UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 18, 2014 at 10:00 a.m.

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1. 09-33313-A-7 WILLIAM DRYSDALE — AMENDED MOTION FOR
13-2124 — SUMMARY JUDGMENT
DRYSDALE V. U.S. DEPT. OF EDUCATION — 2-3-14 [33]

Final Ruling: The motion will be dismissed without prejudice.

Although the movant is without an attorney, he is a licensed attorney in the State of Montana and is authorized to practice law before the Ninth Circuit Court of Appeals and the United States District Court for the Northern District of California.

Te motion will be dismissed because the motion does not comply with Local Bankruptcy Rule 9014-1 because when it was filed it was not accompanied by a *separate* proof of service. See Local Bankruptcy Rule 9014-1(e)(3). Appending a proof of service to one of the supporting documents (assuming such was done) does not satisfy the local rule. The proof of service must be a separate document so that it will be docketed on the electronic record. This permits anyone examining the docket to determine if service has been accomplished without examining every document filed in support of the matter on calendar.

The court has been unable to locate a proof of service for the motion.

Second, the motion will be dismissed because the notice of hearing violates Local Bankruptcy Rule 9014-1(d)(3), which requires the notice to indicate whether and when written opposition must be filed. The subject notice of hearing does not indicate whether and when written oppositions must be filed. Docket 34.

Third, the motion violates Local Bankruptcy Rule 9014-1(c) because the motion does not contain a unique docket control number. This requirement avoids any confusion in locating and identifying papers filed in connection with the motion.

Finally, the motion will be dismissed because it is not accompanied by a separate statement of undisputed facts, as required by Local Bankruptcy Rule 7056-1(a).

2. 09-33313-A-7 WILLIAM DRYSDALE — MOTION FOR
13-2124 USA-1 — SUMMARY JUDGMENT
DRYSDALE V. U.S. DEPT. OF EDUCATION — 1-17-14 [23]

Tentative Ruling: The motion will be granted.

The defendant, United States Department of Education, seeks summary judgment on the plaintiff William Drysdale's 11 U.S.C. § 523(a)(8) claim to discharge his

student loans.

The plaintiff, a non-California attorney, has not filed a response to this motion.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

Student loan obligations are presumed to be nondischargeable, unless the court declares them dischargeable. 11 U.S.C. § 523(a)(8) provides:

"A discharge under section 727 . . . does not discharge an individual debtor from any debt-- unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents, for (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend."

To make a showing of undue hardship the debtor must prove that:

1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans;

2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

3) the debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

"Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." "Courts will also consider a debtor's effort – or lack thereof – to negotiate a repayment plan, although a history of making or not making payments is, by itself, not dispositive." Hedlund v. Educ. Res. Inst. Inc., 718 F.3d 848, 852 (9th Cir. 2013) (internal quotation marks and citations omitted).

In assessing good faith, the Hedlund Court considered efforts to obtain employment, efforts to maximize income, efforts to minimize expenses, efforts to negotiate a repayment plan, the history of payments, and the timing of the attempt to discharge the loan.

The ultimate burden of proof is on the debtor seeking the discharge. "[A]ll three prongs of the Brunner test must be met before a court can make a finding of undue hardship." In re Nys, 446 F.3d 938, 947 (9th Cir. 2006).

The defendant claims that the plaintiff cannot show undue hardship and that there are no triable issues of fact.

All facts stated and discussed below are undisputed. The facts are based on the plaintiff's admissions at a deposition conducted by the defendant on December 4, 2013. Docket 27, Ex. 1.

The plaintiff is a licensed attorney in the State of Montana and he is also authorized to practice law in California before the Ninth Circuit Court of Appeals and before the United States District Court for the Northern District of California. Docket 27 at 10-11.

This means that, on one hand, the plaintiff has the option to work for himself. The court notes that the plaintiff operated his own law practice from 2011 until 2012.

On the other hand, the plaintiff may still work for someone else, even if he does not work as an attorney. Despite not being able to practice law in all courts in California, the plaintiff has the opportunity to work in California as a paralegal or legal assistant. Experienced paralegals can earn as much as $80 to $100 an hour. Less experienced paralegals may still easily earn above $30 an hour. The court notes that the plaintiff has been an attorney since 1985. Docket 27 at 10. The plaintiff is far from inexperienced in the legal field. He passed the Montana Bar in 1985. He could easily command a rate of at least $30 an hour as a paralegal, especially if he contracts for his work independently. Such income would be a handsome addition to his current mostly-retirement monthly income of $3,273. Docket 27, Ex. 3.

The court also notes that while the plaintiff is currently unemployed, he is not disabled or unable to work. Docket 27 at 43.

Additionally, the plaintiff is not limited to searching for work in the legal field. For example, he may search for employment in the retail industry, as a salesperson.

Hence, regardless of whether the plaintiff can maintain a "minimal" standard of living for himself at this time, there is no genuine issue of material fact as to the "additional circumstances" prong. The court cannot find any factual basis for the existence of "additional circumstances" indicating that the plaintiff's state of affairs at this time - whatever it may be - is likely to persist for a significant portion of the repayment period of the subject student loan.

Next, there is no genuine issue of material fact that the plaintiff can maintain - based on current income and expenses - a "minimal" standard of living for himself and his dependents if forced to repay the student loan.

When analyzing whether a "minimal" standard of living can be maintained "the debtor must demonstrate more than simply tight finances." In re Rifino, 245 F.3d 1083, 1088 (9th Cir. 2001).

The plaintiff has no dependents. Docket 27 at 5-6. Although unemployed at this time, the plaintiff has a monthly gross income of $3,273. His monthly

expenses are $3,303, including $150 in "[s]avings for taxes". The monthly income consists of: $1,930 from the Social Security Administration, $1,069.56 on account of his IRS pension, $55.42 of income from an union, and $219.60 from the Irish Government Old Age Pension. Docket 27, Exs. 3 & 5.

The plaintiff makes voluntary monthly support payments of $250 to his sister, who lives in Dublin, Ireland, he owns his own home, and he just purchased a new 2013 VW Jetta vehicle in April 2013, requiring payments of $350 a month. Docket 27 at 7-9, 35, 37-40. The plaintiff has been supporting his sister for the last 10 years. Docket 27 at 7. He does not have any medical problems that would prevent him from working. Docket 27 at 43. It is undisputed that since filing for bankruptcy in 2009 his financial circumstances have stabilized. By the plaintiff's own admission, for instance, his monthly mortgage payments are now manageable. And, he has added no new debt since his 2009 bankruptcy discharge, other than the April 2013 purchase of his new VW vehicle. Docket 27 at 66-67.

As of June 21, 2013, he had an outstanding student loan balance of $55,608.32, which has a monthly payment of $286.61. Docket 27, Ex. 2. No payments have been made on the loan since the plaintiff filed bankruptcy in 2009.

The plaintiff would easily exceed the "minimal" standard of living if he were required to make the $286.61 in monthly student loan payments, given that he has no legal dependents, he makes voluntary monthly payments of $250 to his sister which he could divert to the defendant, and he drives a new 2013 vehicle purchased only in April 2013, requiring payments of $350 a month. These facts and the plaintiff's current financial condition are undisputed.

Further, in light of the undisputed facts in the record, the plaintiff cannot establish that he has made good faith efforts to repay the loan.

The plaintiff's efforts to obtain employment in the legal field have been minimal. He has admitted to applying for "six or eight [jobs] a year" only. Docket 27 at 13. The plaintiff cannot remember how many non-legal jobs he has applied for or what was the nature of the jobs, but he admits to never having attempted to obtain a job in retail, such as a cashier, because, in his own words, "it doesn't appeal." Docket 27 at 13.

While he says that he is willing to take "any reasonable job," working as a cashier does not appear to be sufficiently reasonable for the plaintiff. Docket 27 at 19-20.

The plaintiff also admits to not having any job counseling since 2007, when he stopped working for the IRS. Docket 27 at 20.

As mentioned above, the plaintiff's payment of $250 a month to his sister is voluntary. He is not legally obligated to support his sister. To the extent he feels morally obligated to support her, he should feel also morally obligated to repay his student loan, which he promised to pay when he executed a promissory note(s). The plaintiff has been supporting his sister for 10 years now but has made no student loan payments for nearly five years now, since 2009.

His purchase of the 2013 VW Jetta vehicle in April 2013 further establishes the plaintiff's lack of effort to minimize expenses. The monthly payment for the vehicle is $350. The loan term is six years, meaning that the plaintiff would pay at least $25,200 for the vehicle by the end of the loan term.

The plaintiff's prior vehicle was a 2003 VW Jetta, with 211,000 miles, which he decided could not be driven anymore because "it . . . was spending most of its life in the shop." Docket 27 at 53.

The court is not convinced that this required the purchase of an altogether new vehicle. Even if the plaintiff had the need to purchase another vehicle, he did not have to purchase a new vehicle. He could have bought a used vehicle with a lower monthly payment and/or loan term, or with no payment at all, depending on what, if any, was the down payment for the new VW vehicle. Although not part of the record, the court is curious about the amount of the plaintiff's down payment for the new VW vehicle.

More, the new vehicle was purchased in April 2013, even though the plaintiff had not made payments on account of the student loan since he filed for bankruptcy on June 28, 2009. The purchase shows that the plaintiff is more willing to incur substantial new debt for a brand new vehicle rather than to repay his student loan.

The plaintiff also has not made efforts to negotiate a repayment plan with the defendant. In response to a question about whether he has "submitted [his] income figures to the Department of Education to have them adjust [his] monthly payment under the Income Contingent Plan," the plaintiff responded that he has not submitted his income. Docket 27 at 30.

Finally, the plaintiff filed the underlying chapter 7 bankruptcy case on June 28, 2009 and obtained a discharge on October 8, 2009. But, it was not until April 15, 2013 that the plaintiff filed this adversary proceeding, seeking dischargeability of the student loan at about the same time he incurred over $25,000 in additional debt by purchasing a new vehicle.

In other words, until the time he purchased the new vehicle and filed this action, the plaintiff made no payments on account of the student loan, even though his budget allowed him to make such payments, at least for some time prior to purchasing the new VW vehicle. Taking all these facts together, there are no material disputed facts that the plaintiff has not made good faith effort to repay the student loan. The motion will be granted. The defendant shall submit an order on this motion and a corresponding judgment.

3. 13-30417-A-13 PATRICK FAGUNDES
13-2261
FAGUNDES V. JPMORGAN CHASE ET AL

MOTION TO
REVIEW REQUEST FOR ENTRY OF
DEFAULT
12-30-13 [71]

Tentative Ruling: The request for entry of default will be denied.

The plaintiff, Patrick Fagundes, asks the court to direct the clerk of the court to enter the default of defendant Jesbir Brar.

To the extent this motion seeks relief other than a determination of whether the plaintiff is entitled to the entry of default, the motion will be denied. While some parts of the two-page motion are difficult to understand, the motion appears to be seeking also the entry of a default judgment against Mr. Brar. There is no evidence to support entry of a judgment at this time.

Examination of the docket reveals at least five different summonses: summonses issued August 21, 2013, November 26, 2013, January 23, 2014, and January 28, 2014, as well as two summonses that were filed by the plaintiff but not issued

by the clerk, one filed on December 30, 2013 and a second filed on January 6, 2014.

As to the August 21 summons, the plaintiff attempted service three times. The first one was on August 23, 2013, the second one was on September 2, 2013 and the third one was on September 25, 2013. The proofs of service for the first two attempts indicate that service was effectuated only on counsel for Mr. Brar and do not say that the summons was actually served. The third attempt is outside the 14-day deadline of Fed. R. Bankr. P. 7004(e), which provides: "If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served."

Next, on December 30, 2013, the plaintiff filed with the court a summons. Docket 73. The summons was not issued by the court and is not on the court's standard form. Accordingly, that summons has not been validly issued. The same is true of a summons filed on January 6, 2014.

As to the summonses issued on January 23 and January 28, after Mr. Brar had responded by filing a motion to dismiss the case on December 30, 2013. Docket 66. Hence, the court would not have entered a default based on those summonses.

Finally, as to the summons issued on November 26, there is only one proof of service that indicates that the summons was served on Mr. Brar. The proof of service does not state the date when service was effectuated. Docket 44 at 2. And, although there is an attachment to the proof of service of a mail center receipt with a date of November 27, it is not referred to on the face of the certificate of service and Mr. Brar filed a motion to dismiss the adversary proceeding on December 30, 2013, four days after the deadline for response on the November 26 summons. Docket 66.

More, the proof of service for the November 26 summons is attached to another proof of service with a service date of August 21, 2013. Docket 44 at 1. It took the court considerable time before locating the November 27 proof of service and making sense out of all the documents filed by the plaintiff in connection with his requests for entry of default.

Given the foregoing and given that there is a strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits, the court will not enter Mr. Brar's default. See Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

4. 13-30417-A-13 PATRICK FAGUNDES — MOTION TO DISMISS
13-2261 GMN-3 — 12-30-13 [66]
FAGUNDES V. JPMORGAN CHASE ET AL

Tentative Ruling: The motion will be granted in part.

The defendant, Jesbir Brar, seeks dismissal of the complaint based on Fed. R. Civ. P. 8 and 12(b)(6). He also contends that the court has abstained on the claims asserted against JPMorgan Chase Bank, the other defendant in this action.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged

under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by

the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The facts giving rise to the instant proceeding are as follows. In December 2005, the plaintiff borrowed funds from Long Beach Mortgage Company to finance his purchase of a real property in Rocklin, California. LBMC assigned the deed of trust to Washington Mutual in May 2008. WaMu was acquired by JPMorgan Chase Bank in September 2008, along with its interest in the property. Because of a default by the plaintiff under the loan, the property was sold at foreclosure in January 2013 to Mr. Brar.

The plaintiff filed the underlying chapter 13 case, Case No. 13-30417, on August 7, 2013. He filed this adversary proceeding on August 21, 2013. The causes of action asserted in this proceeding also pertain to the January 2013 foreclosure sale and include:

- quiet title,
- IIED
- negligence,
- fraud,
- conversion,
- violations of the California Foreclosure Protection Act, and
- breaches of the covenants of good faith and fair dealing.

The plaintiff is seeking injunctive relief and TRO as to the property and against the current owner of the property, is seeking rescission, restoration and restitution, and is seeking declaratory relief that the defendants have no interest in the property.

The underlying bankruptcy case was dismissed on August 30, 2013. On October 18, 2013, the plaintiff filed another bankruptcy case, a chapter 13 proceeding, Case No. 13-33496.

This court will treat the instant adversary proceeding as if it was filed in the plaintiff's latest bankruptcy case, Case No. 13-33496, filed on October 18, 2013.

As the complaint alleges that Mr. Brar was merely the purchaser of the property at the foreclosure sale, the court will dismiss the IIED, negligence, fraud, conversion, violations of the California Foreclosure Protection Act, and breaches of the covenants of good faith and fair dealing claims against Mr. Brar. Mr. Brar has never had any direct dealings with the plaintiff pertaining to the property. Mr. Brar purchased the property at a foreclosure sale initiated by the plaintiff's mortgagee. The plaintiff was not a party to the foreclosure sale and has not had dealings with Mr. Brar. Only the claim to quiet title will remain pending. The motion will be granted in part. A responsive pleading shall be filed within 14 days of the hearing.

5. 12-37724-A-11 UDDHAV/CHRISTINE GIRI
UST-1

MOTION TO CONVERT CASE TO CHAPTER 7 OR TO DISMISS CASE
3-12-13 [65]

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have violated an order of the court because they paid their counsel fees for unlawful detainer action work without order of this court, the debtors have accomplished nothing since the case was filed was filed five months ago, and there is no reasonable likelihood of rehabilitation.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . (E) failure to comply with an order of the court." 11 U.S.C. § 1112(b)(4)(A), (E).

The order approving the employment of the debtors' counsel D. Randall Ensminger states: "No compensation is permitted except upon court order following application pursuant to 11 U.S.C. § 330(a)." Docket 30. Nevertheless, Mr. Ensminger admits to receiving $1,250 from the debtors for the eviction of a tenant from one of the debtors' two rental properties.

Stating that "[h]ad they or undersigned counsel realized that court permission was required it would have been requested on an emergency basis," Mr. Ensminger blames ignorance for his failure to obtain a court order approving the payment of the $1,250. Opposition at 4. Mr. Ensminger does not offer to pay back the funds received from the debtors and has made no effort to apply even for retroactive approval of the fees.

The debtors and Mr. Ensminger have violated this court's employment approval order. Docket 30.

The court notes that after the filing of this motion and after the April 19 and June 17 hearings on this motion, Mr. Ensminger has agreed to return the $1,250 he charged the debtors for the eviction work. Docket 147. Although this has mitigated in part Mr. Ensminger's violation of the employment order, the fact remains that he collected the fees in violation of the employment order and that he agreed to return them only five months after this motion was filed.

Further, the court agrees with the U.S. Trustee that there has been delay by the debtors that is prejudicial to creditors. This case was filed on October 2, 2012. This motion was filed on March 12, 2013. Prior to the filing of this motion, the debtors had not filed any valuation motions and the debtors' two cash collateral motions were dismissed by the court. Dockets 32 & 53.

The debtors filed a plan and disclosure statement on January 30, 2013, but they did not set the approval of the disclosure statement for hearing. Also, the

plan and disclosure statement were filed as a single document, a total of six pages in length (Docket 63), even though the debtors are not a small business debtor. Unless the debtors are a small business debtor, they are not allowed to file the plan and disclosure statement as a single document. See 11 U.S.C. § 1125(f)(1).

More, the disclosure statement and plan have gross deficiencies on the face of the six-page document, including, without limitation, conclusory liquidation and feasibility analyses, the classification and treatment of claims is incomplete, no narrative or otherwise history of the debtors' pre-petition financial condition and what precipitated the filing, no future financial projections with stated assumptions, no discussion of how the road construction at the debtors' gas station business has affected the financial affairs of the business and no discussion of how the debtors are planning to confirm a plan given that the road construction hampering business will not be completed until August of 2014 and the debtors' monthly operating reports reflect the debtors' inability to fund a plan.

The March 2013 report reflects that the debtors have netted cumulatively a negative $2,247 during the life of this case. Docket 85.

The February 2013 report indicates that the debtors had netted cumulatively $1,763. Docket 73. According to the February 2013 report, in that month the debtors lost $4,009 and in January 2013 they lost $6,153. Docket 73. The January 2013 report (mislabeled as January 2012) indicates that the debtors had netted cumulatively a negative $3,389. Docket 64.

These figures do not take into account that the debtors have not been paying the mortgage on the gas station property. The gas station business, via the debtors' Lart Group, Inc. operator corporation, is the debtors' principal source of income.

In reviewing the debtors' reports, the court has noticed also that the reports are inconsistent and contain contradictory information. For instance, the February 2013 report says that in the prior month (January 2013), the debtors lost $6,153, whereas the January 2013 report (mislabeled as January 2012) reflects positive net cash receipts of $3,881 and reflects the prior month's receipts (December 2012) as a negative $6,153. Docket 64. The reports are in need of some serious corrections.

The reports are deficient also in reporting the financials of the debtors' corporation, Lart Group, Inc., which runs the gas station business and makes lease payments to the debtors for use of the gas station property. The debtors use the lease payments to pay the mortgage on the property. As of the time this motion was filed, Lart had not been making any lease payments to the debtors and they had not been making any payments on account of the mortgage on the property. The lack of transparency with respect to Lart's financials is a serious concern because the debtors control whether and when Lart will make lease payments to them individually.

On the other hand, the court does not have evidence of how much income is coming into Lart and where that income is going. The only evidence the court has is that Lart has been operating the gas station business and generating some revenue, albeit not making any lease payments to the debtors, and the debtors have not been paying the mortgage on the property.

It was not until this motion was filed that the debtors agreed to prompt Lart

to make "reduced" lease payments to them in the amount of $7,500.

The court does not understand why the debtors are characterizing the $7,500 in lease payments from Lart as "reduced" when the motion states that the lease payments should be in the amount of $5,500, which is the approximate amount of the mortgage on the property.

The lease payments from Lart apparently started on April 3, 2013, apparently for the first time post-petition. The debtors do not say when Lart stopped making lease payments to them pre-petition and when exactly they stopped making the mortgage payments.

The debtors predict that Lart's $7,500 in lease payments can "continue in that amount until the construction is completed and a six month period for business to return to normal is allowed for." Opposition at 2-3.

However, the court is not persuaded that Lart is able to maintain $7,500 lease payments to the debtors, given that Lart did not make lease payments for at least eight months pre-petition and the construction project inhibiting business will not be completed until August of 2014. Motion at 2, 3.

More important, while the court does not have Lart's financials, even if Lart is able to make the $7,500 of lease payments until completion of the construction project, the debtors have not explained why Lart did not make such payments for the eight months pre-petition and for the last six months post-petition. Lart is an entity the debtors own and control. Yet, they have not explained what has changed that Lart is now able to pay $7,500 a month. The construction project is still ongoing.

From the above, the court concludes that the debtors have either not been honest about whether and to what extent Lart has been able to make lease payments to the debtors or Lart is unable to make the asserted $7,500 in payments until the construction project is completed. Either way, there is cause for conversion or dismissal of the case. If the debtors have not been honest about Lart's operation of the gas station, they have mismanaged the estate. See 11 U.S.C. § 1112(b)(4)(B). If Lart is unable to maintain the lease payments to the debtors, in light of Lart's post-petition failure to make lease payments, there is substantial or continuing loss to or diminution of the estate and an absence of a reasonable likelihood of rehabilitation. See 11 U.S.C. § 1112(b)(4)(A). The debtors have stated that their gas station business will not "return to normal" "until the [two-year] construction is completed and a six month period [after completion of the construction]." Opposition at 2-3; Docket 63 at 2.

In conclusion, the debtors' failure to obey this court's orders, the delay in obtaining plan confirmation, the lack of transparency as to Lart's financials, the lack of explanation as to how Lart is suddenly able to make $7,500 in lease payments, and the nominal positive income reported for the life of this case are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

As the debtors own a rental property with a value of $60,000, free and clear of any encumbrances, the court concludes that conversion to chapter 7 is in the best interest of the creditors and the estate. Schedule A. The case will be converted to a chapter 7 proceeding.

6. 13-22534-A-11 SUPPLY HARDWARE, INC. MOTION TO CONVERT CASE TO CHAPTER 7 OR TO DISMISS CASE
UST-1 1-6-14 [174]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtor can no longer obtain plan confirmation and that the debtor has not filed an operating report for September 2013.

The debtor does not oppose this motion, but it has filed a response urging the court to dismiss the case.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation ... (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." 11 U.S.C. § 1112(b)(4)(A), (F).

This case has been pending since February 27, 2013. The debtor is a "small business debtor." 11 U.S.C. § 101(51D). The debtor filed a plan and disclosure statement on June 27, 2013, but it did not obtain confirmation within the applicable 45-day deadline. See 11 U.S.C. §1129(e). Similarly, on October 30, 2013, the debtor filed an amended plan and disclosure statement. That plan has not been confirmed either. And, because this case is over 300 days old now, the debtor is statutorily precluded from filing a new plan. See U.S.C. § 1121(e)(2).

Further, the debtor has failed to file the required monthly operating report for September 2013. See Fed. R. Bankr. P. 2015(a)(3) and 11 U.S.C. § 704(8). The above is cause for conversion or dismissal under section 1112(b)(1).

The court has not found any significant assets that are not collateral for the claim held by National Cooperative Bank. A review of Schedule B reveals two assets that are not collateral for NCB's claim: security deposits on buildings leased by the debtor with a scheduled value of $12,000 and an option to purchase a real property, with a scheduled value of "unknown." The court is not convinced that these assets are sufficiently substantial to warrant conversion to chapter 7. A dismissal permitting the debtor to operate outside of bankruptcy would serve the interests of unsecured creditors better than conversion to chapter 7. The case will be dismissed.

7. 14-20348-A-11 JOE/CAROL MOBLEY STATUS CONFERENCE
1-15-14 [1]

Tentative Ruling: None.

8.	12-35168-A-11 TTH-9	GOVERNMENT TECHNOLOGY SOLUTIONS, INC.	MOTION TO APPROVE COMPENSATION FOR DEBTOR'S ATTORNEY (FEES $90,646.50, EXP. $540.74) 11-21-13 [189]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted.

The court continued the hearing on this motion from January 21, 2014 for the movant to supplement the record. The movant filed a declaration on February 5, 2014. An amended ruling from January 21 follows below.

Timothy Huber, attorney for the debtor, has filed what appears to be his first and final motion for approval of compensation. The requested compensation consists of $90,646.50 in fees and $540.74 in expenses, for a total of $91,187.24. This motion covers the period from August 18, 2012 through October 15, 2013. The court approved the movant's employment as the attorney for the debtor in possession on September 19, 2012. In performing its services, the movant charged hourly rates of $375 and $100.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) preparing schedules and statements not filed on the petition date, (2) communicating with the debtor about strategy, (3) preparing and attending the IDI and the meeting of creditors, (4) attending court hearings, (5) assisting the debtor in the preparation of operating reports, (6) preparing and prosecuting motion for the retaining of existing bank accounts, (7) preparing and prosecuting motion for the payment of pre-petition payroll, (8) defending a motion to dismiss or convert by the U.S. Trustee, (9) preparing and prosecuting motions for the approval of post-petition financing, (10) preparing and prosecuting motions for the extension of small business deadlines, (11) responding to a stay relief motion by Wells Fargo Bank, (12) negotiating the treatment of Wells Fargo Bank's claim, (13) analyzing issues pertaining to general unsecured claims, (14) analyzing and addressing preference issues, (15) preparing plan and disclosure statement, and (16) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved. Given the representations in the declaration of Wendy Deitz, the debtor's CFO, filed on February 5, 2014, the court is satisfied that the revested debtor is able to pay the movant's compensation without jeopardizing its confirmed plan payments. Docket 199. Ms. Deitz represents that "[i]n my opinion, GvTech can perform the payment schedule set forth below based on this analysis of projected revenues and expenses, without jeopardizing GvTech's ability to perform the Plan of Reorganization." Docket 199 ¶ 4.

9. 12-37724-A-11 UDDHAV/CHRISTINE GIRI
DRE-19

MOTION FOR FINAL APPROVAL OF AMENDED DISCLOSURE STATEMENT 12-24-13 [203]

Tentative Ruling: The amended disclosure statement filed on December 24, 2013 (Docket 203) will be approved.

The hearing on this motion was continued so the debtors could amend their disclosure statement in accordance with the court's prior ruling. Docket 199. The debtors filed an amended disclosure statement on December 24, 2013, correcting the issues identified by the court. Docket 203. Accordingly, the court will approve the amended disclosure statement filed on December 24, 2013. Docket 203.

10. 12-37724-A-11 UDDHAV/CHRISTINE GIRI
DRE-19

MOTION TO CONFIRM AMENDED PLAN 10-11-13 [172]

Tentative Ruling: The motion will be granted.

The debtors ask the court to confirm their chapter 11 plan.

Subject to reviewing the tabulation of ballots at the hearing, the court is prepared to confirm the plan.