘Related Persons’ means, with respect to any Person, such Person’s  
 27 predecessors, successors, assigns and present and former Affiliates (whether by operation of law  
 28 or otherwise) and Subsidiaries, and each of their respective current and former officers, directors,  
 principals, employees, shareholders, members (including ex officio members), partners, agents,  
 financial advisors, attorneys, accountants, investment bankers, investment advisors, consultants,  
 representatives and other professionals, and any Person claiming by or through any of them.”  
 Glossary, ¶ 118.

1 (b) [reserve].

2 (c) Injunction Against Interference with Plan. Upon the Effective Date,  
3 all Holders of Claims against or Interests in Debtor and its Related Persons and  
any of its successors or assigns shall be enjoined from taking any actions to  
interfere with the implementation or Consummation of the Plan.

4 Plan, §§ 12.5 (a), (b), and (c) (emphasis added).<sup>20</sup>

5 As the Reorganized Debtor, AWD is both an Exculpated Party and a Released Party. See  
6 notes 17 and 18, supra. AWD therefore would be protected by the exculpation, release and  
7 injunction provisions of the Plan. The court is not persuaded, however, that the Surcharge  
8 Petition implicates any of those provisions at this point.

9 There is no dispute that Scott Canarelli and the SDF Firm have actual knowledge that  
10 AWD received its Chapter 11 discharge. There also is no dispute, however, that AWD has not  
11 made an appearance in the Probate Proceeding. Additionally, there is no dispute that the prayer  
12 of the Surcharge Petition does not seek affirmative relief against AWD. There also is no dispute  
13 that a debtor's discharge of a debt through bankruptcy does not affect the liability of non-debtor  
14 parties. See, e.g., Zurich Order at 5:5-6 ("Section 524(e) makes clear that a debtor's discharge  
15 does not affect the liability of any other entity for the same debt."). There also is no apparent  
16 dispute that the non-debtor parties that are the subject of the Surcharge Petition did not receive  
17 bankruptcy discharges in any other bankruptcy proceeding. Under these circumstances, there  
18 appears to be no affirmative defense of a discharge in bankruptcy that has been waived by any  
19 parties to the Surcharge Petition.<sup>21</sup> As a result, neither the timing nor the substance of the claims

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21 <sup>20</sup> "Releasors' means each of: (a) Debtor and its Estate; (b) Reorganized Debtor; (c) the  
22 DIP Lender; (d) the Distribution Agent; (e) the Futures Representative; (f) Professionals; and (g)  
23 the respective Related Persons of each of the foregoing." Glossary, ¶ 123. "Released  
24 Liabilities' means, with respect to a given Releasor, all claims, obligations, suits, judgments,  
25 damages, demands, debts, rights, Causes of Action and liabilities based on any act, omission,  
26 transaction, event or other occurrence (other than rights to enforce the terms of the Plan or any  
related document or agreement), whether known or unknown, foreseen or unforeseen, then  
existing or thereafter arising, in law, equity or otherwise that arose prior to the Effective Date  
and related to Debtor, the Plan or the Chapter 11 Case, which could have been asserted by such  
Releasor (or on behalf of Debtor or its Estate) against any Released Party." Glossary, ¶ 119.

27 <sup>21</sup> A bankruptcy discharge must be raised as an affirmative defense under Rule 8(c) of the  
28 Nevada Rules of Civil Procedure. See Zurich Order at 4:18-19. Failure to plead an affirmative  
defense may constitute a waiver under Nevada law. Id. at 4:20-22. Whether this pleading

1 presently asserted in the Probate Proceeding implicate AWD, as the Reorganized Debtor, with  
2 respect to the Discharge Injunction, or the exculpation, release, or injunction provisions of the  
3 Plan.

4 There also is no dispute that the Probate Court has jurisdiction over the parties to the  
5 Probate Proceeding. The court has no doubt that the Probate Court can resolve any discovery  
6 disputes brought before it, including any protective orders sought by non-parties. Moreover, no  
7 suggestion has been made that the Probate Court is unable to tailor any judgment so that it does  
8 not constitute a determination of AWD's personal liability on a debt discharged by the confirmed  
9 Plan. Inasmuch as any judgment that determines AWD's personal liability on a discharged debt  
10 is void as a matter of law, such a judgment cannot be enforced.

11 More important, any attempt by Scott Canarelli and the SDF Firm to obtain such a  
12 judgment would constitute a knowing violation of the Discharge Injunction through an  
13 intentional act, thereby subjecting them to contempt sanctions. Additionally, any such attempt  
14 also may subject them to separate damages for intentional breach of the exculpation, release and  
15 injunction provisions of the confirmed Plan. While the bankruptcy court might not have  
16 jurisdiction over nondebtor parties and nonbankruptcy claims asserted in the Probate Proceeding,  
17 this court does have jurisdiction to enforce the Discharge Injunction as well as to interpret and  
18 enforce the provisions of the confirmed Plan.

19 Based on the foregoing, the court will deny, without prejudice, AWD's request to reopen  
20 the case inasmuch as it might unnecessarily expose the Reorganized Debtor to liability for  
21 statutory fees under 28 U.S.C. § 1930(a)(6).<sup>22</sup> The court also will deny, without prejudice,  
22 AWD's request for an OSC until required, if at all, by the outcome of the Probate Proceeding.

23 \_\_\_\_\_  
24 requirement is applicable to a response to a petition filed in a probate matter is uncertain. It may  
25 not make a difference, however, inasmuch as Section 524(a)(1) is not a pleading requirement.  
26 Rather, the federal statute voids "any judgment" that determines the personal liability of a debtor  
27 on a debt that has been discharged.

28 <sup>22</sup> Moreover, reopening a case may not be necessary to pursue a motion solely to enforce  
the discharge injunction. See Kvassay v. Kvassay (In re Kvassay), 2016 WL 5845674, at \* 3  
(B.A.P. Oct. 6, 2016). Reopening may be required, however, to enforce the provisions of a  
confirmed plan.

1           **IT IS THEREFORE ORDERED** that the Reorganized Debtor's Motion (I) to Reopen  
2 Chapter 11 Case; and (II) for an Order to Show Cause Why Scott Lyle Graves Canarelli and His  
3 Counsel Should Not Be Held in Contempt for Violating Plan Discharge, Exculpation, Release  
4 and Injunctive Provisions, Docket No. 1081, be, and the same hereby is, **DENIED**.

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6 Copies sent to all parties via CM/ECF ELECTRONIC FILING

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