UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 27, 2015 at 10:00 a.m.

---

1. 09-42310-A-12 ERIC ANTHEUNISSE — MOTION TO DISMISS CASE 3-26-15 [221]
JPJ-2

Tentative Ruling: The motion will be granted.

The chapter 12 trustee moves for dismissal because the debtor is $29,200 delinquent under the terms of the chapter 12 plan, representing approximately four plan payments. Before the April 27 hearing on the motion, another plan payment of $6,300 will become due.

The debtor responds to the motion, claiming that he will be current on plan payments before the hearing on this motion. He claims this will complete all payments under the plan. However, at this point the delinquency is outstanding.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

As the debtor has not made approximately four payments under the plan, he is in material default for purposes of 11 U.S.C. § 1208(c)(6). This is cause for dismissal.

2. 13-25330-A-12 PAUL MENNICK — MOTION TO DISMISS CASE 3-26-15 [148]
JPJ-1

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

The chapter 12 trustee moves for dismissal because the debtor is $12,020 delinquent under the terms of the chapter 12 plan, representing approximately three plan payments. Before the April 27 hearing on the motion, another plan payment of $3,800 will become due.

The debtor responds to the motion, admitting the delinquency but contending that with the opposition he has filed a first modified plan and a motion to have that modified plan confirmed.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

As the debtor has not made approximately three payments under the plan, he is in material default for purposes of 11 U.S.C. § 1208(c)(6). This is cause for dismissal.

Although the debtor filed a first modified plan and a motion to have that plan confirmed on April 13, 2015, this is not a viable defense to the dismissal motion at least in the absence of evidence that the modified is likely to be feasible. Therefore, the court will not allow this case to remain pending for another 43 days, after the April 27 hearing, on the chance of confirming another plan in this case. And, the debtor has known of the delinquency under the plan for months now, given that he is at least three monthly plan payments behind. The motion will be granted and the case will be dismissed.

3.	15-20034-A-11 ET-3	C & N LANDSCAPE MAINTENANCE, INC.	MOTION TO USE CASH COLLATERAL 3-20-15 [31]

Tentative Ruling: The motion will be denied without prejudice.

The debtor is seeking approval of a stipulation with the IRS for its use of cash collateral securing an $85,054 claim held by the IRS.

Under the terms of the stipulation, the debtor will be allowed to use the cash proceeds from its operation to fund business operations. In exchange, the IRS shall have a replacement lien on post-petition cash proceeds, to the same extent, priority, and validity of the lien on cash collateral as of the petition date, to the extent such cash collateral is utilized by the debtor. The debtor shall also pay all post-petition taxes of the business, as incurred. The stipulation also requires that the debtor keep all cash collateral, after payment of monthly ordinary business expenses, in the DIP operating account, "subject to the stated limits of the Budget." Docket 35 at 3.

There are four ambiguities or inconsistencies in the subject stipulation.

First, there is no budget with any of the pleadings to the motion, even though the stipulation refers to a budget. Docket 35 at 3.

Second, while the motion itself alludes to the debtor being able to make payments to the IRS, the court is not clear whether the stipulation actually anticipates periodic payments to the IRS. On one hand, the stipulation contains a default provision. On the other hand, the court sees no express provision in the stipulation requiring periodic payments by the debtor to the IRS.

Third, although the stipulation does not set a well-defined period for the debtor's cash collateral use, the stipulation provides that the order allowing use shall terminate: (1) upon default, if not cured within five days, (2) upon the granting of a motion for relief from the automatic stay in favor of a creditor asserting a lien against the cash collateral, or (3) upon the conversion, dismissal or closing of the case. Docket 35 at 5.

Fourth, the stipulation states nothing the termination of the use of cash collateral in the event of plan confirmation. Under the stipulation, cash collateral use will continue post-confirmation. This makes no sense, as the terms of the plan will govern after confirmation. Cash collateral is designed to enable the debtor to reach plan confirmation.

4. 10-24351-A-13 ROBERT/MICHELLE REID MOTION FOR
12-2392 JUDGMENT ON THE PLEADINGS
REID ET AL V. BANK OF AMERICA, N.A. ET AL., 2-25-15 [153]

Tentative Ruling: The motion will be denied.

The movants, Wells Fargo Bank and Nationstar Mortgage, L.L.C., ask for judgment on the pleadings on all causes of action. The movants assert that the claims are barred by judicial estoppel and that the complaint does not support causes of action against Wells Fargo or Nationstar. Bank of America has filed a joinder to the motion, asking for dismissal of the claims asserted against it.

The plaintiffs, whose residence is in El Dorado Hills, California, filed the underlying chapter 13 case on February 24, 2010. Case No. 10-24351. Their chapter 13 plan was confirmed on April 19, 2010. Docket 25. The court's order confirming the plan was amended on June 25, 2010. Docket 40.

The claims bar date for nongovernmental creditors was June 30, 2010. Docket 14 at 1.

As of the petition date, the plaintiffs' real property was subject to two mortgages, the first in favor of Bank of America and the second in favor of National City Bank. This dispute pertains to Bank of America's first mortgage and its payment of pre-petition property taxes that were being paid through the plaintiffs' confirmed chapter 13 plan.

The plan provides that El Dorado County's $22,549.85 pre-petition property tax claim would be paid through the plan. Docket 84 at 4; see also Docket 41 at 6. From November 2010 through 2011, the plaintiffs continued to receive tax delinquency and sale notices from El Dorado County on account of their unpaid property taxes. Docket 84 at 4-5. When the plaintiffs called the County, they would be told to ignore the notices, given their confirmed chapter 13 plan.

In October 2011, Bank of America sent a letter to the plaintiffs, telling them that the bank paid all their outstanding property taxes and that an escrow account was established for future property taxes. Docket 84 at 6. Bank of America had paid over $20,000 in back property taxes to the County in October 2011. In another letter, dated about the same time, Bank of America told the plaintiffs that their escrow balance had a shortfall of $34,736.69. As a result, Bank of America informed the plaintiffs by a November 14, 2011 letter that their monthly payments were being increased to $6,630.50. Docket 84 at 6. Bank of America later told the plaintiffs in another letter that their monthly mortgage payments were being increased to $6,766.14 as of January 1, 2012. Docket 84 at 3-7.

The plaintiffs were unable to resolve the increase in their mortgage payment by Bank of America and the bank began sending collection notices to the plaintiffs when the plaintiffs did not pay the increased mortgage payment amount. Docket 84 at 8-9.

The plaintiffs initiated this adversary proceeding by filing a complaint against Bank of America and the County on June 19, 2012. Docket 1.

While the movants claim that in September 2012 Bank of America transferred its beneficial rights under the deed of trust encumbering the subject property to Wells Fargo Bank, the complaint asserts that Bank of America actually transferred the note secured by the property to Wells Fargo Bank. Docket 84 at

3; Docket 153 at 2.

On November 12, 2012, Bank of America filed a proof of claim for Wells Fargo Bank, disclosing a pre-petition arrearage, based on a late charge incurred in January 2010, for $135.64. POC 15-1. On February 14, 2013, Wells Fargo Bank filed a notice of post-petition mortgage fees, expenses, and charges, adding a $300 fee to its claim for preparation of the proof of claim. POC 15-1. On September 23, 2013, as part of POC 15-1, a notice of transfer of claim was filed, informing the court that Wells Fargo Bank is transferring some interest in the claim to Nationstar Mortgage, LLC. POC 15-1; see also Docket 113.

In September 2013, Bank of America transferred its servicing rights to the plaintiffs' loan to Nationstar. Docket 153 at 2.

On September 29, 2014, the plaintiffs filed an amended complaint, adding Wells Fargo Bank and Nationstar as defendants, and dismissing the County from the complaint. Docket 84.

The complaint asserts three causes of action against defendants Bank of America, Wells Fargo Bank and Nationstar: (1) violation of the automatic stay, (2) objection to the defendants' proof of claim (for violation of Fed. R. Bankr. P. 3001, 3002.1 and 3007), which is now in the name of Nationstar (POC 15-1), (3) breach of contract, breach of the chapter 13 plan, and breach of the covenants of good faith and fair dealing. Docket 84 at 15-20. The second amended complaint also contains a fourth claim asserted against Bank of America under the Real Estate Settlement Procedures Act. Docket 84 at 20.

On April 6, 2015, the court entered orders denying Wells Fargo Bank's motion to dismiss the chapter 13 case and overruling Wells Fargo Bank's objection to the chapter 13 trustee's final report and account, in the underlying chapter 13 case. Case No. 10-24351, Dockets 147, 149, 151, 152. On April 14, 2015, the court entered an order approving the trustee's final report and account, and discharging the trustee. Case No. 10-24351, Docket 156. On April 15, 2015, the court entered its notice of intent to enter chapter 13 discharge for the plaintiffs. Case No. 10-24351, Docket 155.

The motion will be denied for several reasons.

First, the court will strike Bank of America's joinder to the motion. The civil and bankruptcy rules do not allow for the joinder of parties to motions or oppositions to motions. Also, the joinder was filed late, on April 13, 2015 only 14 days prior to the hearing on the motion. This violates Local Bankruptcy Rule 9014-1(f)(2)(A), which prohibits the use of the alternative procedure under Rule 9014-1(f)(2) "for a motion filed in connection with an adversary proceeding."

Second, the motion, as brought under Rule 12(c), is untimely and improperly presents matters outside the pleadings.

Federal Rule of Civil Procedure 12(c) provides, "[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings."

This motion for judgment on the pleadings is untimely. The purpose of a motion for judgment on the pleadings under Rule 12(c) is "to test the sufficiency of the complaint, without requiring the parties to engage in expensive and time-consuming discovery and without reaching the merits of the case."

Marsilio v. Vigluicci, 924. F. Supp. 2d 837, 847 (N.D. Ohio 2013).

Discovery in this case was opened on January 26, 2015 and discovery cut-off is May 26, 2015. Dockets 106, 112. The parties have nearly completed all discovery. They are three-quarters of the way through the discovery period. Adjudication of the motion at this time then would not do much, if any, to alleviate the delay and expense of discovery.

Third, the motion will be denied also because it is not truly for judgment on the pleadings under Rule 12(c). It is a disguised summary judgment motion.

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The motion does not refer strictly to the pleadings. It keeps referring to evidence or the lack of evidence from the plaintiffs. For example, page 7 of the motion states "plaintiffs have made no showing of actual damages." Page 9 of the motion states, "plaintiffs have presented no evidence of facts showing how they were damaged." Docket 153. Evidence is not the issue on a motion for judgment on the pleadings.

The motion improperly presents matters outside the pleadings. For instance, the motion refers to the plaintiffs' Schedule B, amendments to the plaintiffs' schedules, and failures to list claims in the schedules. Docket 153 at 3. Such facts are not in the pleadings. The motion also relies on the substance of several documents, which are the subject of a request for judicial notice. Docket 155. For example, the motion refers to text within the assignment of the deed of trust and the notice of transfer of servicing rights. Docket 153 at 2.

The court will exercise its discretion not to allow matters outside the pleadings in connection with this motion. Hence, there will be no conversion of this motion to one for summary judgment under Rule 12(d).

Fourth, even if the court were to consider matters outside the pleadings, effectively converting this motion into one for summary judgment, such motion would still be denied. It would be denied because discovery is still open. Discovery cut-off is still a month away, on May 26, 2015. The court will not consider the evidence of the motion when the probability of newly discoverable evidence is still open.

Moreover, if the court were to treat this as a summary judgment motion, it would be denied also because it violates Local Bankruptcy Rule 7056-1, which requires that:

"Each motion for summary judgment or partial summary judgment shall be accompanied by a 'Statement of Undisputed Facts' which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish that fact. The moving party shall be responsible for the filing with the Court

of all evidentiary documents cited in the moving papers."

The motion is not accompanied by a statement of undisputed facts.

Fifth, the movants' judicial estoppel argument is without merit.

Judicial estoppel bars the prosecution of a claim by a debtor who previously failed to disclose the claim in his bankruptcy schedules. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784-85 (9th Cir. 2001).

"In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action. See, e.g., Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir.1993) .... The reason is that the plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is estopped from representing in the lawsuit that a claim does exist. That basic rule comports fully with the Supreme Court's decision in New Hampshire [v. Maine, 532 U.S. 742 (2001)]: (1) the positions are clearly inconsistent ('a claim does not exist' vs. 'a claim does exist'); (2) the plaintiff-debtor succeeded in getting the first court (the bankruptcy court) to accept the first position; and (3) the plaintiff-debtor obtained an unfair advantage (discharge or plan confirmation without allowing the creditors to learn of the pending lawsuit). The general rule also comports fully with the policy reasons underlying the doctrine of judicial estoppel: to prevent litigants from playing 'fast and loose' with the courts and to protect the integrity of the judicial system. New Hampshire, 532 U.S. at 749-50, 121 S.Ct. 1808."

Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d 267, 271 (9th Cir. 2013).

The debtor must know enough facts to know that a claim exists during the pendency of the bankruptcy case. Hamilton at 784-85.

The movants have not established judicial estoppel. The plaintiffs have not taken positions that are "clearly inconsistent." Specifically, the plaintiffs have not taken a previously inconsistent position that was accepted or relied upon by the court. The claims in the second amended complaint did not arise until October 2011, after the plaintiffs' chapter 13 plan was confirmed in April 2010. Docket 84.

Thus, the instant lawsuit was not "pending" or "soon-to-be-filed" at any time before the plan was confirmed or before the court did anything in the case to rely on representations from the plaintiffs. The plaintiffs could not have scheduled the claims prior to confirmation because the claims had not accrued prior to confirmation.

More important, the claims against Wells Fargo Bank and Nationstar did not begin accruing until after this adversary proceeding was even filed, namely, until Bank of America transferred its interests in the mortgage to them, in September 2012 and September 2013, respectively.

Therefore, there was no representation the plaintiffs could have made about the claims against Wells Fargo Bank and Naionstar to anyone prior to September 2012, much less anyone having the opportunity to rely on such representations. There is no factual basis for judicial estoppel here.

The court also notes that the motion misguidedly cites judicial estoppel precedent arising in chapter 7 cases. Docket 153 at 4. Although the judicial estoppel analysis of a chapter 7 case may be different, the underlying case is a chapter 13. And, the subject claims did not arise pre-petition, as those would be the only relevant claims in a chapter 7 setting. They arose post-petition and, more so, post plan confirmation. How could the plaintiffs then have disclosed those claims in their schedules? The motion makes no sense on this point.

Conversely, it is the defendants who likely are estopped from claiming that they are owed a debt on account of pre-petition property taxes. It was the defendants - including Wells Fargo Bank and Nationstar as successors in interest to Bank of America - that did not file a proof of claim for pre-petition property taxes prior to the June 30, 2010 claims bar date. As a result, the plaintiffs' plan was confirmed without provision for payment of pre-petition property taxes to the defendants. Now, that the defendants are seeking to collect the pre-petition property taxes from the plaintiffs - outside the bankruptcy case and outside the confirmed chapter 13 plan - they are the ones taking an inconsistent position.

As the court confirmed the plan by relying on the absence of a proof of claim from the defendants for pre-petition property taxes, and the payments the plaintiffs were making into the plan for the taxes were eventually disbursed to general unsecured creditors, it is the plaintiffs that have been prejudiced by the defendants' inconsistent positions. The funds the plaintiffs had allocated for payment of the pre-petition property taxes did not pay the taxes.

Sixth, the breach of contract arguments make no sense either. The second amended complaint asserts that Wells Fargo Bank obtained an interest in the note, meaning that when it started enforcing the note, Wells Fargo Bank was in privity with the plaintiffs. Docket 84 at 3. As Wells Fargo Bank's agent and the party enforcing and servicing the note on behalf of Wells Fargo Bank, Nationstar is also viably named as a defendant to that cause of action.

Seventh, the court rejects the absence of actual damages assertion, as related to the stay violation claims. Actual damages are a reasonable inference from the defendants' violation of the automatic stay and breach of the plaintiffs' confirmed chapter 13 plan, their collection pre-petition property taxes from the plaintiffs outside the bankruptcy case and outside the plan.

Eight, Bank of America paid the pre-petition property tax claim of El Dorado County outside the plan. While the court may agree that evidence of claim transfer may not have been necessary under Fed. R. Bankr. P. 3001(e)(2), the defendants' unilateral increase of mortgage payments supports a claim for violation of Rule 3002.1(b), which requires that:

"The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due."

While the court agrees with the movants that secured creditors are not required to file proofs of claim in order for their lien to be protected, they were required to file a proof of claim for pre-petition arrears that were to be paid by the plan, by the claims bar date. Docket 153 at 8 (citing Dewsnup v. Timm, 502 U.S. 410, 417 (1992)). The defendants did not do this.

Instead, the defendants sought to collect a pre-petition property tax arrearage claim directly from the plaintiffs - outside of the bankruptcy process, by creating an escrow account and by increasing the plaintiffs' mortgage payments to satisfy the shortfall in that account. The defendants also added bankruptcy fees, litigation management fees, miscellaneous fees and foreclosure fees to the plaintiffs' new mortgage payments. Docket 84 at 17.

Rule 3002.1(i) also provides that "If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

"(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

"(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure."

The foregoing establishes that the plaintiffs have standing to challenge violations of Rule 3002.1. The court is unaware of and the defendants have not cited to any binding legal authority prescribing that there is no private right of action under Rule 3002.1.

Finally, the proof of claim filed on November 12, 2012 by Bank of America for the pre-petition late charge is late, as the claims bar date was on June 30, 2010. The plaintiffs have completed their confirmed chapter 13 plan and the funds that they had allocated for payment of pre-petition arrears under the plan, such as the defendants' proof of claim and the back property taxes, have been disbursed to general unsecured creditors already. These facts adequately support an objection to the defendants' proof of claim, implicating Rule 3007.

As the movants are not parties to the RESPA claim, addressing that claim is unnecessary.

5. 10-24351-A-13 ROBERT/MICHELLE REID — STATUS CONFERENCE
12-2392 — 9-29-14 [84]
REID ET AL V. BANK OF AMERICA, N.A. ET AL.,

Tentative Ruling: None.

6. 10-41061-A-7 CONSTANCE AGEE — ORDER TO SHOW CAUSE
14-2336 — 3-30-15 [87]
AGEE V. RESIDENTIAL CREDIT SOLUTIONS INC

Tentative Ruling: This order to show cause will be discharged as moot.

This order to show cause was issued because the plaintiff filed a motion to withdraw the reference on March 16, 2015 (Docket 68), but without paying the $176 filing fee.

However, the claims in this adversary proceeding were dismissed against each defendant on March 31, 2015 (Docket 92), April 2, 2015 (Docket 96), and on April 6, 2015 (Docket 100). Given the dismissal of all claims in this adversary proceeding, this order to show cause is now moot. It will be discharged as such.

7. 14-28468-A-11 BUALAI WHITE — MOTION TO VALUE COLLATERAL
MRL-8 — 2-15-15 [80]
VS. FEDERAL HOME LOAN MORTGAGE CORP. (FREDDIE MAC) AND JPMORGAN CHASE

Tentative Ruling: This motion has been resolved by stipulation. Dockets 142 & 144.

8. 15-21575-A-11 BR ENTERPRISES, A CALIFORNIA PARTNERSHIP — MOTION TO EMPLOY
HLC-1 — 3-27-15 [30]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party 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 as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor requests authority to employ George Hollister (dba Hollister Law Corporation) as bankruptcy counsel for the estate. The movant's compensation will be based on an hourly fee arrangement. The movant will assist the debtor with the administration of the chapter 11 estate, including, without limitation, advising the debtor about rights and obligations; representing the debtor at hearings; negotiating with creditors; assisting with the preparation and prosecution of motions, reports, statements, and chapter 11 plan, as necessary to the administration of the estate; and addressing post-confirmation issues.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions."

The court concludes that the terms of employment and compensation are reasonable. The movant is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved.

9. 15-21575-A-11 BR ENTERPRISES, A CALIFORNIA PARTNERSHIP — MOTION TO EMPLOY
HLC-2 — 3-27-15 [35]

Tentative Ruling: The motion will be denied without prejudice.

The debtor in possession requests approval to employ Evanhoe, Kellog & Co. as accountant for the estate. The proposed compensation arrangement is an hourly basis. EKC will provide the estate, among other things, with general accounting services, tax advice, and tax return preparation.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions."

11 U.S.C. § 101(14) defines a "disinterested person" as "a person that— (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason."

"An interest adverse to the estate" is defined by courts to mean "(1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate *or that would create either an actual or potential dispute in which the estate is a rival claimant*; or (2) to possess a predisposition under circumstances that render such a bias against the estate." In re Perry, 194 B.R. 875, 878-79 (Bankr. E.D. Cal. 1996).

EKC appears to be a disinterested person within the meaning of section 101(14). There is evidence in the record that EKC is not a creditor, equity security holder, insider, director, officer, employee of the debtor, and does not have materially adverse interest to the estate's interest or of the interest of any creditors or equity security holders. Docket 37 ¶ 9.

However, while F. William Evanhoe states, as principal of EKC that, he "do[es] not now, nor ha[s] [he] ever, represented an insider of the Debtor or the Debtor's parent, subsidiary, or other affiliate," the same cannot be said about EKC, the entity being retained by the debtor. Docket 37 ¶ 9. In his declaration, Mr. Evanhoe clearly states that EKC "has been retained to do accountancy work and tax returns for the following:

a. Antonio Rodriguez III (50% Partner and Managing Partner of the Debtor);
b. Antonio Rodriguez Jr. (50% Partner of Debtor);
c. Lorraine Rodriguez (wife of Antonio Rodriguez Jr);
d. Cottonwood Creek Racing (owned by Lorraine and Antonio Rodriguez Jr.);
e. Customized Pest Control (listed as a creditor on Debtor's Schedule F);
f. Rodco Financial (Owned 100% by Antonio Rodriguez Jr. and provides payroll services for Debtor and other affiliates of Antonio Rodriguez Jr.);
g. Shasta Enterprises (Owned 100% by Lorraine and Antonio Rodriguez Jr., and currently in its own Chapter 11 proceeding . . . ;
h. Sunset Hills Estates Homeowners Assn (both a creditor and an insider of Debtor)[; and]
i. Vestra Resources, Inc. (listed as a creditor on Debtor's Schedule F)."

Docket 37 ¶ 10.

Besides summarily stating that EKC "has no disqualifying connections," the motion does not explain or adequately explain why the above representations by EKC are not disqualifying. Docket 35 ¶ 10. The only consolation offered to the court about the above representations by EKC is that it will "not charge Debtor's estate for the preparation of returns for persons or entities other than the Debtor." Docket 35 ¶ 10j.

But, this does not convince the court that EKC will not be representing the above persons in matters where an interest adverse to the estate would be possessed or asserted, or where an actual or potential dispute exists, to which the estate would be a rival claimant. The court is also unpersuaded that the matters in which EKC represents the above persons will not predispose EKC to a bias against the estate, in the work to be performed for the estate.

As the debtor's counsel's representation of some of the above persons would constitute an actual conflict of interest, why does the same representation by EKC not pose the same problem? The motion does not adequately address this.

EKC is obviously representing parties holding interests adverse to the estate. Yet, the motion does not state what specifically those representations entail and how such representations are not in conflict with EKC's proposed representation of the estate. As the motion does not establish that EKC is qualified to represent the estate, it will be denied.

10.	15-21575-A-11 HLC-4	BR ENTERPRISES, A CALIFORNIA PARTNERSHIP	MOTION FOR COMPENSATION FOR PROPERTIES BY MERIT, BROKER(S) 4-1-15 [43]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the trustee, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtor in possession, on behalf of Properties by Merit, Inc., real estate broker for the estate, seeks approval to pay Merit's commission compensation, and participating broker commission, as pertaining to the sale of three lots of land in Cottonwood, California. Escrow for the sale of the lots is scheduled to close on April 27 for one lot and May 1 for two of the lots. The requested compensation consists of $20,350 in fees and $0.00 in expenses. The court approved Merit's employment as the estate's real estate broker on April 2, 2015. Docket 48. The requested compensation is based on a 5% commission arrangement.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and

"reimbursement for actual, necessary expenses." The movant's services included assisting the estate with the marketing and sale of the lots.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The compensation will be approved.

11. 15-22575-A-7 LORRINA PENNYWELL — MOTION TO EXTEND AUTOMATIC STAY O.S.T. 4-12-15 [11]
ACK-1

Tentative Ruling: The motion will be denied.

The debtor is asking the court to extend the automatic stay with respect to all creditors. The debtor filed one prior bankruptcy case - a chapter 7, Case No. 15-21359 - which was dismissed only six days prior to the filing of the instant case.

The debtor's prior case was filed on February 23, 2015. The case was dismissed on March 25, 2015 due to the debtor's failure to timely file petition documents, including, among others, all schedules, the statement of financial affairs, and the attorney's disclosure statement. This case was filed six days later, on March 31, 2015. The debtor did not file this motion until April 12.

11 U.S.C. § 362(c)(3)(A) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 (11, 12 or 13) after dismissal under section 707(b), the automatic stay with respect to a debt, property securing such debt, or any lease terminates on the 30th day after the filing of the new case.

11 U.S.C. § 362(c)(3)(B) and (C) further provide that:

"(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall

not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor."

The debtor then may seek a continuation of the stay beyond the original 30-day period if:

- a motion is filed,
- there is notice and a hearing,
- the hearing is held before the expiration of the original 30 day period, and
- the debtor proves that the filing of the later case is in good faith as to the creditors to be stayed.

The debtor bears the ultimate burden of persuasion as to each of the foregoing prongs. In re Elliot-Cook, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006) (citing In re Castaneda, 342 B.R. 90, 94 (Bankr. S.D. Cal. 2006)).

Under the statute, a rebuttable presumption that the later case was not filed in good faith will arise if:

(1) the debtor had more than one case pending in the preceding year;

(2) the first case was dismissed because the debtor failed to:
(a) file or amend the petition or other documents without substantial excuse;
(b) provide court-ordered adequate protection; or
(c) perform the terms of a confirmed plan; or

(3) there is no substantial change in the debtor's affairs and no other reason to believe the case will result in a chapter 7 discharge.

In re Elliot-Cook, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006) (citing In re Castaneda, 342 B.R. 90, 94 (Bankr. S.D. Cal. 2006)).

The debtor's prior case was dismissed due to the fact that she did not timely file the petition documents. The "substantial excuse" proffered by the debtor about the prior case being dismissed is as follows:

"The reason why the prior Chapter 7 was dismissed was because I lost an

immediate family member and started a new job where I commute 4 1/2 hours per day to San Francisco."

Docket 13 ¶ 3.

However, the debtor gives no information about: when she lost an "immediate family member" in relation to the prior filing and the deadline for filing the missing petition documents; who was that family member; and how that impacted her ability to gather the required information for the petition documents. The motion papers also do not elaborate on how driving to work prevented her from filing all petition documents. The court will not speculate about these issues.

Hence, there is an unrebutted presumption that this case was not filed in good faith. The debtor has not demonstrated that the filing of this later case is in good faith. Accordingly, the motion will be denied.

12. 14-31393-A-11 GAJENDRA/MUNA ADHIKARI — MOTION TO EXTEND EXCLUSIVITY PERIOD
DRE-2 — 3-20-15 [19]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are asking the court to extend the time for filing their chapter 11 plan and disclosure statement by 60 days.

The motion will be denied for several reasons.

First, the motion has not been served on all creditors. It was served only on the United States Trustee.

Second, the motion does not say which deadline the debtors are seeking to have extended, the court-imposed deadline for filing a plan and disclosure statement or the exclusivity deadline. The motion does not even identify the actual deadline the debtors are seeking to have extended. Thus, the court cannot tell whether this motion is timely. See Fed. R. Bankr. P. 9006(b)(2) (requiring a showing of excusable neglect when the motion is made after expiration of the specified period).

Third, the basis for the extension is to allow the debtors to negotiate with the IRS, their largest creditor, for dismissal of the case.

However, the debtors do not need IRS' consent for dismissal of the case. They need to make a motion under 11 U.S.C. § 1112(b) and have the court dismiss the case. Only the may the case. The debtors then have brought the wrong motion. They should have filed a dismissal motion and not this motion.

13. 14-29194-A-11 CALIKOTA PROPERTIES, L.L.C. — MOTION TO WITHDRAW AS ATTORNEY
CAH-6 — 3-27-15 [72]

Tentative Ruling: The motion will be denied without prejudice.

Attorney C. Anthony Hughes asks for permission to withdraw as counsel for the debtor because "[i]rreconcilable differences have arisen," including "Debtor has not paid Attorney's fee as they have come due, and it does not appear that Debtor will be able to pay Attorney's fee going forward and the next steps in

the case are to file the Disclosure Statement and plan of reorganization, which requires a large undertaking and feasibility of debtor." Docket 74 at 2.

This case was filed on September 12, 2014.

Local Bankruptcy Rule 2017-1(e) provides: "Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit."

"The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court." American Economy Ins. Co. v. Herrera, No. 06CV2395-WQH, 2007 WL 3276326, at *1 (S.D. Cal. Nov. 5, 2007) (quoting Irwin v. Mascott, 2004 U.S. Dist. LEXIS 28264 (N.D. Cal. December 1, 2004), citing Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir.1982)). Factors considered by courts ruling on the withdrawal of counsel are (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. Herrera, at *1 (citing Irwin, 2004 U.S. Dist. LEXIS 28264 at 4).

California Rule of Professional Conduct 3-700 provides that:

"*(A) In General.*

"*(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.*

"*(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.*

"*(B) Mandatory Withdrawal.*

"*A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:*

"*(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or*

"*(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or*

"*(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.*

"*(C) Permissive Withdrawal.*

"*If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:*

"*(1) The client*
(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
(b) seeks to pursue an illegal course of conduct, or
(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
(f) breaches an agreement or obligation to the member as to expenses or fees.

"*(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or*

"*(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or*

"*(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or*

"*(5) The client knowingly and freely assents to termination of the employment; or*

"*(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.*"

The motion will be denied for several reasons. First, there is no affidavit with the motion, stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw, as required by Local Bankruptcy Rule 2017-1(e).

Second, the contention that the debtor is not paying the movant attorney's fees as they come due is without merit because the court has not authorized the payment of any attorney's fees to the movant. 11 U.S.C. § 330(a) requires a notice and hearing prior to the authorization of payment of attorney's fees to chapter 11 debtor's counsel.

Third, the assertion that "the next steps in the case are to file the Disclosure Statement and plan of reorganization" is perplexing because the movant already filed a plan and disclosure statement on behalf of the debtor. The movant filed a plan and disclosure statement on December 11, 2014. Dockets 44 & 45. The motion fails to elaborate on this adequately.

More, the court is perplexed at why this, even if true, is basis for permitting withdrawal. It may be basis for dismissal or conversion under section 1112(b), but it is not basis for permitting the movant to withdraw.

Fourth, the only potential basis warranting permission to withdraw is the conclusory allegation of "irreconcilable differences."

But, this contention is unsupported by any facts. While the court understands that the movant may be cautious not to divulge information that may be privileged, the court needs at least a general factual assertion that would support the legal conclusion of "irreconcilable differences." The motion will be denied without prejudice.

14. 15-20796-A-12 SILVIA LEPE — MOTION FOR RELIEF FROM AUTOMATIC STAY
CAH-1 — 3-30-15 [12]
JOSE LEPE ET AL., VS.

Tentative Ruling: The motion will be granted in part.

The movants, Alicia and Jose Lepe, seek relief from the automatic stay to proceed in state court with a partition action against the debtor with respect to a real property owned 50% by the debtor and 50% by the movants. The movants are also holders of a $450,000 claim secured by the debtor's 50% interest in the property. The movants obtained the claim against the debtor based on 11 U.S.C. § 523(a)(2), in a nondischargeability action within the debtor's prior 2012 chapter 12 case. Adv. Proc. No. 12-2307, Docket 37.

The property is also subject to a voluntary senior mortgage encumbrance held by The Bank of New York Mellon, in the approximate amount of $651,000.

The debtor has scheduled her 50% interest in the property as having a value of $600,000, meaning that the entire property has an approximate value of $1.2 million.

Given that the movants own 50% interest in the property and the debtor has been paying them nothing for their 50% interest, while she has been generating income from the property, and given the denial of the debtor's plan confirmation motion, there is cause for the lifting of the stay.

The court also notes that despite this motion being brought under Local Bankruptcy Rule 9014-1(f)(1), which requires written opposition at least 14 days' prior to the hearing, the debtor has filed nothing in response to this motion. Accordingly, the debtor has waived her right to oppose this motion at the April 27 hearing.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to allow the movants to prosecute solely partition claims against the debtor with respect to the property, but not to enforce any money judgments against the debtor or the estate. Any money judgments against the debtor shall be reduced to a proof of claim that is to be filed in this case.

No fees and costs are awarded because the movants have not established that they are over-secured creditors. See 11 U.S.C. § 506; see also Docket 12. Nor is there a contractual provision entitling the movants to fees and costs for the prosecution of this motion.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived.

15. 15-20796-A-12 SILVIA LEPE
RLC-1

MOTION TO
CONFIRM CHAPTER 12 PLAN
3-18-15 [7]

Tentative Ruling: The motion will be denied without prejudice.

The debtor is asking the court to confirm her chapter 12 plan filed on March 18, 2015. The chapter 12 trustee, secured creditors Alicia and Jose Lepe, and secured creditor The Bank of New York Mellon oppose confirmation.

This motion will be denied for several reasons.

(1) The debtor has not provided the chapter 12 trustee with tax returns for the last two years, a profit and loss statement, and a projected budget in support of the plan, preventing the trustee from assessing the proposed plan's feasibility.

(2) The plan does not provide for the secured claim of Alicia and Jose Lepe, who hold a $450,000 nondischargeable claim against the debtor's 50% interest in a farm income-producing real property in Dixon, California. Alicia and Jose Lepe own the other 50% interest in the property. While the plan states that the claim of Alicia and Jose Lepe is provided for in paragraph five in the plan, there is no such paragraph in the plan. Docket 8 at 2.

(3) The debtor's plan is not feasible because it is based on income generated from a slaughterhouse that is not owned by the debtor in its entirety. The motion does not explain how the debtor can use 100% of the income from that property even though she owns only 50% of it. The co-owners, Alicia and Jose Lepe, are seeking permission from this court to file a partition action as to the property.

(4) The plan is not feasible because while it calls for $3,180 a month in payments, the debtor has disclosed only $3,167.87 in disposable income in Schedule J and has projected only $3,154.50 of average net monthly income in her business income and expenses statement. See Docket 1.

The court is also unconvinced that the $5,833 in projected future "gross monthly income," listed in the business income and expenses form (Docket 1), is realistic, given that the debtor has admitted in the same form to making only $54,221 - or $4,518.41 a month - in gross income during the past one year prior to filing.

The court is also concerned that the debtor admitted to earning gross year-to-date income as of the petition date, February 2, 2015, in the amount of $3,500. Docket 1, Statement of Financial Affairs at 1. At this rate, the debtor's annual gross income should be approximately $42,000, and not the $69,996 (or $5,883 a month) projected in the Business Income and Expenses Statement.

(5) The plan's calculation of The Bank of New York Mellon's claim, the senior mortgage on the property, is $642,000, whereas the bank asserts that its claim totals approximately $651,310.27. The bank will be filing a proof of claim for that amount. This also makes the plan unfeasible.

(6) The debtor has listed property insurance expenses as both business and personal expenses even though the debtor is living at the slaughterhouse. Under the business expenses, the insurance is $270 a month. Docket 1, Business Income and Expenses Form. Under the personal expenses, the insurance is $75 a

month. Docket 1, Schedule J.

The court finds it unnecessary to address any other grounds for denying confirmation at this time.