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**FILED**

SEP 12 2017

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF CALIFORNIA

3

4 In re: ) Case No. 17-23817-B-13  
5 )  
6 RAFAEL A. REYES and VILLA REYES, )  
7 )  
8 Debtor(s). )  
9 )

10 **MEMORANDUM AND ORDER DENYING DEBTORS' MOTION TO VACATE**

11 Before the court is a motion by debtors Rafael A. Reyes and  
12 Villa Reyes ("Debtors") to vacate the order dismissing this  
13 chapter 13 case, impose the automatic stay, and reinstate an ex  
14 parte application that seeks to reverse a postpetition  
15 foreclosure sale and hold the foreclosing secured creditors in  
16 contempt for purportedly violating the automatic stay by  
17 conducting the foreclosure sale after being notified of this  
18 case. For the reasons below, the motion will be denied.

19 **Introduction**

20 This case was filed on June 6, 2017, dkt. 1, and dismissed  
21 on July 26, 2017, for failure to timely file documents. Dkts.  
22 26, 27. This is also the Debtors' third bankruptcy case filed  
23 within one year. The Debtors' first case, no. 17-20282, was  
24 filed on January 17, 2017, and dismissed on March 1, 2017, for  
25 failure to timely file documents. The Debtors' second case, no.  
26 17-22413, was filed on April 11, 2017, and dismissed on May 1,  
27 2017, again, for failure to timely file documents. The same  
28 attorney represented the Debtors in all three dismissed cases.

1 Background

2 On June 9, 2017, the Debtors were notified that all required  
3 documents were not filed with the petition and they were given  
4 until June 20, 2017, to file missing documents. Dkt. 7. Missing  
5 documents were not timely filed. Instead, on June 21, 2017, the  
6 Debtors filed an *ex parte* application to extend the deadline to  
7 file missing documents. Dkt. 10. The court granted that *ex*  
8 *parte* application on June 26, 2017, and ordered all missing  
9 documents to be filed by July 5, 2017. Dkt. 12.

10 Missing documents were not filed on July 5, 2017. Instead,  
11 late that night the Debtors filed a second *ex parte* application  
12 to further extend the July 5, 2017, deadline.<sup>1</sup> Dkt. 18. The  
13 court granted that second request in an order entered on July 11,  
14 2017, and extended the deadline to file all missing documents to  
15 July 19, 2017. Dkt. 20. In relevant part, the order granting  
16 the Debtors' second request for an extension stated as follows:

17 **IT IS FURTHER ORDERED** (chapter 13 only) that the  
18 Debtor(s) is (are) also responsible to serve the  
19 Chapter 13 plan with a motion for confirmation and set  
20 that matter for hearing in compliance with Local Rule  
21 3015-1(c)(3) by 7/19/17. If the Debtor(s) does (do) not  
22 file the Chapter 13 plan, or fails to timely serve and  
23 set for hearing a motion to confirm, by the extended  
24 date, the case will be dismissed without further notice  
25 of hearing on the *ex parte* request of the trustee.

26 (Emphasis in original).

27 Some missing documents were timely filed on July 19, 2017.

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28 <sup>1</sup>On July 5, 2017, the Debtors also filed an *ex parte*  
application to invalidate a June 7, 2017, foreclosure sale and to  
hold the foreclosing secured creditors in contempt for violating  
the automatic stay by proceeding with that sale the day after  
this case was filed on June 6, 2017, and after they were informed  
on June 6, 2017, this case was filed. Dkt. 17.

1 However, several critical documents were not. Missing from the  
2 documents filed on July 19, 2017, were a chapter 13 plan and a  
3 properly filed, set, and served plan confirmation motion. That  
4 caused the Chapter 13 Trustee to file an *ex parte* motion to  
5 dismiss on July 21, 2017. Dkt. 25. The court granted the  
6 Trustee's *ex parte* motion and dismissed this case in an order  
7 filed on July 26, 2017.<sup>2</sup> Dkts. 26, 27.

8 On August 8, 2017, nearly two weeks after this case was  
9 dismissed, the Debtors filed an *ex parte* application to vacate  
10 the dismissal order, impose the automatic stay, and reinstate the  
11 *ex parte* application previously filed at docket no. 17. Dkt. 35.  
12 The court denied that *ex parte* application without prejudice on  
13 August 10, 2017, and ordered the Debtors to notice and set any  
14 re-filed motion for hearing in accordance with the local rules.  
15 Dkt. 36. Two weeks later, and one month after this case was  
16 dismissed, on August 24, 2017, the Debtors filed the present  
17 motion.<sup>3</sup> Dkt. 37.

18  
19 <sup>2</sup>An opposition to the Trustee's *ex parte* motion to dismiss  
20 was filed on July 26, 2017. Dkt. 28. That opposition stated  
21 only that the failure to timely file a chapter 13 plan by July  
22 19, 2017, "ha[d] just been discovered[,] " was the result of a  
23 clerical mistake by Debtors' counsel, and a chapter 13 plan was  
24 "immediately being filed." *Id.* A declaration was not filed with  
the opposition. And although a chapter 13 plan was also filed on  
July 26, 2017, dkt. 29, a properly filed, noticed, and set plan  
confirmation motion was not.

25 <sup>3</sup>The motion, memorandum of points and authorities,  
26 declarations, and exhibits are all filed as one large .pdf  
27 document. In that regard, the motion fails to comply with one of  
28 the basic pleading requirements in this district, *i.e.*, the  
motion, points and authorities, each declaration, and the  
exhibits are to be filed as separate pleadings. LBR  
9014-1(d) (1); Revised Guidelines for Preparation of Documents.

1 Discussion

2 Relief Under Rule 60(b)(1) Will be Denied.

3 Debtors seek relief from the order dismissing this chapter  
4 13 case under Federal Rule of Civil Procedure 60(b)(1) (made  
5 applicable by Federal Rule of Bankruptcy Procedure 9024). Rule  
6 60(b)(1) permits the court to grant relief from a final judgment  
7 or order for "mistake, inadvertence, surprise, or excusable  
8 neglect." Fed. R. Civ. P. 60(b)(1); Fed. R. Bankr. P. 9024. The  
9 court's treatment of a Rule 60(b)(1) motion is not rigid, but  
10 requires the court to equitably consider all relevant  
11 circumstances surrounding a party's, or its lawyer's, error or  
12 omission. *Pincay v. Andrews*, 389 F.3d 853, 855-56 & 860 (9th  
13 Cir. 2004) (en banc), cert. denied., 544 U.S. 961 (2005) (citing  
14 *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S.  
15 380, 395 (1993)). Moreover, the party moving for Rule 60(b)  
16 relief bears the burden of establishing a basis for relief under  
17 the rule. *Martinelli v. Valley Bank of Nevada (In re*  
18 *Martinelli)*, 96 B.R. 1011, 1013 (9th Cir. BAP 1988); see also  
19 *South Shore Ranches, LLC v. Lakelands Co., LLC*, 2009 WL 2019858,  
20 \*2 (E.D. Cal. 2009). Here, that's the Debtors and they have not  
21 met their burden.

22 Debtors attribute their failure to timely file all required  
23 documents, specifically a chapter 13 plan and a properly filed,  
24 set, and served plan confirmation motion, to counsel's excusable  
25 neglect and mistake. "Evidence," if it can be called that, of  
26

27  
28 Not following that basic rule of pleading is grounds for denying  
the motion. See LBR 9014-1(1).

1 counsel's negligence and mistake is limited to the following  
2 three conclusory statements in counsel's self-serving declaration  
3 filed in support of the present motion:

4 (1) "The Chapter 13 Plan was not filed with the other  
5 documents on July 19, 2017 because of the mistake and  
6 inexcusable [sic] neglect of Debtors' attorney." Dkt.  
7 37 at 3:17-18.

8 (2) "Th[e] mistake was not realized by Debtors'  
9 attorney[.]" *Id.* at 3:18-19.

10 (3) "I take full responsibility for the mistake and  
11 excusable negligence in not filing the remaining  
12 documents for Debtors by July 19, 2017." *Id.* at 3:22-  
13 24.

14 Although counsel's declaration uses terms from the text of  
15 Rule 60(b)(1), it fails to establish that Rule 60(b)(1) relief is  
16 warranted. Counsel's conclusory and self-serving statements are  
17 not facts and they do not address any of the four *Pioneer-Briones*  
18 factors, *i.e.*, (1) the danger of prejudice to any non-moving  
19 party if the dismissal is vacated, (2) the length of delay and  
20 the potential impact of that delay on judicial proceedings, (3)  
21 the reason for the delay, including whether the delay was within  
22 the reasonable control of the movant, and (4) whether the  
23 Debtors' conduct was in good faith. *Pioneer*, 507 U.S. at 395;  
24 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir.  
25 1997). Those factors are also not addressed in the motion or in  
26 the memorandum of points and authorities. For that reason alone,  
27 Rule 60(b)(1) relief is not warranted. *See Bateman v. U.S.*  
28 *Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000) ("The court  
would have been within its discretion [to deny relief] if it  
spelled out the equitable test and then concluded that [counsel]  
had failed to present any evidence relevant to the four

1 factors." ).

2 Nevertheless, the court has independently reviewed the  
3 *Pioneer-Briones* factors in the context of the record before it.  
4 See *Lemoge v. U.S.*, 587 F.3d 1188, 1192 (9th Cir. 2009). None of  
5 those factors weigh in favor of Rule 60(b)(1) relief on the basis  
6 of excusable neglect or mistake.

7 First, this was the Debtors' third bankruptcy case filed  
8 within one year, which means the automatic stay of § 362(a) did  
9 not go into effect when the case was filed. See 11 U.S.C. §  
10 362(c)(4)(A)(i). It was incumbent on the Debtors to request the  
11 imposition of the automatic stay within 30 days of the date the  
12 case was filed and also to set that request for hearing. See 11  
13 U.S.C. § 362(c)(4)(B). The Debtors did not do either.

14 The court is aware that on July 5, 2017, the Debtors filed  
15 an *ex parte* application to reverse the June 7, 2017, foreclosure  
16 sale and hold the foreclosing secured creditors in contempt for  
17 purportedly violating the automatic stay by conducting a  
18 postpetition foreclosure sale after being notified the day before  
19 the sale that this case was filed. However, even if that *ex*  
20 *parte* application could be construed as a request to impose the  
21 automatic stay under § 362(c)(4)(B), it was filed *ex parte* which  
22 means it was not set for a noticed hearing as also is required by  
23 § 362(c)(4)(B). So even assuming the Debtors passed the first  
24 step by filing a request to impose the stay they flunked the  
25 second step by not setting that request for a hearing.

26 Moreover, the *ex parte* application did not request, but  
27 merely assumed, that the automatic stay went into effect when  
28 this case was filed. That assumption was based on a second

1 assumption that § 362(c)(4)(D)(i)(II) automatically applied when  
2 the case was filed. Not so. Section 362(c)(4)(D)(i)(II) applies  
3 only if there is a showing by clear and convincing evidence that  
4 a debtor's prior cases were dismissed because of counsel's  
5 negligence. See 11 U.S.C. § 362(c)(4)(D). That showing was not  
6 made here because the declaration that counsel submitted with the  
7 *ex parte* application, like the one submitted with the present  
8 motion, included only counsel's conclusory and self-serving  
9 assertions that the Debtors' two prior cases were dismissed  
10 because of her negligence. Those assertions are not facts and  
11 they certainly are not the clear and convincing evidence that §  
12 362(c)(4)(D) requires in order to trigger § 362(c)(4)(D)(i)(II).<sup>4</sup>

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14 <sup>4</sup>In addition to the Debtors' two prior cases which were  
15 dismissed because counsel failed to timely file required  
16 documents, counsel engaged in similar conduct in two other cases  
17 recently filed in this district which were also dismissed for the  
18 same reason. *In re Tyler*, no. 17-10177, was filed on January 20,  
19 2017. Not all required documents were filed with the petition in  
20 that case. An order entered on February 16, 2017, extended the  
21 deadline to file the missing documents to March 3, 2017. Some  
22 missing documents were filed two days late on March 5, 2017.  
23 That caused the case to be dismissed on March 6, 2017. Counsel  
24 then re-filed another chapter 13 case for the same debtors on  
25 April 23, 2017, *In re Tyler*, no. 17-11558, and on April 26, 2017,  
26 counsel was again notified that documents were missing. Some  
27 missing documents were to be filed by April 30, 2017, and some by  
28 May 7, 2017. Again, not all missing documents were timely filed  
resulting in yet another dismissal of the second chapter 13 case  
on May 12, 2017. Counsel filed a third case for these debtors on  
September 10, 2017, *In re Tyler*, no. 17-13464, and was again  
notified on September 11, 2017, that numerous required documents  
were missing and not filed with the petition.

Nearly every other case that counsel has filed in this  
district has been dismissed for failure to timely file documents,  
including some in which an extension to file missing documents  
had been granted and some filed multiple times. These include  
the following: *In re Hyatt*, 16-10139 (filed 1/12/16, dismissed  
2/19/16, motion to vacate dismissal denied 3/14/16 & 4/8/16); *In*

1 But even assuming counsel's conclusory and self-serving  
2 statements met the clear and convincing standard, in a third  
3 bankruptcy case like this one, if at all, the automatic stay only  
4 goes into effect on the date an order allowing it to go into  
5 effect is entered. See 11 U.S.C. § 362(c)(4)(C). That means  
6 even if the *ex parte* application was granted on the same day it  
7 was filed the automatic stay would be imposed and effective only  
8 as of July 5, 2017, in which case it would have no impact on the  
9 foreclosure sale completed a month earlier on June 7, 2017.

10 The point is there was no automatic stay in effect when this  
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12 *re Starr*, 15-14857 (filed 12/20/15, dismissed 4/8/16); *In re*  
13 *Starr*, 16-10088 (filed 11/19/15, dismissed 3/3/16); *In re Tracy*,  
14 16-20084 (filed 11/18/15, dismissed 1/3/16); *In re Tracy*, 15-  
15 22785 (filed 4/6/15, dismissed 4/24/15); *In re Dynowski*, 14-31822  
16 (filed 12/4/14, dismissed 12/14/15); *In re Rodriguez*, 13-31031  
17 (filed 8/22/13, dismissed 9/3/13); *In re Manzo*, 13-30462 (filed  
18 8/8/13, dismissed 8/19/13); *In re Ascencion*, 11-24004 (filed  
19 2/17/11, dismissed 3/8/11); *In re Ascencion*, 11-21249 (filed  
20 1/8/11, dismissed 2/8/11).

21 An order entered earlier this year in one of the *Dynowski*  
22 cases sheds light on counsel's motivation behind what appears to  
23 be deliberate conduct and an established part of counsel's  
24 practice. Referring to counsel's other cases filed in this  
25 district, the court stated:

26 These cases show a remarkably consistent pattern of  
27 abuse - failing to file fee disclosures, failing to  
28 file required documents, and failing to attend meetings  
of creditors. **The court concludes from the record in  
the case now before it, as well as these prior cases,  
that Ms. Richards is aiding debtors in an abuse of the  
bankruptcy process that is calculated to hinder, delay,  
and defraud lenders in their efforts to foreclose  
and/or repossess their real property collateral.**

*In re Dynowski*, 15-28574, Dkt. 115 (emphasis added).

And the court also notes that out of approximately 227 cases that  
counsel filed in the Central District of California bankruptcy  
court since 2010, only about 43 have been discharged, and an  
inordinate number of the remaining cases were dismissed for  
failure to file documents timely.

1 case was filed on June 6, 2017, which means the postpetition  
2 foreclosure sale on June 7, 2017, did not and could not have  
3 violated § 362(a) even if the foreclosing secured creditors knew  
4 about this case. That also means granting the Rule 60(b)(1)  
5 relief that the Debtors now request so that they may attempt to  
6 invalidate that June 7, 2017, foreclosure sale on the basis it  
7 violated the automatic stay would only cause substantial  
8 prejudice to the foreclosing secured creditors as non-moving  
9 parties. Accordingly, this first factor weighs heavily against  
10 Rule 60(b)(1) relief.

11 So does the second factor, *i.e.*, delay and the effects of  
12 that delay on the chapter 13 proceeding caused by the untimely  
13 filing of a chapter 13 plan and the absence of a timely-filed,  
14 set, and served plan confirmation motion.

15 The § 341 meeting of creditors was set, convened, and  
16 concluded on July 20, 2017. Dkt. 15. That triggered § 1324(b)  
17 which requires a plan confirmation hearing to be held within 45  
18 days of that date. See 11 U.S.C. § 1324(b). That 45-day time  
19 period may not be extended. *In re Butcher*, 459 B.R. 115, 119  
20 (Bankr. D. Colo. 2011). And it expired on September 5, 2017.<sup>5</sup>  
21 That is a problem.

22 A chapter 13 plan confirmation hearing in this district  
23 requires at least 42-days' notice. See LBR 9014-1(f)(1), & Fed.  
24 R. Bankr. P. 2002(b). So even if a plan confirmation motion was  
25 filed, set, and served with the untimely-filed chapter 13 plan on  
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27 <sup>5</sup>It actually expired on September 3, 2017, which was a  
28 Sunday and the following Monday, September 4, 2017, was a federal  
holiday.

1 July 26, 2017, the earliest date on which a confirmation hearing  
2 could have been held would have been September 6, 2017, *i.e.*, the  
3 day after the § 1324(b) deadline expired.<sup>6</sup> Thus, by not timely  
4 filing the chapter 13 plan on July 19, 2017, and by not filing,  
5 setting, and serving a plan confirmation motion with the plan on  
6 the same date, the Debtors made it impossible to hold a  
7 confirmation hearing within the 45-day period required by §  
8 1324(b).<sup>7</sup> An inability to satisfy § 1324(b) leaves conversion,  
9 or more likely dismissal in this case due to the absence of  
10 nonexempt assets, as the only viable options. *See In re Donnell*,  
11 2012 WL 8255546, \*2 (Bankr. E.D. Cal. 2012). And because it  
12 makes no sense to vacate the order dismissing this case so that  
13 the case can again be dismissed due to an inability to satisfy §  
14 1324(b), this second factor also weighs heavily against Rule  
15 60(b)(1) relief.

16 Third, nothing is said about the reason for the delay in  
17 filing a chapter 13 plan and the absence of a plan confirmation  
18 motion and whether the failure to timely file both was within or  
19 outside the control of Debtors' counsel. Consequently, this

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20  
21 <sup>6</sup>Based on the court's calendar and when chapter 13 matters  
22 are heard, September 12, 2017, would have been the next  
available, and therefore a more accurate, date.

23 <sup>7</sup>Had the Debtors timely filed a chapter 13 plan on July 19,  
24 2017, and filed, set, and served a plan confirmation motion with  
25 it on the same date as the second extension order required the  
26 42-day notice period would have run on August 30, 2017, and a  
27 confirmation hearing could have been "held" on the court's next  
28 available calendar date which then was September 5, 2017. That  
would have satisfied § 1324(b) even if a plan was not confirmed  
on that date. *See In re Hegeduis*, 525 B.R. 74, 82 (Bankr. N.D.  
Ind. 2015); *In re Tiliakos*, 2013 WL 3943502 at \*3 (Bankr. M.D.  
Fla. 2013).

1 factor weighs against Rule 60(b)(1) relief.

2 Fourth, as explained above, bad faith is presumed in this  
3 third bankruptcy case and that presumption was not timely or  
4 substantively rebutted. This also weighs against Rule 60(b)(1)  
5 relief.

6 In sum, the Debtors have not established any basis for  
7 relief under Rule 60(b)(1) and the court's independent evaluation  
8 of the *Pioneer-Briones* factors based on the record before it  
9 confirms that such relief is not warranted in any event.  
10 Therefore, the Debtors' request for relief under Rule 60(b)(1)  
11 will be denied.

12 Relief Under Rule 60(b)(6) Will be Denied.

13 Debtors also seek relief under Rule 60(b)(6). A court may  
14 grant relief from a judgment or order under Rule 60(b)(6)  
15 (applicable by Federal Rule of Bankruptcy Procedure 9024) for  
16 "any other reason that justifies relief." Fed. R. Civ. P.  
17 60(b)(6); Fed. R. Bankr. P. 9024. Relief under Rule 60(b)(6) is  
18 limited to errors or actions beyond the party's control. See  
19 *Cnty. Dental Serv. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 1996).  
20 In other words, to qualify for relief under Rule 60(b)(6) a  
21 moving party must show injury and that circumstances beyond its  
22 control prevented timely action to protect its interests.  
23 *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir.  
24 2006). "Neglect or lack of diligence is not to be remedied  
25 through Rule 60(b)(6)." *In re Shingleton*, 2007 WL 2743503, \*3  
26 (Bankr. D. Idaho) (internal quotations omitted) (citing *Lehman v.*  
27 *U.S.*, 154 F.3d 1010, 1017 (9th Cir. 1998)).

28 In order for the Debtors to establish that circumstances

1 beyond their control prevented the timely filing of a chapter 13  
2 plan and a properly filed, set, and served plan confirmation  
3 motion the Debtors would first need to explain why they were  
4 unable to, and did not comply with, the second extension order  
5 and file both documents on July 19, 2017. As noted above, the  
6 Debtors have not done that. Therefore, the Debtors' request for  
7 relief under Rule 60(b)(6) will be denied.

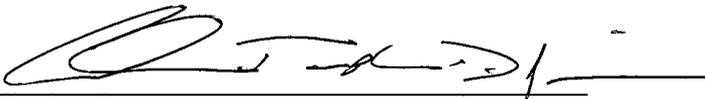
8  
9 **Conclusion**

10 The court is sympathetic to the Debtors' plight and the  
11 representation they received in this and their two prior  
12 bankruptcy cases. However, based on the record before it, the  
13 court is not persuaded that counsel's conduct in this case rises  
14 to the level of mistake or excusable neglect. Unfortunately,  
15 that leaves the Debtors in a position where they are bound by the  
16 consequences flowing from the acts and omissions of their  
17 bankruptcy attorney. See *Casey v. Albertson's Inc.*, 362 F.3d  
18 1254, 1260 (9th Cir. 2004) ("As a general rule, parties are bound  
19 by the actions of their lawyers, and alleged attorney malpractice  
20 does not usually provide a basis to set aside a judgment pursuant  
21 to Rule 60(b)(1)."). Fortunately, with counsel's admitted  
22 negligence and omissions in this case and her willingness to  
23 accept responsibility for both, perhaps the Debtors may find  
24 financial relief through a state law civil remedy. But as for  
25 the request for relief under Rule 60(b) in this case,

1 IT IS HEREBY ORDERED that the Debtors' motion filed at Dkt.  
2 37 is DENIED.

3 IT IS FURTHER ORDERED that the court shall enter a separate  
4 order for counsel to show cause why she should not be further  
5 sanctioned, including notification to the State Bar of  
6 California, by filing this bankruptcy case on June 6, 2017, and  
7 an adversary proceeding in this bankruptcy case on July 17, 2017,  
8 in violation of the order filed on March 1, 2017, in case no.  
9 15-28574, which prohibits counsel from filing any new case or  
10 proceeding after April 15, 2017, without first completing 4 hours  
11 of continuing legal education in ethics and certifying her  
12 completion of that continuing legal education with the clerk of  
13 the court.

14 Dated: September 12, 2017.

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17 UNITED STATES BANKRUPTCY JUDGE  
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INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Rafael A. Reyes  
110 Grubstake Place  
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Antonia Darling  
Office of the U.S. Trustee  
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