

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

July 14, 2009 at 9:32 A.M.

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1. [07-30805](#)-B-7 HAL MAYFIELD HEARING - MOTION FOR
BLL #2 APPROVAL OF AGREEMENT TO PAY
OVER TO BANKRUPTCY ESTATE ITS
ENTITLEMENT OF DEBTOR'S
PORTION OF A PROBATE ESTATE
6-8-09 [[21](#)]
DISCHARGED 4-15-08

Tentative Ruling: The motion is denied without prejudice for procedural defect.

Movant has failed to cite any legal authority in support of his motion in derogation of LBR 9014-1(d) (5).

The court will issue a minute order.

2. [07-30805](#)-B-7 HAL MAYFIELD HEARING - MOTION
BLL #3 FOR ORDER APPROVING ATTORNEYS
FEES AND AUTHORIZING PAYMENT
AT TRUSTEE'S DISCRETION
(\$5,940.00 FEES)
7-14-09 [[25](#)]
DISCHARGED 4-15-08

Disposition Without Oral Argument: This motion is unopposed. Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The application is granted to the extent provided herein. The application is approved for a total of \$5,940.00 in fees and \$0.00 in costs as interim compensation. The chapter 7 trustee is authorized to apply any funds held by the trustee to the allowed fees with the balance of the allowed amount to be paid as an administrative expense. Except as so ordered, the motion is denied.

On December 17, 2007, the debtor filed a chapter 7 petition. By order entered on March 10, 2008 (Dkt. 18), the court approved employment of Byron Lee Lynch as counsel for the trustee, with an effective date of employment of February 11, 2008. Through this first interim application, the trustee now seeks compensation for services for the period of February 11, 2008 through June 5, 2009, equaling \$5,940.00 in attorney's fees. As set forth in the trustee's application, the approved fees are

reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

3. [09-23606](#)-B-7 CHRISTOPHER BERESFORD HEARING - MOTION TO
GAR #1 REOPEN CASE FOR THE PURPOSE OF
FILING STATEMENT OF COMPLETION
OF COURSE IN PERSONAL FINANCIAL
MANAGEMENT
6-29-09 [[13](#)]

CASE CLOSED 6-16-09

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

4. [05-36908](#)-B-7 THOMAS DANIEL HEARING - FIRST APPLICATION
DNL #18 FOR INTERIM COMPENSATION OF
TRUSTEE'S COUNSEL (\$26,655.78
FEES; \$3,867.87 EXPENSES)
6-24-09 [[243](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

5. [08-23015](#)-B-7 JOSEPH/MARYJOY ANIECETE HEARING - TRUSTEE'S
MAR #1 MOTION FOR AN ORDER APPROVING
COMPROMISE OF CONTROVERSY AND
APPROVAL OF SETTLEMENT
6-12-09 [[61](#)]

Tentative Ruling: None.

6. [08-23015](#)-B-7 JOSEPH/MARYJOY ANIECETE HEARING - COUNTER MOTION
MAR #1 6-29-09 [[69](#)]

Tentative Ruling: The countermotion is denied without prejudice for procedural defect.

The debtors failed to establish service of the countermotion on all creditors, as required by Fed. R. Bankr. P. 2002(a)(4).

The court will issue a minute order.

7. [09-28232](#)-B-11 MALABAR FOLSOM LLC
RI #1

CONT. HEARING - APPLICATION
AUTHORIZING APPOINTMENT OF
ATTORNEY REBECCA IHEJIRIKA AS
BANKRUPTCY COUNSEL
5-13-09 [[15](#)]

CONT. FROM 6-9-09

Tentative Ruling: This matter continued from June 9, 2009 to permit movant to further brief the issue of compensation on or before July 7, 2009. (Dkt. 21). Movant timely filed a second supplemental memorandum of points and authorities on July 7, 2009 (Dkt. 54). This matter remains in its preliminary posture as a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

8. [09-24434](#)-B-7 GREGORY/CLARICE BRIDGES
UST #2

HEARING - UNITED
STATES TRUSTEE'S MOTION
TO DISMISS CASE
6-2-09 [[26](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is granted, and the case is dismissed pursuant to 11 U.S.C. § 707(b)(1).

The debtors filed this voluntary chapter 7 petition on March 16, 2009. On May 4, 2009, the United States Trustee ("UST") filed a statement of presumed abuse. (Dkt. 19). On June 2, 2009, the UST filed the instant motion to dismiss for substantial abuse pursuant to 11 U.S.C. § 707(b).

For the court to dismiss pursuant to 11 U.S.C. § 707(b), it must determine 1) that the debtor owes primarily consumer debt and 2) that granting the debtor a discharge would be an abuse of chapter 7. In re Gaskins, 85 B.R. 846, 847 (Bankr. C.D. Cal 1988) (citing Zolq v. Kelley (In re Kelly), 841 F.2d 908 (9th Cir. 1988)).

Consumer debt is defined by 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." In re Kelly, 841 F.2d at 912. The debts as scheduled by the debtors are exclusively consumer debts within the meaning of § 101(8). The petition states that this is a "consumer/ non-business case." (Dkt. 1 at 1). The debtors are individuals who owe primarily consumer debts.

The court must then determine whether permitting debtors to remain in chapter 7 and receive a chapter 7 discharge "would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b). The UST argues, and the court finds, that a presumption of abuse under 11 U.S.C. § 707(b)(2) arises in this case. Debtors filed a Statement of Current Monthly Income and Means Test Calculation ("Form 22A") on March 16, 2009. (Dkt. 1 at 13-20). Form 22A states that debtors' household consists of two people. UST alleges without dispute that debtors' actual current monthly income

is \$13,772.73, equaling annual income of \$165,272.76. That amount exceeds the applicable median family income of \$\$65,097 for a household of two in California. See http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci_data/median_income_table.htm. The UST shows that debtors' actual monthly disposable income is \$1,621.65, resulting in projected disposable income over sixty months of \$97,299.00. That amount exceeds the monetary limits in Section 707(b)(2)(A)(i)(II).

To rebut the presumption of abuse the debtors must show special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. Debtors argue only that the UST used "imagined speculative projections" based on his "grossly inflated projections" that debtors appear to be able to repay a significant amount of their scheduled unsecured debt. Debtors further argue that their income on Form 22A was inflated, giving them unrealistic, imaginary income which should not be included in debtors' projected disposable income under section 707(b)(2). The foregoing arguments fail to rebut the presumption of abuse. The UST shows that the debtors' non-mortgage housing and utilities expenses are overstated by \$1,171.00, that debtors' payroll tax deduction is understated by \$510.44 and that debtors' deduction for payments on pre-petition priority claims is overstated by \$307.54. The debtors have failed to present any evidence to rebut these overstated/understated figures.

The court need not reach the UST's § 707(b)(3) argument since that section applies in cases where the presumption did not arise or was rebutted. It is not applicable here.

The court will issue a minute order.

9. [08-31840](#)-B-7 CLINTON MYERS
CAH #1

HEARING - MOTION TO
COMPEL ABANDONMENT OF PROPERTY
6-7-09 [[242](#)]

DISCHARGED 2-9-09

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied.

Through this motion, LAL Real Estate and Development, LLC ("LAL") seeks an order deeming real property located at 2631 Pinnacle View Drive, Meadow Vista, CA 95722 (APN 058-044-09) (the "Property") abandoned pursuant to 11 U.S.C. § 554(b). The motion alleges that the Property is owned 90% by LAL and 10% by Myers Homes Orland, LLC. 11 U.S.C. § 554(b) only authorizes the court to order the trustee to abandon property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. The key words are "property of the estate." LAL has failed to demonstrate that the Property is property of this bankruptcy estate. In fact, the motion contradicts such a conclusion.

The court will issue a minute order.

10. [08-35540](#)-B-11 REGENT HOTEL, LLC HEARING - APPLICATION
[09-2315](#) HSM #1 FOR WRIT OF POSSESSION
EDWARD DON AND CO., VS. 6-3-09 [[7](#)]

REGENT HOTEL, LLC, ET AL.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This motion is denied without prejudice for a procedural defect.

The notice of hearing fails to advise potential respondents of whether and when opposition is due in derogation of LBR 9014-1(d)(3). A failure to comply with the requirements of the Local Bankruptcy Rules constitutes grounds to deny the motion. LBR 1001-1(g).

The court will issue a minute order.

11. [08-35540](#)-B-11 REGENT HOTEL, LLC CONT. HEARING - MOTION TO
[09-2033](#) RT #1 DISMISS THE CROSS-CLAIM OF
HARRIS SALINAS REBAR, INC., VS. ROBERT BURNS CONSTRUCTION,
INC. AND STOCKTON FENCE AND

REGENT HOTEL, LLC

MATERIAL CO.
5-11-09 [[186](#)]

CONT. FROM 6-9-09

Tentative Ruling: None.

12. [08-35540](#)-B-11 REGENT HOTEL, LLC CONT. HEARING - MOTION TO
[09-2033](#) GLM #2 REMAND OF SECURED CREDITOR
HARRIS SALINAS REBAR, INC., VS. COLLINS ELECTRICAL COMPANY,
INC., AND THE MECHANICS' LIEN

REGENT HOTEL, LLC, ET AL.

CLAIMANTS
5-12-09 [[191](#)]

CONT. FROM 6-9-09

Disposition Without Oral Argument: This motion is unopposed. Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion is granted to the extent provided herein, and adversary proceedings 09-2033, 09-2060, 09-2061, and 09-2062 are remanded to the Superior Court of San Joaquin County.

The court finds that the movant has met the statutory standard for remand under 28 U.S.C. § 1452(b): "any equitable ground." This standard is an unusually broad grant of authority. In re McCarthy, 230 B.R. 414, 417 (B.A.P. 9th Cir. 1999). The "any equitable ground" needed for remand subsumes both usual considerations of fairness, economy, and common

sense, and procedural and jurisdictional grounds for granting a motion to remand. In re Marathon Home Loans, 96 B.R. 296, 300 (Bankr. E.D. Cal. 1989).

The court will issue a minute order.

13. [08-25342](#)-B-11 DIAMOND CREEK PARTNERS, LTD HEARING - THIRD INTERIM
HLC #20 APPLICATION FOR COMPENSATION
BY ATTORNEY FOR CHAPTER 11
DEBTOR (\$79,397.50 FEES;
\$969.99 EXPENSES)
6-16-09 [[500](#)]

Disposition Without Oral Argument: This motion is unopposed. Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved on an interim basis for a total of \$79,397.50 in fees and costs of \$969.99, as chapter 11 administrative expenses. Applicant is authorized to apply funds from its retainer in payment of the allowed fees and costs. Except as so ordered, the motion is denied.

On April 25, 2008, the debtor filed a chapter 11 petition. By order entered on July 21, 2008 (Dkt. 113) (the "Order"), the court authorized the debtor to retain applicant as bankruptcy counsel in this case. By order entered on September 5, 2008, the court approved applicant's first motion for interim compensation in the amount of \$66,462.50 in fees and \$1,267.60 in costs. By order entered on December 29, 2008, the court approved applicant's second motion for interim compensation in the amount of \$84,630.00 in fees and \$2,486.09 in costs. The debtor's attorney now seeks compensation for services for the period of December 1, 2008 through May 31, 2009, equaling \$79,397.50 in attorney's fees. The requested fees and costs are approved on an interim basis as reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

14. [08-25342](#)-B-11 DIAMOND CREEK PARTNERS, LTD HEARING - SECOND INTERIM
HLC #21 APPLICATION FOR COMPENSATION
BY SPECIAL LITIGATION COUNSEL
FOR CHAPTER 11 DEBTOR
(\$19,159.50)
6-16-09 [[496](#)]

Disposition Without Oral Argument: This motion is unopposed. Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. The application is approved on an interim basis for a total of \$19,159.50 in fees and \$0.00 in costs, as chapter 11 administrative expenses. Applicant is authorized to apply funds from his retainer in payment of the allowed fees and costs. Except as so ordered, the motion is denied.

On April 25, 2008, the debtor filed a chapter 11 petition. By order entered on August 22, 2008 (Dkt. 179) (the "Order"), the court authorized the debtor to retain applicant as special litigation counsel in this case. Applicant now seeks compensation for services for the period of December 1, 2008 through May 31, 2009, equaling \$19,159.50 in attorney's fees. The requested fees and costs are approved on an interim basis as reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

15. [08-28342](#)-B-7 DALE COPE
JRR #2

HEARING - TRUSTEE'S MOTION
FOR APPROVAL OF COMPROMISE
AND SETTLEMENT OF ADVERSARY
COMPLAINT
5-7-09 [[45](#)]

DISCHARGED 10-6-08

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied without prejudice.

Through this motion, the chapter 7 trustee seeks approval of a compromise. The compromise in question arises from an alleged payment of \$5,000.00 ("Funds") by debtor to James Souza ("Souza") during the preference period, as defined by the Bankruptcy Code. After the chapter 7 trustee learned of this payment, he requested turnover of the Funds, but Souza was unable to comply. On March 9, 2009, the trustee filed an adversary complaint, case no. 09-2165, ("Action") against Souza to avoid the transfer of the Funds to Souza pursuant to 11 U.S.C. § 547(b). The chapter 7 trustee now seeks to resolve the Action through the instant compromise.

The motion is not supported by evidence, e.g., a declaration. Pursuant to LBR 9014-1(d)(6), every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Furthermore, the motion fails to explain several things, including (1) the specific the terms of the settlement (no settlement agreement is provided), (2) the financial condition of the estate and the effect of a 30% settlement on dividends to creditors and (3) the basis for the trustee's conclusion that "James Souza [who lent the debtor \$10,000 pre-petition]...does not have the ability to repay the \$5,000.00 to the bankruptcy estate."

The court will issue a minute order.

16. [07-21846](#)-B-7 DANA ANDREWS HEARING - MOTION TO
[07-2119](#) JJS #4 DISMISS THIRD AMENDED COMPLAINT
DANA ANDREWS, VS. 5-29-09 [[134](#)]

ANDREWS FAMILY REVOCABLE
TRUST, ET AL.
DISCHARGED 4-7-08

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter has been continued to July 28, 2009 at 9:32 a.m. pursuant to a stipulation and order signed on July 13, 2009. This matter is therefore dropped from this calendar.

17. [09-24948](#)-B-7 GREGORY/DARLENE KITTRELL HEARING - UNITED
UST #2 STATES TRUSTEE'S MOTION
TO DISMISS CASE
6-3-09 [[18](#)]

Tentative Ruling: The motion is denied.

The debtors filed this voluntary chapter 7 petition on March 20, 2009. On May 4, 2009, the United States Trustee ("UST") filed a statement of presumed abuse. (Dkt. 15). On June 3, 2009, the UST filed the instant motion to dismiss for substantial abuse pursuant to 11 U.S.C. § 707(b).

For the court to dismiss pursuant to 11 U.S.C. § 707(b), it must determine 1) that the debtor owes primarily consumer debt and 2) that granting the debtor a discharge would be an abuse of chapter 7. In re Gaskins, 85 B.R. 846, 847 (Bankr. C.D. Cal 1988) (citing Zolg v. Kelley (In re Kelly), 841 F.2d 908 (9th Cir. 1988)).

Consumer debt is defined by 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." In re Kelly, 841 F.2d at 912. The debts as scheduled by the debtors are exclusively consumer debts within the meaning of § 101(8). The petition states that this is a "consumer/ non-business case." (Dkt. 1 at 1). The debtors are individuals who owe primarily consumer debts.

The court must then determine whether permitting debtors to remain in chapter 7 and receive a chapter 7 discharge "would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b). The UST argues, and the court finds, that a presumption of abuse under 11 U.S.C. § 707(b)(2) arises in this case. Debtors filed a Statement of Current Monthly Income and Means Test Calculation ("Form 22A") on March 20, 2009. (Dkt. 1 at 51-58) Debtors state in Form 22A that the presumption of abuse arises, and the UST agrees. Form 22A states that debtors' household consists of three people. UST alleges without dispute that debtors' actual current monthly income is \$10,517.44, equaling annual income of \$126,209.28. That amount exceeds the applicable median family income of \$70,684.00 for a household of three in California. See http://www.usdoj.gov/ust/eo/bapcpa/20090315/bci_data/median_income_table.

htm. The UST shows that debtors' actual monthly disposable income is \$1,746.37, resulting in projected disposable income over 60 months of \$104,782.20. That amount exceeds the monetary limits in Section 707(b)(2)(A)(i)(II).

To rebut the presumption of abuse the debtors must show special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. 11 U.S.C. § 707(b)(2)(B)(i). Debtors argue that Mr. Kittrell's monthly income has recently declined from approximately \$4,380.00 per month to \$3,745.00 per month. More importantly, debtors argue that Ms. Kittrell is no longer receiving payments on certain account receivables from Ms. Kittrell's consulting business because Ms. Kittrell closed this operation in or about November 2008. Due to the foregoing, debtors argue that their income on Form 22A was inflated, giving them unrealistic, imaginary income which should be deducted from debtors' projected disposable income for purposes of section 707(b)(2). The court agrees. Special circumstances of the kind described in section 707(b)(2)(B)(i) include only those circumstances that cause higher household expenses or adjustments of income "for which there is no reasonable alternative," i.e., that are unforeseeable or beyond the control of the debtor. In re Cribbs, 387 B.R. 324, 329 (Bankr. S.D. Ga. 2008) The debtors' arguments, particularly regarding the temporary inflation of their income based on receipt of payments from Ms. Kittrell's closed consulting business, show circumstances that are beyond the debtors' control, that justify an adjustment of current monthly income for purposes of § 707(b) and that therefore rebut the presumption of abuse.

The motion is also denied under the "totality of the circumstances" test of section 707(b)(3). That test applies in a case in which the presumption in section 707(b)(2)(A) does not arise or is rebutted. In re Norwood-Hill, 403 B.R. 905, 908 (Bankr. M.D. Fla. 2009). Here, the presumption did arise and has been rebutted. However, as the UST recognizes in the motion, the totality of the circumstances test takes into account the debtors' actual ability to pay. The UST has failed to show abuse on that basis, as opposed to debtors' ability to pay based on solely on the debtors' Form 22A.

The court will issue a minute order.

18. [04-29060](#)-B-7 MICHAEL/LEONE CAREY

HEARING - MOTION TO
CLARIFY ORDER FOR DISCHARGE
6-12-09 [[51](#)]

DISCHARGED 8-9-05
CASE CLOSED 4-3-09

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is denied due to procedural defects and, alternatively, on the merits.

The motion contains several procedural defects. First, the notice of hearing fails to advise potential respondents of the proper requirements for opposition. LBR 9014-1(d)(3). Second, the motion fails to cite the

legal authority relied upon by debtors. LBR 9014-1(d)(5). Third, the motion is not accompanied by evidence. LBR 9014-1(d)(6). Fourth, the motion has not been assigned a docket control number. LBR 9014-1(c)(1). Fifth, the case is currently closed. The court previously instructed the debtors that a motion such as this could not be processed until debtors reopened the instant case and paid the requisite reopening fee. A failure to comply with the Local Bankruptcy Rules is grounds for denial of the motion. LBR 1001-1(g).

Alternatively, the motion is denied because the relief sought through this motion requires an adversary proceeding pursuant to Fed. R. Bankr. P. 7001(2), (6), (7) and/or (9).

The court will issue a minute order.

19. [08-20569](#)-B-11 DUNMORE HOMES, INC. HEARING - MOTION
[09-2030](#) LNB #1 FOR AN ORDER AUTHORIZING
TRAVELERS CASUALTY AND WITHDRAWAL OF COUNSEL
SURETY CO. OF AMERICA, VS. 6-9-09 [[94](#)]
SIDENY DUNMORE, ET AL.

Tentative Ruling: This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of any party in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). In this instance, the court issues a tentative ruling.

The motion is granted. Movant Levene, Neal, Bender, Rankin & Brill, LLP ("LNBRB") is permitted to withdraw as counsel for defendant Sidney B. Dunmore ("Dunmore") in adversary proceeding 09-2030. LNBRB shall forward to Dunmore any documents or correspondence that are related to this case and received by movant in the future. Except as so ordered, the motion is denied.

Movant alleges without dispute that LNBRB and Dunmore have agreed to terminate their employment relationship. In the absence of opposition, movant has shown sufficient grounds for permissive withdrawal under Cal. R. Prof. Conduct 3-700(C)(5) because Dunmore has knowingly and freely assented to termination of the employment relationship.

The court will issue a minute order.

20. [02-21071](#)-B-7 JOSEPH/ELIZABETH SPERA CONT. HEARING - MOTION TO
[05-2128](#) HLH #7 COMPEL ABANDONMENT PROPERTY
MICHAEL BURKHRT, VS. 4-30-09 [[219](#)]

PHILLIP/MIRNA BALL

DISCHARGED 5-2-02
CONT. FROM 6-9-09

Tentative Ruling: This matter continued from June 9, 2009 with a briefing schedule. Movant's supplemental brief was due by June 30, 2009. Respondent's supplemental response was due by July 7, 2009. On June 30,

2009, defendant filed her supplemental brief. (Dkt. 238). On July 7, 2009, plaintiff filed his supplemental response. (Dkt. 240). Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion is granted in part and denied without prejudice in part. Considering the plaintiff-trustee's stipulation and to the extent that the estate has an interest in the subject vehicles, two commercial tow trucks ("Vehicles"), the Vehicles are deemed abandoned by the estate. The remainder of movant's requests are denied without prejudice to the filing of an adversary proceeding. Except as so ordered, the motion is denied.

This motion seeks abandonment of assets in which the estate claims no interest, injunctive relief, recovery of money damages, and declaratory relief, all but the first of which require an adversary proceeding. Fed. R. Bankr. P. 7001(1), (7), and (9).

Counsel for the movant shall submit an order that is consistent with the foregoing ruling and that is approved as to form by the plaintiff-trustee.

21. [06-24971](#)-B-7 BRUCE SEYMOUR CONT. HEARING - OBJECTION
HSM #19 TO CLAIM NO. 40 OF
FIRDOS S. SHEIKH, M.D.
5-11-09 [[477](#)]

CONT. FROM 6-30-09

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter has been continued to August 11, 2009 at 9:32 a.m. by order entered on July 10, 2009. (Dkt. 508). This matter is therefore dropped from this calendar.

22. [05-37174](#)-B-7 TERRY/JO ANN SMITH, VS. CONT. HEARING - MOTION
MHK #3 TO AVOID LIEN
E.L. SMITH, JR., DDS, INC., VS. 5-11-09 [[37](#)]

DISCHARGED 2-27-06
CONT. FROM 6-9-09

Disposition Without Oral Argument: This matter continued from June 9, 2009 to allow movant to serve the motion, its supporting papers, and notice of the continued hearing on E.L. Smith, Jr., DDS, Inc. in the manner required by Fed. R. Bankr. P. 7004 by June 9, 2009. Movant timely complied and filed a notice of continued hearing and certificate of service on June 8, 2009. (Dkt. 43; Dkt. 44). This motion is unopposed. Due to the size of this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion is granted in part pursuant to 11 U.S.C. § 522(f)(1)(A), and the judicial lien in favor of E.L. Smith, Jr., D.D.S., Inc., a California

corporation, recorded in the official records of Sacramento County, Document No. 20040607 (the "Lien"), is avoided as against the real property located at 9487 Sunnywood Lane, Folsom California ("Property") to the extent that the Lien exceeds \$84,363.15.

The motion alleges without dispute that the Property had a value of \$435,000.00 as of the date of the petition and that the unavoidable prior liens total \$275,636.85. The debtors claimed the Property as exempt under California Code of Civil Procedure Section 704.730, under which they exempted \$75,000.00. The respondent holds the Lien created by the recordation of an abstract of judgment in the chain of title of the Property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is \$84,363.15 in equity to support the Lien. Therefore, the fixing of the Lien impairs the debtors' exemption of the Property to the extent that the Lien exceeds \$84,363.15, and the fixing of the Lien is avoided to the extent that it exceeds \$84,363.15.

The court will issue a minute order.

23. [09-22675](#)-B-7 DANARJ, INC.
SLC #1

HEARING - TRUSTEE'S
MOTION FOR SALE OF ASSETS
FREE AND CLEAR OF LIENS AND
ENCUMBRANCES
6-15-09 [[13](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is granted in part and denied in part. The chapter 7 trustee is authorized pursuant to 11 U.S.C. § 363(b)(1) to sell the estate's interest in equipment which is more fully described in the motion (collectively "Equipment") to Mike Leib ("Leib") \$6,000.00 cash. The chapter 7 trustee's request to sell the Equipment to Leib free and clear of liens and encumbrances is denied. The proceeds of the sale shall be administered for the benefit of the estate. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

By this motion, the trustee seeks to sell the bankruptcy estate's interest in the Equipment free and clear of liens and encumbrances that may exist. The court can only authorize a sale free and clear of a lien or interest if the trustee establishes one or more of the bases set forth in 11 U.S.C. § 363(f) with respect to the lien or interest. Furthermore, the court cannot either statutorily or constitutionally authorize a sale free and clear of a lien or interest the holder of which did not receive sufficient notice of the sale to enable it to object. 11 U.S.C. § 363(b); In re Center Wholesale, Inc., 759 F.2d 1440, 1448-49 (9th Cir. 1985); In re Moberg Trucking, Inc., 112 B.R. 362 (9th Cir. BAP 1990). Here, the trustee has not identified any such lien that may exist against the Equipment, and the trustee has not evaluated any provision of 11 U.S.C. § 363(f). Because the trustee has not established any of the bases set forth in section 363(f), the trustee has not shown that she is legally entitled to a sale free and clear of liens and encumbrances.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

The trustee shall submit an order that conforms to the foregoing ruling.

24. [09-24085](#)-B-7 GAVRILO SPAICH HEARING - UNITED
UST #1 STATES TRUSTEE'S MOTION TO
DISMISS CHAPTER 7 CASE
6-5-09 [[51](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). Because the debtor is in pro se and because of the size of this morning's three related calendars (113 matters), the court issues the following abbreviated tentative ruling. Any party may at the hearing request a more explanatory Disposition After Oral Argument.

The motion is granted, and this case is dismissed pursuant to 11 U.S.C. § 521(e)(2)(B).

Through this motion, the United States trustee ("UST") seeks dismissal of this case due to debtor's failure to provide the UST with debtor's most recently filed tax return and with debtor's pay advices or other evidence of income received within the sixty-day period prior to filing. Pursuant to the applicable provisions of 11 U.S.C. § 521(e)(2)(B), the court shall dismiss the case unless the debtor demonstrates that his failure to comply with 11 U.S.C. § 521(e)(2)(A)(i) or (ii) is due to circumstances beyond the control of the debtor. Here, debtor asserts that he has been unable to provide the trustee with a copy of his most recently filed tax return due to efforts by Ms. Spaich and her attorney to prevent debtor from accessing property on which a copy of debtor's tax return is located. Debtor further asserts that he lacks funds to purchase a copy of the return from the Internal Revenue Service and that Mr. Spacone, whom debtor believes possesses a copy of the relevant return, will not return debtor's call. Based on the foregoing, the court finds that debtor has not shown that his failure to provide the trustee with his most recently filed tax return is due to circumstances beyond debtor's control. Accordingly, the case is dismissed pursuant to 11 U.S.C. § 521(e)(2)(B).

The court will issue a minute order.

25. [09-22186](#)-B-7 PEDRO BARRIOS HEARING - PLAINTIFF'S
[09-2218](#) MOTION FOR DEFAULT JUDGMENT
U.S. TRUSTEE, VS. 6-5-09 [[17](#)]

PEDRO BARRIOS

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(1). Because the Debtor/ Defendant is in pro se and because of the size of this morning's three related calendars (113 matters), the court issues the following abbreviated tentative ruling. Any party may at the hearing request a more explanatory Disposition After Oral Argument.

The motion is granted.

Plaintiff United States Trustee has in its complaint sufficiently pled its cause of action for revocation of the debtor/ defendant's discharge pursuant to 11 U.S.C. Section 727(a)(8). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Fed. R. Bankr. P. 7008(a), incorporating Fed. R. Civ. P. 8(d); Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir.1977). Therefore, it is established for purposes of this adversary proceeding that, on May 30, 2003, the debtor/ defendant Pedro Cabrera Barrios ("Debtor/ Defendant") commenced case no. 03-26057-C-7 (the "First Case") under chapter 7 of the Bankruptcy Code. The Debtor/ Defendant received his discharge in the First Case on September 9, 2003. Less than eight years after the filing of the First Case, the Debtor/ Defendant filed the current bankruptcy case, case no. 09-22186-B-7 (the "Second Case"), in this court on February 9, 2009. Pursuant to Section 727(a)(8), the Debtor/ Defendant is not entitled to a discharge in the Second Case.

The court will issue a minute order granting the motion. The plaintiff shall submit a separate form of judgment denying the Debtor/ Defendant's discharge in the Second Case.

26. [08-35092](#)-B-13J VINCENT/SERAH LOGAN HEARING - MOTION TO
[08-2698](#) KSH #2 DISMISS ADVERSARY PROCEEDING
VINCENT/SERAH LOGAN , VS. 6-12-09 [[13](#)]

COUNTRYWIDE HOME
LOANS, INC.

PARENT CASE DISMISSED 2-5-09

Disposition Without Oral Argument: This motion is unopposed. Due to the number of matters on this morning's three related calendars (113 matters), the court issues the following abbreviated ruling.

The motion to dismiss the four-count adversary complaint filed by plaintiffs, debtors Vincent L. Logan and Serah L. Logan (collectively "Plaintiffs"), is granted in part, and the adversary complaint is dismissed without prejudice in its entirety.

In considering what standards govern a bankruptcy court's determination regarding whether to retain a related case after dismissal of the underlying bankruptcy case, the Ninth Circuit has applied authority governing federal district courts to retain pendent state claims after the federal claims have been dismissed. See In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992). That authority requires the court to consider economy, convenience, fairness and comity in deciding whether to retain jurisdiction over pendent state claims. Id.

In this case, the court finds that the foregoing factors weigh in favor of dismissal of the adversary proceeding, particularly where, as here, plaintiffs have not opposed dismissal. First, judicial economy weighs in favor of dismissal because it is less efficient and convenient for the bankruptcy court to resolve the claims in the adversary proceeding than to allow them to be resolved in a non-bankruptcy forum that ordinarily

handles such disputes. The underlying bankruptcy case has been dismissed, and the outcome of the adversary proceeding will have no bearing on any bankruptcy case pending before this court. In addition, little activity has taken place in this proceeding in the seven months that it has been pending, no discovery has occurred, and defendant Countrywide Home Loans ("CHL") alleges without dispute that service has not been effected on it. Second, fairness weighs in favor of dismissal because plaintiffs have not prosecuted the adversary proceeding diligently to date and have not opposed the motion. Third, convenience weighs in favor of dismissal because neither Plaintiffs nor CHL have any other matters before this court. Fourth, comity weighs in favor of dismissal because the federal and state law claims in the complaint do not require this court's bankruptcy expertise.

The court will issue a minute order.

27. [05-20294](#)-B-7 DEBRA DILLARD HEARING - AMENDED
JRR #3 TRUSTEE'S MOTION FOR APPROVAL
OF COMPROMISE AND SETTLEMENT
5-27-09 [[93](#)]

DISCHARGED 4-21-05

Tentative Ruling: None.

28. [08-32094](#)-B-13J AIDA/JAIME SALDIVAR HEARING - MOTION
[08-2690](#) WSS #1 TO DISMISS COMPLAINT
CARL/LISA TAPOYA, VS. 5-25-09 [[11](#)]

AIDA/JAIME SALDIVAR

Tentative Ruling: This motion has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). Because the plaintiffs are in pro se, the court issues the following tentative ruling.

The motion is granted, and the adversary complaint is dismissed as untimely.

Pursuant to Fed. R. Bankr. P. 4007(c) and the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines filed in debtors' bankruptcy case, 08-32084-B-7, the clerk established December 1, 2008 as the deadline to file a complaint objecting to dischargeability of debts in this case. Here, plaintiffs filed the instant adversary complaint on December 11, 2008. No request under Fed. R. Bankr. P. 4007(c) to enlarge the time for filing a non-dischargeability complaint was made by plaintiffs, and no such enlargement was ordered by the court in this case.

The court will issue a minute order.