

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

February 17, 2016 at 2:30 p.m.

1. [14-29090](#)-E-13 FLAVIO/NILDA GARCIA ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[21](#)]

Final Ruling: No appearance at the February 17, 2016 hearing is required.

The court having previously discharged the Order to Show Cause (Dckt. 21) in light of the court granting the substitution of attorney on February 5, 2016 (Dckt. 25), **the Order to Show Cause is removed from calendar.**

2. [13-23994](#)-E-13 VICTOR/CHERI MELENDEZ ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[26](#)]

Final Ruling: No appearance at the February 17, 2016 hearing is required.

The court having previously discharged the Order to Show Cause (Dckt. 26) in light of the court granting the substitution of attorney on February 4, 2016 (Dckt. 29), **the Order to Show Cause is removed from calendar.**

3. [11-45395](#)-E-13 NADER SHAHCHERAGHI ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[74](#)]

Final Ruling: No appearance at the February 17, 2016 hearing is required.

The court having previously discharged the Order to Show Cause (Dckt. 74) in light of the court granting the substitution of attorney on February 4, 2016 (Dckt. 77), **the Order to Show Cause is removed from calendar.**

4. [13-31139](#)-E-13 MARY YANG ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[22](#)]

Final Ruling: No appearance at the February 17, 2016 hearing is required.

The court having previously discharged the Order to Show Cause (Dckt. 22) in light of the court granting the substitution of attorney on February 4, 2016 (Dckt. 25), the Order to Show Cause is removed from calendar.

5. [11-40709](#)-E-13 ISAAC/STELLA MALL ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[95](#)]

Final Ruling: No appearance at the February 17, 2016 hearing is required.

Debtors' Atty: C. Anthony Hughes

<p>The Order to Show is discharged, no sanctions ordered.</p>
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Notes:

Substitution of Attorney for Debtors filed 2/10/16 [Dckt 97]; order pending [RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 98]

FEBRUARY 17, 2016 STATUS CONFERENCE

On February 10, 2016, the Substitutions of Counsel executed by Debtors were filed. Dckt. 97. This resolves the issue and the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, the Substitution of Attorney executed by Debtors having been filed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered.

6. [13-25372-E-13](#) ROBERT/DEANNA RODRIGUEZ
RHS-1

ORDER TO SHOW CAUSE
1-6-16 [[33](#)]

Debtors' Atty: C. Anthony Hughes

<p>The Order to Show Cause is discharged.</p>
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Notes:

Substitution of Attorney for Debtors filed 2/10/16 [Dckt 35]

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 36]

FEBRUARY 17, 2016 STATUS CONFERENCE

On February 10, 2016, the Substitutions of Counsel executed by Debtors were filed. Dckt. 35. This resolves the issue and the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, the executed substitution of counsel having been filed (Dckt. 35), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered.

7. [10-28544-E-13](#) RAJ SINGH

MOTION TO SET ASIDE O.S.T.
2-9-16 [[209](#)]

DEBTOR DISMISSED:
12/21/2011
CASE CLOSED: 05/09/2013

No Tentative Posted:

Due to the order shortening time for the hearing the instant Motion to Set Aside, no tentative ruling has not been posted.

REVIEW OF MOTION

Raj Singh, the Debtor in this Chapter 13 bankruptcy case has filed a motion for the court to set aside the Pre-Filing Review Order entered in this case. Orders, Dckts. 182, 200. The court, pursuant to a prior motion to vacate the Pre-Filing Review Order, denied the motion to vacate but amended the order to delete the requirement that Raj Singh pay all past due filing fees for his prior multiple bankruptcy cases, in addition to the fees for any new case he was authorized to file. Order, Dckt. 200.

In the present Motion to Set Aside, Raj Singh alleges as grounds for the Motion:

- A. Raj Singh is unemployed and has no secured creditor;
- B. Illegal creditors have looted his personal belonging and rights;
- C. Such looting occurred because the illegal creditors illegally proved that Raj Singh is Suman Mehta and other persons;
- D. Having difficulties with poor health and illegal creditors, Raj Singh gave up his bankruptcy protection by dismissing it.
- E. For unknown reasons, the judge in this case issued a Pre-Filing Review Order.
- F. Years have passed, but creditors have not collected anything significant from Raj Singh, as Raj Singh has nothing;
- G. Raj Singh may need to file a bankruptcy on an emergency basis;
- H. Raj Singh has no creditors to protect by a Pre-Filing Review Order; and
- I. The Pre-Filing Review Order is not carefully tailored to address the perceived conduct of Raj Singh in this and prior bankruptcy cases.

Motion, Dckt. 209; filed February 9, 2016.

The court granted Raj Singh's motion to have this motion to set aside set on shortened time. Order, Dckt. 211; filed February 10, 2016.

On February 12, 2016, Raj Singh filed a supplemental pleading titled, "Some Points in Support of Request to Set Aside the Prefiling Order and For Other Relief." Dckt. 214. In the Points in Support, Raj Singh asserts:

- A. Raj Singh may need to file a bankruptcy on an emergency basis;
- B. Raj Singh is not planning to file a bankruptcy unless it is really needed to protect his basic needs;
- C. Raj Singh has no secured creditors to be protected by the Pre-Filing Review Order;
- D. Enjoining a vexatious litigant is an extreme remedy and should be used only in exigent circumstances;
- E. A pre-filing review order should be narrowly tailored to the vexatious litigant's wrongful behavior;
- F. The existing Pre-Filing Review Order does not allow Raj Singh to file a bankruptcy in the event of an emergency;
- G. Reopening the bankruptcy case is not necessary for the court to exercise federal court jurisdiction; and
- H. Raj Singh does not have money to pay to reopen the bankruptcy case.

Dckt. 214.

8. [10-28701-E-13](#) STANLEY/JANELLE ORR
[15-2250](#)
ORR ET AL V. NATIONSTAR
MORTGAGE, LLC ET AL

STATUS CONFERENCE RE: COMPLAINT
12-23-15 [[1](#)]

Final Ruling: No appearance at the February 17, 2016 Status Conference is required.

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 12/23/15
Answer: none

Nature of Action:
Recovery of money/property - other
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status conference is continued to 2:30 p.m. on April 20, 2016.

Notes:

Request for Entry of Default [Nationstar Mortgage, LLC] by Plaintiff filed 1/26/16 [Dckt 7]; Entry of Default and Order filed 1/28/16 [Dckt 10]

Request for Entry of Default [exhibit 1] by Plaintiff filed 1/26/16 [Dckt 8]

Request for Entry of Default [The Bank of New York Mellon (See Exhibit 1 for the full name)] by Plaintiff filed 1/27/16 [Dckt 9]; Entry of Default and Order filed 1/28/16 [Dckt 12]

FEBRUARY 17, 2016 STATUS CONFERENCE

The defaults of Defendants having been entered, the court continues the Status Conference to afford Plaintiff-Debtors the opportunity to obtain the entry of default judgments.

9. [15-20506-E-13](#) DENISE BATTS
RHS-1

ORDER TO SHOW CAUSE
1-6-16 [[43](#)]

No Tentative Ruling:

Debtor's Atty: C. Anthony Hughes

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXX~~

Notes:

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 46]

No retainer agreement filed. C. Anthony Hughes remains attorney of record.

FEBRUARY 17, 2016 STATUS CONFERENCE

Peter Macaluso, the propose new counsel for Debtor states that Debtor has been sent the substitution of counsel on four occasions since August 2015. The Debtor has not responded to these attempts to substitute counsel.

10. [13-24415](#)-E-13 ANTONIO/MARIA HERNANDEZ
RHS-1

ORDER TO SHOW CAUSE
1-6-16 [[148](#)]

No Tentative Ruling

Debtors' Atty: C. Anthony Hughes; Michael David Croddy

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXX~~

Notes:

Notice to Withdraw Substitution of Attorney for Debtors Filed on August 6, 2015
filed 2/10/16 [Dckt 150]

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why
Case Should Not be Dismissed filed 2/10/16 [Dckt 151]

FEBRUARY 17, 2016 HEARING

On February 10, 2016, Peter Macaluso filed a declaration stating that he
now does not intend to substitute in as counsel for Debtor. This is contrary
to what was represented to this court in the August 8, 2015 filing by counsel.
Dckt. 147.

11. [10-37416-E-13](#) SHARION WILTON
[15-2243](#)
WILTON V. BANK OF AMERICA,
N.A.

STATUS CONFERENCE RE: COMPLAINT
12-17-15 [[1](#)]

No Tentative Ruling

Plaintiff's Atty: Douglas B. Jacobs
Defendant's Atty: unknown

Adv. Filed: 12/17/15
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property
Other (e.g. other actions that would have been brought in state court if
unrelated to bankruptcy case)

The Status Conference is ~~XXXXXXXXXXXXXXXXXXXXXX~~.

Notes:

Plaintiff's Status Conference Statement filed 2/3/16 [Dckt 7]

FEBRUARY 17, 2016 STATUS CONFERENCE

Counsel for Plaintiff-Debtor reports that Defendants have not responded to the Summons and Complaint. Further, there has been no communications or settlement discussions. Status Report, Dckt. 7.

This Adversary Proceeding is a quiet title action asserting the right to have Bank of America, N.A. reconvey the deed of trust for which the secured claim was valued at \$0.00 pursuant to 11 U.S.C. § 506(a) now that Plaintiff-Debtor has completed the Chapter 13 Plan which provided for said claim.

12. [11-41822-E-13](#) MICHAEL/CAROLYN RANGEL
RHS-1

ORDER TO SHOW CAUSE
1-6-16 [[60](#)]

No Tentative Ruling

Debtors' Atty: C. Anthony Hughes

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXX~~

Notes:

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 62]

No retainer agreement filed. C. Anthony Hughes remains attorney of record.

FEBRUARY 17, 2016 STATUS CONFERENCE

Peter Macaluso, the propose new counsel for Debtor states that Debtor has been sent the substitution of counsel on three occasions since September 2015. The Debtor has not responded to these attempts to substitute counsel

13. [11-46470-E-13](#) RICHARDDONDON/JENNIFER
RHS-1 MELZER

ORDER TO SHOW CAUSE
1-6-16 [[34](#)]

Debtors' Atty:

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

Notes:

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 37]

No retainer agreement filed. C. Anthony Hughes remains attorney of record.

FEBRUARY 17, 2016 STATUS CONFERENCE

Peter Macaluso, the propose new counsel for Debtor states that Debtor has been sent the substitution of counsel on three occasions since September 2015. The Debtor has not responded to these attempts to substitute counsel

14. [13-29563](#)-E-13 JAVIER/JEANNE RODRIGUEZ ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[102](#)]

Debtors' Atty: C. Anthony Hughes

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXX~~

Notes:

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 104]

No retainer agreement filed. C. Anthony Hughes remains attorney of record.

FEBRUARY 17, 2016 STATUS CONFERENCE

Peter Macaluso, the propose new counsel for Debtor states that Debtor has been sent the substitution of counsel on five occasions since September 2015. The Debtor has not responded to these attempts to substitute counsel

15. [13-35771](#)-E-13 GREGORY/CHRISTI SMOAK ORDER TO SHOW CAUSE
RHS-1 1-6-16 [[43](#)]

Debtors' Atty: C. Anthony Hughes

The Order to Show Cause is ~~XXXXXXXXXXXXXXXXXXXX~~

Notes:

[DPC-1] Trustee's Motion to Dismiss Case filed 1/19/16 [Dckt 45], set for hearing 2/17/16 at 10:00 a.m.

[RHS-1] Declaration of Peter G. Macaluso in Response to Order to Show Cause Why Case Should Not be Dismissed filed 2/10/16 [Dckt 54]

No retainer agreement filed. C. Anthony Hughes remains attorney of record.

FEBRUARY 17, 2016 STATUS CONFERENCE

Peter Macaluso, the propose new counsel for Debtor states that Debtor has been sent the substitution of counsel on five occasions since September 2015. The Debtor has not responded to these attempts to substitute counsel.

16. [09-27153-E-13](#) GIL/JOANNE RAPOSO
[15-2095](#)
RAPOSO ET AL V. OCWEN LOAN
SERVICING, LLC ET AL

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
1-5-16 [[77](#)]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Nichole L. Glowin

Adv. Filed: 5/14/15
Answer: none

Amd. Cmplt Filed: 1/5/16
Answer: 2/4/16

Nature of Action:
Declaratory judgment

Notes:

Continued from 11/19/15 to be conducted in conjunction with the court order for the appearance of the attorneys identified as representing Defendants.

[PLC-1] Order Denying Motion for Entry of Judgment [OneWest Bank FSB] filed 11/25/15 [Dckt 74]

[PLC-2] Order Denying Motion for Entry of Judgment [Ocwen Loan Servicing, LLC] filed 11/25/15 [Dckt 75]

[RHS-1] Order discharging order to show cause filed 11/25/15 [Dckt 76]

Amended Complaint filed 1/5/16

Answer to Amended Complaint filed 2/4/16

SUMMARY OF FIRST AMENDED COMPLAINT

In the First Cause of Action, Plaintiff-Debtors request that the court quiet title to their residence, determining that the lien represented by the Second Deed of Trust is void. The debt secured by the Second Deed of Trust was valued at \$0.00 pursuant to 11 U.S.C. § 506(a) and that claim was provided for in Plaintiff-Debtors' Chapter 13 Plan, which has now been completed.

The First Cause of Action further alleges that while a reconveyance of the Second Deed of Trust has been filed by Ocwen Loan Servicing, LLC, the actual creditor from whom the reconveyance is to be delivered is Deutsche Bank National Trust Company, Trustee.

The Second Cause of Action seeks \$500.00 in statutory damages pursuant to California Civil Code § 2941.

The Third Cause of Action seeks relief as against Ocwen Loan Servicing, LLC for Unfair Practices pursuant to California Business and Professions Code §§ 17200 et seq.

The Fourth Cause of Action is for slander of title based on the failure to reconvey the Second Deed of Trust.

The Fifth Cause of Actions states a request for prevailing party attorneys' fees, based both on contract and California Civil Code § 2941.

Attached as an Exhibit to the First Amended Complaint which discloses:

- A. Original Trustee was Old Republic National Title Insurance Company
- B. Original Beneficiary was IndyMac Bank, FSB

SUMMARY OF ANSWER

In the Answer, Defendants Ocwen Loan Servicing, LLC; CIT Bank, N.A.; and Deutsche Bank National Trust Company, Trustee; admit and deny specific allegations in the First Amended Complaint. It is admitted in the Answer that Ocwen Loan Servicing, LLC is the current servicer of the Second Deed of Trust. (The court understands this statement to be that Ocwen Loan Servicing, LLC is the servicer for the loan which is secured by the Second Deed of Trust, which includes the authority to take specified acts in connection with the loan and Second Deed of Trust).

The Defendants admit that Ocwen Loan Servicing, LLC recorded a reconveyance in September 2015, of the Second Deed of Trust, asserting that it was acting as the loan servicer for Deutsche Bank National Trust Company, Trustee.

RECONVEYANCE OF SECOND DEED OF TRUST

On October 20, 2015, Plaintiff-Debtors filed Exhibits in this Adversary Proceeding which included copies of a Substitution of Trustee and the September 2015 Reconveyance. Exhibits 1 and 2, Dckt. 65.

Substitution of Trustee

The Substitution of Trustee identifies Ocwen Loan Servicing, LLC as the beneficiary under the Second Deed of Trustee, and thereon substitutes T.D. Service Company as the Trustee under the Second Deed of Trust.

Reconveyance of Second Deed of Trust

The Reconveyance is stated to be a full reconveyance of the Second Deed of Trust, being executed by T.D. Service Company as the Trustee under the Second Deed of Trust.

The First Amended Complaint does not name T.D. Service Company as a defendant. The First Amended Complaint makes the affirmative allegation that:

"A due diligence review of the Sacramento County Recorder's Office reveals that no Deed of Reconveyance has been recorded as of the date of this Adversary Proceeding."

First Amended Complaint, ¶ 25; Dckt. 77. This statement is qualified in Footnote One, which states that a Deed of Reconveyance was recorded, but Plaintiff-Debtors contend that it is defective because the Substitution of Trustee was executed by Ocwen Loan Servicing, LLC and not Deutsche Bank National Trust Company, Trustee.

It appears that this entire dispute turns on the California law question of whether the Substitution of Trustee executed by Ocwen Loan Servicing, LLC was sufficient to substitute T.D. Service Company as the successor trustee for the Second Deed of Trustee.

Review of California Law

Though very early in the pleadings in this Adversary Proceedings, what otherwise would appear to be a simple question of California law is mushrooming into ancillary claims for damages. This Adversary Proceeding has been pending since May 2015, without the Parties being unable to resolve this dispute. Though the Defendants and their counsel, and Plaintiff's counsel, in other bankruptcy cases and adversary proceedings have been able to promptly resolve this type of post-plan completion dispute, such resolution appears to elude the Parties and their respective counsel in this Adversary Proceeding.

California Civil Code § 2934a provides the statutory underpinnings for substituting a trustee under a deed of trust, providing that the beneficiaries may substitute a new trustee. Cal. Civ. § 2934a(1). When a substitution is filed,

"(d) A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing herein requires that a trustee under a recorded substitution accept the substitution. Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section."

Cal. Civ. § 2934a(d).

Thus, it appears that the issue underlying all the current dispute is whether, at the time the Substitution of Trustee was issued, Ocwen Loan Servicing, LLC was the agent of Deutsche Bank National Trust Company, Trustee.

While Ocwen Loan Servicing, LLC is stated to be the "beneficiary" under the Second Deed of Trust in the Substitution of Trustee, it is also commonly known that Ocwen Loan Servicing, LLC is a loan servicing company that acts for the payee under the note and the beneficiary under the deed of trust. FN.1.

FN.1. This continues the court's old saw about agents clearly and accurately identify when they are acting as an agent for a principal in a loan modification, proof of claim, or stipulation, and clearly identify the creditor principal.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 5, 6, Dckt. 77. To the extent any matters are non-core, Plaintiff-Debtors consent to the bankruptcy judge issuing all orders and the final judgment on all matters in

this Adversary Proceeding.

In their Answer, Ocwen Loan Servicing, LLC; CIT Bank, N.A.; and Deutsche Bank National Trust Company, Trustee; does not deny that federal court jurisdiction exists pursuant to 28 U.S.C. § 1334 and 157; but deny that the matters in the First Amended Complaint are core proceedings and do not consent to the bankruptcy judge entering orders and the final judgment for non-core matters. Answer ¶¶ 5, 6, and 7, Dckt. 81.

From the pleadings, it appears that the issues concerning the effect of the confirmed Chapter 13 Plan, 11 U.S.C. § 506(a) valuation, and the rights arising from the completion of the Chapter 13 Plan are core proceedings. However, there appears to be no dispute or disagreement concerning these issues.

The dispute appears to relate to the effect of the Substitution of Trustee, and thereby the Reconveyance of the Deed of Trust, and the various non-bankruptcy law claims relating to the alleged failure to reconvey the Second Deed of Trust.

The court shall issue a scheduling order for the parties to address the issue of what matters in this Adversary Proceeding are core and those which are asserted to be non-core.

A. Defendants shall file and serve a brief identifying the non-core matters and the basis for asserting they are non-core on or before **xxxxxxxx, 2016;**

B. Plaintiff-Debtors shall file and serve a response brief identifying the non-core matters, responding to Defendant's brief, and the stating the basis for disputing the asserted non-core matters by Defendant on or before **xxxxxxxx, 2016;**

C. Defendants file a reply brief, if any, to Plaintiff-Debtors response brief on or before **xxxxxxxx, 2016;** and

D. A hearing to determine the core and non-core matters, and the procedure for the bankruptcy judge to handle the non-core matters at 1:30 p.m. on **xxxxxxx, 2016.**

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

a. The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 5, 6, Dckt. 77. To the extent any matters are non-core, Plaintiff-Debtors consent to the bankruptcy judge issuing all orders and the final judgment on all matters in this Adversary Proceeding.

In their Answer, Ocwen Loan Servicing, LLC; CIT Bank, N.A.; and Deutsche Bank National Trust Company, Trustee; does not deny that federal court jurisdiction exists pursuant to 28 U.S.C. § 1334 and 157; but deny that the matters in the First Amended Complaint are core proceedings and do not consent to the bankruptcy judge entering

orders and the final judgment for non-core matters. Answer ¶¶ 5, 6, and 7, Dckt. 81.

b. Initial Disclosures shall be made on or before -----, 2016.

c. Expert Witnesses shall be disclosed on or before -----, 2016, and Expert Witness Reports, if any, shall be exchanged on or before -----, 2016.

d. Discovery closes, including the hearing of all discovery motions, on -----, 2016.

e. Dispositive Motions shall be heard before -----, 2016.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- p.m. on -----, 2016.

17. [10-39254-E-13](#) RICHARD/ANNE FERGUSON
[15-2246](#)
FERGUSON ET AL V. DITECH
FINANCIAL LLC

STATUS CONFERENCE RE: COMPLAINT
12-17-15 [[1](#)]

Final Ruling: No appearance at the February 17, 2016 Status Conference is required.

DISMISSED 2/9/16

Plaintiff's Atty: Douglas B. Jacobs
Defendant's Atty: unknown

Adv. Filed: 12/17/15
Answer: none

<p>The Adversary Proceeding having been dismissed pursuant to the Notice by Plaintiff, the Status Conference is removed from the Calendar.</p>

Nature of Action:
Validity, priority or extent of lien or other interest in property
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Plaintiff's Status Conference Statement filed 2/3/16 [Dckt 8]

Order Dismissing Adversary Complaint filed 2/9/16 [Dckt 12]

18. [11-27845-E-11](#) IVAN/MARETTA LEE
[15-2194](#) BMV-2
LEE ET AL V. SHELLPOINT
MORTGAGE SERVICING ET AL

STATUS CONFERENCE RE: MOTION TO
STRIKE
1-25-16 [[50](#)]

Upon review of the pleadings in this case, the court set a Status Conference on the present Motion to Review the pleading requirements under the Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007. Additionally, the court addressed with the parties the nature of the motion and the claims asserted by Plaintiff-Debtors to which it relates.

The Plaintiff-Debtors have confirmed their Chapter 11 Plan which includes provisions that states:

**"ARTICLE 4-
TREATMENT OF CLAIMS UNDER THE PLAN**

Claims and Interests shall be treated in the manner set forth in this Article 4. Except as specifically provided elsewhere in the Plan, the treatment of, and the consideration to be received by, holders of Allowed Claims and holders of Allowed interests pursuant to the Plan shall be in full satisfaction, settlement, release, extinguishment and discharge of the respective Allowed Claims and Allowed Interests.

2d. Bank of America, NA for 272 Christine Dr., Sacramento, CA

Debtor will surrender the collateral at 272 Christine Dr., Sacramento, CA, to Bank of America, NA, on the Effective Date of the Plan. The confirmation order will constitute an order for relief from stay. Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of Bank of America, NA, there will be no deficiency claim treated as a general unsecured claim.

2e. Bank of America, NA for 2323/2331 Grove Ave., Sacramento, CA

Debtor will surrender and abandon the collateral at 2323/2331 Grove Ave., Sacramento, CA, to The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate holders of the CWMBS, Inc., CHL Mortgage Pass-Through Trust 2006-0A5, Mortgage Pass Through Certificates, Series 2006-0A5, its assignees and/or successors in interest, on the Effective Date of the Plan. The confirmation order will constitute an order for relief from stay. The 14-day stay provided by Federal Rule of Bankruptcy Procedure 4001 (a)(3) is waived. Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate holders of the CWMBS, Inc., CHL Mortgage Pass-Through Trust 2006-0A5, Mortgage Pass Through Certificates, Series 2006-0A5,

its assignees and/or successors in interest, there will be no deficiency claim treated as a general unsecured claim."

Chapter 11 Plan Article 4, Section C, ¶¶ 2d and 2e; Exhibit A to Order Confirming Plan; Dckt. 283.

In the First Amended Complaint ("FAC," Dckt. 34), the core allegations are summarized by the court as follows:

A. Pursuant to the terms of the confirmed plan:

1. The 272 Christine Drive Property "was to be surrendered on the effective date of the Plan." FAC ¶ 9.
2. "The confirmation order will constitute an order for relief from stay." *Id.*
3. "Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of Bank of America, NA, there will be no deficiency claim treated as a general unsecured claim." *Id.*
4. Plaintiff-Debtors "were to surrender and abandon the collateral at 2323/2331 Grove Ave., Sacramento, CA, to [The Bank of New York Mellon, Trustee] on the Effective Date of the Plan." FAC ¶ 10
5. "The confirmation order will constitute an order for relief from stay. The 14-day stay provided by Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived." *Id.*
6. "Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of [The Bank of New York Mellon, Trustee, there will be no deficiency claim treated as a general unsecured claim." *Id.*
7. Plaintiff-Debtors "have has complied fully with the terms and provisions of the Plan. Pursuant to the Court Notice, the Final Decree was entered on January 4, 2013 and the case was closed." FAC ¶ 12.
8. "Defendant Bank of America, N.A., has not complied with the terms and provisions of the confirmed Plan regarding the surrender and abandonment of 272 Christine Drive, Sacramento, CA and 2323-2331 Grove Avenue, Sacramento, CA." FAC ¶ 15.
9. "After the issuance of the confirmed Plan and the abandonment and surrender of the property with the full satisfaction of the secured claim, Defendant Bank of America, N.A., did not transfer the deed of the property, 272 Christine Drive, Sacramento, CA from Plaintiffs to Bank of America, N.A." FAC ¶ 17.

10. "After the issuance of the confirmed Plan and the abandonment and surrender of the property with the full satisfaction of the secured claim, Defendant Bank of America, N.A., did not transfer the deed of the property, 2323-2331 Grove Avenue, Sacramento, CA from Plaintiffs to Bank of America, N.A." FAC ¶ 19.
11. "Pursuant to the confirmation of the Chapter 11 Plan on May 4, 2012, Plaintiffs surrendered and abandoned the properties and were not required to transfer the deeds to the properties, since the creditor, Bank of America, N.A., was to proceed with the transfer of the deeds to the properties." FAC ¶ 20.
12. "Since Bank of America, N.A., was the creditor of the two properties that were surrendered and abandoned at the time Bank of America, N.A., was the creditor, Bank of America, N.A., violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two properties by assigning the loans to IndyMac and Shellpoint after the properties were surrendered and abandoned." FAC ¶ 21.
13. "Since Bank of America, N.A., was the creditor of the two properties that were surrendered and abandoned at the time Bank of America, N.A., was the creditor, Bank of America, N.A., violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two property by not transferring the deeds of the properties from Plaintiffs to Bank of America, N.A." FAC ¶ 22.
14. "Due to the improper actions of Bank of America, N.A., defendant Shellpoint stated to Plaintiffs that 2323-2331 Grove Avenue, Sacramento, CA has not been surrendered or abandoned. The statement from Defendant Shellpoint dated June 4, 2015 stated that the property is in default and foreclosure proceedings have or may soon commence. In the statement Defendant Shellpoint states that because Plaintiffs "have not taken steps to resolve the delinquency, we have been instructed by the owner of your mortgage loan to commence foreclosure." FAC ¶ 24.
15. "The actions of Defendant IndyMac in claiming that 272 Christine Drive, Sacramento, CA has not been surrendered and proceeding with the mortgage on the surrendered property is in contravention and violation of 11 U.S.C. Section 1141." FAC ¶ 29.
16. "The actions of Defendant Shellpoint in claiming that 2323-2331 Grove Avenue, Sacramento, CA has not been surrendered or abandoned, proceeding with the mortgage and to proceed with foreclosure is in contravention and violation of 11 U.S.C. Section 1141." FAC ¶ 30.

17. "33. The foreclosure proceeding of the surrendered properties in violation of the order of the Bankruptcy Court confirming the Chapter 11 Plan has been listed in 2015 in Plaintiffs' credit reports." FAC ¶ 33.

The Plan makes express reference to 11 U.S.C. § 1141, which provides in pertinent part:

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan-

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(I) of this title [subject to exceptions not applicable in this Adversary Proceeding]....

It appears from the First Amended Complaint that Plaintiff-Debtors assert that by virtue of confirmation of the Chapter 11 Plan the title to the Properties at issue left the Plaintiff-Debtors and was immediately vested in the respective creditors. This contention is based upon the use of the words "surrender" and "abandon" of the collateral stated in the Plan provisions. The First Amended Complaint does not describe what documents the creditors were to prepare and record so as to make such asserted transfer of title part of the real property records in the State of California.

No Tentative Ruling

The Motion to Appoint a Trustee was served on February 11, 2016. Cert. of Serv., Dckt. 11. The pleadings were served on the Debtor, the President and CEO of the Debtor (who is it stated to be the agent for service of process), and the U.S. Trustee. The court issued an order shortening time, setting the hearing for 2:30 p.m. on February 17, 2016. Order, Dckt. 12. Opposition may be presented orally at the hearing.

REVIEW OF MOTION

On February 8, 2016, Schreiber Foods, Inc., Agri-Dairy Products, Inc., and ball Metal Food Container, LLC (the "Petitioning Creditors") filed an Involuntary Chapter 7 Petition for Ajava Systems, Inc., dba World Grocer. Dckt. 1. On the Involuntary Petition these three creditors asserts unsecured claims totaling \$2,084,589.80.

On February 11, 2016, the Petitioning Creditors filed a Motion for Appointment of a Chapter 7 Trustee pursuant to 11 U.S.C. § 303(g). This provision authorizes the court to order the appointment of an interim trustee to take possession of property of the estate and operate a debtor's business prior to the entry of the order for relief in the involuntary case. Such interim trustee may be ordered "if necessary to preserve property of the estate or to prevent loss to the estate." 11 U.S.C. § 303(g).

In the Motion, Dckt. 7, Petitioning Creditors allege:

A. "Petitioning Creditors are informed and believe that the food processing plant is no longer operating. However, many assets of the corporation may still remain at the food processing plant." Motion, ¶ 5.

B. "Petitioning Creditors are informed and believe that Debtor's CEO has indicated that he would sell the corporate assets, keep the cash for himself, and move out of the country to avoid meeting contractual obligations." Motion, ¶ 6.

C. "The information related to Debtor's CEO leaving the country after liquidating corporate assets came, in part, from declarations filed in support of a prejudgement writ of attachment as part of an action filed in the Stanislaus Superior Court by New Century Transport, LLC against Debtor and CEO (Case No. 2018106)." Motion, ¶ 7.

The evidence presented in support of the above allegations is the Declaration of Jerome E. Smyth ("Dec."), Dckt. 10. The testimony provided under penalty of perjury by Mr. Smyth, in pertinent part, is:

A. "Except for those matters for which I have been informed and believe, as specifically identified below, I have personal knowledge of the matters stated herein, and if called upon to testify to such matters, could competently do so." Dec. ¶ 1.

B. "I am informed and believe that the food processing plant is no longer

operating. However, many assets of the corporation may still remain at the food processing plant." Dec. ¶ 2.

C. "I am informed and believe that certain food items may still remain at the processing plant. The value of these food items may diminish if they are not properly maintained." Dec. ¶ 3.

D. "I am informed and believe that Debtor's CEO has indicated that he would sell the corporate assets, keep the cash for himself, and move out of the country to avoid meeting contractual obligations." Dec. ¶ 4.

In the final paragraph of the Declaration, Mr. Smyth testifies that the above information relating to the allegations that the CEO of the Debtor intends to steal the assets of the estate (11 U.S.C. § 541(a), § 303(a)(g) and commit federal crimes (18 U.S.C. § 152, concealment of assets; 18 U.S.C. § 153, embezzlement of assets; 18 U.S.C. § 1519, destructions of documents or alternation of records) come, "in part, from declarations filed in support of a prejudgment writ of attachments part of an action filed in the Stanislaus Superior Court by New Century Transport, LLC against Debtor and CEO (Case No. 2018106)." Dec. ¶ 5.

The Federal Rules of Evidence require that a competent non-expert witness is one who has personal knowledge of the matters that are the subject of his or her testimony. Fed. R. Evid. 601, 602, 701. Weinstein's Federal Rules of Evidence Manual 2nd Edition, Matthew Bender & Company, Inc., Article VI, § 602.02, 701.03. Here, Mr. Smyth does not purport to have any personal knowledge concerning his testimony, but only that he is "informed [by some unknown person] and believes" as to matters in his testimony.

The court has not been presented with the testimony of the persons who filed the declarations in the state court action - either by their new declarations here or certified copies of the declarations filed in the state court action. Fed. R. Evid. 901; 902(1), (2), (4).

While the information alleged in the Motion and stated based on "information and belief" is concerning, the court does not have in front of it evidence upon which the requested relief is based.

Appointment of an Interim Trustee

At any time before an order for relief in an involuntary case under Chapter 7 is entered, a court may order an interim trustee to be appointed pursuant to 11 U.S.C. § 701 where it is necessary to preserve the property of the estate or to prevent loss to the estate. 11 U.S.C. § 303(g). Because the need for an interim trustee ceases after the court decides whether an order for relief should be entered, cases heard and determined within a short time should not be granted in absence of an exceptionally strong need. *In re Rush*, 10 B.R. 518, 524 (Bankr. N.D. Ala. 1980); *In re Reed*, 11 B.R. 755, 757 (Bankr. S.D. W. Va. 1981); *In re Prof'l Accountants Referral Servs., Inc.*, 142 B.R. 424, 429 (Bankr. D. Colo. 1992). The present risk of asset dissipation by the Debtor is a factor supporting appointment. *Kattelman v. Madden*, 88 F.2d 858, 864 (8th Cir. 1937); *In re The Ctr. for Mgmt. & Tech., Inc.*, No. 07-19486-NVA, 2007 WL 3197221, at *6 (Bankr. D. Md. Oct. 26, 2007)(finding that the risk of leased equipment being lost or removed demonstrated a need for an interim trustee). The debtor's possession of "perishable" assets, deteriorating physically or in price, is another factor supporting appointment. *Hill v. Douglass*, 78 F.2d 851, 854 (9th Cir. 1935)(finding

that road-making equipment deteriorating in value demonstrated a need for a receiver); *In re Press Printers & Publishers*, 12 F.2d 660, 661 (3d Cir. 1926).

If an interim trustee is to be appointed, a bond is required in an amount sufficient to protect the involuntary defendant from all costs and losses occasioned by the appointment of an interim trustee which are allowable under 11 U.S.C. § 301(I). Fed. R. Bankr. P. 2001; *In re James Plaza Joint Venture*, 62 B.R. 959, 963 (Bankr. S.D. Tex. 1986).

FEBRUARY 17, 2016 HEARING

At the hearing, Petitioning Creditors presented ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.

At the hearing, Debtor presented ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.