

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
LIVEMERCIAL AVIATION HOLDING, LLC,) CASE NO. 10-20051 JPK
) Chapter 11
Debtor.)

ORDER ON MOTION TO STRIKE DEBTOR'S
EMERGENCY MOTION FOR AN ORDER PURSUANT TO
BANKRUPTCY RULE 2004 TO ISSUE DISCOVERY
REQUEST TO VARIOUS ENTITIES ("MOTION")

The Motion, filed on February 24, 2010 by Nick Popovich, by counsel, is directed to a motion filed by the debtor on February 5, 2010. The Motion seeks to obtain an order which strikes, or which declares inadmissible, certain statements made in the debtor's motion and certain materials attached to that motion. The basis for the Motion is Rule 12(f).¹

The motion to which the Motion is addressed is essentially, as its title suggests, a motion for an order pursuant to Fed.R.Bankr.P. 2004 which requests orders of the court for examination of four parties, including an entity designated as Sage-Popovich, Inc.

The court first notes that the actual entity involved in the debtor's motion is a corporation. Although presumably Nick Popovich is a principal of this corporate entity, there is nothing in this record which seeks any relief with respect to Nick Popovich individually, and thus Nick Popovich is not in any manner a party with respect to the debtor's motion. Therefore, even if the Motion were deemed to present a matter to the court under Fed.R.Civ.P. 12(f), under subparagraph (2) of that rule, the Motion which requests relief is to be filed "by a party". The Motion thus presents no request for relief on behalf of an entity having any standing to request it under Rule 12(f).

¹ The Motion is confusingly comprised of two apparently separate documents, both titled identically. Each of these documents states specifically that relief is sought pursuant to Ind. Tr. 12(f), an obvious reference to the Indiana Rules of Trial Procedure. These rules obviously have no application to matters before a federal court. For the sake of argument, however, the court will assume that the Motion was intended to invoke Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(f).

Apart from the foregoing, Fed.R.Bankr.P. 2004 is a somewhat hybrid animal. A Rule 2004 motion does not request any form of relief requiring an adversary proceeding under Fed.R.Bankr.P. 7001. Rule 2004 does not require “notice and hearing” with respect to a motion which requests an order of examination, and does not provide for any response to the motion by any party sought to be examined. However, any person or entity sought to be examined under Rule 2004 obviously has an opportunity to contest the granting of the motion in some manner, and viewed in this manner, a Rule 2004 motion is at least analogous to a motion initiating a contested matter under Fed.R.Bankr.P. 9014(a), and is perhaps directly within the scope of Rule 9014. Rule 9014(c) states provisions of other rules which are applicable to contested matters, and Fed.R.Bankr.P. 7012 is not among those rules. Thus, Fed.R.Civ.P. 12(f) has no applicability to a contested matter under Fed.R.Bankr.P. 9014, and the Motion therefore does not request a form of relief which may be granted by the court. Rule 2004 itself does not contain any provision for striking of any statement or material presented to the court in a motion seeking an order of examination under that rule.

Additionally, the specific relief sought by the Motion – either striking or deeming inadmissible certain statements and materials – is moot. On February 10, 2010, the debtor, PNC Bank, National Association and PNCEF, LLC filed a joint motion requesting that the court approve arrangements entered into among those parties in resolution of several matters pending between them in the debtor’s case, including the motion to which the Motion is addressed. That motion was noticed to all creditors and parties-in-interest who had appeared in the case at the time that it was filed; no objection or request for hearing was filed with respect to that motion; and the court has entered an order which approves that motion. Included in that order is the following provision:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Debtor’s Emergency Motion Pursuant to Bankruptcy Rule 2004 (Docket Item No. 32), and the Debtor’s Motion for Hearing on Expedited Basis on Emergency Motion (Docket Item No. 33), as

well as all subpoenas and exhibits pertaining thereto and reference in either of said filing, including those which are Docket Item No. 23, are hereby deemed withdrawn.

This joint motion was approved by the court's order entered on March 6, 2010. This order essentially provides Nick Popovich with the form of relief requested by the Motion.²

For the reasons stated above, the court determines that the Motion should be denied.

IT IS ORDERED that the Motion is denied.

Dated at Hammond, Indiana on March 16, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
US Trustee
Christopher Schmidgall

² A motion to strike material from a record under Rule 12(f) does not cause that material to be eviscerated from a record. Rather, the granting of a motion to strike leaves the material on the court's docket record, but removes the stricken material from further consideration in any manner in the case.