

3. [15-90109-E-11](#) NATIONAL EMERGENCY
JBS-1 MEDICAL SERVICES

MOTION TO DISMISS CASE
3-29-16 [[82](#)]

Tentative Ruling: The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney and Office of the United States Trustee on March 29, 2016. By the court's calculation, 9 days' notice was provided.

The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

The Motion to Dismiss the Chapter 11 Bankruptcy Case is granted and the case is dismissed.

This Motion to Dismiss the Chapter 11 bankruptcy case of National Emergency Medical Services Association, Inc., ("Debtor") has been filed by National Association of Government Employees, Inc., ("Movant"), the creditor. Movant asserts that the case should be dismissed or converted based on the following grounds:

1. The Debtor-in-Possession has failed to propose a plan and Disclosure Statement by the March 23, 2016.

Movant states that on February 4, 2016, the Debtor-in-Possession reported that it had not filed a plan due to its counsel having a series of family events but that counsel planed to file a Disclosure Statement and plan shortly. The court ordered that the Debtor-in-Possession shall file and serve a motion to approve Disclosure Statement on or before March 23, 2016. Dckt. 77.

RULING

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n 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 sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Cause exists to dismiss this case pursuant to 11 U.S.C. § 1107(b).

The court at the February 4, 2016 hearing explicitly stated in the civil minutes the following:

Counsel for Debtor-in-Possession reported that due to a series of unfortunate family events he has not been able to get a plan on file. Debtor in Possession shall have filed and served a motion to approve disclosure statement on or before March 23, 2016. If not so timely served, parties in interest may specifically set for hearing at 2:00 p.m. on April 7, 2016, motions seeking relief based on the failure to prosecute this bankruptcy case.

Dckt. 77. The accompanying order for the status conference restated that requirement that a plan and disclosure statement be filed on or before March 23, 2016. Dckt. 79.

The instant case was filed February 6, 2015. Dckt. 1. Since that time, the Debtor-in-Possession has failed to propose any type of plan or disclosure statement. The Debtor-in-Possession has been benefitting from the protections of the Bankruptcy Code without prosecuting the case in good faith. The Debtor-in-Possession on multiple occasions represented to the court that the Debtor-in-Possession would be filing a Disclosure Statement and plan in the immediate future.

The Debtor-in-Possession has failed to meet this promise. The Debtor-

in-Possession does not appear to be prosecuting this case in good faith. Instead, the Debtor-in-Possession appears to be "dragging their feet" in order to avoid having to fulfill the obligations of a Chapter 11 Debtor-in-Possession fiduciary.

Looking at the February 2016 Monthly Operating Report, untimely filed on March 31, 2016, in the past year this Debtor in Possession has generated \$426,257.00 in cash receipts. Dckt. 85. During that time the Debtor in Possession has disbursed \$359,08.00 as it has continued to operate under bankruptcy protection. The largest expense is for Salary and wages, \$160,211. When the payroll tax and insurance expenses are included, the employee costs are \$241,979. *Id.* this is 67% of the total disbursements during the year this Debtor has been in bankruptcy.

The court has given Debtor-in-Possession ample opportunity to the Debtor-in-Possession to prosecute this case in good faith and diligently. There is nothing to indicate that there is any reorganization ongoing, but merely the Debtor in Possession continuing to operate the business and pay its employees, without providing for paying any pre-petition creditors.

The motion is granted and the case is dismissed.

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 Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the case is dismissed.

4. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA STATUS CONFERENCE RE: NOTICE OF
[12-9008](#) REMOVAL
CHOPRA ET AL V. LOANVEST XI, 4-30-12 [[1](#)]
LP

Plaintiff's Atty: Robert M. Yaspan
Defendant's Atty: Stephen D. Finestone

Adv. Filed: 4/30/12
Answer: 9/12/12

Nature of Action:
Recovery of money/property - turnover of property
Declaratory judgment
Determination of removed claim or cause

Notes:
Status Conference set by order dated 3/14/16 [Dckt 72]

5. [11-94410-E-7](#) SAWTANTRA/ARUNA CHOPRA STATUS CONFERENCE RE: NOTICE OF
[12-9027](#) PLF-3 REMOVAL
LOANVEST XI, LP V. CHOPRA 8-31-12 [[1](#)]

Plaintiff's Atty: Charles A. Hansen; Stephen D. Finestone
Defendant's Atty: Robert M. Yaspan

Adv. Filed: 8/31/12
Answer: 7/30/13

Notes:
Status Conference set by order dated 3/14/16 [Dckt 63]

6. [13-91315-E-7](#) APPLEGATE JOHNSTON, INC. STATUS CONFERENCE RE:
[15-9052](#) THIRD-PARTY COMPLAINT
MCGRANAHAN V. LAGUNA GOLD 1-14-16 [[44](#)]
MORTGAGE, INC.

Third-party Plaintiff's Atty: Daniel L. Egan
Third-party Plaintiff: Laguna Gold Mortgage, Inc.

Third-party Defendant's Atty: Patrick M. Keene
Third-party Defendant: Ahern Rentals, Inc.

Adv. Filed: 1/14/16 [Dckt 44]
Answer: none

Notes:

7. [13-91315-E-7](#) APPLEGATE JOHNSTON, INC. CONTINUED STATUS CONFERENCE RE:
[15-9052](#) COMPLAINT
MCGRANAHAN V. LAGUNA GOLD 7-15-15 [[1](#)]
MORTGAGE, INC.

Plaintiff's Atty: Daniel L. Egan
Defendant's Atty: Patrick M. Keene

Adv. Filed: 7/15/15
Answer: 1/14/16

Counterclaim Filed: 1/14/16
Answer: none

Nature of Action:
Recovery of money/property - preference

Notes:
Continued from 2/4/16

8. [14-91325-E-7](#) JORGE SANCHEZ AND CORINA CONTINUED TRIAL SCHEDULING
[15-9001](#) ZAMORA-SORIANO CONFERENCE RE: COMPLAINT
TURLOCK IRRIGATION DISTRICT V. 1-8-15 [[1](#)]
SANCHEZ ET AL

Plaintiff's Atty: Ken R. Whittall-Scherfee
Defendant's Atty: Pro Se

Adv. Filed: 1/8/15
Answer: 3/5/15

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny

Notes:

Continued from 2/4/16; the Parties reported that they were documenting their settlement.

9. [12-93049-E-11](#) MARK/ANGELA GARCIA CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
11-30-12 [[1](#)]

Debtors' Atty: Mark J. Hannon
Trustee's Atty: Estela O. Pino

Notes:

Continued from 1/14/16

Operating Reports filed: 1/15/16, 2/15/16, 3/15/16

[SDN-3] Amended Disclosure Statement to Creditor's Plan of Reorganization by YP Formerly Known as Pacific Bell Directory filed 1/20/16 [Dckt 739]; Order approving filed 1/22/16 [Dckt 744]

[SDN-3] Amended Plan of Reorganization filed 1/20/16 [Dckt 740], set for hearing 4/7/16 at 2:00 p.m.

10. [12-93049](#)-E-11 MARK/ANGELA GARCIA
MJH-13

CONTINUED OBJECTION TO CLAIM OF
UNITED STATES FIRE INSURANCE
COMPANY, CLAIM NUMBER 19
2-9-15 [[509](#)]

APRIL 7, 2016 STATUS CONFERENCE

XXXXXXXXXXXXXXXXXXXX

JANUARY 14, 2016 CONFERENCE

The hearing is continued to 2:00 p.m. on April 7, 2016, to be conducted in conjunction with the confirmation hearing.

DECEMBER 17, 2015 CONFERENCE

The Hearing on the Objection to Claim is continued to 2:00 p.m. on January 14, 2016, to be conducted in conjunction with the hearing for Approval of Disclosure Statement.

SEPTEMBER 3, 2015 CONFERENCE

The Debtors, Chapter 11 Trustee, and Creditors are jointly working on a final attempt to present a proposed plan and disclosure statement which can be set for a confirmation hearing. The Conference is continued to afford the parties this final opportunity to confirm a plan.

11. [12-93049](#)-E-11 MARK/ANGELA GARCIA
SDN-3

CONFIRMATION OF AMENDED PLAN OF
REORGANIZATION FILED BY YP
WESTERN DIRECTORY, LLC
1-20-16 [[740](#)]

The Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

January 27, 2016 Plan, Disclosure Statement, Disc Stmt Ord, and Ballot Mailed

February 26, 2016 Last Day for Submitting Written Acceptances or Rejections

February 26, 2016 Last Day to File Objections to Confirmation

March 18, 2016 Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

Tabulation of Ballots:

Class	Voting	Ballot Percentage Calculation	Claim Percentage Calculation
Class 1: Deutsche Bank	For: 0 Against: 1		
Class 2: Chase Bank - cancelled debt, not impaired	For: Against:		
Class 3: United States First Insurance (USFI)	For: 1 Against: 0		
Class 4: G Street Investments, LLC	For: 1 Against: 0		
Class 5: Bankers Surety Services LLC	For: 1 Against: 0		
Class 6: Tax Collector, Gordon B. Ford	For: Against:		
Class 7: Travis Credit Union (Repossessed secured asset included with unsecured creditors)	For: Against:		

Class 8: Iain Macdonald	For: 1 Against: 0		
Class 9: Tax Collector, Gordon B. Ford	For: Against:		
Class 10.1: (1) John M. Rorabaugh; (2) American Express Bank, FSB; (3) YP; (4) Iain A. Macdonald; (5) Bankers Surety; (6) Law Office of Brunn & Flynn	For: 6 Against: 0		

Declaration of Sheryl Noel filed in support of confirmation provides evidence of the compliance with the necessary elements for confirmation in 11 U.S.C. § 1129:

11 U.S.C. § 1129(a).

1. The plan complies with the application provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.
Evidence: Motion, Dckt. 761, pg. 4
2. The proponent of the plan complies with the applicable provisions of the Bankruptcy Code.
Evidence: Motion, Dckt. 761, pg. 4
3. The plan has been proposed in good faith and not by any means forbidden by law.
Evidence: Declaration, Dckt. 765, ¶ 17; Motion, Dckt. 761, pg. 5
4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.
Evidence: Motion, Dckt. 761, pg. 5
5. (A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

Evidence: Motion, Dckt. 761, pg. 5

6. Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

Evidence: Motion, Dckt. 761, pg. 5; Declaration, Dckt. 765, ¶ 119

7. With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective dates of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 et seq., on such date; or

(B) if section 1111(b)(2) of this title [11 USCS § 1111(b)(2)] applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Evidence: Declaration, Dckt. 765, ¶ 21; Motion, Dckt. 761, pg. 6

8. With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

Evidence: Motion, Dckt. 761, pg. 6; Declaration, Dckt. 765, ¶ 22

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of the Bankruptcy Code, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

Evidence: Motion, Dckt. 761, pg. 7; Declaration, Dckt. 765, ¶ 24

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of the Bankruptcy Code, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

Evidence: Motion, Dckt. 761, pg. 7

(C) with respect to a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code, the holder of such claim will receive on account of such claim regular installment payments in cash--

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

Evidence: Motion, Dckt. 761, pg. 7

10. If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

Evidence: Motion, Dckt. 761, pg. 7; Declaration, Dckt. 765, ¶ 26

11. Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

Evidence: Motion, Dckt. 761, pg. 7; Declaration, Dckt. 765, ¶ 29

12. All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

Evidence: Motion, Dckt. 761, pg. 8

13. The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title [11 USCS § 1114], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title [11 USCS § 1114], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

Evidence: Motion, Dckt. 761, pg. 8

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

Evidence: Motion, Dckt. 761, pg. 8

15. In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan-

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

Evidence: Motion, Dckt. 761, pg. 8-9

16. All transfers of property under the plan shall be made in accordance

with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

Evidence: Motion, Dckt. 761, pg. 9

11 U.S.C. § 1129(b)

1. Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Evidence: Motion, Dckt. 761, pg. 9-10

2. For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

Evidence: Motion, Dckt. 761, pg. 9-10

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of

such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class, will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

Evidence: Motion, Dckt. 761, pg. 10; Declaration, Dckt. 765, ¶ 25

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

DEUTSCHE BANK TRUST COMPANY AMERICAS OPPOSITION

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass Through Certificates, Series 2-7-QS2 by and through its current loan servicing agent PHH Mortgage Corporations ("Creditor") filed an objection to confirmation on February 26, 2016. Dckt. 756.

The Creditor argues that the Amended Plan of Reorganization provides the following for Creditor's claim in Class 1:

The Plan does not provide for any modification to this claim. The Debtors, however, have applied for a loan modification with [Creditor] to have a forbearance of the arrearage pre and post-petition. Any modification of this first deed of trust will be dependent upon the approval of [Creditor]. . .

The Chapter 11 Trustee has listed the Debtors' residence for sale, it is marketed in the general area, and real estate professionals are and will continue to be employed to seel and market the Debtors' residence. If not sold, Plan Administrators will continue to list the residence for sale. In the even of a sale this claim will be paid in full.

The Creditor objects to the Plan on the following grounds:

1. The Plan is illusory in that it fails to provide the Plan Administrators with a marketing period to sell the Subject Property.
2. The plan fails to provide Creditor with monthly payments of principal and interest as required under the terms of the Note and Deed of Trust.
3. The Plan fails to provide for a cure of the post-petition advances made by Creditor for real property taxes and hazard insurance on the Effective Date of the Plan.

As to the first ground, the Creditor asserts that the sale proposed in the Plan is illusory because the sale of the Subject Property is optional and completely within the discretion of the Plan Administrators. The Creditor further argues that because the Plan Administrators would not be obligated to make any payments to Creditor while the property is being marketed, the Plan Administrators will not be motivated to sell the property.

The Creditor asserts that the Plan is attempting to modify the Creditor's claim which is secured by the Debtor's principal residence. Because of this, the Creditor argues that the plan must be amended to provide for a reasonable marketing period for the Plan Administrators to market and sell the property. Additionally, the Creditor asserts that the Plan must be amended to provide for monthly payments of principal and interest during the marketing period of the Property.

The Creditor's second objection asserts that the Debtor has failed to demonstrate that the proposed plan is feasible. The Creditor asserts that the feasibility of the Plan depends in part on the fair market value of the property and the amount of debt encumbering the property. According to the Creditor, there is no equity in the subject property for the benefit of the estate nor does it generate any type of rental income. The Creditor asserts that the property is not necessary and that the Plan is not feasible because there is insufficient equity in the property after paying secured lienholder in full and closing costs.

Lastly, the Creditor argues that the Plan fails to address the cure of Creditor's post-petition escrow advances. The Creditor asserts that the account is currently escrowed for "taxes/insurance" and the Debtors need to make arrangements to cure all post-petition escrow advances. The Creditor is uncertain if there is sufficient monthly income to make additional escrow payments.

DEBTOR'S REPLY

The Debtor filed a reply on March 18, 2016. Dckt. 759. The Debtor first notes that the four out of five secured creditors have voted to accept the amended plan and over 90% of unsecured creditors have also voted for the acceptance.

As to the property, the Debtor states that the residence has been marketed for almost a year by the Trustee, with just one offer coming in to

date which would satisfy the Creditor's lien. The sale has become more difficult because the California Department of Transportation may select to build a highway at one of three sites, one of which would eliminate more than three acres of the Debtors' vineyards. The Debtor asserts that the Counsel for Creditor offered to submit a loan modification to his principal, which would be \$3,500.00 for a fixed term of 30 years at 5%. The Debtors state that they have accepted these terms and counsel for the parties discussed placing these terms in the plan. The Debtor argues that in order for the residence to get the maximum price, the sale needs to be an open sale outside of bankruptcy with the California Department of Transportation hopefully not selecting the Debtor's land.

The Debtor then objects that the Creditor may not have standing to object. The Debtor asserts that there is a question as to who the first mortgage secured creditor is. The Debtor asserts that in the Motion for Relief from the Automatic Stay and the Proof of Claim, the Creditor has offered conflicting servicing agents. In the Motion for Relief, the creditor was identified as:

"Deutsche Bank Trust Company Americas, as Trustee for residential Accredit Loans, Inc., Mortgage Asset-Backed Pass Through Certificates, Series 2007-QS2."

Dckt. 84. A review of the Motion shows that the only place a loan servicer is mentioned is in the caption of the Motion which states ". . . the loan servicer PHH Mortgage Corporation."

The Debtor highlights that on Proof of Claim No 20, the servicer is identified as "PHH Mortgage Services."

The Debtor also asserts that in Proof of Claim No. 20, which was filed on November 15, 2013, the Creditor is identified as Deutsche Bank Trust Company Americas, as Trustee for RALI 2007-QS2. The Debtor then states that Proof of Claim No. 2-1 was filed on March 28, 2013 by HSBC Bank, USA, N.A. The attachments to the Proof of Claim indicates that HSBC assigned all of its interest in the loan to Deutsche Bank Trust Company Americas, as Trustee for RALI 2007-QS2. The Debtor argues that HSBC and Deutsche must be the same entity if the Proof of Claims filed are accurate.

The Debtor asserts that there are no declarations from either Deutsche or PHH Mortgage Corporation as to who the holder of the lien is, who the actual servicer is, and when, if at all, the interests were transferred.

The Debtor next argues that there is substantial equity in the residence that provides adequate protection to a first deed of trust holder. The Debtor does note, however, that the California Department of Transportation interest in the residence's land has made marketability difficult.

The Debtor next argues that the language in the amended plan as it relates to the first mortgage lender was provided by the previous attorneys for the first mortgage lender.

Lastly, the Debtor states that there is no plan at the current time to sell the Debtor's residence without it being able to pay a substantial portion of the second mortgage.

DISCUSSION

Though this case has had a long and tortured history, including the Debtor's failure to timely prosecute this as a small business case, most creditors have "gotten on board" and support the plan. However one person, who asserts to be a creditor, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass Through Certificates, Series 2007-QS2 ("DBTCA Tee"), acting through PHH Mortgage Corporation, opposes confirmation. Opposition, Dckt. 756. The Debtor, not YP Western Directory, LLC, respond to the Opposition. Response of Debtor, Dckt. 759.

While Debtor asserts that most of the other creditors like the plan, such does not make whatever plan treatment proposed by YP Western Directory, LLC is proper for DBTCA Tee's claim (to the extent it is the creditor in this case) or whomever the creditor is for that claim. Even absent an objection, the court is obligated to make sure that the requests for relief, even for the confirmation of a plan, complies with the Bankruptcy Code. See *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); see also *Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

For the Debtors (but apparently not YP Western Directory, LLC) there is a "serious question" as to who is the creditor for this claim. Response, p. 2:21.5; Dckt. 759. Debtor first directs the court to the issue of whether, and when, PHH Mortgage Corporation became the servicing agent for the creditor. Debtor directs the court to Proof of Claim No. 20, on which the servicer is identified as PHH Mortgage Services.

Proof of Claim No. 20 was filed on March 28, 2013, identifying HSBC Bank, USA, N.A. as the creditor. The proof of claim is executed by National Bankruptcy Services as the agent for "HSBC Bank." On November 15, 2013, an amended proof of claim was filed, listing "Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QS2. The field on Amended Proof of Claim No. 20 for notices states that they are to be sent to "PHH Mortgage Services." Amended Proof of Claim No. 20 is signed by someone at Buckley Madole, P.C. as the agent for PHH Mortgage Services.

The Transfer of Claim filed in this case, Dckt. 272, identifies the Transferee of the HSBC Bank USA, N.A. claim as "PHH Mortgage Services as servicing agent for Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QS2." Dckt. 272. This Transfer is signed by "Craig A. Edelman as the Transferee/Transferee's agent. While inartfully written, this appears to identify the creditor, the Transferee, as Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QS2, acting through its agent, PHH Mortgage Services.

In the proposed Amended Chapter 11 Plan, YP Western Directory, LLC, the Plan Proponent, provides for "Deutsche Bank Trust Company Americas as the Class 1 Creditor. Amended Plan, p. 3:5-8, Dckt. 740. YP Western Directory, LLC states that the claim of Deutsche Bank Trust Company Americas is secured by the Debtor's residence. In the Amended Disclosure Statement filed by YP Western Directory, LLC, Deutsche Bank Trust Companies Americas is listed as the creditor holding the Class 1 Claim, which is stated to be secured by the Debtor's residence, 5672 Eleanor Rd, Oakdale, California. Amended Disclosure

Statement, p. 21:18-24; Dckt. 739.

What the court has in front of it, notwithstanding the Debtor's protestations, are the representation of YP Western Directory, LLC that Deutsche Bank Trust Company Americas is the creditor. The Transfer of Proof of Claim No. 20 identifies the creditor as Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QS2. It appears that YP Western Directory, LLC has shorthanded the name in the Amended Plan and Amended Disclosure Statement. In light of the significance in naming the real party in interest in the Plan and the certifications given pursuant to Federal Rule of Bankruptcy Procedure 9011, there is little reason to think that the Plan Proponent named someone who is not a creditor.

A check of the California Secretary of State's on-line business information discloses that there is PHH Mortgage Corporation authorized to do business in California. <http://kepler.sos.ca.gov/>. There is no PHH Mortgage Services authorized to do business in California.

Consideration of Plan Term

Debtor's oppose the objection of Deutsche Bank Trust Company Americas as Trustee for RALI 2007-QS2 to the provisions of the proposed Amended Plan which state:

"Class 1: Secured claim of Deutsche Bank (Senior Deed of Trust).

The Plan does not provide for any modification to this claim. The Debtors, however, have applied for a loan modification with Deutsche Bank and with PHH Mortgage its loan servicing agent to have a forbearance of the arrearage pre and post-petition. Any modification of this first deed of trust will be dependent upon the approval of Deutsche Bank and/or PHH Mortgage Services.

There is provision for monthly payments.

The Chapter II Trustee has listed the Debtors' residence for sale, it is marketed in the general area, and real estate professionals are and will continue to be employed to sell and market the Debtors' residence. If not sold, Plan Administrators will continue to list the residence for sale. In the event of a sale this claim will be paid in full."

Amended Plan, p.5:10-20; Dckt. 740.

The Amended Plan continues in the Part IV: Execution of Plan section:

"Secured Claims:

Class 1: Deutsche Bank

No provision is made under the Plan for payments to this secured creditor. The Debtors' residence is and will be listed for sale, marketed in the general area, and real estate

professionals are and will continue to be employed to sell and market the Debtors' residence. In the event of a sale this claim will be paid in full."

Amended Plan, p. 11:1-6; *Id.*

The Amended Plan makes no provision for the orderly sale of the Debtor's residence.

The Opposition of Deutsche Bank Trust Company Americas, as Trustee, through its agent PHH Mortgage are well taken. To the extent that Debtor has heartburn over whether this is the "creditor," the issue has been squarely placed before the court as to whether this plan term complies with the Bankruptcy Code.

The Plan, as presented by YP Western Directory, LLC and trumpeted by Debtor, provides that the Class 1 secured claim will not be paid any monies until at some later date when the decision is made to sell the Debtor's residence. The Debtor will continue to live in the residence, without any payment made to the Class 1 creditor. This might be one year or 100 years - YP Western Directory, LLC has advanced a plan which allows the Plan Administrator, the Debtor, to live in the residence as long as they want and then sell it at whatever date into the future.

This proposed treatment for a secured claim is in stark contrast as to how YP Western Directory, LLC has provided for its own claim (or purportedly its own claim - with Proof of Claim No. 11 listing California Bell Directory, a California Corporation, as the creditor, with no transfer of the claim to YP Western Directory, LLC having been filed).

The treatment of General Unsecured Claim provided in the plan requires that 50% of the claim will be paid over a four year period in quarterly installments. Amended Plan, p. 9:20-26. The Plan further requires that there be equal quarterly installments of \$58,000.00 for June, September, and December 2018; equal quarterly payments totaling \$92,000.00 for March, June, September, and December 2019; and a payment totaling \$25,000.00, for March 2020.

Conspicuously absent from the treatment for payment of YP Western Directory, LLC's general unsecured claim is the "when the Plan Administrator Debtor decides to pay something on the claim, there will be a payment, sometime in the non-specific future."

Absent consent of the creditor, 11 U.S.C. § 1124 sets the general rules for what a plan proponent may do through a Chapter 11 plan. These provision do not provide for an opened liquidation of the collateral at a non-specific future date - which will be unilaterally determined by the debtor as the plan administrator.

With respect to the minimum legal standard to confirm a plan, 11 U.S.C. § 1125(a)(7) and (8) provide:

"(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title [11 USCS §§ 701 et seq.] on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan."

For the Class 1 claim, the holder of the claim has not accepted and the Amended Plan makes no attempt to provide the liquidation value. Rather, the Plan provides for making some payment, at some non-specific future date, when and if the Plan Administrator Debtor elects to voluntarily sell Debtor's residence.

Status of YP Western Directory, LLC

The Debtor's response to the Objection to Confirmation cause the court to go to the California Secretary of State's website to see who is listed by the state as PHH Mortgage Corporation and PHH Mortgage Services. The court, in light of the YP Western Directory, LLC claim being in the name of Pacific Bell Directory, the court checked the Secretary of State website for these two entities.

For YP Western Directory, LLC states that the Status of YP Western Directories, LLC is "CANCELLED.:

For Pacific Bell Directory, the status is reported as "CONVERTED OUT."

<http://kepler.sos.ca.gov/>. It may well be that Debtor has ferreted out another purported entity who cannot be a creditor at this point in time.

12. [12-93049](#)-E-11 MARK/ANGELA GARCIA
[13-9029](#)
UNITED STATES FIRE INSURANCE
COMPANY V. GARCIA ET AL

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
4-30-15 [[64](#)]

Plaintiff's Atty: Gregory M. Salvato
Defendant's Atty:
Mark J. Hannon [Mark Garcia; Angela Garcia]
Estela O. Pino [John Bell]

Adv. Filed: 8/23/13
Answer: 10/4/13

Amd. Cmplt. Filed: 4/30/15
Answer: 5/20/15

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Notes:

Continued from 1/14/16 to be conducted in conjunction with the confirmation hearing.

Continued from 12/17/15 to be conducted in conjunction with the hearing for Approval of Disclosure Statement.

APRIL 7, 2016 CONFERENCE

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

JANUARY 14, 2016 CONFERENCE

The Status Conference hearing is continued to 2:00 p.m. on April 7, 2016, to be conducted in conjunction with the confirmation hearing.

DECEMBER 17, 2015 STATUS CONFERENCE

The Status Conference is continued to 2:00 p.m. on January 14, 2016, to be conducted in conjunction with the hearing for Approval of Disclosure Statement.

JULY 2, 2015 STATUS CONFERENCE

On June 25, 2015, United States Fire Insurance Company ("USFI") filed a Status Report in this Adversary Proceeding. Dckt. 72. It states that USFI believes that an agreement has been reached which settles this Adversary Proceeding and the objection to claim filed by Mark and Angela Garcia ("Defendant-Debtor") Debtors. USFI's counsel has transmitted the final forms for the Stipulation for Entry of Judgment and Stipulation for allowance of the USFI claim (POC 19-3).

The Report further states that USFI contemplates that no court approval is required, and unless otherwise ordered by the court. USFI does intend to seek court approval of the compromise with respect to the allowance of its claim in the Defendant-Debtor's bankruptcy case.

13. [12-93049-E-11](#) MARK/ANGELA GARCIA CONTINUED STATUS CONFERENCE RE:
[15-9013](#) AMENDED COMPLAINT
GARCIA ET AL V. G STREET 5-30-15 [[14](#)]
INVESTMENTS, LLC. ET AL

Plaintiff's Atty: Mark J. Hannon
Defendant's Atty:
David M. Wiseblood [G Street Investments, LLC]
Sheryl D. Noel [Iain MacDonald]

Adv. Filed: 4/10/15
Answer: none

Amd. Cmplt. Filed: 5/30/15
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property
Injunctive relief -imposition of stay
Subordination of claim or interest

Notes:
Continued from 1/14/16 to be conducted in conjunction with the confirmation hearing.

APRIL 7, 2016 STATUS CONFERENCE

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

JANUARY 14, 2016 CONFERENCE

The status conference is continued to 2:00 p.m. on April 7, 2016, to be conducted in conjunction with the confirmation hearing.

DECEMBER 17, 2015 STATUS CONFERENCE

The Status Conference is continued to 2:00 p.m. on January 14, 2016, to be conducted in conjunction with the hearing for Approval of Disclosure Statement.

SEPTEMBER 3, 2015 STATUS CONFERENCE

identification of core and non-core matters in this Adversary Proceeding. The attorneys Plaintiff-Trustee and Meyers Wilson) are continuing to meet and confer to address the issues in this case in light of the District Court's denial of the Motion to Withdraw the Reference.

The parties concur that all issues in the Complaint, Crossclaim, and Counterclaim are core, except for the malpractice claims.

The Parties will meet and confer concerning the outstanding discovery, the use of BDRP, and other matters concerning the procedures in this Adversary Proceeding (including whether the bankruptcy judge will sign the pre-trial orders for the non-core malpractice claims).

The court continues the Status Conference to facilitate the communications.

**REVIEW OF PLEADINGS, CORE AND NON-CORE STATEMENTS,
AND CONSENTS AND NON-CONSENTS TO BANKRUPTCY JUDGE ISSUING FINAL
ORDERS AND JUDGMENTS FOR NON-CORE MATTERS**

PLAINTIFF TRUSTEES SECOND AMENDED COMPLAINT

On October 2, 2015, the Trustee filed a Second Amended Complaint ("SAC"). Dckt. 44. The Second Amended Complaint alleges claims for and seeks the following relief:

- A. Allegations of Jurisdiction and Core Matters
 - 1. Jurisdiction is asserted to exist pursuant to 28 U.S.C. §§ 151, 157(a), 157(b)(2), and 1334. SAC ¶ 2.
 - 2. It is alleged that this Adversary Proceeding is a core proceeding pursuant to:
 - a. 28 U.S.C. § 157(b)(2)(A), "matters concerning administration of the estate; and
 - b. 28 U.S.C. § 157(b)(2)(E), "orders to turn over property of the estate."
- B. Debtors, Sushi and Susea Prasad, commenced their Chapter 13 bankruptcy case on December 30, 2009. It was converted to a case under Chapter 7 on December 21, 2012. SAC ¶ 1.
- C. Meyer Wilson Co., LPA, ("Defendant Attorneys") represented Debtors in *Prasad et. Al. V. World Group Securities, Inc.*, Financial Industry Regulation Authority Office, Case No. 12-00334, (the "Arbitration Claim") filed on January 31, 2012. SAC ¶ ¶ 7, 9
- D. The claim related to the conduct of a broker working for World Group Security, Inc. ("WGS"), including claims for fraud, operation of a Ponzi scheme, and failure to supervise the broker. SAC ¶ 9.
- E. It is alleged that Debtors concealed the existence of the Arbitration claim during their 341 Meeting on January 31, 2013.

SAC ¶ 10.

- F. On April 13, 2013, Debtors executed a Mediation Settlement Statement agreeing to accept \$105,000 in settlement of their claim, with attorneys' fees and expenses to be paid from that amount. The net proceeds of the settlement is computed to be \$59,822.03, after payment of expenses and costs. SAC ¶ 11.
- G. The Settlement Agreement was executed on April 29, 2013. SAC ¶ 12. It provides for payment of the \$105,000.00 to Defendant Attorneys, as counsel for Debtors. SAC ¶ 12.
- H. The claims and settlement proceeds thereof are asserted to be property of the bankruptcy estate. SAC ¶ 13.
- I. Debtors did not seek and the bankruptcy court did not approve the Settlement and Debtors have not amended their Schedules to list the rights and claims as assets. SAC ¶ 15.
- J. Defendant Attorneys were not authorized as counsel pursuant to 11 U.S.C. § 327 and Defendant Attorneys have not sought the allowance of fees pursuant to 11 U.S.C. § 330. SAC ¶ 16.
- K. It is alleged that Debtors advised Defendant Attorneys that Debtors had filed bankruptcy and Debtors' case was pending. SAC ¶ 17.
- L. Claims to avoid and recover the full \$105,000 is asserted as arising pursuant to 11 U.S.C. § 549 (post-petition transfers) and § 550 are asserted against Debtors. First Claim for Relief, SAC ¶¶ 19-23.
- M. Claims to avoid the claim of the transfer of \$105,000.00 to Defendant Attorneys pursuant to 11 U.S.C. § 549 are asserted against Defendant Attorneys. Second Claim for Relief, SAC ¶¶ 24-27.
- N. Claims to avoid the claim of the transfer of \$105,000.00 to Defendant Attorneys pursuant to 11 U.S.C. § 549 are asserted against TAFI. Third Claim for Relief, SAC ¶¶ 28-32.
- O. Claims for violation of the automatic stay in purporting to settle and compromise rights and interests of the bankruptcy estate are asserted against all Defendants. Fourth Claim for Relief, SAC ¶¶ 33-36.
- P. Claims for the turnover and an accounting to the \$60,000.00 of the settlement proceeds by Debtors are asserted against Debtors. Fifth Claim for Relief, SAC ¶¶ 37-42.
- Q. Claims for the turnover and an accounting to the \$105,000.00 of the settlement proceeds by Debtors are asserted against Defendant Attorneys. Sixth Claim for Relief, SAC ¶¶ 43-48.
- R. Claims for professional liability for duties alleged to be owed to the Plaintiff Trustee are asserted against Defendant Attorneys with respect to the rights and interest of the estate which were the subject of the Settlement. Seventh Claim for

Relief, SAC ¶¶ 49-53.

DEFENDANT ATTORNEYS' ANSWER AND COUNTERCLAIM

Defendant Attorneys admit and deny specific allegations in the First Amended Complaint. Defendant Attorneys plead sixteen affirmative defenses.

Answer of Defendant Attorneys to Second Amended Complaint

Meyer Wilson Co, LPA ("Defendant Attorneys") filed its Answer ("MWA") and a Counterclaim ("MWCC") on October 22, 2015. Dckt. 56. In the Answer:

- A. Defendant Attorney denies that the "bankruptcy court" has jurisdiction over this Adversary Proceeding. MWA ¶ 2.
- B. Defendant Attorney denies that the claims asserted in the Second Amended Complaint are core matters, and Defendant Attorney does not consent to the bankruptcy judge entering final orders and judgment on non-core matters. MWA ¶ 3.
- C. The Defendant Attorneys' Answer admits and denies specific allegations in the Second Amended Complaint.
- D. The Defendant Attorneys plead seventeen affirmative defenses, including:
 - 1. the claims are barred by the statute of limitations provided in 11 U.S.C. § 549(d) and 546(a);
 - 2. that the claims of Debtors accrued post-petition;
 - 3. the claims are barred by state law statute of limitations, Cal. C.C.P. §§ 337, 338, 339, 340, 340(3), 340.5, 340.6, and 343;
 - 4. Plaintiff Trustee lacks standing;
 - 5. The claims for punitive damages under California state law would violate Defendant Attorneys':
 - a. Constitution rights to substantive and procedure Due Process pursuant to the Fourteenth Amendment;
 - b. Constitute cruel and unusual punishment, and constitute excessive fines in violation of the Eighth Amendment;
 - c. Constitute a taking of private property for public use without compensation in violation of Defendant Attorneys' rights under the Fourteenth Amendment.

MWA ¶¶ 55, 56, 57, 61, 66, 69.

Counterclaim of Defendant Attorneys

In addition to the Answer, Defendant Attorneys filed a Counterclaim

against Plaintiff Trustee. The Counterclaim alleges:

- A. Federal court jurisdiction exists in the bankruptcy court pursuant to 28 U.S.C. §§ 157 and 1334, and because the Counterclaim relates to the Second Amended Complaint in this Adversary Proceeding. MWCC ¶ 73.
- B. The Counterclaim does not make the affirmative required allegations of whether the claims are core matters, and if not core matter, whether Defendant Attorneys consent to the bankruptcy judge entering final orders and judgment on the Counterclaim. See Fed. R. Bankr. P. 7008, which in addition to incorporating Fed. R. Civ. P. 8(a), requires:

"In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge."
- C. Debtors commenced their Chapter 13 case on December 30, 2009, and converted the case to one under Chapter 7 on December 21, 2012. MWCC ¶ 77.
- D. On August 19, 2010, Debtor invested monies with a broker at World Group Securities, Inc. MWCC ¶ 78.
- E. Debtors were the victims of fraud and a Ponzi scheme by the broker at World Group Securities, Inc. MWCC ¶ 78.
- F. Debtors learned of the fraud after the broker filed bankruptcy on August 19, 2010. MWCC ¶ 78.
- G. On January 31, 2012, Debtor Attorneys filed the Arbitration Claim for Debtors. MWCC ¶ 29.
- H. The causes of action asserted in the Arbitration Claim accrued post-petition for the Debtors and are legal or equity interests of the Debtors pursuant to 11 U.S.C. § 541(a)(1). Thus, the claims are not property of the bankruptcy estate for Debtors bankruptcy case filed on December 30, 2009. MWCC ¶ 79. FN.1.

FN.1.

11 U.S.C. § 541. Property of the estate

"(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

- I. The proceeds of the Settlement were never property of the

estate. MWCC ¶ 80.

- J. The First Claim for Relief requests the court determine the respective rights of the parties in the Arbitration Claim and the proceeds thereof. MWCC ¶¶ 81-84.

Defendant Attorneys Request for Jury Trial

Defendant Attorneys also filed its Demand for Jury Trial pursuant to Federal Rule of Civil Procedure 38(b). Federal Rule of Bankruptcy Procedure 9015 provides the procedure for jury trials in bankruptcy cases and adversary proceedings, incorporating the provisions of Federal Rule of Civil Procedure 38, 39, 47-49, and 51, and Federal Rule of Civil Procedure 81(c).

Plaintiff Trustee's Answer to Counterclaim

The Plaintiff Trustee has filed his Answer to the Defendant Attorneys' Counterclaim ("MWCC Ansr."), which responses include the following:

- A. The Plaintiff Trustee admits the allegations of federal court jurisdiction for the Counterclaim. MWCC Ansr. ¶ 1.
- B. The Answer does not state whether Plaintiff Trustee asserts that the counter claim is a core proceeding, and if not core, whether Plaintiff Trustee consents or does not consent to the bankruptcy judge entering the final orders and judgment thereon.
- C. The Answer admits and denies specific allegations in the Counterclaim.
- D. The Answer asserts one affirmative defense.

TRANSAMERICA FINANCIAL ADVISORS, INC.'S ANSWER AND CROSS COMPLAINT

Summary of Answer filed by Transamerica Financial Advisors, Inc.

Transamerica Financial Advisors, Inc, fka World Group Securities, Inc. ("TAFI") filed a First Amended Answer ("FAA") and Cross-Complaint ("FAACC") to the Complaint on October 22, 2015. Dckt. 70. In the First Amended Answer TAFI admits and denies specific allegations in the Second Amended Complaint. TAFI asserts seven affirmative defenses, including the doctrine of ratification and/or acquiescence, and injuries were not caused by TAFI.

TAFI denies the allegations that federal court jurisdiction exists pursuant to 28 U.S.C. §§ 151, 157(a), 157(b)(2), and 1334. TAFI FAACC ¶ 2.

TAFI also denies that the claims are core matters, and to the extent non-core consents to the entry of final orders and judgment in this Adversary Proceeding by the bankruptcy judge. TAFI FAACC ¶ 3.

Summary of Cross Complaint of Transamerica Financial Advisors, Inc.

TAFI asserts cross claims against Debtors, alleging:

- A. Federal court jurisdiction for the Cross Claim against Debtors exists pursuant to 28 U.S.C. §§ 1334(b) and 157(a). Further,

that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(A), (E), and (O), and if not core, TAFI consents to the bankruptcy judge issue all final orders and judgement on the Cross Claim. TAFI CC ¶¶ 1, 2.

- B. In the First Claim for Relief, TAFI asserts claims for contractual indemnification from Debtors pursuant to the Settlement Agreement for any liability on the claims asserted by the Plaintiff-Trustee. TAFI CC ¶¶ 118-22.
- C. In the Second Claim for Relief, TAFI asserts claims for intentional and negligent misrepresentation against Debtors to the extent of any liability of TAFI to the Plaintiff Trustee. TAFI CC ¶¶ 23-30.
- D. In the Third Claim for Relief, TAFI asserts claims for equitable indemnification and contribution against Debtors. TAFI CC ¶¶ 31-36.
- E. In the Fourth Claim for Relief, TAFI asserts claims for restitution or unjust enrichment against Debtor to the extent of any liability of TAFI to the Plaintiff Trustee. TAFI CC ¶¶ 37-39.

DEBTORS ANSWER AND CROSS CLAIMS

Summary of Debtor's Answer to Cross Claim of Transamerica Financial Advisors, Inc.

The Answer ("DTX Ansr.") of Sushil Prasad and Susea Prasad ("Debtors") admits and denies specific allegations in the Cross Claims. These include:

- A. Debtors admit the allegations of federal court jurisdiction, that the claims in this Cross Claim are core matters, and to the extent non-core, consent to the bankruptcy judge issuing final orders and judgement. DTX Ansr. ¶¶ 1, 2.
- B. Debtors assert sixth affirmative defenses, which include:
 - 1. Debtors acted in good faith based on the advice of counsel. DTX Ansr. ¶ 40.
 - 2. Debtors turned over \$26,000.00 of the proceeds to the Trustee, and should be credited that amount against any claim of TAFI. DTX Ansr. ¶ 41.
 - 3. Debtors assert that TAFI has failed to join a necessary party, Defendant Attorneys. DTX Ansr. ¶ 42.
 - 4. Debtors assert that the conduct of Defendant Attorneys is a superceding cause, which precludes TAFI asserting claims against Debtors. DTX Ansr. ¶ 45.

Summary of Cross Claim of Debtors Against Defendant Attorneys

Debtors have filed Cross Claims against Defendant attorneys. The

allegations in the Cross-Claim ("DCC") include:

- A. This court has jurisdiction for the Cross-Claim pursuant to 28 U.S.C. §§ 1334(b) and 157(a), that this is core proceeding pursuant to 28 U.S.C. § 157(b)(A), (E), and (O), and to the extent non-core, Debtors consent to the bankruptcy judge entering all final orders and judgement thereon. DCC ¶¶ 1, 2.
- B. In the First Claim for Relief, Debtors assert that they are entitled to damages from Defendant Attorneys based on professional liability claims for damages incurred for the claims asserted by the Plaintiff Trustee and TAFI. DCC ¶¶ 13-20.
- C. In the Second Claim for Relief, Debtors assert claims for equitable indemnification and/or contribution from Defendant Attorneys for damages incurred in this Adversary Proceeding to Plaintiff Trustee and TAFI. DCC ¶¶ 21-22.

Summary of Answer to Debtors' Cross-Claim by Defendant Attorneys "DCC (Ansr.)"

In the Answer, Defendant Attorneys:

- A. Defendant Attorneys admit the allegations that federal court jurisdiction exists for the Cross-Claim. DCC Ansr. ¶ 1.
- B. Defendant Attorneys deny that the Cross-Claim is a core matter and does not consent to the bankruptcy judge entering final orders and judgment thereon. DCC Ansr. ¶ 2.
- C. Defendant Attorneys state fourteen affirmative defenses, which include:
 - 1. The claims of Debtors which are the subject of this Adversary Proceeding were claims of the Debtors and not property of the bankruptcy estate. DCC Ansr. ¶ 22.
 - 2. The claims of Debtors are barred by the applicable statutes of limitations, including, Cal. C.C.P. § 340.6. DCC Ansr. ¶ 28.
 - 3. Defendant Attorneys assert that they relied in good faith upon advice of counsel for the matters which are the subject of the Cross-Claim. DCC Ansr. ¶ 35.
 - 4. Defendant Attorneys assert that Debtors expressly and impliedly assumed the risk of loss and damage for the matters in the Cross-Claim. DCC Ansr. ¶ 36.

STATUS REPORT BY PLAINTIFF-TRUSTEE

On August 13, 2015, the Plaintiff-Trustee filed a Status Report (Dckt. 25) advising that a motion for leave to file a Second Amended Complaint has been filed. The hearing on the motion is set for October 1, 2015. By the second amended complaint the Trustee seeks to assert a claim for professional negligence against the Defendant-Attorneys. It is stated that the claim is asserted by the Plaintiff-Trustee, asserting to be an owner of the claim which

was settled, and the Plaintiff-Trustee not having authorized the Defendant-Attorneys to settle the claim which is asserted to be property of the estate.

In the motion (Dckt. 19) reference is made to the investment upon which the Arbitration Claim is based, was made prior to the bankruptcy case. This was stated in the Debtors' declaration in support of confirmation of the second modified Chapter 13 Plan. 09-94269, Dckt. 94. It is alleged that Defendant-Attorneys owed a duty of care to Plaintiff-Trustee, as the successor to Debtors when the case was converted to one under Chapter 7.

The deadline for filing an opposition to the motion for leave to file second amended complaint has not expired.

MOTION TO WITHDRAW REFERENCE - CORE PROCEEDING DETERMINATION

On October 22, 2015, Defendant Attorneys filed a motion with the District Court to withdraw the reference of this Adversary Proceeding to this bankruptcy court. Motion, Dckt. 58. On February 4, 2016, the District Court entered an order denying the Motion to Withdraw the Reference. Dckt. 90 ("ED Cal Order"). The ruling of the District Court, E.D. Cal. 15-cv-2229, is summarized as follows:

- A. "The case [Adversary Proceeding] involves issues concerning whether the settlement proceeds are part of the bankruptcy estate and whether Meyer Wilson committed malpractice in representing the Debtors and misappropriating the proceeds.
" ED Cal Ord, p. 6:10-13.
- B. "Whether the proceeds were part of the bankruptcy estate hinges on when the underlying claims accrued. Claim accrual, in turn, is governed by state law and bankruptcy law - not other federal laws. *In re Goldstein*, 526 B.R. 13, 21 (9th Cir. B.A.P. 2015) Malpractice too is a state - not federal -question. *Ross v. Yaspan*, 2013 WL 3448725, at *4 (C.D. Cal. July 9, 2013)." *Id.*, p. 6:14-19.
- C. "Meyer Wilson has not shown that the rule in *Howsam* will arise in this case. Even if it did, there is no indication that the answer would involve more than "routine application" of the relevant law. The Court therefore holds that mandatory withdrawal is not warranted." *Id.*, p. 7:19-23.
- D. "The parties appear to agree that Meyer Wilson is entitled to a jury trial before the district court as to the malpractice claim. Mot. at 6-7; Trustee's Opp. at 6." *Id.*, p. 6:25-27.
- E. "The Ninth Circuit has held that the right to a jury trial does not warrant transfer of all pre-trial proceedings to the district court. See *In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007) . The procedure by which the bankruptcy court handles pretrial matters and the district court conducts a trial is a well-worn procedure in this district." *Id.*, p. 8:3-8.
- F. "Most of the claims in this case appear to be core bankruptcy matters, because they "could arise only in the context of a bankruptcy case." See *Battle Ground Plaza, LLC v. Ray*,. 624 F.3d 1124, 1131 (9th Cir. 2010) (citation omitted) . Indeed, the thrust of the case is whether the settlement proceeds are

assets of the bankruptcy estate. *Id.*; p. 8:26-28, 9:1-4.

- G. "To the extent there are other non-core matters, this Court follows the procedure set out by 28 U.S.C. § 157, whereby the bankruptcy court first considers the claims using its expertise in bankruptcy law and knowledge facts of the case and then "submit[s] proposed findings of fact and conclusions of law to the district court[.]" 28 U.S.C. § 157(c) (1)." *Id.*, p. 9:4-9.
- H. "The Court therefore finds it preferable for the bankruptcy court to continue handling pretrial matters. In the event that this case reaches trial, the issues of fact and law will be significantly narrowed and this Court will be well-equipped to oversee the case at that time."

STATUS CONFERENCE STATEMENT FILED BY DEBTORS

On February 10, 2016, Debtors filed their Status Conference Statement. Dckt. 91. Debtors repeat their allegations of federal court jurisdiction for this Adversary Proceeding and that the claims therein are core matters. Debtors also repeat their consent to the bankruptcy judge issuing all final orders and the judgments in this Adversary Proceeding.

STATUS CONFERENCE STATEMENT FILED BY PLAINTIFF TRUSTEE

The Plaintiff Trustee filed a Status Report on February 18, 2016. The Plaintiff Trustee reports that all Parties have exchanged initial disclosures.

STATUS CONFERENCE STATEMENT FILED BY DEFENDANT ATTORNEYS

Defendant Attorneys filed a Status Report on February 19, 2016. Dckt. 107. Defendant Attorneys state that all parties have exchanged their initial disclosures.

The Report recites that as between the Plaintiff Trustee and Debtors, the court approved a settlement in December 2015.

FINAL BANKRUPTCY COURT JUDGMENT

In the Second Amended Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 151, and 157(a) and (b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A) and (E). To the extent any claims are not core, Plaintiff Trustee consents to the bankruptcy judge entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims as of the February 25, 2015 Status Conference.

TAFI and the Debtors agree that federal jurisdiction exists for this Adversary Proceeding and that it is a core proceeding. To the extent any claims are not core, TAFI and Debtors consent to the bankruptcy judge entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims as of the February 25, 2015 Status Conference.

Defendant attorneys agree that federal jurisdiction exists for this Adversary Proceeding. While admitting that some of the claims are core proceedings, Defendant Attorneys do not consent to the bankruptcy judge

entering all final orders and judgments in this Adversary Proceeding for the Second Amended Complaint and all Counterclaims and Cross-Claims for non-core matters.

In its Answer and Counterclaim, Defendant Meyer Wilson Co., LPA denies, on information and belief, that the Bankruptcy Court (federal court) has jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. §§ 151, 157(a), and 1334, and the referral of bankruptcy cases to this court pursuant to General Orders 182 and 223 of the United States District Court for the Eastern District of California. Answer ¶ 2, Dckt. 14. Based on information and belief, Defendant-Attorneys also denies that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(A) and (E). Answer ¶ 3, *Id.* To the extent that this is not a core proceeding, Defendant-Attorneys state that they do not consent to the bankruptcy judge entering final orders and the judgment. *Id.*

In the Counterclaim Defendant-Attorneys affirmatively pleads that the Bankruptcy Court has jurisdiction over the claims raised in this Adversary Proceeding pursuant to 28 U.S.C. §§ 157 and 1334, because this Adversary Proceeding relates to the Chapter 7 bankruptcy case of Defendant-Debtors.

Identification of Core Matters

The complexity of identifying core and non-core matters is increase by there being several Counterclaims and Cross-Claims. The court's review of the claims yields the following initial identification of core and non-core matters in this Adversary Proceeding:

SECOND AMENDED COMPLAINT (DCKT. 44)	
CORE or CONSENT	NON-CORE No Consent

<p>1. Determination if Claims Are Property of Estate.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 541.</p> <p>2. Claim to Avoid Transfer - 11 U.S.C. § 549 - Debtors.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>3. Claim to Avoid Transfer - 11 U.S.C. § 549 - Defendant Attorney.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>4. Claim to Avoid Transfer - 11 U.S.C. § 549 - TAFI.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 549.</p> <p>5. Claim For Violation of Automatic Stay - All Defendant.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. §§ 362 and 105(a), and the inherent power of the bankruptcy court.</p> <p>6. Claim For Turnover and Accounting - 11 U.S.C. § 542 - Debtors.</p> <p>a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 542.</p>	<p>1. Claim For Professional Liability Damages - Defendant Attorney.</p> <p>a. Non-Core matter arising under State law for issues which remain after bankruptcy judge completes the core matter proceedings.</p>
<p>DEFENDANT ATTORNEYS' COUNTERCLAIM (DCKT. 56)</p>	
<p>CORE or CONSENT</p>	<p>NON-CORE No Consent</p>

1. Claim for determination of Bankruptcy Estate's Interest (if any) in the Arbitration Claim and rights relating thereto.

a. Core matter arising under the Bankruptcy Code, 11 U.S.C. § 541.

TAFI CROSS-CLAIMS (Dckt. 70)

CORE or CONSENT	NON-CORE No Consent
<p>1. Contractual Indemnification - Debtors.</p> <p style="padding-left: 40px;">a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p style="padding-left: 40px;">b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p> <p>2. Intentional and Negligent Misrepresentation - Cal. Civ. §§ 1709 and 1710 - Debtors</p> <p style="padding-left: 40px;">a. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p> <p>3. Equitable Indemnification and/or Contribution - Debtors</p> <p style="padding-left: 40px;">a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p style="padding-left: 40px;">b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p>	<p>None</p>

<p>4. Restitution or Unjust Enrichment - Debtors</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters, assets of Bankruptcy Estate received by Debtors, and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p> <p>b. Parties to TAFI Cross-Claims have consented to bankruptcy judge issuing all final orders and judgment.</p>	
DEBTORS' CROSS-CLAIM (DCKT. 72)	
CORE or CONSENT	NON-CORE No Consent
<p>1. Equitable Indemnification and/or Contribution - Defendant Attorneys</p> <p>a. Core matter arising in the bankruptcy case directly related to the core proceedings for determination of core matters and acceptance of Settlement for Bankruptcy Estate in the Second Amended Complaint.</p>	<p>1. Claim for Professional Liability - Defendant Attorneys</p> <p>a. No consent by Cross-Claim Defendant Attorneys.</p>

15. [09-94269-E-7](#) SUSHIL/SUSEA PRASAD
[15-9018](#) MF-2
FERLMANN V. PRASAD ET AL

CONTINUED MOTION TO COMPEL
AND/OR MOTION FOR SANCTIONS
1-26-16 [[80](#)]

No Tentative Ruling: The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Meyer Wilson and Meyer Wilson's counsel on January 27, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions is -----.

Stephen Ferlmann ("Plaintiff"), the Chapter 7 Trustee for the estate of Sushil Prasad and Susea Prasad ("Debtor"), filed the instant Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions on January 26, 2016. Dckt. 80.

The Plaintiff filed the instant Adversary Proceeding No. 15-09018 on May 29, 2015. Dckt. 1. The Plaintiff served Meyer Wilson Co. LPA ("Meyer Wilson") with Plaintiff's Request for Interrogatories - Set One and Request for

Production of Documents on August 27, 2015. The Plaintiff asserts that Meyer Wilson had until October 1, 2015 to respond. The Plaintiff gave a week extension at the request of Meyer Wilson. The Plaintiff asserts that on October 8, 2015, Meyer Wilson produced responses to both the interrogatories and request for documents. However, the Plaintiff argues that Meyer Wilson did not comply with the Federal Rules of Civil Procedure and objected to the requests on the basis of attorney-client privilege and/or work product doctrine. Furthermore, the Plaintiff asserts that Meyer Wilson did not produce a privilege log.

The Plaintiff received the privilege log and amended responses to the Request for Documents on October 16, 2015.

As to the interrogatories, Plaintiff argues that the responses are incomplete and evasive and the objections raised by Meyer Wilson are frivolous. The Plaintiff states that for most of the interrogatories answers, Meyer Wilson objected on the following grounds:

1. "Vague and ambiguous"
2. "Overbroad, unduly burdensome and oppressive"
3. "protected by the attorney-client privilege and/or work product doctrine"

The Plaintiff asserts that, because Meyer Wilson's responses are allegedly inadequate and its objections meritless, Meyer Wilson has waived any objections and must be ordered to full respond to the interrogatories listed on the separate document filed by Plaintiff in compliance with Local Bankr. R. 9014-2. Dckt. 82.

As to the request for documents, the Plaintiff begins by stating that the Debtor waived the protections provided by attorney-client privilege and work product doctrine pursuant to their attorney-client relationship with Meyer Wilson. On December 9, 2015, the court approved the settlement agreement between the Debtor and the Plaintiff in the underlying bankruptcy case which contained such waiver. Case No. 09-94269, Dckt. 148.

In light of this waiver, the Plaintiff asserts that the Plaintiff is entitled to the documents listed in the privilege log and Meyer Wilson should be ordered to produce them.

Plaintiff also requests that the court order Meyer Wilson to pay the attorney's fees and expenses of the Plaintiff due to Meyer Wilson's alleged improper objections, incomplete responses, and failure to provide the documents in the Privilege Log. The Plaintiff is seeking \$5,000.00 in reimbursement.

MEYER WILSON'S OPPOSITION

Meyer Wilson filed an opposition to the instant Motion on February 11, 2016. Dckt. 93.

Meyer Wilson first argues that Plaintiff did not attempt to meet and confer on Meyer Wilson's responses and document production until after the December 9, 2015 court approval of the Settlement Agreement between Debtor and

Plaintiff.

Meyer Wilson asserts that Plaintiff sent a meet and confer correspondence on December 11, 2015, claiming that because the Debtor agreed to waive the attorney-client privilege, Meyer Wilson must now amend their responses and produce the documents withheld on the basis of the attorney-client privilege and work product doctrine. Meyer Wilson alleges that there were no dates given to when Meyer Wilson should respond.

Meyer Wilson claims that the work product that Debtor had purportedly waived is inextricably intertwined with Meyer Wilson's clients who were also claimants in the Arbitration Claim but are not parties to the instant Adversary Proceeding and are not involved in the Debtor's legal malpractice claim. Meyer Wilson argues that it cannot produce the remaining documents identified in the privilege log because its non-party clients have not waived the privilege.

Due to the failure of Plaintiff to engage in good faith effort to resolve discovery disputes, Meyer Wilson asserts that the Motion should be dismissed. Meyer Wilson argues that, pursuant to Fed. R. Civ. P. 37, Plaintiff did not sufficiently engage and adequately certify that, prior to the instant Motion, Plaintiff made a good faith effort to resolve the disputes. Meyer Wilson argues that the December 11, 2015 letter alone is not sufficient to show a good faith effort, especially in light of Meyer Wilson allegedly contacting Plaintiff following the letter to meet and confer to resolve the disputes.

Additionally, Meyer Wilson claims that it has complied regarding Plaintiff's request for production of documents and has made all responsive documents, not subject to an objection, available to the Plaintiff. Meyer Wilson claims that it has produced all attorney-client correspondence between Meyer Wilson and Debtor to Plaintiff, as well as a supplemental privilege log. Meyer Wilson argues that the remaining documents that have been withheld are on the basis of work product and attorney-client privilege as these documents not only relate to Meyer Wilson's representation of the non-party clients who were also claimants in the Arbitration Claim. Due to the non-party clients not waiving their privilege, Meyer Wilson argues that it cannot produce those documents.

Meyer Wilson further alleges that it has provided complete and proper responses and objection to the Plaintiff's interrogatories. Meyer Wilson concedes that it did not adequately explain the basis for how the interrogatories were "vague and ambiguous," "overbroad, unduly burdensome and oppressive" and not relevant. However, Meyer Wilson claims that it attempted to meet and confer with the Plaintiff after the instant Motion was filed. Meyer Wilson asserts that it is working to supplement its responses to the interrogatories to address the concerns raised in the Motion.

As to the request that the court deem waived all of Meyer Wilson's objections and claims of privilege waived, Meyer Wilson asserts that this is improper. Meyer Wilson argues that it responded to the interrogatories and at the time the privilege had not been waived by the Debtor. As such, Meyer Wilson was under a duty to object on that basis and not provide responses to Plaintiff. The fact that the settlement between Plaintiff and Debtor does not retroactively make Meyer Wilson's prior objections meritless or improper justifying waiver of all objections. Meyer Wilson once again argues that the Plaintiff's letter on December 11, 2015 was not sufficient as a meet and confer

request.

Lastly, Meyer Wilson asserts that sanctions are premature and not warranted. Meyer Wilson reiterates that at the time of supplying the responses, the privilege had not been waived and that Meyer Wilson had complied with all discovery deadlines. Because the Plaintiff allegedly filed the instant Motion rather than attempting to meet and confer to settle the disputes, Meyer Wilson argues that sanctions are improper at this time.

PLAINTIFF'S REPLY

The Plaintiff filed a reply on February 18, 2016. Dckt. 100. The Plaintiff argues that Meyer Wilson continues to engage in a pattern of delay and has failed to respond fully to the discovery requests. The Plaintiff argues that it has acted in good faith to resolve the discovery disputes by offering a one-week extension for responses in October and then the letter on December 11, 2015. The Plaintiff asserts that it was not until February 10, 2016 that Meyer Wilson contacted Plaintiff to meet and confer. Plaintiff asserts that the delay was due to Meyer Wilson waiting for the District Court to rule on its Motion to Withdraw the Reference. It was not until the denial of the Motion to Withdraw the Reference that the Plaintiff alleges Meyer Wilson attempted to confer with Plaintiff.

Additionally, Plaintiff argues that Meyer Wilson should be ordered to produce the documents identified in the amended privilege log and to supplement its responses to the interrogatories. Plaintiff alleges that, to the extent the documents in the amended privilege log pertain to Meyer Wilson's representation of group two claimants in the Arbitration Claim, which the Debtor was a part of, and not specific to claimants other than the Debtor, Plaintiff is entitled to those documents. Specifically, the Plaintiff asserts that it is entitled at a minimum to the following documents that relate to group two claimants:

1. MWC000273-232
2. MWC000324
3. MWC000326-MWC000327
4. MWC000332-MWC000333
5. MWC000337
6. MWC000345
7. MWC000348
8. MWC000354
9. MWC000356
10. MWC000366
11. MWC000370
12. MWC000372

13. MWC000375-MWC000382
14. MWC000539-MWC000541
15. MWC000543

Plaintiff argues that if in these documents there is specific information with respect to a claimant other than the Debtor, Plaintiff argues that Meyer Wilson can redact that information.

Plaintiff asserts there are documents that pertain only to Debtor, relate to the Debtor's bankruptcy, and documents produced by experts or consultants with respect to the arbitration claim that should be provided. Specifically, the Plaintiff lists the following documents:

1. MWC000330
2. MWC000349-MWC000350
3. MWC000577-MWC000580
4. MWC000634-MWC000669

SUPPLEMENTAL DECLARATION OF KRISTIN IVERSEN

Meyer Wilson filed the supplemental declaration of Kristin Iverson on February 19, 2016. Dckt. 104. Ms. Iverson testifies that Meyer Wilson hand served amended interrogatory responses as well as an additional document originally withheld on the basis of the attorney-client privilege between Meyer Wilson and its attorney Kathy Phelps an February 19, 2016.

Ms. Iverson also asserts that Meyer Wilson has not purposefully attempted to hinder discovery. Rather, Ms. Iverson claims that Meyer Wilson acted with the intent of protecting the privilege of clients in the arbitration claim that had not waived their privilege.

Ms. Iverson attaches the February 12, 2016 email chain between Ms. Iverson and Plaintiff's counsel and the amended interrogatory and document production responses. Dckt. 105, Exhibit A and B.

APPLICABLE LAW

Discovery

Federal Rule of Civil Procedure 37(a)(1), made applicable in bankruptcy adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Federal Rule of Civil Procedure 37 Civil Rule 37(c) sanctions the failure to supplement discovery responses.

The certification requirement of Federal Rule of Civil Procedure 37(a)(1) was described in *Shuffle Master v. Progressive Games*, 170 F.R.D. 166

(D. Nev. 1996) as comprising two elements:

[T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two sub components must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170. The court went further, stating that "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" 170 F.R.D. at 171.

If the party on whom the interrogatories were served responds by serving objections to some or all of the interrogatories, or serves answers that the interrogating party considers evasive or incomplete, and if the propounding party has tried unsuccessfully to negotiate a resolution of the dispute, a motion for an order compelling answers may be appropriate. 7-37 Moore's Federal Practice, § 37.02 (Matthew Bender 3d ed.)

Federal Rule of Civil Procedure 37(a)(3) and Federal Rule of Bankruptcy Procedure 7037 provide that upon the failure to provide a Response to Interrogatories or Production of Documents the court may compel such Responses and Productions, and order appropriate sanctions. The sanctions which may be ordered by the court include:

- (1) directing that the matters or facts which are the subject of the discovery are established for the adversary proceeding as asserted by the requesting party;
- (2) prohibiting the party failing to produce the discovery from supporting or opposing designated claims or defendants, or introducing designated matters into evidence with relate to the discovery;
- (3) Striking pleadings (including the Answer), in whole or in part;
- (4) Issuing a default judgment against the party failing to provide the Responses or Produce the Documents; or
- (5) Treating as contempt of a federal court order the failure to comply with the order to provide Responses to the Interrogatories or Produce the Documents.

For a party seeking reasonable payment of expenses in bringing a motion for an order to compel discovery, Federal Rule of Civil Procedure Rule 37(a)(5) states "If the motion is granted-or if the disclosure or requested discovery is provided after the motion was filed-the Court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movement's reasonable expenses incurred in making the motion,

including attorney's fees".

Sanctions and Contempt

Bankruptcy Courts have the jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see also 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings file with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or sua sponte by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A Bankruptcy Court is also empowered to regulate the practice of law before it. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.* 501 U.S. 32,43 (1991); see also *Lehtinen*, 564 F.3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

DISCUSSION

To begin, the court first starts with the Statement filed by the Plaintiff, in compliance with Local Bankr. R. 9014-2, which outlines the discovery responses the Plaintiff alleges are insufficient.

1. Interrogatories

a. No. 1:

i. Interrogatory: "Please state the full name, address, job title and employer of each Person answering and assisting in answering these Interrogatories."

ii. Response: "Meyer Wilson Co., LPA with the assistance of its attorneys of record Murphy Pearson Bradley & Feeney."

b. No. 7:

- i. Interrogatory: Do You contend that the Debtors breached any obligation or duty under any contract between You and the Debtors?"
 - ii. Response: "Responding Party objects to this request on the grounds that it vague and ambiguous. Responding Party further objects to the extent that it requests information that is protected by the attorney-client privilege and/or work product doctrine. Responding Party objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive. Responding Party objects to this interrogatory on the ground that the information sought is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence."
- c. No. 8:
- i. Interrogatory: "Do You contend that the Debtors failed to follow any instructions or directions, issued by You, that adversely affected the Arbitration Claim?"
 - ii. Response: "Responding Party objects to this request on the grounds that it vague and ambiguous. Responding Party further objects to the extent that it requests information that is protected by the attorney-client privilege and/or work product doctrine. Responding Party objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive. Responding Party objects to this interrogatory on the ground that the information sought is not relevant to the subject matter of the action and is not reasonably calculated to lead to the discovery of admissible evidence."
- d. No. 9:
- i. Interrogatory: "Please state the full name, mailing address, e-mail address and telephone number of each Person, having any knowledge of the relevant facts relating to the basis of this adversary proceeding, the cause thereof, or the damages resulting therefrom."
 - ii. Response: "Witnesses include the Prasads, and the attorneys and staff employees of Meyer Wilson Co., LPA. The relevant contact information of the witnesses are known to the Propounding Party."
- e. No. 11:
- i. Interrogatory: "In connection with Your representation of the Debtors in the Arbitration Claim, did you consult with any expert? If so, please provide:
 - (1) The name, mailing address, e-mail address and telephone number of such expert;

- (2) The name of the employee, agent, representative, attorney or investigator of You who sought such expert's opinion and the date such opinion was sought;
- (3) The opinion, whether tentative, preliminary, or final, rendered by such expert, and the date such opinion was rendered;
- (4) Please provide copies of any such expert's writing, documents or reports, as well as copies of your writings, documents or memoranda about such expert's opinion;
- (5) If such expert did not prepare a writing, document or report concerning the investigation or opinion, whether You prepared a writing, document or memorandum about such experts opinion."

ii. Response: "Responding Party objects on the grounds that it is vague and ambiguous as to the term 'consult' and 'expert'. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney - client privilege and/or work product.

Without waiving and subject to the foregoing, Responding Party responds as follows: Meyer Wilson Co., LPA retained expert witness {P. Richard Evans, 9450 N. Meridian Street, Suite 300, Indianapolis, IN 46260 solely to calculate damages in connection with Meyer Wilson Co., LPA's representations of the Prasads. Meyer Wilson Co. LPA will produce documents in its possession in response to the above interrogatory to the extent the request is not objectionable, if any."

f. No. 13:

- i. Interrogatory: "Please describe all Communications between You and attorney Kathy Phelps regarding the Debtor's bankruptcy. For each Communication, state its substance, identify the date, all Persons in attendance, the location, and all documents discussed or referred to.
- ii. Answer: "Responding Party objects on the grounds that it is vague and ambiguous. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product. Kathy Phelps was retained as a legal consultant in the FINRA arbitration and was not disclosed or used as an expert witness in that action."

- g. No. 15:
- i. Interrogatory: "Please state Your opinion as to whether the settlement of the Arbitration Claim for \$105,000 was fair and reasonable and state all facts in support of your opinion."
 - ii. Answer: "Responding Party objects on the grounds that it is vague and ambiguous. Responding Party further objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product.

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Based on 15 years' experience representing approximately 1,000 investors with claims against brokerage firms in FINRA arbitration, including numerous cases similar to claims pursued in this underlying claim, this settlement was extremely fair and reasonable."

- h. No. 17:
- i. Interrogatory: "Please identify with particularity when, where and how You were notified of the Debtors' bankruptcy."
 - ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product."

- i. No. 19:
- i. Interrogatory: "Describe all Communications between the Debtors and You regarding the underlying facts supporting the Arbitration Claim, including their investments with Vincent Thakur Signh. For each Communication, state its substance, identify the date, all Persons in attendance, the location, and all documents discussed or referred to."
 - ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product.

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Meyer Wilson Co., LPA does not recall exact specifics with regard to the date and substance of all communications with the Prasads."

- j. No. 20:
- i. Interrogatory: "Please describe with particularity all amounts, dates, and methods by which You received

payments from Transamerica in connection with the Arbitration Claim."

- ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product. Responding Party objects to this request on the grounds that it is vague and ambiguous and overbroad.

Without waiving subject to the foregoing objections, Responding Party responds as follows: Transamerica Financial Advisors, Inc. sent a check via Federal Express to Meyer Wilson Co., LPA on May 16, 2013 relating to the Arbitration Claim. The amount of the payment is confidential, as it relates not only to the Prasads, but to other non-parties to this lawsuit."

k. No. 22:

- i. Interrogatory: "Please identify in detail all written, recorded or oral statements that You have obtained from the Debtors in connection with the Arbitration Claim, including the date the statement was obtained and the name of the Person obtaining the statement."

- ii. Answer: "Responding Party objects to this request to the extent that it requests information that is protected by the attorney-client privilege and/or work product, or other applicable privilege.

Without waiving and subject to the foregoing objections, Responding Party responds as follows: Meyer Wilson Co., LPA does not recall exact specifics with regards to the date of all communications with the Prasads."

2. Request for Documents

- a. The Plaintiff asserts that Meyer Wilson submitted a Privilege Log and is required to provide the documents listed in the Privilege Log because the Debtors waived all confidentiality and privileges pursuant to their attorney-client relationship with Meyer Wilson as detailed in the Settlement Agreement.

Dckt. 82.

The Plaintiff relies on the Settlement Agreement between the Plaintiff and the Debtor as grounds that the attorney-client privilege and confidentiality have been waived. On November 12, 2015, the Plaintiff filed a Motion to Approve Settlement Agreement in the underlying bankruptcy case. Case No. 09-94269, Dckt. 139. The court approved the settlement on December 3, 2015. Case No. 09-94269, Dckt. 139. The specific provision of the settlement which is the heart of the instant Motion is § 1.3 which states:

- 1.1 Debtors shall pay to the Trustee the sum of \$26,000.00 in full and complete settlement of the claims asserted

against the Debtors in the Adversary Proceeding. Receipt of said payment is acknowledged.

1.2 The Debtors shall cooperate with the Trustee and Trustee's Counsel in testifying to the facts of the Adversary Proceeding, the Arbitration Claim, and Meyer Wilson's representations of the Debtors, including but not limited to:

(a) Providing to the Trustee and Trustee's counsel all documents including but not limited to writings, memoranda, notes, correspondence, statements, expert reports, pleadings, financial records, checks, and agreements in their possession relating to the arbitration claim, the Adversary Proceeding, and Meyer Wilson's representation of the Debtors.

(b) Cooperation with the Trustee and Trustee's counsel in obtaining all papers and property (client file), including but not limited to writings, memoranda, notes, correspondence, statements, expert reports, pleadings, financial records, checks, and agreements held with Meyer Wilson with respect to their representation of the Debtors.

1.3 The Debtors hereby waive confidentiality and privileges pursuant to the attorney-client relationship with Meyer Wilson, and consent to the disclosure of information to the Trustee and Counsel for Trustee, which are confidential and privileged. The Debtors waive the attorney-work product privilege in all respects.

Case No. 09-94269, Dckt. 143, Exhibit C. The settlement is signed by the Debtor and by the Debtor's attorney.

February 25, 2016 Hearing

After reviewing the papers in connection with the instant Motion, it is clear to the court that the professional discourse between some counsel and parties in this Adversary Proceeding has broken down. While parties and their counsel may elect to so engage in such conduct, it does not come without a cost. (Whether it be sanctions, monies expended unproductively for attorneys' fees, or the ultimate fees which attorneys may be paid by their clients.)

At the hearing, the Parties were ordered to meet and confer concerning the supplemental responses and further proposed responses by Defendant Attorneys. On or before March 31, 2016, the Parties were ordered to file supplemental pleadings advising the court of the issues resolved, additional proposals for responses by Defendant Attorneys, and replies to such additional proposed responses.

The matter was continued to 2:00 p.m. on April 7, 2016. Dckt. 114.

PLAINTIFF'S STATUS REPORT

The Plaintiff filed a status report on March 31, 2016. Dckt. 117. The Plaintiff states that the Parties have met and conferred numerous times in order to resolve the discover disputes pertaining to documents requested by Plaintiff.

As to the documents concerning Group 2 Claimants, the Plaintiff asserts that he is yet to receive the documents previously requested. The Plaintiff asserts that the Defendant is only willing to produce documents pertaining to Group 2 claimants if the parties enter into a stipulated protective order requiring that the documents be filed under seal if submitted to the court. The Plaintiff argues that the protective order is not necessary and that any third party would have their names and other identifying information redacted prior to submission to Plaintiff. However, the Plaintiff, in the interest of resolving the issue, agrees to enter into a protective order. The Plaintiff states that the Parties are circulating a dfat of such stipulation currently.

As to the document pertaining to Kathy Bazoian Phelps, the Plaintiff states that the Defendant represented that Ms. Phelps was hired as a consultant in the Financial Industry Regulatory Authority arbitration action. Dckt. 82. However, the Plaintiff asserts that after the instant Motion, Defendant produced an opinion letter from Ms. Phelps to Defendant, revealing that Ms. Phelps was not hired as a consultant but rather in connection with several claimants' personal bankruptcies. The Plaintiff asserts that the Defendant misrepresented Ms. Phelps' services prior and it was not until the instant Motion that the Defendant produced this letter. Additionally, the Plaintiff asserts that Defendant has been unwilling to produce certain correspondence and the retainer agreement between Defendant and Ms. Phelps on the grounds that the documents were subject to the attorney-client privilege. The Plaintiff argues that this is baseless because Ms. Phelps was retained in connection with several of the claimants' bankruptcies, including the Debtor's own bankruptcy.

The Plaintiff does state that the Defendant is now willing to produce the requested correspondence and retainer agreement, subject to a stipulated protective order.

Lastly, the Plaintiff reiterates his request for attorney's fees pursuant to Fed. R. Civ. P. 37(a)(5)(A). Additionally, Plaintiff is seeking additional fees in compensation for its continuing efforts to receive the documents requested. Plaintiff states that it will file an updated itemization of fees.

DEFENDANT'S SUPPLEMENTAL BRIEF

The Defendant filed a supplemental brief on March 31, 2016. Dckt. 119.

The Defendant states that the Parties are currently working on finalizing a stipulated protective order. The Defendant has stated that it will produce the documents once the order is finalized and filed. The Defendant states that the stipulated protective order must be approved and signed by the Debtors and Transamerica. The Defendant anticipates that the protective order will be filed shortly after the April 7, 2016, hearing.

The Defendant argues that it has attempted to meet and confer with the

Plaintiff in good faith and provide complete and proper responses. The Defendant asserts that the award of attorney's fees would be improper because they are unduly punitive and are unwarranted. The Defendant argues that its initial responses were based on the attorney-client privilege that Debtors had not yet waived, as well as the attorney-client privilege and work product relating to its other clients and its own attorney, Kathy Phelps. The Defendant argues that the email sent by the Plaintiff on December 11, 2015 was ambiguous and did not qualify as an attempt to meet and confer. The Defendant argues that it has attempted in good faith to resolve the issues arising in the Motion to Compel and that the parties are working on a stipulated protective order.

APRIL 7, 2016 HEARING

XXXXXX

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 Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions filed by Stephen Ferlmann, the Plaintiff-Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion For Order Compelling Meyer Wilson Co. LPA to Respond to Plaintiff's Interrogatories, Request for Production, and Sanctions is
XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

16. [15-90984-E-7](#) [16-9005](#) ANTONIO CANTO AND MARIA PEREIRA STATUS CONFERENCE RE: COMPLAINT
ORNELAS TRANSPORTATION, INC. 2-5-16 [[1](#)]
V. CANTO ET AL

Plaintiff's Atty: Eric J. Sousa
Defendant's Atty: Eric D. Farrar

Adv. Filed: 2/5/16
Answer: 3/4/16

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud

Notes:
Joint Discovery Plan filed 3/28/16 [Dckt 11]

17. [14-91596-E-7](#) [16-9004](#) TIMOTHY BROWN STATUS CONFERENCE RE: COMPLAINT
U.S. TRUSTEE V. BROWN 2-1-16 [[1](#)]
ADV. CASE DISMISSED:
03/09/16

Final Ruling: No appearance at the April 7, 2016 Status Conference is required.

Plaintiff's Atty: Edmund Gee
Defendant's Atty: unknown

Adv. Filed: 2/1/16
Answer: none

Nature of Action:
Objection/revocation of discharge

The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.

Notes:
Case closed 3/28/16