**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

**June 13, 2016 at 10:00 a.m.**

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1. 15-29600-A-11 ANTIGUA CANTINA & GRILL, INC.
RCO-1 CHARLES N. TRAVERS VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
4-28-16 [41]

**Tentative Ruling:** The motion will be denied without prejudice.

The movant, Charles N. Teavers IRA #887220801 (un undivided 300/625 interest) and Charles N. Travers Money Purchase Plan #887221940 (an undivided 326/625 interest), seeks relief from the automatic stay as to the debtor's sole real property in Sacramento, California.

11 U.S.C. § 362(g) provides that:

"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

"(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

"(2) the party opposing such relief has the burden of proof on all other issues."

In other words, the moving creditor has the burden of persuasion as to the value of and lack of equity in the property while the debtors have the burden of persuasion as to necessity to an effective reorganization. United Sav. Ass'n of Texas v. Timbers of Inwwod Forest Assocs., Ltd., 484 U.S. 365, 375 (1988). The standard in a chapter 11 proceeding is a showing that "the property is essential for an effective reorganization that is in prospect." This means, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." Timbers at 376. While bankruptcy courts demand a less detailed showing during the four months of exclusivity, "even within that period[,] lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." Timbers at 376.

The movant has proffered evidence that the value of the property is $765,700 and the encumbrances against the property total approximately $1,207,135. The movant's evidence of value is based on a broker's price opinion and an accompanying declaration of Michael Murphy. Docket 45, Ex. C.

On the other hand, the debtor has submitted its own evidence of value for the property. The debtor's "as is" value of the property is $2,059,516.95.

The court is not persuaded that the movant has met its burden of persuasion on the value of the property. The declaration in support of the movant's broker's price opinion does not state that Mr. Murphy, the appraiser, inspected the

inside and outside of the property. His declaration merely states that he "prepared a Broker's Price Opinion and value analysis of [the property] for the purpose of arriving at an opinion of value." Docket 45, Ex. C at 1. Further, there is over a $1 million discrepancy in the two valuations of the property and the movant has filed no reply to the debtor's opposition attempting to reconcile the discrepancy.

The movant has not met its burden of persuasion on value and equity in the property. The motion will be denied.

2. 16-20500-A-12 KELLY/DEBORA HEISER — MOTION TO DISMISS CASE 5-9-16 [17]
JPJ-1

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

The chapter 12 trustee moves for dismissal, pointing out that the debtors have not filed a plan yet, despite filing this case on January 29, 2016.

The debtors oppose the motion, contending that they are in the middle of a divorce. The debtors' counsel is communicating with the debtors "primarily throught the Debtors' family law counsel." Docket 21 at 2.

11 U.S.C. § 1221 provides: "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

The 90-day plan filing deadline ended on April 28 and the debtors did not file a plan by the deadline. The debtors also did not ask the court to extend the deadline, prior to its expiration. The debtors have not explained why they did not ask for extension of the deadline prior to its expiration.

More, the response to the motion admits that the debtors' interests as a family have diverged and Mr. Heiser is no longer interested in proceeding with this case.

Given the debtors' breach of the 90-day plan filing deadline, given the debtors' divergent interests in this case, and given that at least one debtor does not wish to continue with the prosecution of this case, cause for dismissal exists. The motion will be granted and the case will be dismissed.

3. 15-27210-A-13 MARTIN/MARIA DEL CARMEN ORTEGA — MOTION TO DISMISS ADVERSARY PROCEEDING 5-2-16 [8]
16-2063
ORTEGA ET AL V. COLLINS
JUDGMENT RECOVERY SERVICES ET AL

**Tentative Ruling:** The motion will be granted in part and denied in part.

Defendant U.S. Bank seek dismissal of all the claims in the subject complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Collins Judgement Recovery Services holds a pre-petition claim against the plaintiffs, Martin and Maria Ortega, the debtors in the underlying chapter 13 case filed on September 14, 2015.

The complaint asserts that "[d]efendants have continued to hold, and refuse to

release said funds [$26,469.99], thereby conducting and continuing post-petition collection efforts against Debtors/Plaintiffs, and failed to cease and desist after numerous communications by Debtors' counsel." Docket 1 at 4.

The plaintiffs obtained an order confirming a 60-month chapter 13 plan on March 2, 2016. Case No. 15-27210-A-13J, Docket 52. The plan revests the estate's property in the plaintiffs. Docket 42 at 5. The plaintiffs filed this adversary proceeding on March 30, 2016.

The complaint seeks declaratory relief and damages for alleged violations of the automatic stay and the discharge injunction.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

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

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

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

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

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

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

*complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'*

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

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

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

The discharge violation claim will be dismissed because the plaintiffs have not obtained a bankruptcy discharge. Their 60-month chapter 13 plan in the underlying bankruptcy case was confirmed only on March 2, 2016, just little over three months ago.

The court sees no basis to dismiss this claim with leave to amend. The plaintiffs have not come forth with a contention that they can amend the complaint to plead a plausible discharge violation claim. The claim will be dismissed with prejudice.

The stay violation claim will be denied.

According to the complaint, U.S. Bank is not a creditor of the plaintiffs.

11 U.S.C. § 362(a) provides that:

"*Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—*

"*(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;*

"*(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;*

"*(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.*"

"*(4) any act to create, perfect, or enforce any lien against property of the*

*estate;*

"*(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;*

"*(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;*

"*(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and*

"*(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.*"

The court rejects U.S. Bank's contentions that section 362(a)(1) does not apply to it.

Section 362(a)(1) prohibits "the . . . continuation . . . of . . . administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . ."

With respect to the subject garnishment, U.S. Bank is not a creditor of the plaintiffs or their chapter 13 estate. It is a garnishee bank, associated with Collins' collection of its claim. However, by refusing to honor its promise to pay the $26,469.99 deposit, U.S. Bank is effectively continuing the garnishment proceeding against the plaintiffs. The complaint is clear that *both* defendants are "continu[ing] to hold, and refuse to release said funds [$26,469.99], thereby conducting and continuing post-petition collection efforts." Docket 1 at 4.

Section 362(a)(1) does not require the person who "continu[es]" the action or proceeding in question to have started the action or proceeding. The statute prohibits only the "continuation" of the action or proceeding. There is no exemption in the statute for "innocent" parties.

U.S. Bank's reference to Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 21 (1995) is unhelpful with respect to the section 362(a)(1) discussion, as that decision addressed only stay violations under section 362(a)(3) and (6).

Further, $17,425 of the funds in question have been claimed as exempt by the plaintiffs in their bankruptcy case, meaning that the plaintiffs - aside from the bankruptcy estate - have standing to prosecute the stay violation claim against U.S. Bank. Case No. 15-27210-A-13J, Dockets 11 & 48, Schedule C.

U.S. Bank then may be held liable for stay violations under section 362(a)(1).

The court finds it unnecessary to address any of the other provisions of section 362(a).

The court also disagrees that the complaint fails to allege an injury sustained as a result of the alleged stay violation. The defendants have been deprived

of the $26,469.99.

11 U.S.C. § 362(k)(1) provides that an individual injured by willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

An award for damages for a willful violation of section 362(a) is mandatory. Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 7 (B.A.P. 9th Cir. 2002); Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 483 (9th Cir. 1989).

The "[movants] ha[ve] the burden of proof under § 362(k), which requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay." Harris v. Johnson (In re Harris), Case No. 10-00880-GBN, WL 3300716, at *4 (B.A.P. 9th Cir. Apr. 7, 2011) (citing to Fernandez v. G.E. Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 180 (B.A.P. 9th Cir. 1998)).

To the extent the complaint states a claim for declaratory relief based on violation of a bankruptcy discharge it too is dismissed.

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| 4. | 15-25213-A-11<br>UST-1 | BLU COMPANIES,<br>INCORPORATED | MOTION TO<br>CONVERT OR TO DISMISS CASE<br>4-18-16 [35] |

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

The U.S. Trustee moves for conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b), arguing: (1) unexcused failure to timely file form B26 (report as to value, operations, and profitability of a non-debtor in which the estate owns substantial or controlling share); (2) failure to comply with court order requiring plan and disclosure statement to be filed by February 22, 2016; (3) failure to prosecute the case causing a delay that is prejudicial to creditors; and (4) absence of reasonable likelihood of rehabilitation.

The debtor - a holding company for various investments in other businesses - responds, contending it has been unable to formulate a plan due to uncertainty of when its investments will start producing income. The debtor argues that the motion should be denied because it has negotiated a sale of the debtor's equity interest in Bluon Energy, L.L.C., which would allow the debtor to formulate a plan within 45 days.

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

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

The above instances of cause are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtor filed this case on June 29, 2015 but has not yet filed a plan and disclosure statement. The deadline the court set in its August 24, 2015 status conference order was February 22, 2016. Docket 22.

Further, from the debtor's failure to file Form B26 for Bluon Energy (the company representing the debtor's principal investment) in January 2016, the court infers that the debtor either does not know or does not want to disclose the *present* value of its interest in Bluon. As mentioned in the court's ruling on the debtor's sale motion, also being heard on this calendar, the debtor has proffered no evidence in that motion as to the present value of its investment in Bluon either.

And, the debtor's response to this motion does not even attempt to explain its failure to file Form B26 for Bluon.

The delay in filing a plan and disclosure statement, when taken into account with the denial of the debtor's sale motion and its failure to file Form B26 for Bluon Energy, constitutes unreasonable delay that is prejudicial to creditors. Although the one-year anniversary of the petition date is fast approaching, the filing of a plan and disclosure statement is nowhere in sight for the debtor.

The totality of the foregoing also indicates to the court an absence of reasonable likelihood of reorganization, within reasonable time.

The above is cause for dismissal or conversion to chapter 7 under section 1112(b).

As the debtor lists in its schedules approximately $5.36 million in unencumbered personal property assets and it has substantial unsecured debt, totaling approximately $7.253 million, conversion to chapter 7 would be in the best interest of the estate and the unsecured creditors. Docket 1, Schedules B, D, F.

5. 13-23517-A-7 TRACY GATEWAY, L.L.C. — ORDER TO APPEAR FOR EXAMINATION (YVONNE LAU) 1-20-16 [39]
15-2065
FUKUSHIMA V. APOLLO EQUITY, L.L.C.

**Tentative Ruling**: None. The respondent shall appear prior to the start of the 10:00 a.m. calendar to be sworn in for the examination.

6. 13-23517-A-7 TRACY GATEWAY, L.L.C. — ORDER TO SHOW CAUSE 1-12-16 [38]
15-2065
FUKUSHIMA V. APOLLO EQUITY, L.L.C.

**Tentative Ruling**: The court issued this order to show cause because Apollo Equity, L.L.C. did not appear for an examination on January 11, 2016. The examination was continued to February 22, 2016 at 10:00 a.m. and then to March 7, 2016 at 10:00 a.m.

At the March 7 hearing, the court will consider assessing sanctions against Apollo if it determines that Apollo willfully failed to obey the court's November 13, 2015 order to appear at the January 11, 2016 examination.

If Apollo fails to appear on March 7, the court also will consider sanctions to compel attendance at an examination and production of records, including authorizing the apprehension of a representative of Apollo by the U.S. Marshall to compel such attendance and production.

7. 13-23517-A-7 TRACY GATEWAY, L.L.C. — ORDER TO
15-2065 — APPEAR FOR EXAMINATION
FUKUSHIMA V. APOLLO EQUITY, L.L.C. — (APOLLO EQUITY, L.L.C.)
11-13-15 [36]

**Tentative Ruling:** None. A responsible individual for the judgment debtor, Apollo Equity, L.L.C., shall appear prior to the start of the 10:00 a.m. calendar to be sworn in for the examination.

8. 15-29421-A-12 JERRY WATKINS — MOTION TO
CA-1 — VALUE COLLATERAL
VS. OCWEN LOAN SERVICING, L.L.C. — 3-21-16 [26]

**Tentative Ruling:** None. The court continued the hearing on this motion from May 16, 2016, as the parties were negotiating a settlement of the motion.

9. 15-29421-A-12 JERRY WATKINS — MOTION TO
CA-4 — CONFIRM PLAN
2-29-16 [19]

**Tentative Ruling:** The motion will be denied.

The debtor seeks to confirm a chapter 12 plan filed on February 29, 2016. The motion will be denied for the following reasons.

(1) The motion lacks a liquidation analysis. Docket 19.

(2) There is no evidence with the motion supporting the contention that the debtor meets the liquidation test.

(3) The motion lacks an analysis of whether the debtor is able to make the required plan payments. Docket 19. While the motion attaches approximately 18 pages of exhibits pertaining to the debtor's income, the motion makes no effort to explain the exhibits and analyze the data in the exhibits, to establish that the debtor is able to make required plan payments.

(4) The debtor has not yet obtained an order stripping down the secured claim of U.S. Bank.

(5) The motion contains no discussion on good faith, with respect to both the filing of the case and proposal of the plan. This is vital given that this is the debtor's fourth bankruptcy case since March 31, 2009. Each of the debtor's prior bankruptcy cases were dismissed.

10. 14-30833-A-11 SHASTA ENTERPRISES — STATUS CONFERENCE
10-31-14 [1]

**Tentative Ruling:** None.

11. 14-30833-A-11 SHASTA ENTERPRISES
FWP-25

MOTION TO APPROVE DISCLOSURE STATEMENT
4-28-16 [481]

**Tentative Ruling:** The motion will be granted.

The chapter 11 trustee is asking the court to approve the disclosure statement filed on April 28, 2016. Docket 481.

The court continued the hearing on the motion from May 31 in order for the trustee to make further changes to the disclosure statement. The trustee has made the anticipated changes to the disclosure statement. Docket 520.

The motion will be granted and the disclosure statement - as modified after the May 31 hearing - will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

12. 14-30833-A-11 SHASTA ENTERPRISES
FWP-27

MOTION TO SELL FREE AND CLEAR OF LIENS AND MOTION TO PAY
5-16-16 [500]

**Tentative Ruling:** The motion will be conditionally granted in part.

The chapter 11 trustee requests authority to sell "as is" and "where is" for $640,000 in cash the estate's interest in 2000 Trainor Street, Red Bluff, California, to PJ Helicopters, Inc. Approval of the sale is sought free and clear of the disputed approximately $12,000 post-petition personal property tax lien in favor of Tehama County Tax Collector.

The trustee also seeks:

(1) authority to pay outstanding (approximately $24,733) and prorated prospective property taxes out of escrow, along with the estate's escrow and closing costs and expenses;

(2) authority to pay a $515,000 discounted amount on the current mortgage on the property, held by the Curto Trust; the discount will stay in place even if the property is sold to an overbidder.

(3) the approval of a breakup fee of $10,000 to PJ, in the event a third-party overbidder purchases the property;

(4) authority to pay a real estate commission to the estate's broker, Properties by Merit, Inc.; the proposed commission is 5%; Properties by Merit is representing both the estate and buyer in this transaction;

(5) a waiver of the 14-day period of Fed. R. Bankr. P. 6004(h);

(6) a good faith finding under section 363(m); and

While the property is not subject to any other monetary encumbrances, it is nonetheless subject to non-monetary encumbrances, such as easements, dedications, notices and redevelopments. The sale is subject to such non-monetary encumbrances.

The trustee estimates that the net sales proceeds to the estate will be approximately $35,000.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business.

Under 11 U.S.C. § 363(f), the trustee may sell property of the estate free and clear of liens only if: 1) applicable nonbankruptcy law permits sale of such property free and clear of such liens; 2) the entity holding the lien consents; 3) the proposed purchase price exceeds the aggregate value of the liens encumbering the property; 4) the lien is in bona fide dispute; or 5) the entity could be compelled to accept a money satisfaction of the lien.

The sale will generate an estimated net proceeds of $35,000 for the estate. Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate.

The court will approve the sale free and clear of Tehama's personal property tax lien under section 363(f)(4), given that the trustee disputes the lien and the lien was obtained post-petition without relief from the automatic stay.

The court will approve the $10,000 break-up fee to PJ, in the event it does not purchase the property due to an over-bidding, to compensate PJ for its due diligence and investigation efforts with respect to the property.

The court will authorize payment of the real estate commission to the estate's broker, consistent with its employment terms approved by the court.

The court will waive the 14-day period of Rule 6004(h) and it will make a good faith determination under section 363(m), subject to receiving and reviewing a declaration from PJ concerning its good faith in purchasing the property. As of the time the motion papers were filed, there was no such declaration from PJ, attesting to its good faith in this transaction.

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| 13. | 15-29136-A-12<br>MAS-1 | P&M SAMRA LAND<br>INVESTMENTS L.L.C. | MOTION TO<br>COMPEL, FOR PRODUCTION OF<br>DOCUMENTS AT DEPOSITION AND FOR<br>SANCTIONS<br>5-13-16 [119] |

**Tentative Ruling:** The motion will be granted.

Ag-Seeds Unlimited, a creditor of the estate, seeks to compel the debtor to appear for an ordered examination under Fed. R. Bankr. P. 2004 and produce ordered production of documents. It also asks for sanctions of $875.

The debtor opposes the motion, stating that it refused to schedule a Rule 2004 exam and produce documents to Ag because Ag through its present counsel had deposed the son of the debtor's principal several years ago, during which he "lunged and screamed at [the son] in a threatening manner." Docket 138 at 1. Another reason for the debtor's opposition is that it has filed an objection to Ag's claim, which, it argues, if disallowed, will make the exam and corresponding document production request moot.

The use of Fed. R. Civ. P. 37 in discovery under Fed. R. Bankr. P. 2004 makes no sense. Rule 37 can be used only in an adversary proceeding or contested matter, whereas Rule 2004 is used prior to the commencement of the adversary

proceeding or contested matter. Fed. R. Bankr. P. 7037 unequivocally states that Fed. R. Civ. P. 37 "applies in adversary proceedings." There is no authority for the applicability of Rule 37 in bankruptcy outside of an adversary proceeding or contested matter.

Turning to the motion, this court has inherent authority to impose sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The authority covers a broad range of conduct that goes beyond the violation of an order. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). While it may be used to impose civil contempt sanctions, this inherent authority may be applied without resorting to contempt proceedings, but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003) (noting that the inherent sanction authority, and civil penalties in general, must either be compensatory in nature or designed to coerce compliance); see also Miller v. Cardinale (In re Deville), 280 B.R. 483, 495 (B.A.P. 9th Cir. 2002) (citing and discussing Chambers at 42-51 and Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996)).

Chambers at 43 holds that the inherent sanction authority includes power to control admission to the court's bar and to discipline attorneys who appear before the court. See also Lehtinen at 1059 (reminding the suspended attorney that attorney disciplinary proceedings are neither civil nor criminal in nature and are not for the purpose of punishing but to maintain the integrity of the courts and the profession).

To exercise its inherent authority to sanction, a court must make explicit finding of bad faith or willful conduct, which is conduct more egregious than mere negligence or recklessness. Lehtinen at 1058.

Bad faith is determined by examining the totality of the circumstances. In re Rolland, 317 B.R. 402, 414-15 (Bankr. C.D. Cal. 2004). The misrepresentation of facts, the unfair manipulation of the Bankruptcy Code, the history of filings and dismissals, and the presence of egregious behavior are all factors to be considered in determining whether bad faith exists." Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

A finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

The court entered an order on March 23, 2016, authorizing Ag "to examine [the debtor] pursuant to FRBP 2004(a) on the subjects specified in FRBP 2004(b)" and "[t]hat pursuant to FED. R. BANKR. P. 2004(c), attendance for examination and production of documentary evidence may be compelled in the manner provided in FRBP 9016 for the attendance of witnesses at a hearing or trial." Docket 59 at 1.

The debtor refused the to be examined and to produce the documents because it is worried about "a breach of the peace" by Ag's counsel, based on a deposition of someone other than the debtor's principal years ago. Docket 138 at 2.

Even if the debtor is correct about the "breach of the peace" issue, the debtor did not object to Ag's request for an exam and production of documents. The debtor and its counsel were served with Ag's request for exam and document production on March 22, 2016. Docket 58. Nor has the debtor sought a

protective order. When a court enters an order, the order must be complied with unless it sustains a timely objection or enters a protective order.

The debtor's refusal of to bee examined and to produce the documents was in bad faith as the debtor was notified of the court March 23 order (Docket 64) and the debtor did nothing to seek a protective order. Indeed, the debtor actually promised compliance with the order. Docket 122, Ex. C. The debtor then reneged on the promise by changing dates, asserting unavailability. Id. After a back and forth on dates and availability, the debtor's counsel suggested to Ag's counsel to "take it to [the court]."

And now that Ag has filed this motion, the debtor has come up with another reason to refuse the exam and document production, a reason that was not even articulated by the debtor to Ag in prior communications. It is afraid of a breach of the peace. Additionally, the debtor also asserts that its recent objection to Ag's proof of claim is another reason to at least delay ruling on this motion.

The court will not delay enforcement of its March 23 order, much less speculate about how the court will rule on the debtor's claim objection, set for hearing on July 25, 2016. At this time, Ag is a creditor of the debtor in possession.

From the foregoing actions by the debtor and its counsel, the court infers bad faith on the part of the debtor and its counsel, Noel Knight, involving ill will or, at the least, an affirmative attempt to violate the law – violation of the court's March 23 order.

Accordingly, the court will impose the following sanctions against the debtor and its counsel. The shall appear for an examination on June 20, 2016 at 10:00 a.m. in this court's public conference room just outside the courtroom. The court will order the debtor to comply with the document production request as originally propounded on the debtor. The documents sought by Ag shall be produced to Ag no later than noon on June 17, 2016, at the law offices of Ag's counsel.

The court will also award the requested $875 to Ag's counsel to compensate Ag for having to file and prosecute this motion. The filing and prosecution of the motion was necessary, given the debtor's refusal of the exam and document production.

The $875 amount is reasonable. This motion and supporting declaration are five pages long and Ag has had to file reply papers totaling an additional six pages in length. Dockets 119, 121, 141, 142, 143. Ag also: has had numerous communication exchanges between Ag's counsel and the debtor's counsel, prior to the filing of the motion; has had to prepare the exhibits in support of the motion and reply; will have to prepare for the June 13 hearing on the motion. The $875 figure is reasonable in light of those services.

The court will award the $875 sanction jointly and severally against both the debtor and its counsel, Noel Knight. The sanction shall be paid to Ag's counsel no later than noon on June 17, 2016. This means that Ag's counsel must receive the payment no later than that deadline.

14. 16-22654-A-7 MARC LIM
HSM-1

MOTION TO ABANDON
5-26-16 [45]

**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 offer 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 trustee wishes to abandon the estate's interest in:

(1) $263,794 in receivables from the debtor's defunct produce selling corporation business, Lim's Produce, including $25,000 the debtor has received post-petition on account of the receivables;

(2) a $45,000 deposit with the debtor's counsel, Dahl Law, constituting the cash Lim's Produce had, seemingly at the time the debtor filed this case;

(3) A leased portable office trailer, including the lease; the trailer is located at the site of Lim's Produce business.

The receivables and deposit with Dahl Law were assets of the debtor's corporation, Lim's Produce, and are the subject of federal district court litigation instituted by creditors of Lim's Produce, claiming to be owed more than $1 million from the sale of produce to Lim's Produce and claiming the existence of a trust against the receivables and $45,000 deposit pursuant to the Perishable Agricultural Commodities Act. Both the debtor and Lim's Produce are defendants in the litigation.

Lim's Produce ceased doing business in early to mid-April 2016. On April 26, Lim's Produce filed dissolution papers with the California Secretary of State and assigned all of its assets and liabilities to the debtor. The debtor filed this bankruptcy case also on April 26.

Post-petition, on April 28, the district court issued a temporary restraining order directed at Lim's Produce and anyone acting on behalf of or in concert with Lim's Produce, prohibiting Lim's Produce from transferring its assets. The order specifically recognizes the plaintiff-creditors' trust interests in assets of Lim's Produce pursuant to the Perishable Agricultural Commodities Act.

On May 4, the debtor removed the district court action to this court. Notwithstanding this, the district court issued a preliminary injunction on May 13 per the terms of the TRO.

The foregoing events have generated numerous legal disputes with the plaintiff-creditors of Lim's Produce, including their assertion of a Perishable Agricultural Commodities Act trust against business assets in the debtor's

possession, such as the receivables and the deposit.

11 U.S.C. § 554(a) provides that a trustee may abandon any estate property that is burdensome or of inconsequential value or benefit to the estate, after notice and a hearing.

Given the substantial litigation involving the receivables (including the $25,000 collected post-petition) and $45,000 deposit, given the asserted trust claims under the Perishable Agricultural Commodities Act, given that these assets belonged to the debtor's corporation, given that the receivables must still be collected, and given the costs, risks, delay and inconvenience of any further litigation pertaining to the assets, the court agrees with the trustee that these assets are burdensome or of inconsequential value to the estate.

The leased trailer is also burdensome or of inconsequential value to the estate, as the estate has no use for it and lease payments continue to accrue. Lim's Produce ceased doing business altogether in early to mid-April 2016.

Accordingly, all the subject assets will be ordered abandoned. The motion will be granted.

15. 16-22654-A-7 MARC LIM
HSM-2

MOTION TO
ABANDON AND TO REJECT LEASE OR
EXECUTORY CONTRACT
O.S.T.
5-31-16 [58]

**Tentative Ruling:** The motion will be granted.

The trustee wishes to abandon the estate's interest in:

(1) A leased real property in Sacramento, California, including the pertinent lease agreement;

(2) five Isuzu delivery trucks listed in the debtor's Amended Schedule B, filed on May 20, 2016, at items 3.6, 3.7, 3.8, 3.9 and 3.10;

(3) a 1984 Chevrolet pickup truck listed in the debtor's Amended Schedule B, filed on May 20, 2016, at item 3.12;

(4) machinery, fixtures, equipment and supplies listed in the debtor's Amended Schedule B, filed on May 20, 2016, at item 40; specifically, this includes one commercial ice machine and all assets listed in the item 40 detail sheet, except: the forklift, one electric pallet jack, another electric pallet jack (not scheduled), one manual pallet jack, and three computer terminals, all of which are in the possession of the trustee or the estate's auctioneer; and

(5) all other tangible personal property located at the business premises of the debtor's now defunct Lim's Produce corporation business.

Specifically, the assets to be abandoned do not include 42 boxes of books, records, other papers and documents, and computer and server equipment and accessories already removed from the business premises; and do not include a 2006 International truck which will be removed from the business premises prior to the hearing on this motion.

In addition, the trustee seeks to reject two leases, one for the premises of

the debtor's corporation business, Lim's Produce and another pertaining to a leased portable office trailer.

The above items were assets of the debtor's corporation, Lim's Produce, and are the subject of federal district court litigation instituted by creditors of Lim's Produce, claiming to be owed more than $1 million from the sale of produce to Lim's Produce and claiming the existence of a trust against many assets, pursuant to the Perishable Agricultural Commodities Act. Both the debtor and Lim's Produce are defendants in the litigation.

Lim's Produce ceased doing business in early to mid-April 2016. On April 26, Lim's Produce filed dissolution papers with the California Secretary of State and assigned all of its assets and liabilities to the debtor. The debtor filed this bankruptcy case also on April 26.

Post-petition, on April 28, the district court issued a temporary restraining order directed at Lim's Produce and anyone acting on behalf of or in concert with Lim's Produce, prohibiting Lim's Produce from transferring its assets. The order specifically recognizes the plaintiff-creditors' trust interests in assets of Lim's Produce pursuant to the Perishable Agricultural Commodities Act.

On May 4, the debtor removed the district court action to this court. Notwithstanding this, the district court issued a preliminary injunction on May 13 per the terms of the TRO.

The foregoing events have generated numerous legal disputes with the plaintiff-creditors of Lim's Produce, including their assertion of a Perishable Agricultural Commodities Act trust against business assets in the debtor's possession.

11 U.S.C. § 554(a) provides that a trustee may abandon any estate property that is burdensome or of inconsequential value or benefit to the estate, after notice and a hearing.

11 U.S.C. § 365(a) provides that "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

The estate has no interest in continuing to lease the business premises of Lim's Produce. The court also notes that the lessors are even disputing the existence of a lease.

The Isuzu vehicles are each subject to claims held by Isuzu Finance of America, Inc. The trustee has investigated the claim secured by each vehicle, he has evaluated each vehicle and, after considering the claims, sale expenses and potential litigation with the creditors asserting Perishable Agricultural Commodities Act trust interests, he has determined that the vehicles are burdensome or of inconsequential value to the estate.

The same is true as to the machinery, fixtures, equipment and supplies being abandoned, listed in item 40 of the debtor's Amended Schedule B, filed on May 20, 2016. The trustee, along with an auctioneer, has inspected these items and all other tangible personal property located at the business premises, and he has determined that they each have low value, not justifying the sale expenses or dispute with the plaintiff-creditors over their asserted Perishable

Agricultural Commodities Act trust interests in the items.

The 1984 Chevrolet pickup truck is scheduled as having nominal value, of $800, and it is not running.

Given the foregoing, the court will order the assets abandoned.

The court will approve rejection of the leases as well. The trustee has no need for the business premises or the trailer. And, if the leases are not rejected, the estate may continue incurring administrative expenses. The court also notes that the 120-day automatic lease rejection period of 11 U.S.C. § 365(d)(4)(A) has not expired. This chapter 7 case was filed only on April 26, 2016.

The motion will be granted.

16. 15-28574-A-13 JOHN DYNOWSKI
WW-1

MOTION FOR ORDERS, TO DETERMINE ACTIONS TAKEN AND FOR SANCTIONS
3-2-16 [38]

**Tentative Ruling:** The debtor's request for attorney's fees will be granted in part and denied in part.

On April 25, 2016, the court granted the subject motion "in accordance with the court's ruling in Case No. 14-31822 published in connection with PennyMac's stay relief motion (DCN COR-2)." Docket 78. In granting this motion and awarding sanctions for violation of the stay in this case, the court stated:

"*In summary:*

". . .

"*(2) The court will grant the debtor's stay violation motion in Case No. 15-28574-A-13, subject to a continuance for the submission of evidence on attorney's fees. The hearing on the debtor's stay violation motion in Case No. 15-28574-A-13 will be continued to June 13, 2016 at 10:00 a.m., for the sole purpose of allowing the debtor to submit evidence on his attorney's fees. The debtor shall have until May 16 to file and serve his supplemental evidence. PennyMac may file opposition to such evidence no later than May 31. The debtor may file a reply to any opposition no later than June 7.*"

Case No. 14-31822, Docket 57 at 13-14.

The debtor seeks $9,205 in attorney's fees for addressing PennyMac's stay violations in this case. PennyMac objects to nearly all time entries proffered by the debtor's counsel.

Here are the court's rulings with each respective time entry objected to by PennyMac:

2/4/16 ($140): This time entry will be reduced to $70 (by 50%) because Reuben Kim was no longer attorney for PennyMac; Kim ceased being attorney for PennyMac sometime in December 2015. Docket 63 at 3.

2/8/16 ($945): This time entry will be reduced to $295 (by approximately 2/3) because Reuben Kim was no longer attorney for PennyMac; the court cannot tell

from the description whether and to what extent the communication with Craig Baumgartner related to the subject case; and the research "regarding time of filing" seems to pertain to the filing of the first bankruptcy case, as it relates to the proximate foreclosure sale; the timing of filing the instant case was not an issue; the only issue here was whether the stay came into effect when the case was filed.

2/9/16 ($455): This time entry will be reduced to $227.50 (by 50%) because the date and time of filing this case was not an issue; these were issues of the first bankruptcy case; the court also does not understand the language "status of Unlawful detainer and documents."

2/10/16 ($1,190): This time entry will be reduced to $595 (by 50%) because the court cannot tell from the description to what extent the services related to the subject case, as opposed to the first bankruptcy case filed by the debtor.

2/19/16 ($525): This time entry will be reduced to $375 because the voluntary 70% fee reduction by the debtor for drafting the stay violation motions in the two bankruptcy cases is arbitrary and makes no sense, especially given that the bulk of the debtor's stay violation arguments pertained to the foreclosure sale as it related to the filing of the first bankruptcy case, not this case.

2/26/16 ($35): This time entry will be reduced to $25 because the voluntary 70% fee reduction by the debtor for drafting the stay violation motions in the two bankruptcy cases is arbitrary and makes no sense, especially given that the bulk of the debtor's stay violation arguments pertained to the foreclosure sale as it related to the filing of the first bankruptcy case, not this case.

2/27/16 ($490): This time entry will be reduced to $350 because the voluntary 70% fee reduction by the debtor for drafting the stay violation motions in the two bankruptcy cases is arbitrary and makes no sense, especially given that the bulk of the debtor's stay violation arguments pertained to the foreclosure sale as it related to the filing of the first bankruptcy case, not this case.

2/29/16 ($70) & 3/1/16 ($70) & 3/2/16 ($70) & 3/4/16 ($140): These time entries will be disallowed in their entirety because the law firm of the attorneys referenced in the description, Kim, Sgroi and Malcolm, was no longer counsel for PennyMac; it ceased being counsel for PennyMac sometime in December 2015. Docket 63 at 3. Also, it is unclear from the record who is Matthew Tokarz (3/2 time entry) and why PennyMac should be paying the debtor for talking to Mr. Tokarz.

3/3/16 ($350): This time entry will be reduced to $250 because the voluntary 70% fee reduction by the debtor for drafting the stay violation motions in the two bankruptcy cases is arbitrary and makes no sense, especially given that the bulk of the debtor's stay violation arguments pertained to the foreclosure sale as it related to the filing of the first bankruptcy case, not this case.

3/16/16 ($595): The court disagrees with PennyMac that the debtor cannot recover fees for reviewing and responding to PennyMac's stay annulment motion in this case; as the court made it clear in its ruling, stay violations are probative to whether a creditor is entitled to annulment of the stay; responding to such stay annulment motions, when there has been a willful stay violation, requires the debtor to raise the stay violation; the debtor's engagement in the stay annulment motion was reasonable and necessary.

Nevertheless, the fees in this time entry will be reduced to $350; the 1.7

hours spent by the debtor's counsel solely to review PennyMac's stay annulment motion is excessive; 1 hour for the review is more than sufficient.

3/18/16 ($420): This time entry will be reduced to $300 because the voluntary 70% fee reduction by the debtor for drafting the stay violation motions (including reviewing of related papers) in the two bankruptcy cases is arbitrary and makes no sense, especially given that the bulk of the debtor's stay violation arguments pertained to the foreclosure sale as it related to the filing of the first bankruptcy case, not this case.

3/30/16 ($245): This time entry will be disallowed in its entirety because the law firm of the attorneys referenced in the description, Kim, Sgroi and Malcolm, was no longer counsel for PennyMac; it ceased being counsel for PennyMac sometime in December 2015. Docket 63 at 3.

4/6/16 ($560): This time entry will be reduced to $280 (by 50%) because the court cannot tell from the description to what extent the services related to the subject case, as opposed to the first bankruptcy case filed by the debtor.

4/9/16 ($490): This time entry will be reduced to $300 because a large part of the arguments raised by the debtor in his response to the stay annulment motion were in error or irrelevant, including blaming his prior attorney, Leslie Richards, for the deficiencies in his multiple filings.

4/11/16 ($385): This time entry will be disallowed in its entirety because the description does not identify the response reviewed by the debtor's counsel (a response to what?).

4/12/16 ($455): This time entry will be reduced to $278 because a large part of the arguments raised by the debtor in his response to the stay annulment motion were in error or irrelevant, including blaming his prior attorney, Leslie Richards, for the deficiencies in his multiple filings.

4/19/16 ($140): This time entry will not be reduced; as discussed earlier, the debtor's engagement in the stay annulment motion was reasonable and necessary.

4/22/16 ($210): This time entry will be reduced to $130 because the ruling reviewed by the debtor's counsel involved four separate motions, only two of which were in this case; the other two were in the debtor's first bankruptcy case.

4/25/16 ($455): This time entry will be reduced to $227.50 (by 50%) because the hearing the debtor's counsel attended involved four motions, only two of which were in this case and pertained to the stay violations in this case.

To the extent the debtor's counsel has purposefully omitted charges for other services he deems to have been related to the stay violations, the court does not have evidence of the value or description of such services. As such, the court is unable to give any credit to the debtor's counsel for them.

The court calculates the total allowed fees of the debtor's counsel to be $4,983. PennyMac shall pay the fees to the debtor's counsel no later than seven days after entry of the order on this motion by the court. The debtor's request for attorney's fees will be granted in part and denied in part.

17. 14-31890-A-11 SHAINA LISNAWATI
JHH-13

MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY
5-23-16 [272]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given by the debtor's counsel, 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's counsel, Judson Henry, has filed a third interim motion for approval of compensation. The requested compensation consists of $7,000 in fees and $0.00 in expenses. This motion covers the period from January 16, 2016 through May 20, 2016. The court approved the movant's employment as the chapter 11 debtor's attorney on February 11, 2015. In performing services, the movant charged an hourly rate of $250.

The movant's fees are capped at $19,000. With this motion, the movant has reached the cap. In connection with the movant's first interim motion for compensation, the court awarded the movant $7,000 in fees. In connection with the movant's second interim motion for compensation, the court awarded the movant another $7,000 in fees.

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

The movant's services included, without limitation: (1) negotiating loan modifications with the debtor's mortgage creditors, (2) assisting the debtor with the preparation of monthly operating reports, (3) revising the debtor's plan and disclosure statement, and (4) preparing and filing a compensation motion.

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