

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas Holman
Bankruptcy Judge
Sacramento, California

February 11, 2014 at 9:32 A.M.

1. [13-30690](#)-B-11 WILLIAM PRIOR MOTION TO DISMISS ADVERSARY
[13-2288](#) JWK-3 PROCEEDING
PRIOR V. TRI COUNTIES BANK ET 12-27-13 [[93](#)]
AL

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

The motion is continued to March 11, 2014, at 9:32 a.m.

The court will issue a minute order.

2. [13-30690](#)-B-11 WILLIAM PRIOR MOTION FOR LEAVE TO REPLEAD
[13-2288](#) JWK-3 COMPLAINT IN INTERVENTION AFTER
PRIOR V. TRI COUNTIES BANK ET REMOVAL
AL 1-17-14 [[119](#)]

Tentative Ruling: The plaintiff debtor's opposition is overruled. The motion is granted. Pursuant to Fed. R. Bankr. P. 9027(g), the movant, the United States Federal Deposit Insurance Corporation, as Receiver for Citizens Bank of Northern California (the "FDIC"), is authorized to replead its complaint in intervention in the manner described in the motion. The FDIC shall file and serve the repleaded complaint on or before February 21, 2014. Except as so ordered, the motion is denied.

Considering the limited manner in which the FDIC seeks to replead the complaint in intervention, the court does not agree with the debtor that repleading at this time would be premature given the pendency of the FDIC's motion to dismiss the adversary proceeding and across-motions for summary judgment filed by the debtor and defendant Tri Counties Bank. The substance of the motion to dismiss and the motions for summary judgment deal primarily with the court's jurisdiction over this matter. The manner in which the FDIC wishes to replead its complaint in intervention is not directly affected by the jurisdictional issues raised in the pending motions. Therefore, the court grants the motion.

The court will issue a minute order.

3. [13-30690](#)-B-11 WILLIAM PRIOR AMENDED MOTION FOR SUMMARY
[13-2288](#) NJR-2 JUDGMENT
PRIOR V. TRI COUNTIES BANK ET 1-3-14 [[107](#)]
AL

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

The motion is continued to March 11, 2014, at 9:32 a.m.

The court will issue a minute order.

4. [13-30690](#)-B-11 WILLIAM PRIOR MOTION FOR PARTIAL SUMMARY
[13-2288](#) WFH-2 JUDGMENT
PRIOR V. TRI COUNTIES BANK ET 1-14-14 [[111](#)]
AL

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

The motion is continued to March 11, 2014, at 9:32 a.m.

The court will issue a minute order.

5. [13-30690](#)-B-11 WILLIAM PRIOR CONTINUED MOTION FOR LIMITED
[13-2288](#) JWK-2 MOTION TO STAY DISCOVERY
PRIOR V. TRI COUNTIES BANK ET 11-20-13 [[48](#)]
AL

Tentative Ruling: The motion is continued to March 11, 2014, at 9:32 a.m., to be heard after the hearings on the plaintiff in intervention's motion to dismiss, the plaintiff debtor's motion for summary judgment and defendant Tri Counties Bank's motion for summary judgment. The stay of discovery pending resolution of the motion imposed by the court's order entered November 21, 2013 (Dkt. 54), remains in effect.

The court will issue a minute order.

6. [13-30690](#)-B-11 WILLIAM PRIOR CONTINUED MOTION FOR PROTECTIVE
[13-2288](#) NJR-1 ORDER
PRIOR V. TRI COUNTIES BANK ET 12-17-13 [[76](#)]
AL

Tentative Ruling: The motion is continued to March 11, 2014, at 9:32 a.m., to be heard after the hearings on the plaintiff in intervention's motion to dismiss, the plaintiff debtor's motion for summary judgment and defendant Tri Counties Bank's motion for summary judgment. The discovery which is the subject of this motion is stayed pending resolution of the motion.

The court will issue a minute order.

7. [12-23115](#)-B-11 MELANIE CORNELL MOTION BY MITCHELL L. ABDALLAH
SWD-1 TO WITHDRAW AS ATTORNEY
1-12-14 [[284](#)]

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.

8. [12-23115](#)-B-11 MELANIE CORNELL MOTION TO CONVERT CASE TO
UST-1 CHAPTER 7 OR MOTION TO DISMISS
CASE
1-6-14 [[280](#)]

Tentative Ruling: The written opposition filed on January 28, 2014 (Dkt. 299), is stricken. The motion is granted. The bankruptcy case is converted to one under chapter 7. Except as so ordered, the motion is denied.

The written opposition is stricken because it was prepared, filed and served on behalf of the debtor by J.J. Sandlin, Esq., who is not counsel of record for the debtor in this bankruptcy case. Mr. Sandlin has never applied for authorization to be employed by nor been approved as counsel for the debtor in this case. The debtor is only permitted to employ an attorney who satisfies the requirements of 11 U.S.C. § 327(a). As the debtor has never applied to employ Mr. Sandlin, there is no evidence in the court's records that Mr. Sandlin is qualified to represent the debtor. The debtor's present counsel of record is Mitchell Abdallah, Esq. the court acknowledges that Mr. Abdallah's name appears above the caption on the opposition papers,

but Mr. Abdallah has not signed the opposition, the accompanying memorandum of points and authorities or any of the other papers supporting the opposition.

Turning to the substance of the motion, the United States trustee (the "UST") seeks dismissal or conversion of this case for cause pursuant to 11 U.S.C. § 1112(b). Pursuant to 11 U.S.C. § 1112(b)(1), the court shall convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause. Section 1112(b) also limits the foregoing directive in several ways:

First, under section 1112(b)(2), the court shall not convert or dismiss the case, even if the movant establishes cause, if the court determines that specifically identified unusual circumstances exist and such circumstances establish that conversion or dismissal would not be in the best interests of creditors and the estate.

Second, under section 1112(b)(1), if cause is established and no specifically identified unusual circumstances are established, the court must convert or dismiss the case for cause unless the court determines that a trustee should be appointed under section 1104(a). Section 1104(a)(3) states that, rather than converting or dismissing the case, the court may appoint a chapter 11 trustee if doing so would be in the best interests of creditors and the estate.

Third, under section 1112(b)(2), if cause is established and no specifically identified unusual circumstances are established, the court must convert or dismiss the case for cause unless the debtor or another party in interest opposing dismissal or conversion establishes the requirements of section 1112(b)(2)(A) and (B). Under section 1112(b)(2), the debtor or other opposing party in interest must establish that:

(1) There is a reasonable likelihood that a plan will be confirmed within the time limitations specified in the subsection;

(2) The grounds for converting or dismissing the case include an act or omission by the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and

(3) There exists a reasonable justification for the act or omission demonstrating cause to dismiss the case and the act or omission will be cured within a reasonable time fixed by the court.

7 Lawrence P. King, et. al. Collier on Bankruptcy § 1112.04 (15th ed. rev. 2007).

Section 1112(b)(3) requires that, absent the UST's consent or compelling circumstances that prevent the court from meeting the requirements of the subsection, the court must commence a hearing on the motion within thirty (30) days after it is filed and must decide the motion within fifteen (15) days after the hearing is commenced. This motion was filed on January 6, 2014, and the UST set this motion for hearing on February 11, 2014, the first available calendar date for a 28-day motion filed under LBR 9014-1(f)(1). The UST's action in setting the hearing more than thirty days after it was filed constitutes movant's consent to hearing the motion more than thirty days after it was filed. The decision on this matter will take place within fifteen-day days after the hearing is

commenced.

Section 1112(b)(4) sets forth a non-exhaustive list of examples of "cause." The court has the discretion to consider cause not specifically listed under § 1112(b). Cause may include unreasonable delay that is prejudicial to creditors. In re Consolidated Pioneer Mortg. Entities, 264 F.3d 803, 808-09 (9th Cir. 2001).

The court finds, for the reasons stated in the motion, that the UST has established cause for dismissal or conversion.

As the UST points out in the motion, as of the date of the hearing on this motion this chapter 11 case will have been pending for 725 days – nearly two years. In that time, the debtor has filed one proposed plan and disclosure statement, on July 27, 2012 (Dkt. 45, 46), 564 days before the date of the hearing on this motion. A hearing on approval of the disclosure statement and a hearing on approval of confirmation of the plan was set for October 30, 2012, but the plan and disclosure statement were deemed withdrawn by the court after the hearing on October 30, 2012, at which neither the debtor nor her counsel of record made an appearance. Since then, the debtor has not filed an amended plan or disclosure statement.

In addition, on April 5, 2013, U.S. Bank, N.A. obtain relief from the automatic stay to foreclose on real property where in the debtor resides located at 23629 Faegerlie Road, Auburn, California and to obtain possession of the real property in accordance with applicable nonbankruptcy law. The debtor filed an appeal of the court's order granting relief from the automatic stay in the District Court. However, the court's review of its own records and the District Court's records shows that the debtor has not prosecuted the appeal; the last filing in the District Court regarding the appeal is a Notice of Incomplete or Delayed Record filed on May 24, 2013, which shows that the debtor did not file a reporter's transcript and/or a notice regarding the transcript. There is no evidence in the court's records that the debtor has taken any action to complete the record of the matter on appeal or to prosecute the appeal in any fashion. The court finds that the debtor's failure to prosecute her chapter 11 case by moving the case toward confirmation of a chapter 11 plan and her failure to prosecute the appeal of the order granting U.S. Bank, N.A. relief from the automatic stay constitutes an unreasonable delay that is prejudicial to creditors and cause to convert or dismiss the case.

The court also finds that the UST has established cause to convert or dismiss the case pursuant to 11 U.S.C. § 1112(b)(4)(F). As set forth in the motion, the debtor was required to file her monthly operating report for the month of November, 2013, on or before December 16, 2013, allowing for the automatic extension of time afforded by Fed. R. Bankr. P. 9006. The debtor did not file the November, 2013, monthly operating report until January 3, 2014 (Dkt. 276). The court finds that the debtor's late filing of the monthly operating report constitutes an unexcused failure to satisfy the reporting requirement for the purposes of § 1112(b)(4)(F) and cause to convert or dismiss the bankruptcy case.

The court further finds that the debtor has not established pursuant to Section 1112(b)(2) that, even though cause exists, the case should not be

dismissed. The debtor has failed to establish any of the requirements of section 1112(b)(2)(A) or (B).

The court finds that conversion, rather than dismissal of the case is in the best interests of the creditors and the estate. The debtor's Statement of Financial Affairs in this case (Dkt. 15 at 21) indicates that she has claims against U.S. Bank, N.A. Although those claims are not scheduled this property of the estate on Schedule B, the court finds that it would be appropriate in this circumstance for a chapter 7 trustee to investigate whether the claims are an administrable asset.

The court will issue a minute order.

9. [13-33506](#)-B-7 HAROLD/CATHERINE KAY MOTION TO EMPLOY WEST AUCTIONS,
MPD-3 INC. AS AUCTIONEER(S)
1-14-14 [[39](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014, the trustee's request to employ West Auctions, Inc. ("West") as auctioneer for the chapter 7 trustee is granted on the terms set forth in the application. West's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that West is a disinterested person as that term is defined in 11 U.S.C. § 101(14).

Counsel for the chapter 7 trustee shall submit an order approving employment of West that conforms to the foregoing ruling.

10. [13-33506](#)-B-7 HAROLD/CATHERINE KAY MOTION TO SELL
MPD-4 1-14-14 [[44](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted in part. Pursuant to 11 U.S.C. § 363(b), the trustee is authorized to sell the personal property of the estate listed in the motion (the "Property") on an "as-is" and "where-is" basis at auction, through West Auctions, Inc. ("West"). The trustee is authorized pursuant to 11 U.S.C. § 330(a) to pay West, a commission of 12% of the gross proceeds of the sale, plus costs in the amount of \$450.00. The trustee is authorized to execute all documents necessary to complete the approved sale. Except as so ordered, the motion is denied.

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 court finds that the approved fees and costs are reasonable compensation for actual, necessary services.

Counsel for the chapter 7 trustee shall submit a proposed order that conforms to the foregoing ruling.

11. [13-33506](#)-B-7 HAROLD/CATHERINE KAY MOTION TO EMPLOY HOUSE OF
MPD-5 REALTY, INC. AS BROKER(S)
1-14-14 [[49](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014, the chapter 7 trustee is authorized to employ House of Realty, Inc. ("HOR") as real estate broker to the estate for the purpose of marketing and selling real property located at 132 Woodcliff drive, Redding, California. HOR's fees and costs, if any, shall be paid only pursuant to application. 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016. Except as so ordered, the motion is denied.

The court finds that HOR is a disinterested person as that term is defined in 11 U.S.C. § 101(14).

Counsel for the chapter 7 trustee shall submit an order approving employment and compensation of HOR that is consistent with this ruling.

12. [12-28614](#)-B-7 PETER/VALENTINA PETRENKO MOTION TO ENJOIN DEFENDANTS
[13-2380](#) TCS-3 FROM GARNISHING PLAINTIFF'S
PETRENKO V. SALLIE MAE ET AL SOCIAL SECURITY PAYMENTS
1-14-14 [[12](#)]
WITHDRAWN BY M.P.

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

The motion is removed from the calendar. The movant withdrew the motion on January 27, 2014 (Dkt. 17).

13. [13-35316](#)-B-7 BRUCE/JUDITH SCHNEIDER MOTION TO COMPEL ABANDONMENT
WSS-1 1-9-14 [[13](#)]

Tentative Ruling: The motion is denied.

By this motion the debtors seek an order deeming personal property of the bankruptcy estate consisting of the debtors' interest in a sole proprietorship known as Promotions by Schneider (the "Business") as abandoned by the bankruptcy estate pursuant to 11 U.S.C § 554(b). The

16. [13-35731](#)-B-7 PAUL KEITHLY JR. AND MOTION TO AVOID LIEN OF
JM-1 KIMBERLY KEITHLY CITIBANK, N.A.
12-19-13 [[11](#)]

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

The motion is denied without prejudice.

The debtors seek an order avoiding a judicial lien held by Citibank, N.A. to the extent it impairs a claim of exemption to which they would be entitled in their real property located at 162801 Williamstowne Drive, Lathrop, California. To avoid a judicial lien pursuant to 11 U.S.C. § 522(f), the debtor must show the following:

First, there must be an exemption to which the debtor "would have been entitled under subsection (b) of this section." 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be either a nonpossessory, nonpurchase-money security interest in categories of property specified by the statute, 11 U.S.C. § 522(f)(2), or be a judicial lien. 11 U.S.C. § 522(f)(1).

In re Mohring, 142 B.R. 389, 392-93 (Bankr. E.D. Cal. 1992), aff'd, 24 F.3d 247 (9th Cir. 1994) (table).

In this instance, the motion is missing information necessary to resolve it. Specifically, the debtors have not listed the Property as exempt on their sworn Schedule C, nor, in the absence of an exemption actually claimed on Schedule C, have they presented any evidence regarding a claim of exemption to which they "would be entitled" as specified in 11 U.S.C. § 522(f)(1). Nor have the debtors applied the formula set forth under § 522(f)(2)(A) to the facts of this case. The debtors have merely provided information regarding the identity and value of the real property and a copy of the recorded abstract of judgment. That is insufficient to obtain an order avoiding the judicial lien. The debtors are required by the court's local rules to provide both the evidence and legal authority which they assert that entitles them to the relief requested. LBR 9014-1(d)(5) and (6). Accordingly, the motion is denied without prejudice.

The court will issue a minute order.

17. [13-20645](#)-B-7 ROBERT/TRISTINA KITAY MOTION TO SET ASIDE DEFAULT AND
[13-2126](#) GONZALEZ V. KITAY ET AL DEFAULT JUDGMENT, MOTION TO
DISMISS ADVERSARY PROCEEDING,
MOTION TO VACATE HEARING, ETC.
1-3-14 [[70](#)]

Tentative Ruling: The motion is denied in part and dismissed as moot in part. The defendant debtor Robert N. Kitay's ("Debtor" or "Defendant") request to vacate the court's order entered August 21,

2013 (Dkt. 23) (the "Default Order"), striking his answer to the initial complaint and entering his default is denied. Debtor's request to vacate the court's order entered October 31, 2013 (Dkt. 35) (the "MDJ Order"), granting in part the plaintiff's motion for entry of default judgment is also denied. The Debtor's request for dismissal of the adversary proceeding is granted in part. All claims for relief in the first amended complaint filed on November 19, 2013 (Dkt. 45) (the "FAC") with the exception of the claim for relief under 11 U.S.C. § 523(a)(4) as to Robert N. Kitay only are dismissed without leave to amend. The Debtor's request for a continuance of the plaintiff's motion for entry of default judgment filed on December 3, 2013 (Dkt. 55), is dismissed as moot.

Request to Vacate Default

With respect to the Debtor's request for vacatur of the Default Order and the MDJ Order, the request is denied because the debtor has not satisfy the standard for obtaining a vacatur. Fed. R. Bankr. P. 7055, incorporating Fed. R. Civ. P. 55(c), states that the court may set aside an entry of default for good cause, and it may set aside a default judgment under Fed. R. Civ. P. 60(b). In determining to set aside the Default Order and the MDJ Order, the court must consider three factors to consider in determining whether to set aside a default judgment under Fed. R. Bankr. P. 7055: (1) whether default was willful or whether culpable conduct of defendant led to default, (2) whether setting aside default would prejudice the adverse party, and (3) whether meritorious defense has been presented. Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-26 (9th Cir.2004). These factors are disjunctive, and the debtor bears the burden of showing that they have been satisfied. The court may deny the motion if any of the three factors is true. Id. at 926.

In this case, the court finds that the debtor has not met his burden regarding the first factor. The Debtor's default was entered after the Debtor failed to comply with the court's order entered July 20, 2013 (Dkt. 15), which continued the status conference in the adversary proceeding to August 21, 2013, and which ordered the plaintiff and the Debtor to comply with the court's Order to Confer on Initial Disclosures and Setting Deadlines (Dkt. 5) (the "OTC") if the adversary proceeding was not resolved before July 23, 2013. The Debtor argues in the motion that he did not comply with the OTC because he was never served with the OTC by the plaintiff. He argues that service of the OTC on him was required before he was required to comply with any of the court's orders in the adversary proceeding, and that it was the plaintiff's responsibility to ensure that the Debtor complied with the OTC.

However, the debtor ignores the fact that he filed an answer to the initial complaint on May 15, 2013 (Dkt. 13) (the "Answer"), which Answer did not raise the issue of the court's personal jurisdiction over the Debtor; in fact, the Answer conceded the court's jurisdiction over the Debtor and the adversary proceeding. By appearing in the adversary proceeding by way of the Answer, the debtor voluntarily submitted himself to the jurisdiction of the court. In re Connaway, 178 U.S. 421, 428 (1900) ("The voluntary appearance of a [party] is equivalent to personal service of the summons and copy of the complaint upon him."). As a result, he was required to comply with the July 20, 2013 order, which was served on

him at his address of record for the adversary proceeding, as well as the OTC. The OTC also places the duties of meeting and conferring at a discovery conference, arranging for initial disclosures and for the preparation and filing of a joint discovery plan equally on both parties. Even if he was unable to meet and confer with the plaintiff in response to the plaintiff's letter regarding settlement and/or a discovery schedule, the Debtor failed to appear at the continued status conference any failed to file any document in the adversary proceeding in advance thereof. There is nothing in the OTC or the rules of the court applicable to this adversary proceeding which excuse the debtor's compliance under such circumstances. The debtor, as an attorney licensed in the state of California, was presumably well aware of the significance of appearing in this action and the consequences of failing to comply with the court's orders. Based on the foregoing, the court finds that the debtor's conduct which led to his default was willful.

As to the second factor, the court finds that the debtor has not met his burden of showing that the plaintiff would not be prejudiced by setting aside the Default Order or the MDJ Order. The motion does not address the issue of prejudice to the plaintiff at all.

As to the third factor, the court finds that the debtor has sustained his burden of showing a meritorious defense to the adversary proceeding. The debtor's burden to show a meritorious defense is not extraordinarily heavy. "All that is necessary to satisfy the 'meritorious defense' requirement is to allege sufficient facts that, if true, would constitute a defense." United States v. Signed Personal Check No. 730, 615 F.3d 1085, 1094 (9th Cir. 2010). In this case, the court finds that the Debtor has alleged sufficient facts in the motion that, if true would constitute a defense to the plaintiff's claims.

However, although the Debtor has sustained his burden of showing that he has a meritorious defense to the plaintiff's allegations, because he failed to meet his burden of showing that the Default Order and the MDJ Order were not the result of willful or culpable conduct or that the plaintiff would not be prejudiced if the orders were vacated, the Debtor's request is denied.

Request to Dismiss Adversary Proceeding

With respect to the Debtor's request for dismissal of the adversary proceeding in its entirety, the court's decision is based on the following procedural history. The plaintiff filed the initial complaint (Dkt. 1) (the "Complaint") on April 15, 2013. The Complaint alleged claims for relief under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6) and 727(a)(3) and (a)(4). The Complaint named Robert N. Kitay and the "Law Offices of Robert N. Kitay" as defendants. Robert N. Kitay filed the Answer on May 15, 2013 (Dkt. 13). The Answer was stricken by order entered August 21, 2013 (Dkt. 23) and, pursuant to the court's order, the clerk of the court entered Robert N. Kitay's default on August 21, 2013 (Dkt. 25).

On September 20, 2013, the plaintiff filed a motion for entry of default judgment (Dkt. 27), specifically seeking entry of default judgment against Robert N. Kitay. The motion was heard on October 29, 2013. By order entered November 4, 2013 (Dkt. 40), the court ordered that the

plaintiff would recover \$5000.00 from Robert N. Kitay, plus costs in the amount of \$290.00, which amount would be nondischargeable pursuant to 11 U.S.C. § 523(a)(4). The court dismissed the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) and 727(a)(3) and (a)(4), with leave granted to the plaintiff to amend. The plaintiff was ordered to file and serve the FAC consistent with the requirements of Fed. R. Bankr. P. 7004 on or before November 19, 2013, failing which the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) and 727(a)(3) and (a)(4) would be dismissed without further notice or hearing.

The plaintiff filed the FAC on November 19, 2013 (Dkt. 45). The FAC removes the "Law Offices of Robert N. Kitay" as a defendant and added joint debtor Tristina Kitay ("Tristina") as a defendant. The FAC retained the plaintiff's claims under 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6). The FAC also removed plaintiff's claims under 11 U.S.C. § 727 and added claims for relief for "breach of contract," "professional negligence" and "constructive fraud."

The debtor correctly argues that the plaintiff did not comply with the court's order entered November 4, 2013 (Dkt. 40), to file and serve the FAC (Dkt. 45) on or before November 19, 2013, consistent with the requirements of Fed. R. Bankr. P. 7004, failing which the plaintiff's claims under 11 U.S.C. §§ 523(a)(2)(A), (a)(6), 727(a)(3) and (a)(4) would be dismissed. The plaintiff did not properly serve the Debtor or Tristina with the FAC, as he served the Debtor and Tristina at an address that was not their address of record. The plaintiff's assertion that the address for service was listed as the Debtor's and Tristina's street address on their voluntary petition filed on January 17, 2013, in the parent bankruptcy case is unavailing; on February 2, 2013, the Debtor and Tristina filed a notice of change of address in the parent case, which changed their address of record to 2508 Garfield, Avenue, Suite A, Carmichael, California, the same address used by the debtor on the Answer. The plaintiff failed to timely serve the FAC's amended claims for nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (a)(6) on both the Debtor and Tristina. More importantly, any objections as to Tristina's discharge or to nondischargeability as to a debt with respect to Tristina are time-barred; the filing of the FAC on November 19, 2013, which named Tristina as a defendant, occurred long after the deadline of April 15, 2013, to file a claim objecting Tristina's discharge or the nondischargeability of a debt as to Tristina expired.

The plaintiff's failure to timely serve the FAC constitutes grounds for dismissal of his claims under 11 U.S.C. §§ 523(a)(2)(A), (a)(6), as to both Debtor and Tristina as set forth in the court's November 4, 2013 order. The claims under § 523(a)(2)(A) and (a)(6) having been dismissed, court also dismisses the plaintiff's claims for "breach of contract," "professional negligence" and "constructive fraud" because those claims, without an accompanying claim for a determination of nondischargeability, are not appropriately brought in the adversary proceeding associated with the parent chapter 7 case. Those claims are properly asserted through the chapter 7 claims process and can be set forth in a proof of claim filed in the parent bankruptcy case.

Based on the foregoing dismissal of claims from the FAC, the only remaining claim for relief in the FAC is a claim for determination of nondischargeability as to Robert N. Kitay, on which the court has already granted the plaintiff's motion for entry of default judgment

in the amount of \$5000.00 by order entered November 4, 2013.

Request to Continue Hearing on Plaintiff's Motion for Entry of Default Judgment

With respect to the Debtor's request for a continuance of the plaintiff's motion for entry of default judgment filed on December 3, 2013, the request is dismissed as moot. The court denied that motion by order entered January 17, 2014 (Dkt. 87).

The court will issue a minute order on this motion. The claims for relief in this adversary proceeding now having been fully resolved, the plaintiff shall submit a proposed form of judgment stating that he shall recover \$5000.00 from Robert N. Kitay, which amount shall be nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

18. [13-23535](#)-B-7 JOHN LEE MOTION FOR COMPENSATION BY THE
HSM-4 LAW OFFICE OF HEFNER, STARK &
MAROIS, LLP FOR THOMAS P.
GRIFFIN, JR., TRUSTEE'S
ATTORNEY(S), FEES: \$7,169.00,
EXPENSES: \$88.75
1-9-14 [[49](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of \$7,169.00 in fees and \$88.75 expenses, for a total of \$7,257.75, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

The applicant seeks compensation for services rendered and costs incurred during the period of June 8, 2013, through and including February 11, 2014. By order entered on June 26, 2013 (Dkt. 25), the court authorized the chapter 7 trustee to retain the applicant as general bankruptcy counsel in this case. The applicant's employment was effective June 8, 2013. The fees and costs requested are approved in full. The court notes that it would ordinarily reduce the applicant's fees because it has stated in its motion that it intends on charging one hour preparing for and appearing on the hearing on this matter. This matter is being disposed of without oral argument and will therefore not be called at the hearing on February 11, 2014. No appearance is necessary. However, because the applicant has already performed 2.4 hours of service billed at no charge to the estate, the requested fees are approved in full. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

19. [13-35137](#)-B-7 LINDA NEEL CONTINUED MOTION TO COMPEL
ALF-1 ABANDONMENT
12-27-13 [[10](#)]

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.

20. [13-30958](#)-B-7 EDWARD LEGRANDSAWYER MOTION FOR ENTRY OF DEFAULT
[13-2320](#) UST-1 JUDGMENT
U.S. TRUSTEE V. LEGRANDSAWYER 1-3-14 [[15](#)]

Tentative Ruling: This is a properly filed motion under Local Bankruptcy Rule 9014-1(f)(1). Because the debtor/defendant is in pro se, the court issues the following abbreviated tentative ruling.

The motion is granted in part. Judgment will be entered in favor of the plaintiff Tracy Hope Davis, United States Trustee for the Eastern District of California (the "Plaintiff"), (A) denying the defendant Edward D. Legrandsawyer aka Edward Danquah Legrandsawyer aka Edward Danquah LeGrand-Sawyer aka Edward Danquah Le-Grand-Sawyer (the "Defendant")'s discharge in his bankruptcy case, case no. 13-30958-B-7, pursuant to 11 U.S.C. § 727(a)(4)(A); and (B) barring the Defendant from filing, or causing to be filed, any subsequent petition for relief under Title 11 of the United States Code for a period of five (5) years after entry of judgment in this adversary proceeding without prior approval of the court in which the Defendant proposes to file. Except as so ordered, the motion is denied.

The Plaintiff has in its complaint sufficiently pled its causes of action for a denial of the Defendant's discharge under 11 U.S.C. § 727(a)(4)(A) and an injunction against the filing of another bankruptcy case pursuant to 11 U.S.C. §§ 105 and 349. "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).

The court will issue a minute order granting the motion. The Plaintiff shall submit a separate judgment that conforms to the court's ruling and complies with Fed. R. Bankr. P. 9021.

21. [13-35582](#)-B-7 LATASHA NORMAN CONTINUED MOTION TO COMPEL
MJH-1 ABANDONMENT
12-13-13 [[8](#)]

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.

22. [13-34499](#)-B-7 JEAN BOEHM CONTINUED MOTION TO COMPEL
TPH-1 ABANDONMENT
11-13-13 [[5](#)]

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.

23. [13-31040](#)-B-11 JIMMY ALEXANDER CONTINUED MOTION TO VALUE
DSS-3 COLLATERAL OF JON AND PEGGY
SANDERS
8-29-13 [[17](#)]

Tentative Ruling: None.

24. [13-31040](#)-B-11 JIMMY ALEXANDER CONTINUED MOTION TO VALUE
DSS-4 COLLATERAL OF JON AND PEGGY
SANDERS
8-29-13 [[21](#)]

Tentative Ruling: None.

25. [13-31040](#)-B-11 JIMMY ALEXANDER MOTION TO APPROVE STIPULATION
DSS-7 RE: TREATMENT OF CLAIM UNDER
DEBTOR'S PROPOSED CHAPTER 11
PLAN OF REORGANIZATION
1-21-14 [[108](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Subject to such opposition, the court issues the following abbreviated tentative ruling.

The motion is denied without prejudice.

The motion was not properly served. Federal Bankruptcy Rule 4001(d)(1)(C) states that a motion to approve an agreement relating to relief from the automatic stay "shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity that the court directs." Fed. R. Bankr. P. 4001(d)(1)(C). Federal Bankruptcy Rule 1007(d) refers to the list of the twenty (20) largest unsecured creditors in a chapter 11 reorganization case. Fed. R. Bankr. P. 1007(d). Here, the proof of service (Dkt. 111) indicates that the motion, notice of hearing, and memorandum of points and authorities were served by United States Mail on the "attached service list." However, no service list is attached to the proof of service. The proof of service indicates that only Austin P. Nagel, the Office of the United States Trustee (Sacramento), Jason M. Blumberg, and Greg P. Campbell were provided electronic notice. The debtor has provided no evidence that the creditors provided for by Federal Bankruptcy Rule 1007(d) were served. As such, the debtor has failed to satisfy the service requirements of Federal Bankruptcy Rule 4001(d)(1)(C), and the motion is denied without prejudice.

The court will issue a minute order.

26. [13-34046](#)-B-7 JASON/SHANNON WONG MOTION TO EMPLOY CHRISTINE
BHS-2 KATZAKIAN AS REALTOR
1-17-14 [[41](#)]

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.

27. [13-36049](#)-B-7 HASAN/SUADA DELIC MOTION TO COMPEL ABANDONMENT
CAH-1 1-14-14 [[12](#)]

Tentative Ruling: The motion is continued to March 11, 2014, at 9:32 a.m.

As the personal property for which the debtors seek abandonment (the "Property") is alleged to be of inconsequential value and benefit to the estate solely due to the fact that the Property is claimed as exempt, the court continues the motion to a date after the period for objecting to the debtors' claims of exemption pursuant to Fed. R. Bankr. P. 4003(b)(1) has expired.

The court will issue a minute order.

28. [12-30458](#)-B-7 GUADALUPE/LISA AYALA
SMD-5

MOTION FOR COMPENSATION FOR
GABRIELSON AND COMPANY,
ACCOUNTANT(S), FEES: \$2,157.50,
EXPENSES: \$59.78
1-8-14 [[49](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the court approves on a first and final basis compensation for the bankruptcy estate's accountant, Gabrielson and Company ("G&C"), in the amount of \$2,157.50 in fees and \$59.78 in costs, for a total of \$2,217.28, for services rendered during the period of November 12, 2013, through and including January 6, 2014, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

On May 31, 2012, the debtors commenced this bankruptcy case by filing a voluntary petition under chapter 7. By order entered December 9, 2013 (Dkt. 48) (the "Order"), the court granted the chapter 7 trustee's request to employ G&C as accountant for the bankruptcy estate. The Order does not specify an effective date of employment, so G&C's employment was effective December 9, 2013. The application for an order authorizing G&C's employment was filed on November 12, 2013 (Dkt. 44). This department does not approve compensation for work prior to the effective date of a professional's employment. DeRonde v. Shirley (In re Shirley), 134 B.R. 930, 943-944 (B.A.P. 9th Cir. 1992). However, the court construes the present application as requesting an effective date in the order approving G&C's employment retroactive to November 12, 2013, the first date on which G&C rendered services to the trustee according to the attached billing records. The request for that effective date is granted. Due to the administrative requirements for obtaining court approval of professional employment, this department allows in an order approving a professional's employment an effective date that is not more than thirty (30) days prior to the filing date of the employment application without a detailed showing of compliance with the requirements of In re THC Financial Corp., 837 F.2d 389 (9th Cir. 1988) (extraordinary or exceptional circumstances to justify retroactive employment). In this case, the court grants an effective date that is on the date of the filing of the employment application.

In the absence of an objection from any party in interest, the court finds that, as set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

G&C shall submit an amended form of employment order which is identical to the Order, but which shall in addition specify an effective date of employment of November 12, 2013. Upon entry of the amended employment order, the court will issue a minute order granting the motion as set forth above.

29. [12-23670](#)-B-7 MIGUEL/AMELIA RODRIGUEZ MOTION FOR COMPENSATION FOR
SLF-7 DANA A. SUNTAG, TRUSTEE'S
ATTORNEY(S), FEES AND EXPENSES
\$10,000.00
1-14-14 [[78](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of \$10,000.00 in fees and expenses, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

Applicant seeks compensation for services rendered and costs incurred during the period of April 10, 2012, through and including February 11, 2014. By order entered on May 31, 2012 (Dkt. 25), the court authorized the trustee to retain the applicant as general bankruptcy counsel in this case. The applicant's employment was effective April 10, 2012. The fees and costs requested are approved in full. The court notes that it would ordinarily reduce the applicant's fees because it has charged for an unnecessary CourtCall appearance on this matter. This matter is being disposed of without oral argument and will therefore not be called at the hearing on February 11, 2014. No telephonic court appearance is required. However, because the applicant has already agreed to a fee reduction in this case, the requested fees are approved in full. As set forth in the application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

30. [11-21377](#)-B-7 DANIEL SLOAN MOTION FOR COMPENSATION FOR
MPD-2 MICHAEL P. DACQUISTO, TRUSTEE'S
ATTORNEY(S), FEES: \$22,500.00,
EXPENSES: \$2,749.16
1-13-14 [[20](#)]

Disposition Without Oral Argument: This motion is unopposed. The court issues the following abbreviated ruling.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, the application is approved on a first and final basis in the amount of \$22,500.00 in fees and \$2,749.16 in expenses, for a total of \$25,249.16, payable as a chapter 7 administrative expense. Except as so ordered, the motion is denied.

Applicant seeks compensation for services rendered and costs incurred during the period of February 3, 2011, through and including February 11, 2014. By order entered on March 4, 2011 (Dkt. 12), the court authorized the trustee to retain the applicant as general bankruptcy counsel in this

Protective Committee for Independent Stockholders of TMT Trailer Fairy, Inc. V. Anderson, 390 U.S. 414 (1968) and In re A&C Apple and Charlie Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court further recognizes that a separate motion for compensation for Mr. Donahue has been filed, served, and set for hearing elsewhere on today's calendar. However, the trustee states at the end of Paragraph 4 of the motion (Dkt. 54, p.3) that "all other real and personal property of the debtor will remain her property." The court construes this as a request by the trustee to abandon the estate's interest in these properties. The trustee has failed to either (1) address in the motion the elements for abandonment of property of the estate under 11 U.S.C. § 554(a); or (2) file a separate motion for abandonment of property of the estate.

The court will issue a minute order.

32. [12-21979](#)-B-7 MARISA CISNEROS MOTION FOR COMPENSATION FOR
MATTHEW P. DONAHUE, SPECIAL
COUNSEL, FEES: \$15,333.33,
EXPENSES: \$1,969.20
1-10-14 [[59](#)]

Tentative Ruling: The motion is denied without prejudice.

The trustee requests court approval of first and final compensation for Matthew Donahue ("Mr. Donahue"), special counsel for the trustee in this chapter 7 case, in the amount of \$15,333.33 in fees and \$1,969.20 in expenses for a total of \$17,302.53. By order entered September 21, 2013 (Dkt. 51), the court approved the trustee's motion to employ Mr. Donahue as special counsel to prosecute a personal injury lawsuit (the "Lawsuit") on behalf of the estate. As set forth in the instant motion, Mr. Donahue's rate of compensation is based on a contingent fee arrangement whereby he collects 33.33% of the gross proceeds of the Lawsuit. As such, his compensation depends on a successful conclusion to the Lawsuit. The trustee acknowledges this point at paragraph (h) of the application, stating that "under the terms of said agreement, the compensation paid to Donahue is premised upon and conditioned upon a recovery being made on behalf of the estate." (Dkt. 59, p.2). While the court recognizes that the trustee has allegedly entered into an agreement to settle the Lawsuit on behalf of the estate for \$46,000.00, the motion to approve the settlement agreement was denied without prejudice elsewhere on today's calendar. Until a final settlement agreement is approved by the court, there is no contingency fee for the court to approve. As such, the motion is denied without prejudice.

The court will issue a minute order.

33. [12-36599](#)-B-7 BRANTLEY/ERIN GARRETT MOTION TO MODIFY SCHEDULING
[12-2719](#) REL-2 ORDER O.S.T.
DAILY ET AL V. GARRETT ET AL 1-27-14 [[77](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(3) (motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

34. [12-36599](#)-B-7 BRANTLEY/ERIN GARRETT MOTION TO COMPEL O.S.T.
[12-2719](#) REL-3 1-31-14 [[84](#)]
DAILY ET AL V. GARRETT ET AL

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(3) (motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

35. [13-25191](#)-B-7 AJAY CHANDRA MOTION FOR ENTRY OF DEFAULT
[13-2204](#) BKM-1 JUDGMENT AND/OR MOTION FOR
CENTRAL VALLEY CONCRETE, INC. DETERMINATION OF
V. CHANDRA NON-DISCHARGEABILITY OF DEBT
AGAINST AJAY CHANDRA
1-6-14 [[29](#)]

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

This matter is continued to February 25, 2014, at 9:32 a.m.