UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

June 24, 2015 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 11-43803-D-12 JPJ-2 — TERESA GROESBECK — MOTION TO DISMISS CASE 5-14-15 [74]

2. 15-21706-D-7 PPR-1 — VLADIMIR/VALENTINA KOZLOV — MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 5-13-15 [13]
THE BANK OF NEW YORK MELLON
VS.
Final ruling:

This matter is resolved without oral argument. This is The Bank of New York Mellon's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not

necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

3.	14-25816-D-11 KO-3 UMPQUA BANK VS.	DEEPAL WANNAKUWATTE	MOTION FOR RELIEF FROM AUTOMATIC STAY 5-27-15 [636]

Final ruling:

This matter is resolved without oral argument. This is UMPQUA Bank's motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay. Moving party is to submit an appropriate order. There will be no further relief afforded. No appearance is necessary.

4.	10-23821-D-7 DBJ-2	JEFFREY/DENISE CRAWFORD	MOTION TO AVOID LIEN OF WELLS FARGO BANK, N.A. 5-14-15 [36]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

5.	14-31725-D-11	TAHOE STATION, INC.	CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 11-30-14 [1]

6.	14-31725-D-11 FWP-5	TAHOE STATION, INC.	CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION , MOTION FOR REPLACEMENT LIENS PURSUANT TO STIPULATION 4-3-15 [115]
7.	13-29030-D-7	WILLIAM/JANET CHENG	MOTION TO SET ASIDE 5-6-15 [815]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. The matter is resolved without oral argument. This is the debtors' motion to set aside and vacate the civil minute order appearing on the court's docket at DN 814 and the civil minutes at DN 812 "etc." Those minutes and minute order, in turn, resolved the debtors' motion to vacate an earlier ruling. Thus, the present motion is a motion to vacate an order denying a motion to vacate an earlier ruling. That earlier ruling, in turn, was a ruling on the debtors' motion to disqualify the judge in this case.

Reconsideration is appropriate if the court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Smith v. Clark County Sch. Dist., 727 F.3d 950, 955 (9th Cir. 2013) (citation omitted, internal quotation marks omitted).

The grounds asserted in this new motion are the same ones that have been asserted by the debtors time and time again in this case, with a couple of exceptions. First, the debtors indicate they are in the process of filing a criminal complaint against the trustee in the district court. Second, the debtors claim they "discovered today May 5th 2015 that Judge Bardwil with conflicts of interests transfered Chengs March 10-2015 notice of appeal to chief justice of Eastern district of California appealing Brardwil Memo opinion and decision etc., to BAP.: through his instruction to BNC." DN 816, at 1:18-22. They add that the BNC followed this court's instruction and transferred the debtors' appeal to the BAP, and that the debtors were not noticed of the transfer. The debtors also complain that this court has "removed Chengs' motion for jury trial at Judge C. Klein Court." Id. at 2:3.

First, the debtors' plan to file a criminal complaint against the trustee has no bearing on the court's ruling on their motion to disqualify the judge in this case, which is, after all, the ruling the debtors seek for the second time to vacate. The debtors' additional accusation – that this court has conflicts of interest because it is participating in the trustee's criminal acts – is unsupported and is nothing more than an expression of their dissatisfaction with the court's rulings in this case. Second, their proposition that the judge in this case instructed the Bankruptcy Noticing Center to transfer their appeal from the district court to the Bankruptcy Appellate Panel is simply inaccurate.

Third, the court has previously considered the debtors' complaint that the court removed their motion for a jury trial in Department C of this court: the court considered that argument when it ruled on the debtors' original motion to vacate the order denying their motion to disqualify the judge in this case. The debtors have presented no new evidence on this point or any other. The court finds that it did not commit clear error nor was the court's initial decision on the motion to disqualify or its decision on the first motion to vacate manifestly unjust. And there has been no intervening change in controlling law.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

8.	15-22231-D-7 MJH-1	JAVIER RUPIO	MOTION TO COMPEL ABANDONMENT 5-27-15 [12]

9.	15-21934-D-7 DMW-3	JAMES/MONICA HODGES	MOTION TO SELL 5-21-15 [20]

10.	10-50339-D-7 CW-1	ELEFTHERIOS/PATRICIA EFSTRATIS	MOTION TO EMPLOY GUY KORNBLUM AS SPECIAL COUNSEL 5-15-15 [236]

Final ruling:

The court finds that a hearing on this matter will not be helpful and is not necessary. This is the motion of Guy Kornblum ("Counsel") for approval of his employment as special counsel to the bankruptcy estate retroactive to June 29, 2011 through September of 2012. As a preliminary matter, the court is aware that on June 16, 2015, Counsel purported to withdraw the motion. However, as opposition had already been filed by that date, Counsel no longer had the authority to unilaterally withdraw the motion. See Fed. R. Bankr. P. 9014(c) and 7041, incorporating Fed. R. Civ. P. 41(a). Accordingly, the purported withdrawal was ineffective, and the court will hear the matter. The United States Trustee and the chapter 7 trustee have opposed the motion. The motion will be denied because Counsel has failed to show a

satisfactory explanation for his failure to secure prior court approval of his employment; thus, he has not demonstrated that exceptional circumstances exist warranting retroactive approval.

The debtors filed this case on November 17, 2010. They did not schedule the claims in the prosecution of which Counsel represented them, for which he now seeks retroactive approval of his employment, as assets on their bankruptcy schedules. Thus, the claims became property of the bankruptcy estate when the case was filed and have remained property of the estate ever since, despite the fact that the case was twice closed and reopened. Cheng v. K&S Diversified Invs., Inc. (In re Cheng), 308 B.R. 448, 461 (9th Cir. BAP 2004). As such, any professional representing the debtors in prosecuting those claims was required to have his or her employment approved by the bankruptcy court. Bankruptcy Code § 327(a), made applicable to debtors-in-possession by § 1107(a).

The bankruptcy court has discretion to approve the employment of a professional retroactively. In re THC Fin. Corp., 837 F.2d 389, 392 (9th Cir. 1988). In the Ninth Circuit, the standards for determining whether the employment of a professional should be approved retroactively are that such employment "should be limited to exceptional circumstances where an applicant can show both a satisfactory explanation for the failure to receive prior judicial approval and that he or she has benefited the bankrupt estate in some significant manner." Id. As another bankruptcy judge in this district has observed regarding these standards, "exceptional means exceptional." In re B.E.S. Concrete Products, Inc., 93 B.R. 228, 231 (Bankr. E.D. Cal. 1988). "Mere negligence is not sufficient . . . ." Id., citing In re Downtown Inv. Club III, 1988 Bankr. LEXIS 925, *10-11 (9th Cir. BAP 1988). The burden of proof is on the applicant; as indicated, the decision is within the court's discretion. B.E.S. Concrete, 93 B.R. at 231.

Counsel testifies in support of the motion that on March 14, 2011, he entered into a written agreement with debtor Eleftherios Efstratis and Genesis Specialty Tile & Accessories, LLC ("Genesis"), of which Mr. Efstratis was the president,[1] to represent Mr. Efstratis and Genesis "regarding the claim that Genesis has against Amerus Life Insurance Company, Ray Omo, and others resulting from the fraudulent sale to Genesis of a retirement plan for the benefit of Genesis employees." G. Kornblum Decl., filed May 15, 2015 ("Kornblum Decl."), at 2:13-15. Counsel adds that he was retained "to represent Genesis and Mr. Efstratis, individually, to evaluate the claim and to file a lawsuit." Id. at 2:20-22. The lawsuit was commenced on June 29, 2011 in the Sacramento County Superior Court.

The critical part of Counsel's testimony, in the court's view, is this:

> I later learned that only Mr. Efstratis and his wife were in a bankruptcy proceeding and that Genesis, a separate legal entity, was not the subject of any bankruptcy proceeding. Genesis is the primary plaintiff, and I understood that Bankruptcy court approval was not required for representation of Genesis and the other non-bankruptcy plaintiffs, and that Mr. Efstratis's bankruptcy counsel would obtain whatever approval was needed for the representation of Mr. Efstratis.

Kornblum Decl. at 3:4-11.[2] Counsel also testifies that by addendum to the fee agreement in October of 2011, joint debtor Patricia Efstratis, her daughter, and another individual were added as clients and plaintiffs. Counsel represented all of those parties in the litigation until September of 2012, "at which time [he] withdrew because [his] fees were not being paid." Id. at 3:17-18. In December of

2014, Counsel obtained a judgment against Genesis and Mr. Efstratis for $213,978.66.

What is important in this is that (1) Counsel does not disclose when during his representation he became aware of the bankruptcy case, only that it was "later," meaning after he undertook the representation in March of 2011 but before he added Mrs. Efstratis as a client and plaintiff in October of 2011; and (2) after he discovered the bankruptcy, he took no steps to ensure that his employment by Mr. Efstratis, or later by Mrs. Efstratis, was approved by this court. He simply, according to his version, relied on their bankruptcy counsel, and even on that point, Counsel's testimony is vague. He is quite clear that he understood bankruptcy court approval was not required for his representation of Genesis and the other non-bankruptcy plaintiffs; thus, he apparently understood it was required for his representation of the debtors. He states only that he understood the debtors' bankruptcy counsel would obtain whatever approval was needed. He does not indicate whether he asked their bankruptcy counsel about obtaining court approval, and if so, what steps, if any, he needed to take to ensure such approval was obtained. Nor did Counsel, apparently, pay attention to what was going on in the bankruptcy case; if he had, he would presumably have learned the case had been converted to chapter 7 in December of 2011, two months after he claims to have added Mrs. Efstratis as a client and plaintiff.

For these reasons, even absent opposition, the court would have concluded that Counsel has failed to show a satisfactory explanation for his failure to receive prior court approval of his employment. The trustee's opposition, however, supported by declarations of Mr. Efstratis and Melinda Jane Steuer, casts quite a different light on Counsel's testimony. Mr. Efstratis testifies that at his first meeting with Counsel, on February 14, 2011, he told Counsel that he and his wife were debtors in a chapter 11 case pending in this court; he adds: "I gave Mr. Kornblum the name of my bankruptcy attorney at that time – Illyssa Fogel. Mr. Kornblum told me that he wanted to hold off on talking to my bankruptcy attorney until after he had analyzed the case." E. Efstratis Decl., filed June 10, 2015 ("Efstratis Decl."), at 2:2-4.

Mr. Efstratis testifies he met again with Counsel on March 10, 2011, with an attorney named David Zeff also present,[3] and again brought up the fact that he and his wife were in bankruptcy, adding: "I again provided the contact information for Ms. Fogel. Mr. Zeff stated that the bankruptcy meant that I could not be a plaintiff in the state court action. Mr. Zeff also advised me to hold off on advising the Bankruptcy Court about the state court action for the time being." Efstratis Decl., at 2:7-10. The fee agreement between Counsel and Mr. Efstratis (and Genesis) was signed March 14, 2011. Mr. Efstratis testifies he met again with Counsel on May 10, 2011, and "again asked that Mr. Kornblum contact [his] bankruptcy attorney." Id. at 2:17. He adds: "I was concerned that I would not have sufficient funds to pay Mr. Kornblum to pursue the state court litigation. I also wanted to make sure that my bankruptcy would not adversely affect the state court litigation. Mr. Kornblum told me that he would speak to my bankruptcy attorney." Id. at 2:17-20.

Counsel filed the complaint in the state court on June 29, 2011; contrary to his assertion that he "added" the joint debtor, Patricia Efstratis, as a client and plaintiff in October of 2011, she was named as a plaintiff in the original complaint, along with Mr. Efstratis, Genesis, the debtors' two children, and two other individuals. Mr. Efstratis testifies that on July 15, 2011, he sent an email to Counsel; a copy filed as an exhibit contains a single sentence: "My ch 11 attorney Illyssa Fogel would like to speak to you. Her number is [given]."

Trustee's Ex. B. On July 29, 2011, Counsel filed a first amended complaint in the state court action, in which both debtors, along with Genesis, the debtors' children, and the other two individuals, were named as plaintiffs. It is clear from Mr. Eleftherios' July 15 email that Counsel was aware of the bankruptcy case, at the very latest, before he filed the first amended complaint. There is no evidence Counsel sought to contact Ms. Fogel at that time, despite Mr. Efstratis' repeated requests.

On February 10, 2012, Counsel sent a letter to Ms. Fogel, copied to the debtors, referencing the debtors' bankruptcy case number at the top of the letter, and beginning, "Over the past several weeks we have tried to arrange a conference call with you and your clients relating to our representation of certain parties in [the state court action]." Trustee's Ex. E, p . 1. The letter went on to report on the status of the litigation, but the real focus was Counsel's outstanding attorney's fees, $88,038, his firm having already received $34,481. Thus, he stated: "It is our understanding from our Attorneys Representation and Fee Agreement executed by the clients that Mr. Eleftherios (Sr.) has agreed to fund the lawsuit. But because of his current financial circumstances and the current bankruptcy proceedings, he is unable to do so." Id., p. 3. He concluded, "We need to discuss how this matter should proceed, how payment can be made, and if our firm can continue to provide representation." Id., p. 4.

What is perhaps most noteworthy about the letter is what it reveals about the time Counsel probably first became aware of the bankruptcy case. As discussed above, Mr. Eleftherios testifies he told Counsel about the bankruptcy case at their first meeting, on February 14, 2011, and repeatedly thereafter; Mr. Eleftherios' July 15, 2011 email demonstrates Counsel knew about the bankruptcy by that date, at the latest. In his February 10, 2012 letter to Ms. Fogel, Counsel refers to his first meeting with Mr. Eleftherios, on February 14, 2011, stating, "There were some concerns about the timing of the filing of the subject lawsuit, so out of an abundance of caution it was decided that it should be promptly commenced, which is what we did." Ex. E, p. 1. Counsel did not indicate, and does not indicate in the present motion, what those concerns were or whether they had anything to do with the fact of the bankruptcy case. It should be noted that he did not file the complaint commencing the state court action for four months after that initial meeting; during that time, had he known of the bankruptcy case, he would have had plenty of time to seek court approval of his employment by the debtors or to make sure their bankruptcy counsel did so.

Counsel went on in the letter:

> Meanwhile we reached an agreement with the Plaintiffs that any recovery in the matter by settlement or judgment would be distributed on a *pro rata* basis so that we could jointly represent them, and also to avoid any conflict among them. It was also understood that legal fees and costs would be paid through Mr. Eleftherios (Sr.). It appears that at the time there was not clear communication regarding the status of any bankruptcy proceedings involving Mr. and Mrs. Eleftherios (Sr.). [¶] Nonetheless, since time was of the essence, and there were clients not involved in any bankruptcy who had a joint interest in the recovery, the suit was filed.

Ex. E, pp. 1-2 (footnote omitted). He added: "While we understand that Mr. and Mrs. Eleftherios (Sr.) are subject to the current Bankruptcy Court proceedings, the other Plaintiffs and clients are not. In our view the action needed to be filed when we did file it." Id., p. 3.

This language is telling for at least four related reasons. First, it suggests Counsel was aware of the fact of the bankruptcy case before he commenced the state court action. Second, it undercuts Counsel's testimony that he "later learned" of the bankruptcy case; that is, after he commenced the action, and thus, casts doubt on his credibility. Third, this language supports the conclusion that Counsel knew, early on, that there was a bankruptcy case out there that involved at least some of his clients, but chose to ignore that fact and rely instead on his awareness that several of the plaintiffs were not in bankruptcy. Finally, this language underscores the fact that Counsel was representing not just the debtors but related entities, as well as individuals who were relatives of the debtors and others who were not. All of these were "connections" with the debtors Counsel would have been required to disclose to the court in an application for approval of his employment, as would Counsel's understanding that "legal fees and costs [apparently for all the plaintiffs] would be paid through Mr. Eleftherios (Sr.)." These are connections this court would have considered and very well may have prevented the court from approving Counsel's employment.

Counsel is not a novice attorney. He has practiced in California for almost 50 years. On the basis of Counsel's experience, and based on the ambiguity of Counsel's testimony as to when he learned of the debtors' bankruptcy case, as compared with the precision of Mr. Efstratis' recollection of the repeated occasions on which he told Counsel about the case, the court concludes that Counsel was aware of the bankruptcy case at least by July 15, 2011, and probably as early as February 14, 2011. Yet Counsel failed to take any action to ensure that his employment as counsel for the debtors was approved by this court. For these reasons, the court concludes that Counsel has failed to show a satisfactory explanation for his failure to receive prior approval of his employment.

Finally, there is subsequent evidence of a lack of concern for the effect of bankruptcy on the state court action in an email dated March 5, 2015 from David Zeff to Counsel's successor as attorney for the plaintiffs in the state court action, Melinda Jane Steuer, as authenticated by her testimony. That email bears quoting in full:

> **Dear Ms. Steuer:**
>
> **I called today to discuss the rationale for any bankruptcy proceeding with reference to the settlement with [] Amerus in the Sacramento action. As you know, Ted [Mr. Efstratis, Sr.] is not a party to the case against Amerus-the Sacramento case.[4] Genesis is, along with a number of individual plaintiffs including Ted's wife. We see no reason why Ted's bankruptcy or the bankruptcy of his wife has to be reopened in order to settle with Amerus. The funds could be paid by Amerus simply to Genesis and the other parties plaintiff could agree to the settlement to relieve Genesis of the liability of Mr. Kornblum's judgment.**
> **The reason I called today was to discuss this concept. Please call me back immediately. If I do not hear from you on this subject, I will assume that the bankruptcy as [sic] a sham proceeding in order to divert funds from Mr. Kornblum's judgment, and I will proceed with collection against Genesis and Ted.**
> **Sincerely DMZ**

Trustee's Ex. G.

This email appears to evidence an attempt to conceal the settlement of the

state court action from this court, and similarly, the ultimate payment of Counsel's fees. The court does not know what Counsel's role was in this email; it does appear, however, that Mr. Zeff is attempting to collect Counsel's fees. It appears from Mr. Eleftherios' testimony described above and from Counsel's statements in his letter to Ms. Fogel that evading disclosure of the state court action to this court was within Counsel's contemplation from the beginning.

The trustee also challenges Counsel's claim that his services benefitted the estate in a significant way. However, as the THC requirements are in the conjunctive, and as Counsel has failed to make a showing as to the first requirement, the court need not address the second.

The court will issue a minute order denying the motion.

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1 The debtors listed their interest in the LLC on their Schedule B as an asset owned by their marital community, with an "indeterminate" value. They did not indicate there were any other owners of the LLC.

2 The first sentence of the quoted paragraph is oddly worded in that it suggests Counsel knew there were bankruptcy proceedings going on, but "later learned that only Mr. Efstratis and his wife" were in bankruptcy and that Genesis was not.

2 The copy of the letter agreement comprising the parties' fee agreement, filed by Counsel as an exhibit, is marked "Zeff Decl. - Exhibit 1" at the bottom of each page, suggesting it was used as an exhibit in Counsel's lawsuit for fees and suggesting Mr. Zeff was an associate in his firm.

4 Ms. Steuer states in her declaration, "Ted subsequently dismissed his claims in the state court action for lack of standing." M. Steuer Decl., filed June 10, 2015, at 2:11.

11.	12-39040-D-7 GMR-5	JUDITH FOSTER	MOTION FOR COMPENSATION FOR GEOFFREY RICHARDS, CHAPTER 7 TRUSTEE 5-23-15 [74]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable and appropriate compensation for actual, necessary, and beneficial services under Bankruptcy Code § 726. As such, the court will grant the motion and the moving is to submit an appropriate order. No appearance is necessary.

12. 11-31046-D-7 DAVID FOYIL
HSM-1

MOTION TO EMPLOY HOWARD S. NEVINS AS ATTORNEY(S) AND/OR MOTION FOR COMPENSATION FOR HOWARD S. NEVINS, TRUSTEE'S ATTORNEY
5-22-15 [203]

Tentative ruling:

This is the application of Hefner, Stark & Marois, LLP ("Counsel") for approval of its employment as counsel for the trustee in this case and for approval of compensation. The proof of service evidences service of the application and all documents filed with the application on the debtor, the trustee, the United States Trustee, and the creditors who have requested special notice in this case. The proof of service also purports to evidence service of the notice of hearing on creditors, but the service list referred to in the proof of service is not attached.

The court intends to continue the hearing to permit Counsel to file an amended proof of service or if the motion was not properly served to continue the hearing and have the moving party to file a notice of continued hearing and to serve the notice on all creditors. The court will hear the matter.

13. 15-23746-D-7 GORDON BONES

NOTICE OF INCOMPLETE FILING
5-7-15 [3]

Final ruling:

This is the objection of creditors Melissa Joseph, as trustee of the Richard W. De Silva Revocable Living Trust, and Julie Ana DeSilva (the "Creditors"), to the court's Notice of Incomplete Filing and Notice of Intent to Dismiss Case If Documents Are Not Timely Filed. As the debtor has now filed the required schedules and statements, the case will remain open. The Creditors' objection will be overruled as moot. No appearance is necessary.

14. 14-32452-D-11 JOHN RODRIGO
SJS-3

MOTION TO USE CASH COLLATERAL
5-18-15 [72]

15. 09-29162-D-11 SH-315 — SK FOODS, L.P. — CONTINUED OBJECTION TO CLAIM OF STEVE SAMRA FARMS, CLAIM NUMBER 357
2-24-15 [5495]

16. 09-29162-D-11 SH-315 — SK FOODS, L.P. — CONTINUED COUNTER MOTION TO ALLOW LATE FILED CLAIM
4-1-15 [5598]

17. 09-29162-D-11 SH-316 — SK FOODS, L.P. — CONTINUED OMNIBUS OBJECTION TO CLAIMS
2-25-15 [5500]

18. 09-29162-D-11 SH-332 — SK FOODS, L.P. — OBJECTION TO CLAIM OF RANDALL YINGLING, CLAIM NUMBER 211
5-11-15 [5678]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection to claim no. 211 has been filed and the objection is supported by the record. Accordingly, the court will sustain the trustee's objection to claim, and the court will disallow Randall Yingling's claim in any amount over $224,279. Moving party is to submit an appropriate order. No appearance is necessary.

19. 14-26469-D-7 GERARDO CHAVEZ — MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY, LLC
CLH-2 — 5-20-15 [72]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

20. 14-31685-D-7 CATHERINE PALPAL-LATOC — CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
SDB-1 — 3-5-15 [48]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response has been filed to the objection to the debtor's claim of exemptions and the objection is supported by the record. Accordingly, the court will sustain the creditor, Eugeio Albalos, Jr.'s, objection to the debtor's claim of exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

21. 14-21786-D-7 CARENDA MARTIN — MOTION FOR COMPENSATION BY THE LAW OFFICE OF NEUMILLER & BEARDSLEE FOR CLIFFORD W. STEVENS, TRUSTEE'S ATTORNEY
CWS-3 — 5-19-15 [45]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

22. 15-20486-D-7 ALISON ABELS — MOTION TO INTERVENE
15-2079 BHS-1 — 5-20-15 [9]
ABELS V. NAVIENT

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in ECMC's motion to intervene is supported by the record. As such the court will grant ECMC's motion to intervene. Moving party is to submit an appropriate order. No appearance is necessary.

23. 14-24788-D-11 CHRISTIAN/AMANDA BADER
RLC-7

MOTION FOR COMPENSATION BY THE LAW OFFICE OF REYNOLDS LAW CORPORATION FOR STEPHEN M. REYNOLDS, DEBTORS' ATTORNEY
5-15-15 [135]

DEBTOR DISMISSED:
03/06/2015
JOINT DEBTOR DISMISSED:
03/06/2015

Tentative ruling:

This is the motion of Stephen M. Reynolds ("Counsel") for an allowance of compensation in the amount of $19,140 for his services as counsel for the debtors-in-possession before the case was dismissed, May 7, 2014 through March 4, 2015. The United States Trustee has filed opposition and Counsel has filed a reply. For the following reasons, the motion will be granted in part.

The United States Trustee raises three objections to the motion; the court agrees with two of them. First, the debtors' Schedule B and Statement of Financial Affairs in this case, as originally filed, were materially inaccurate, due in large part to Counsel's re-filing of similar or, in some cases, the very same documents he had filed in an earlier case in which Christian Bader, one of the debtors in this case, was the debtor. In fact, the debtors' Schedules A, B, and C in this case were identical to those filed in Dr. Bader's earlier case. Thus, the debtors' Schedule B in this case listed eight different checking accounts with balances equal – to the penny – to the balances listed in Dr. Bader's first case, despite the fact that the schedules in the two cases were filed six and one-half months apart. The values of all the debtors' other assets – their children's 529 plan, an IRA, the amount of Dr. Bader's accounts receivable, the values of their vehicles, and the value of Dr. Bader's dental equipment – were also exactly the same as the values listed in the first case. The debtors' Schedule I was also identical to the one filed in Dr. Bader's earlier case (but for formatting changes made when the official form was amended), despite the fact that his income, which is their only income, varies significantly.

In addition, the debtors' Statement of Financial Affairs in this case was identical to the one filed in Dr. Bader's earlier case with two exceptions: the one in this case (1) added a reference to a vehicle loan paid off after the prior case was dismissed, and (2) deleted debtor Amanda Bader's name at question 16, whereas in the prior case, because the only debtor was Dr. Bader, he had listed her as his separated spouse. Thus, the Statement of Financial Affairs in this case listed the debtors' 2013 income as exactly the same as had been listed in Dr. Bader's earlier case, whereas the figure in the earlier case reflected year-to-date income to September 6, 2013 only and the figure in this case should have reflected income through December 31, 2013. The statement of affairs in this case reported their income for the entire year as $548,863, whereas the correct figure, according to an amended Statement of Financial Affairs filed several weeks into the case, was $643,126. Thus, the debtors failed to report income of almost $100,000. They also failed to report any income for the year-to-date 2015, whereas they had income for that period, the period up to May 6, 2014, of $281,410. In short, there were serious material inaccuracies in the original statement of affairs in this case, inaccuracies that resulted from Counsel simply filing a virtual copy of the statement of affairs filed in the earlier case without updating the amounts listed.

These were egregious errors, reflecting a level of carelessness or indifference that is unacceptable in any bankruptcy case. These errors resulted in Counsel's clients signing under the penalty of perjury schedules and statements that were untrue. Although debtors signing documents under oath in bankruptcy cases are held to a high level of care and attention, and the debtors in this case bear some of the blame, the court will not lightly gloss over the fact that Counsel permitted his clients to sign grossly inaccurate documents without updating them or, apparently, even advising his clients to review them carefully, and then filed those inaccurate documents with the court.

In his reply to the United States Trustee's opposition, Counsel acknowledges that "[t]he schedules should have been accurate when filed and I concede the objection." Reply, filed April 21, 2015 ("Reply"), at 1:23. He hastens to add, however, that "[t]he inaccuracies were not relied on and [were] corrected when detected early in the case." Id. at 1:23-24. The inaccuracies were detected by the United States Trustee and the court, not Counsel or the debtors, and would have remained uncorrected and therefore been relied on had not the United States Trustee and the court caught them. Counsel has offered no reasonable explanation for his failure to review the documents; his response is nothing short of cavalier. Considering that Counsel is a seasoned bankruptcy practitioner, the court finds that these inaccuracies were a clear violation of Fed. R. Bankr. P. 9011. In the court's view, the re-filing of the same schedules and statements filed six months earlier in a different case with virtually no review is, in and of itself, a basis for disallowing Counsel's fees; at the very least, it warrants a substantial markdown from the fees sought.

Next, the United States Trustee objects that Counsel was paid $5,000 for his services in the prior case, out of an agreed fee of $6,000, leaving a balance due of $1,000, but he did not disclose in the schedules filed in this case that he was still owed $1,000. Counsel responds that he waived the $1,000 balance "just as I always waive fees in Chapter 13 cases when the cases are dismissed." Reply, at 2:4. He adds that if he had considered the fees as still owed, he would have listed them (which would have prevented his being employed in this case), and that "[t]here was no sub rosa attempt to hide the fees owed because I did not consider those fees owed after the dismissal of the Chapter 13 case." Id. at 2:10-11.

The problem here is not that Counsel may have been a creditor when this case was filed – the court accepts Counsel's statement that he waived the balance due. The problem is Counsel's serious misunderstanding of the disclosure requirements for bankruptcy professionals. Counsel's insistence that "he" did not consider the fees owed and that if "he" had considered them owed, he would have listed them on the schedules merely underscores the problem. It is not up to the professional seeking to be employed to determine which of the facts of his connections with the debtors to disclose; it is his duty to disclose all of the facts.

"The duty of professionals is to disclose all connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest . . . . They cannot pick and choose which connections are irrelevant or trivial. . . . No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it." Neben & Starrett v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir. 1995), quoting In re EWC, Inc., 138 B.R. 276, 280-81 (Bankr. W.D. Okla. 1992). "The duty is one of complete disclosure of all facts . . . ." Park-Helena, 63 F.3d at 881, quoting In re Plaza Hotel Corp., 111 B.R. 882, 883 (Bankr. E.D. Cal. 1990).

Thus, in Park-Helena, for example, the debtor's counsel stated in its Rule 2016 statement that its retainer had been paid by the debtor, when in fact, it had been paid by the debtor's president from his personal checking account. The court rejected counsel's argument that the check represented funds the president owed to the debtor, and thus, that the retainer was actually paid with funds of the debtor (Park-Helena, 63 F.3d at 881), and affirmed the bankruptcy court's denial of all fees. Id. at 882. In Kun v. Mansdorf (In re Woodcraft Studios), 464 B.R. 1 (N.D. Cal. 2011), the debtor's counsel stated in his employment application that he had never represented the debtor before, that he had no connection to any party-in-interest, and that he had received a $5,000 retainer. He did not disclose that he had performed $3,950 worth of work as the debtor's attorney in preparing the case for filing for which he had not drawn down on his retainer, which made him a pre-petition creditor. The bankruptcy court denied all fees and ordered disgorgement of the $5,000 retainer; the decision was affirmed by the district court. 464 B.R. at 10.

The district court's ruling was based on the failure to disclose, not the fact that counsel's failure to draw down on the retainer before the petition was filed arguably made him a pre-petition creditor.

> [Counsel's] failure to inform the Bankruptcy Court of his pre-petition relationship with the debtor and the full circumstances surrounding his receipt and use of the $5,000 retainer provided the Bankruptcy Court discretion to deny all of his fees, including his $5,000 retainer. [Counsel's] disclosure violations were substantial. Although his employment application included debtor's agreement to pay him a $5,000 retainer, Appellant failed to disclose any pre-petition work that he had done for debtor and the fact that he had already incurred fees. Such information was relevant to the court's determination of whether [counsel] was disinterested under § 327, and was required by Rule 2014(a).

Woodcraft, 464 B.R. at 9. "Based on these disclosure violations, the Bankruptcy Court was well within its discretion to deny all fees to [counsel] and order disgorgement of his retainer." Id. at 10. The court found counsel's argument that he was not actually a creditor to be "inapposite," and held that "the disclosure violations themselves are independent grounds for denying [counsel's] fees, regardless of whether the undisclosed information would have materially affected the Bankruptcy Judge's decision to approve of his employment." Id. at 11, citing Park-Helena, 63 F.3d at 880.

Here, Counsel disclosed in the declaration supporting his employment application in this case that he represented debtor Christian Bader in a prior chapter 13 case, both debtors in a chapter 7 case filed in 2008, and a family member in a case filed in 2008. He stated he had not received a retainer in connection with this case, that he had received a $5,000 retainer from Christian Bader in connection with the prior chapter 13 case, and that he had exhausted that retainer prior to filing this case. He did not disclose that he had waived the $1,000 balance due from the chapter 13 case. That was a fact that Counsel was required to disclose; his failure to do so causes the court to question the veracity of his present assertion that he had waived the balance, and warrants a reduction in fees.

Finally, the United States Trustee objects that Counsel has "lumped" services together, preventing an assessment of the reasonableness of time spent on particular tasks. The court agrees that Counsel's travel time should have been segregated out,

if not billed at a lower hourly rate. The court questions Counsel's statement in reply that he has made the trip from his office in Davis to the courthouse in Sacramento "hundreds of times" and knows that it takes one hour. This reply discounts the possibility that traffic would impact the amount of time spent, as it often does in that corridor. The reply also assumes the court and creditors know what Counsel knows, which is not appropriate. However, the court does not agree with the United States Trustee's position that time spent reviewing, for example, an OSC and researching and drafting a response and declaration is impermissible lumping. At any rate, in this case, Counsel for the most part appropriately billed separately for individual tasks.

To conclude, the court finds Counsel's conduct in filing schedules and statements virtually identical to those filed six months earlier in a different case to be egregious, so as to warrant a substantial reduction in the fees requested. The court also finds Counsel's failure to disclose an obvious "connection" with the debtors; namely, his decision to write off the balance due under an earlier fee agreement, to be without excuse. For these reasons, the court will reduce Counsel's fees from the requested $19,140 by 40%, to $11,484.

The court will hear the matter.

24.	15-20096-D-7 15-2051 ESIO V. KUMAR	DAVID KUMAR CAH-1	MOTION FOR RELIEF FROM DEFAULT 5-20-15 [19]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the defendant's motion for relief from default pursuant to Fed. R. Civ. P. 55(c), incorporated herein by Fed. R. Bankr. P. 7055. The plaintiff has not filed opposition. For the following reasons, the motion will be granted.

The standard for setting aside a default is "good cause." Fed. R. Civ. P. 55(c). The factors the court is to consider are these: "(1) whether [the defendant] engaged in culpable conduct that led to the default; (2) whether [the defendant] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the plaintiff]." Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004). As indicated by the use of the word "or," these factors are in the disjunctive; a motion to set aside a default or default judgment may be denied if any one of them is present. Id. at 926. The burden of proof is on the moving party. Id.

However, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." United States v. Signed Personal Check No. 730, 615 F.3d 1085, 1091 (9th Cir. 2010) (citations omitted). Thus, the court will consider the various factors in light of this overriding principle.

First, the court finds that the defendant's conduct in failing to timely answer the complaint was not culpable. "[A] defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." Signed Personal Check No. 730, 615 F.3d at 1092, quoting TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in

original). "[I]n this context the term 'intentionally' means that a movant cannot be treated as culpable simply for having made a conscious choice not to answer; rather, to treat a failure to answer as culpable, the movant must have acted with bad faith, such as an 'intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process.'" Signed Personal Check No. 730, 615 F.3d at 1092 (citation omitted). There is no suggestion in this case that the defendant did any of those things. Instead, the defendant's uncontroverted testimony is that he failed to file a timely answer because he works long hours and was unable to take action to defend himself until he hired counsel. This conduct was not "culpable" as defined by the case law interpreting culpable conduct for purposes of a motion to set aside a default.

Second, the court finds that the defendant has presented facts that, if true, would constitute a defense in this action.

> A defendant seeking to vacate a default judgment must present specific facts that would constitute a defense. But the burden on a party seeking to vacate a default judgment is not extraordinarily heavy. All that is necessary to satisfy the "meritorious defense" requirement is to allege sufficient facts that, if true, would constitute a defense: the question whether the factual allegation is true is not to be determined by the court when it decides the motion to set aside the default.

Signed Personal Check No. 730, 615 F.3d at 1094 (citation omitted; internal quotation marks omitted). Here, the defendant testifies to alleged facts that, if accurate, would refute the plaintiff's figures as to the amount due. Thus, he has alleged facts that, if true, would constitute a defense.

Third, setting aside the default would not prejudice the plaintiff, at least not in any way sufficient to justify denying this motion. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case." TCI Group Life, 244 F.3d at 701; see also Thompson v. American Home Assur. Co., 95 F.3d 429, 433-34 (6th Cir. 1996) ["Rather, the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion."]. In this case, the plaintiff's complaint was filed on March 5, 2015, only three and one-half months ago. The defendant's default was entered on April 22, 2015, and the defendant filed this motion to set aside the default on May 20, 2015. There is no indication the plaintiff would suffer prejudice, other than a slight delay in the litigation, if the case is allowed to proceed.

For the reasons stated, the motion will be granted by minute order, and the defendant's answer to the complaint, filed May 20, 2015, will be deemed to have been timely filed. No appearance is necessary.

25. 15-20096-D-7 DAVID KUMAR
APN-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
5-18-15 [27]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received his discharge on April 28, 2015 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

26. 13-21199-D-7 JAMES SCOTT

MOTION TO COMPEL ABANDONMENT
5-18-15 [308]

Final ruling:

This is a motion to abandon real property signed and filed by the debtor "in-pro-per." The debtor is represented by counsel of record in this case. As debtor is not free to pick and choose which actions to take in a case through his or her counsel of record and which to take "in pro per."

As the motion was not brought by the debtor through his counsel of record, the motion will be denied by minute order. No appearance is necessary.

27. 15-24411-D-7 MARTHA JOHNSON
TJW-1
LAURIE NESCI VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
6-9-15 [11]

28. 15-23615-D-7 FRANCES RHODES
CJO-1
GREEN TREE SERVICING LLC VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
6-9-15 [11]

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtor's Statement of Intentions indicates she intends to surrender the collateral and the trustee has filed a Report of No Assets. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

29. 14-25816-D-11 DNL-56 — DEEPAL WANNAKUWATTE — COUNTER MOTION FOR AUTHORITY TO ABANDON REAL PROPERTY
6-10-15 [649]

30. 12-33117-D-7 TOG-1 — DANNY/SOCORRO SOTO — MOTION TO AVOID LIEN OF WELLS FARGO BANK, N.A.
6-4-15 [89]

31. 10-50339-D-7 HSM-4 — ELEFTHERIOS/PATRICIA EFSTRATIS — CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH GENESIS SPECIALTY TILE AND ACCESSORIES, LLC, ELEFTHERIOS T. EFSTRATIS, PATRICIA E. EFSTRATIS, ET AL.
5-20-15 [243]

32. 15-23447-D-7 CJO-1 — MARY MURPHY — MOTION FOR RELIEF FROM AUTOMATIC STAY
6-8-15 [12]
GREEN TREE SERVICING, LLC
VS.

33. 14-20064-D-7 GLENN GREGO ORDER ON REMAND RE: CONVERSION OR DISMISSAL OF CASE 6-1-15 [354]

Tentative ruling:

On February 6, 2014, this court issued an order converting this case from chapter 11 to chapter 7 (the "Conversion Order"). The debtor appealed. On May 29, 2015, the Ninth Circuit Bankruptcy Appellate Panel (the "BAP") issued a judgment by which it vacated the Conversion Order and remanded the case to this court to consider dismissal of the case as an alternative to conversion. On June 1, 2015, this court issued an Order on Remand, setting the matter for hearing on June 24, 2015 and giving the parties time to file briefs and/or submit evidence. On June 9, 2015, on the United States Trustee's emergency motion and over the debtor's opposition, the BAP issued an order extending the stay imposed by Fed. R. Bankr. P. 8025(a) until 11:59 p.m. on July 1, 2015.

In response to the Order on Remand, the chapter 7 trustee, the United States Trustee, and unsecured creditor Pacific Western Bank have weighed in in favor of conversion. No other creditors have responded. The debtor has purported to file a response which the court will, for the reason discussed below, not consider. For the following reasons, the court will convert the case to chapter 7, effective at 12:00 a.m. on July 2, 2015, and direct the reappointment of a chapter 7 trustee.

The BAP found no reversible error in this court's finding that the debtor filed this case in bad faith. Instead, it vacated and remanded because this court had failed to consider dismissal of the case as an alternative to conversion. The BAP quoted from an earlier decision in concluding that "the bankruptcy court [has] an independent obligation under § 1112 to consider what would happen to all creditors on dismissal and, in light of its analysis, whether dismissal or conversion would be in the best interest of all creditors . . . ." Grego v. United States Trustee, 2015 Bankr. LEXIS 1792, at *20 (9th Cir. BAP May 29, 2015), quoting Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 612-13 (9th Cir. BAP 2014). The BAP was especially concerned that this court had failed to consider the alternatives from the perspective of the secured creditors, who "might have preferred dismissal over conversion, so that they could proceed immediately with their state court remedies." Grego, 2015 Bankr. LEXIS 1792, at *21. The BAP also noted that "the record suggests that [the debtor] had almost no unsecured creditors and almost no unencumbered nonexempt assets, thus indicating that there would be little or no chapter 7 estate to administer and no unsecured creditor body to administer the estate on behalf of." Id. As expressly suggested by the BAP, the court has caused the Order on Remand to be served on the debtor, the chapter 7 trustee, the United States Trustee, and all creditors, including the secured creditors, and they have been given an opportunity to present their views.[1]

The secured creditors who have filed claims in this case are the Franchise Tax Board and the San Luis Obispo County Tax Collector, with claims of $17,681 and $13,317, respectively. Another secured creditor has obtained relief from stay as to two of the real properties scheduled by the debtor. Neither the Franchise Tax Board, the Tax Collector, nor any of the scheduled secured creditors has filed a response to the Order on Remand. The court will, however, consider the interests of secured creditors, as described below.

The chapter 7 trustee and the United States Trustee make good points that favor conversion as opposed to dismissal. The chapter 7 trustee has submitted testimony of several individuals supporting the conclusion that, as the trustee puts it, "[t]he Debtor has been acting as landlord and collecting rents . . . from tenants, yet not paying any of the obligations on the rental units, such as utilities . . . ." Trustee's Response, filed June 12, 2015, at 1:23-26. The trustee has submitted declarations of customer service representatives of the South Tahoe Public Utility District and South Tahoe Refuse & Recycling Services, who testify, respectively, that the sewer and garbage bills on a four-unit apartment complex in South Lake Tahoe, California, have not been paid in almost six years and almost five years, respectively. For both of those utilities, the accounts for the apartment complex are in the names of the debtor and the Oscar Grego Family Trust (the "Trust"). The debtor listed the property comprising the apartment complex as an asset on three different Schedules A in this case, listing himself as a co-owner.[2]

The debtor testified in a declaration filed with the BAP in opposition to the trustee's emergency motion for a stay that he filed this bankruptcy case to preserve residential real properties in South Lake Tahoe and Cambria, California, presumably the properties he listed on his Schedules A. In contrast to the testimony of the two utility company representatives, the debtor testified in that declaration, with regard to "utilities, sewer, garbage, and other services related to these properties" that "in [his] capacity as manager of the properties, [he] saw to it that all of these obligations were kept current during the two years before the filing of this bankruptcy." Debtor's Response and Opposition to Emergency Motion, filed June 8, 2015 in BAP Case No. 14-1067, at p. 4. This case was filed January 3, 2014; thus, the debtor's testimony in his declaration filed with the BAP is directly at odds with the testimony of the utility company representatives submitted by the trustee.

The trustee has also submitted a declaration of an individual who is a tenant in the apartment complex, who testifies he and another individual entered into a month-to-month agreement for an apartment on October 4, 2014. The lease agreement filed as an exhibit, which the tenant authenticates, names the debtor as the landlord and calls for rent, at $900 per month, to be paid by depositing it into an account at U.S. Bank. The tenant states he and his co-tenant were billed separately by the debtor for utilities and that they added the utility payments to the rent they paid the debtor by deposits at U.S. Bank. The tenant states the rent was paid to the debtor by way of those deposits until March 2015 when the tenant was contacted by the trustee. The tenant adds that after he began paying rent to the trustee, the debtor contacted him and instructed him to continue to pay rent to the debtor at the U.S. Bank account in accordance with the lease. The tenant even received a text from the debtor stating that if he had already paid rent to the trustee, he would have to pay it again to the debtor. And, notwithstanding the stay of the BAP's judgment pursuant to FRBP 8025(a), the debtor's purported attorney, Wiley Ramey, wrote the tenant advising that the debtor had been restored to the status of debtor-in-possession and rent was to be paid to the debtor.

The trustee testifies he conducted a meeting of creditors on December 30, 2014, at which the debtor testified he does not own any real property and is not collecting the rent for real property in the Trust. He stated the rent is going directly to "J.P. Morgan National Bank." This testimony by the debtor, given under oath, directly contravenes the tenant's testimony that the debtor is named on the lease agreement as the landlord, and that the tenant paid rent from October of 2014 to March of 2015 to the debtor by deposit into an account at U.S. Bank. Thus, the debtor's sworn testimony, in the declaration he submitted to the BAP and at the

meeting of creditors, is in direct conflict with the testimony of three individuals who have, apparently, no connection with each other and no dog in this fight.

The court is well aware of the serious material inaccuracies and omissions in the schedules and statements of affairs the debtor has filed in this case; the court finds the debtor has continued his pattern of untruthfulness in his testimony in the declaration filed with the BAP and at the December 2014 meeting of creditors. In short, it is clear the debtor will say whatever he thinks will suit his own ends at any given time. As a result, the court cannot place any reliance on the debtor's schedules and statements or on his testimony, and gives no weight to whatever he might say about his intentions with regard to creditors if this case were dismissed. Moreover, the debtor has consistently claimed virtually all the claims filed in this case are invalid. Even if there are problems with some of the claims (which has not been determined), the debtor's lack of truthfulness makes it impossible to conclude he would act in best interests of legitimate creditors if this case were dismissed.

Further, whatever rights the debtor may now claim he has as a result of the BAP's ruling, the debtor's conduct in leasing, almost a year into the case and long after it was converted to chapter 7, an apartment in a complex he himself scheduled as co-owned by him and his conduct in collecting the rents under that lease evidence a clear intention on the debtor's part to interfere with the trustee's management of property of the estate. This conduct belies any intention the debtor might claim to act in the interests of even legitimate creditors if this case were dismissed.

As far as secured creditors are concerned, the debtor has challenged the claims of both the Franchise Tax Board and the San Luis Obispo County Tax Collector. As for the Franchise Tax Board, the debtor claimed he intended to file amended tax returns "reducing the obligations to zero." Objections to Creditor's [sic] Claims, filed February 20, 2015, at 3:24. He claimed the Tax Collector's claim is for taxes on property "in the name of the Oscar Grego Trust and are secured by real property in any event." Id. at 4:8-9. He did not claim the taxes had been paid or that they were not due, and he did not profess an intention to pay them. Further, on his Schedules I and J in this case, the debtor listed the rents from the real properties – a total of $3,725 per month – as his sole source of income, as against $17,511 in monthly expenses, not including any real estate taxes, which he listed as $0. Assuming without deciding that the $8,300 per month he listed for mortgage payments on properties other than his residence includes taxes and insurance, his rental income, $3,725, is grossly insufficient to pay even the mortgages on the rental properties, let alone the debtor's living expenses. In addition, the debtor listed the mortgage payment on his residence at $4,066 per month, whereas the creditor's motion for relief from stay indicates the mortgage payment went to $6,785 on December 1, 2013. Clearly, the debtor has insufficient income to service the debt on the residential real properties he filed this case to preserve or to pay his living expenses, let alone to pay the delinquent property taxes owed to the San Luis Obispo County Tax Collector or the income taxes due the Franchise Tax Board.

As to the mortgage creditors, the court takes judicial notice of the declaration filed January 16, 2015 in support of Deutsche Bank National Trust Company's motion for relief from stay to the effect that no mortgage payments had been made on the loan secured by one of the properties the debtor listed on his Schedules A since July of 2009; that is, for five and one-half years as of the time the relief from stay motion was filed. Arrearages for monthly payments alone totaled $194,601 at that time, and an additional $32,304 was due for escrow advances made by the creditor. Similarly, the court takes judicial notice of a declaration filed May 7, 2014 of the same individual in support of the Bank's motion for relief

from stay on a different property, also listed on the debtor's Schedules A, to the effect that no mortgage payments had been made since June 2009, with the result that mortgage payments totaling $239,067 were in arrears, along with $72,752 in escrow advances.

The debtor opposed the latter described motion, testifying that he and his family were living in the property and that he was seeking a loan modification. He also challenged the Bank's standing to seek relief from stay. As the debtor had stopped making the mortgage payments on the two properties years before he filed this case, the court has no reason to believe he would act in the best interests of his secured creditors if the case were dismissed. As far as pursuing their state court remedies is concerned, the creditors who have not already done so are free to seek relief from stay. The court is not aware of the trustee's intentions with regard to the remaining real properties in the estate, but regardless, would seriously consider any relief from stay motion if the payment history were similar to the history in the two motions already filed and granted.

The United States Trustee makes the important point that "Debtor has been responsible for three bankruptcy cases filed within three years, each affecting secured creditors[']ability to access their state court remedies. Dismissal would not preclude a subsequent bankruptcy filing again affecting secured creditors." United States Trustee's Reply, filed June 15, 2015, at 9:24-10-1.[3] The debtor has testified it was his intention in filing this case to preserve residential real properties. As the United States Trustee points out, if this case were dismissed, nothing would prevent him from transferring the properties or from filing again to thwart secured creditors' rights to their state court remedies. For these reasons, the court believes the interests of secured creditors are better served by having this case continue under chapter 7 than by dismissal. As far as the debtor's interest in preserving the properties is concerned, that is not the court's concern in a § 1112 analysis, which is directed to the interests of creditors.

Turning then to the unsecured creditors, filed claims amount to $7,921 priority and $77,008 general. Of the latter amount, $67,400 is held by a single creditor whose claim the debtor is challenging by way of an adversary proceeding. Assuming for the sake of argument only that claim were disallowed, there would still be $7,921 in priority claims and $9,608 in general unsecured claims that would stand to be paid at least in part if this case remains in chapter 7. The trustee testifies he has negotiated the sale of three lawsuits in which the debtor is the named plaintiff – lawsuits that are property of the estate – for a total of $68,000. Thus, it does appear there are assets that can be liquidated for the benefit of unsecured creditors.[4]

Finally, as instructed by the BAP, the court considers "whether there exist any unusual circumstances militating against both conversion and dismissal (from the perspective of the estate's creditors)." Grego, 2015 Bankr. LEXIS 1792, at *22. Given the blatant lack of truthfulness on the part of the debtor in the preparation and signing of his various schedules and statements of financial affairs filed in this case, given his continuing willingness to testify under oath to whatever suits his purposes at any given time, and given his determination to interfere with the trustee's administration of property of the estate, the court has no confidence the debtor would respect his fiduciary duty to creditors if he were restored to the status of a debtor-in-possession. Thus, viewing the question from the perspective of the creditors, as the BAP directed, the court concludes that there are no unusual circumstances that militate against both conversion and dismissal and in favor of restoring the debtor to that status. Finally, except for the collection of rents on

real property, the prosecution or compromise of litigation, and possibly the sale of real property, there is no business to be operated on behalf of the estate, and no reason to suppose a chapter 11 trustee would serve the interests of creditors any better than a chapter 7 trustee.

As indicated above, the court will not consider the debtor's response to the Order on Remand. The response was signed and filed by an attorney, Mr. Ramey, who substituted out of this case as the debtor's attorney three months ago. Mr. Ramey is not the debtor's attorney of record, and thus, has no authority to participate in the case. See LBR 2017-1(b)(1). Mr. Ramey has indicated on the first page of the response that he is "appearing specially" for the debtor. This court's local rules do not authorize special appearances. The "Notice of Special Appearance" signed by Mr. Ramey and the "Declaration of Debtor Authorizing Attorney Wiley Ramey to Appear Specially and/or as Co-Counsel," filed May 26, 2015 and June 5, 2015, respectively, do not override the court's local rules. The debtor and Mr. Ramey have been warned repeatedly that documents filed by Mr. Ramey when he is not the debtor's attorney of record will not be considered. In the most recent such warning, the court noted that the continued filing of documents by Mr. Ramey when not the debtor's attorney of record may subject him to sanctions. If Mr. Ramey files any more documents as attorney for the debtor, whether "appearing specially" or otherwise, without properly substituting into the case as attorney of record in all respects, the court will issue an order to show cause why sanctions should not be issued against him pursuant to Fed. R. Bankr. P. 9011.

For the reasons stated, the court concludes that, among the alternatives – dismissal, conversion, appointment of a chapter 11 trustee, or restoring the debtor to the status of debtor-in-possession, conversion is in the best interests of creditors and the estate. Technically, the BAP's judgment vacated the Conversion Order, and although the judgment is stayed until 11:59 p.m. on July 1, 2015, the Conversion Order will be vacated at that time, and the case will be a chapter 11 case. Thus, the court will order that, effective at 12:00 a.m. on July 2, 2015, the case will be converted to chapter 7. The United States Trustee is directed to appoint a chapter 7 trustee.

The court will hear the matter.

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1 The United States Trustee points out that, as a result of the debtor's multiple revisions to his schedules and master address list, it is uncertain whether all of his creditors are aware of the case. The debtor's most recently filed master address list omitted a large number of creditors who had previously been on the list. The Order on Remand was served on all creditors on the most recent master address list. The issue of whether other creditors should be included on the master address list is not before the court at this time, and the court takes no position on it.

2 He also listed rental agreements for the property where the apartment complex is located and for three other properties on an amended Schedule G filed February 4, 2014; however, he listed the tenants of all of the properties, albeit with their addresses, only as "Current Tenant," without listing any names. Thus, none of the tenants had ever received notice of this case until the trustee intervened a few months ago, despite the fact that the debtor was unequivocally required to list the names and addresses of all tenants on his master address list (Fed. R. Bankr. P. 1007(a)(1)), such that they would receive notice of the case.

3 The debtor's first chapter 11 case was filed January 27, 2011. The second case, which he filed in the name of the Trust, was filed November 1, 2013, less than two months after the first case was closed. The present case was filed January 3, 2014, a week before the second case was dismissed. Thus, as the United States Trustee puts it, the debtor was responsible for filing three cases within three years.

4 The court recalls that in February of this year, the debtor filed an omnibus objection to all of the claims that had been filed as of that date. The objection was overruled for several procedural reasons and because the debtor had failed to submit any evidence, and thus, had failed to overcome the prima facie validity of the claims. The debtor has had every opportunity to present serious objections to claims, and will continue to have that opportunity. His previous attempt carries no weight, however, and any continuing contention that the claims are invalid must yield to the interests of creditors holding claims that are, as of this time, allowed claims.

34.	14-20064-D-7 BHS-2	GLENN GREGO	CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH HERITAGE OAKS BANK AND SID PATEL, ROE PATEL, MARIN MANAGEMENT, INC. AND CAMBRIA INN, LLC 5-13-15 [328]

Final ruling:

The hearing on this motion is continued to July 15, 2015 at 10:00 a.m. No appearance is necessary.

35.	15-24067-D-7 FI-1	SAMELLA PORTER	MOTION TO DISMISS CASE 6-9-15 [13]

36.	14-26078-D-7	LUISITA SONGCO	MOTION BY TRACY L. WOOD TO WITHDRAW AS ATTORNEY 6-1-15 [91]

Final ruling:

This is the motion of attorney Tracy Wood ("Counsel") to withdraw as counsel for the debtor in this case. The motion will be denied for the following reasons. First, the notice of hearing does not comply with the court's local rules and is inadequate to provide the debtor with notice that she has the right to oppose the motion. The notice of hearing (which is combined with the motion – see below) states as follows:

NOTICE IS HEREBY GIVEN that Tracy L. Wood, attorney for Debtor, hereby moves under Civil Rule 83.3(g)(3) for an order permitting him to be relieved as attorney of record in this action. There will be no oral argument or appearance necessary at the time of the hearing, which is set for the time, date and location in the above caption. Pursuant to local rule, 2017-1(e) the court will take this matter under submission.

This notice is defective for several reasons. The court assumes "Civil Rule 83.3(g)(3)" refers to a local rule for the district court for the Southern District of California, which does not apply in this court. This court does have a "local rule 2017-1(e)"; however, it says nothing about the court taking matters under submission. The statement that the court will take the matter under submission and the statement that "there will be no oral argument" are misleading and may have suggested to the debtor she would not have the right to be heard at the hearing. With regard to notice, counsel is urged to review this court's local rules, including LBR 9014-1, prior to filing any subsequent motions.

Further, the statements that "Debtor has been advised that Tracy L. Wood cannot continue to represent her interests" and that "plaintiff's counsel has no choice but to withdraw from representation" suggest that Counsel's withdrawal is a foregone conclusion when it is not. This court's local rule is very clear: "The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder." LBR 2017(e). The quoted statements may well have suggested to the debtor there would be little, if any, point in her appearing at the hearing.

Second, Counsel served only the debtor, the chapter 7 trustee, the United States Trustee, and those creditors who have filed claims in this case; he did not serve the several other creditors listed on the debtor's schedules. Although the rule requires service on the client and "all other parties who have appeared," all creditors are parties-in-interest in a bankruptcy case and all should have been served.

Third, the motion will be denied for a variety of other procedural reasons. The motion "& notice thereof," along with the proof of service, are combined in a single document, contrary to LBR 9014-1(d)(3) and (e)(3) and the court's Revised Guidelines for the Preparation of Documents, EDC 2-901 (Rev. 1/17/14), incorporated by LBR 9004-1(a). The motion does not contain a docket control number, as required by LBR 9014-1(c). The proof of service evidences service only of "a copy of the foregoing," and there is no proof of service attached to Counsel's supporting declaration; thus, there is no evidence of service of the declaration. Neither Counsel's supporting declaration nor the proof of service is signed under oath, as required by 28 U.S.C. § 1746. Finally, the moving party filed almost identical "motions & notices thereof" on May 5, 2015 and June 1, 2015, with no differences between them except that the former gives a hearing date of June 15, 2015 and the latter a hearing date of June 24, 2015. Apparently, Counsel decided to reschedule the hearing – his Notice of Unavailability filed May 5, 2015 states he will be unavailable between May 3, 2015 and June 3, 2015. However, rather than either (1) withdrawing the first motion or (2) simply filing and serving a notice of continued hearing, Counsel re-filed the motion and notice with no changes except for the hearing date. This has created confusion on the court's docket.

Finally, the motion states as grounds for the motion only that the debtor has been advised Counsel cannot continue to represent her, that she needs to seek other counsel, that she has not responded to the correspondence advising her of those

facts, and that continued representation would result in an unreasonable financial burden on Counsel. By contrast, Counsel's supporting declaration says nothing about financial considerations, instead discussing only his difficulty in communicating with the debtor. Finally, the declaration does not describe Counsel's efforts to notify the debtor of the motion to withdraw, as required by LBR 2017-1(e).

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

37.	13-35288-D-7 14-2097 GENERAL COUNCIL OF THE ASSEMBLIES OF GOD V. BOLE ET	DUSTIN/KAREN BOLE MGB-2	CONTINUED MOTION FOR SUMMARY JUDGMENT 3-18-15 [71]

Tentative ruling:

This is the motion of the plaintiff, General Council of the Assemblies of God, for summary judgment against the defendants, Dustin Bole and Karen Bole, on the plaintiff's complaint to determine that the defendants' debt is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code. The defendants have filed opposition and the plaintiff has filed a reply. For the following reasons, the motion will be denied.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. The moving party has the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). The plaintiff's motion raises two distinct sets of issues.

I. Is the Plaintiff's District Court Judgment Entitled to Preclusive Effect?

Relying on the doctrine of issue preclusion, the plaintiff contends the issue of whether its claim arose from willful and malicious injury by the defendants has been conclusively determined by a pre-petition judgment of the federal district court for the Northern District of Illinois – a judgment for $6,141,714, and thus, that there is no genuine issue of material fact and that the plaintiff is entitled to judgment as a matter of law. Issue preclusion, formerly known as collateral estoppel, applies in nondischargeability actions. Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). In assessing the preclusive effect of a federal court judgment, the court looks to federal common law. Taylor v. Sturgell, 553 U.S. 880, 891 (2008); Western Sys. v. Ulloa, 958 F.2d 864, 891, n.12 (9th Cir. 1992). Under that law, for the doctrine to apply, the court must find that "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008). The burden of proof is on the party seeking application of the doctrine. Id. at 1050-51.

The problem here is that the plaintiff's district court judgment was a default judgment, whereas under federal common law, a default judgment is not issue preclusive because the issues are considered not to have been "actually litigated." United States IRS v. Palmer (In re Palmer), 207 F.3d 566, 568 (9th Cir. 2000); Silva v. Smith's Pac. Shrimp (In re Silva), 190 B.R. 889, 893 (9th Cir. BAP 1995); Marlee Elecs. Corp. v. Antonakis (In re Antonakis), 207 B.R. 201, 204-05 (Bankr. E.D. Cal. 1997).[1] California law on issue preclusion, and the law in some other states, is to the contrary. See e.g., Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800-01 (9th Cir. 1995) (Florida law); Clarke v. Latimer (In re Latimer), 2014 Bankr. LEXIS 2368, *5 (Bankr. D. Hawaii 2014) (Idaho law); Younie v. Gonya (In re Younie), 211 B.R. 367, 375 (9th Cir. BAP 1997) (California law). In fact, almost all the cases cited by the plaintiff construed state law on issue preclusion, not federal common law.

One exception is the plaintiff's citation to FDIC v. Daily (In re Daily), 47 F.3d 365, 368 (9th Cir. 1995), in which the Ninth Circuit affirmed the application of collateral estoppel to a default judgment issued by a federal district court. The court found, however, that the judgment "was not an ordinary default judgment." Id. at 368. Instead, the defendant had "actively participated in the litigation, albeit obstructively, for two years before judgment was entered against him." Id. The court cited the district court's ruling on the plaintiff's motion for a default judgment, FDIC v. Renda, 126 F.R.D. 70 (D. Kan. 1989). That decision reveals that the defendant failed respond to discovery requests for nine months, until after the plaintiff had filed a motion to compel, in response to which the defendant requested additional time but failed to provide responses for an additional ten months, and ultimately served responses only after the plaintiff filed its motion for default judgment. And the responses served at that time were evasive and otherwise inadequate. The district court entered the default judgment as a discovery sanction. See 126 F.R.D. at 73.

Having reviewed that decision, the Ninth Circuit held that "[a] party who deliberately precludes resolution of factual issues through normal adjudicative procedures may be bound, in subsequent, related proceedings involving the same parties and issues, by a prior judicial determination reached without completion of the usual process of adjudication." Daily, 47 F.3d at 368.

> Daily did not simply give up but actively participated in the adversary process for almost two years prior to the FDIC's motion for default judgment. As the bankruptcy court observed, "Daily had a full and fair opportunity to litigate the allegations contained in the [RICO complaint] but [instead] . . . chose not to participate in the discovery process and pre-trial proceedings[, and to] frustrate[] and thwart[] the FDIC's trial preparation[] and defy the order of the United States District Court compelling discovery."

Id. In those circumstances, the court held, collateral estoppel was properly applied. Id.

The plaintiff in the present case has offered a number of exhibits tending to support the conclusion that defendant Karen Bole, with the assistance of defendant Dustin Bole, who was served early on, went to significant lengths to evade service of process in the district court action, and thereby refused to participate in the action. The defendants dispute these charges. The court does not agree, in any event, that defendant Karen Bole's conduct, if any, in evading service of process or defendant Dustin Bole's conduct, if any, in assisting her brings the case within

Daily so as to take it outside the general rule that default judgments issued by federal courts are not entitled to preclusive effect. The plaintiff filed its district court complaint on November 2, 2010 and obtained its default judgment on June 29, 2011. The default judgment was based solely on the defendants' failure to respond to the complaint, not on any conduct obstructing or delaying discovery.

In subsequent briefing, the plaintiff has cited two additional cases in which the courts applied preclusive effect to prior default judgments issued by a federal court. The first is distinguishable from this case in significant ways. In In re Palombo, 456 B.R. 48 (Bankr. C.D. Cal. 2011), the debtor filed for bankruptcy just two months into the district court case, and the district court's default judgment against the debtor was not issued until 13 months into the bankruptcy case. In the interim, the district court, nine months into the bankruptcy case, entered a default judgment against the debtor's co-defendants and directed the plaintiff to obtain an order from the bankruptcy court as to the effect of the automatic stay on the district court action as against the debtor. The bankruptcy court, on the plaintiff's motion for relief from stay, determined that the stay did not apply because the district court action was a police and regulatory action under § 362(b)(4) of the Bankruptcy Code. (The action was brought by the U.S. Secretary of Labor under the Employee Retirement Income Security Act ("ERISA").) Two and one-half months later, the district court entered a default judgment against the debtor.

The bankruptcy court recognized the general rule that federal court default judgments are not afforded preclusive effect, but, relying expressly on Daily, found an exception appropriate in light of several factors. First, the debtor was served, four months before the default judgment was entered against him, with the district court's default judgment against his co-defendants, which contained detailed findings regarding the debtor's conduct and ERISA violations. "Thus, the importance of the facts to this litigation [the dischargeability action] was clearly foreseeable at the time of the earlier action [the district court action] which was ongoing, not years earlier." Palombo, 456 B.R. at 59.

Second, "even after the District Court took the extraordinary step of staying the ERISA action and directing the Secretary to obtain an order from this Court addressing the stay, and this Court stated that the ERISA case was not subject to the stay, [the debtor] continued to default in the ERISA action." Id. Given the district court's judgment against the debtor's co-defendants, with its factual findings, and the bankruptcy court's order determining that the stay did not apply, "it was clearly foreseeable that the consequences of not defending the ERISA case would be issue preclusion in this bankruptcy proceeding." Id. at 60. Third, the court found that application of issue preclusion would be in the public interest. "[Employee benefit] [f]und participants, beneficiaries, and their assignee healthcare providers were left without benefits or reimbursement as a result of [the debtor's] conduct." Id. at 61.

No similar factors are present in this case. The district court's default judgment against the defendants was issued in June of 2011, almost two and one-half years before they filed for bankruptcy. There is no reason to conclude it was foreseeable when the defendants defaulted in the district court action that issue preclusion would apply down the road.[2] There are no public interest considerations here that would not be present in any two-party dispute; in short, there is nothing here that should take this case outside the general rule about federal court default judgments.[3]

In the other case cited by the plaintiff, In re Wilson, 72 B.R. 956 (Bankr.

M.D. Fla. 1987), the court applied preclusive effect to a district court default judgment with little analysis. See 72 B.R. at 959. The default judgment involved in that case appears to have been an ordinary default judgment. Thus, it appears the Wilson court would have given preclusive effect to virtually any default judgment despite the general rule that federal court default judgments are not entitled to such effect. Further, Wilson is distinguishable from this case in that the hearing on the plaintiff's motion for a default judgment had been held and the district court had announced its findings and conclusions on the record before the debtor filed for bankruptcy, but the district court had not yet entered the default judgment. Thus, there was but a short span of time between the time the debtor defaulted on the district court complaint and the time he filed bankruptcy. Arguably, this affected the element of foreseeability of the consequences of defaulting. In the present case, as indicated, the time span was two and one-half years.

Further, in applying issue preclusion to a district court default judgment, the bankruptcy court in Wilson relied on a single case, Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir. 1987), in which the court expressly stated it was not determining the question of "the applicability of general collateral estoppel principles" (810 F.2d at 1535), but instead, was applying a rule governing the collateral estoppel effect of a judgment against an indemnitee when the indemnitee later seeks to recover against his indemnitor. Id. at 1535-36.[4] There is nothing in Wilson or in the sole case on which it relied, Gibbs, that would support the plaintiff's position on issue preclusion in this case.

Finally, it is significant that under federal issue preclusion law, the courts recognize that it may be unfair for a variety of reasons to estop a defendant from relitigating issues that were determined against him by a prior judgment. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). For example, if the amount at stake in the prior action was small, the defendant may not have had sufficient incentive to defend himself. Id. Or if the action was in an inconvenient forum, he may have been unable to defend himself. Id. at 330-31, n.15. Thus, it has been held that "the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel [use against a losing defendant], but to grant trial courts broad discretion to determine when it should be applied." Id. at 331. "The general rule should be that in cases . . . where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." Id. Thus, even where the usual requirements for application of issue preclusion are met, the courts may take "indices of unfairness" into account in determining whether to apply it. Syverson v. IBM, 472 F.3d 1072, 1078-79 (9th Cir. 2007), citing Parklane Hosiery, 439 U.S. at 331.

In this case, the amount at stake, as disclosed in the prayer to the plaintiff's district court complaint, was in the millions of dollars. This presumably provided a strong incentive to the defendants to respond. However, the action was filed in the Northern District of Illinois, whereas the defendants at that time resided in Stockton, California. In this situation, and given the general rule that federal court default judgments are not entitled to preclusive effect, and finally, given that the default judgment was entered two and one-half years before the defendants filed their bankruptcy case, the court will not give preclusive effect to the plaintiff's default judgment in this dischargeability action.

II. Independent of the District Court Judgment, Is the Plaintiff Entitled to

Summary Judgment?

The plaintiff also contends "the established facts are sufficient to support entry of summary judgment" independent of the district court judgment. Plaintiff's Memo. of P. & A. ("Memo."), at 24:13-14. Immediately following that statement, the plaintiff cites the entry of the defendants' default in the district court action as resulting in the well-pleaded allegations of the district court complaint being deemed true. Thus, the argument is not "independent of" the district court judgment, or at any rate, not independent of the defendants' default entered in that case. The plaintiff has cited no authority for the proposition that facts deemed admitted by entry of default in pre-petition litigation are also deemed admitted in a subsequent nondischargeability action. Such a rule would simply subsume the general rule that a federal court default judgment is not entitled to preclusive effect in a subsequent action. Thus, the court will not consider the allegations in the district court complaint as evidence in this proceeding.[5]

The plaintiff also cites certain testimony of the defendants in their depositions taken in this adversary proceeding as supporting summary judgment in the plaintiff's favor. The court will consider the plaintiff's allegations and the defendants' deposition testimony in light of the following standards. The plaintiff's complaint is based on § 523(a)(6) of the Bankruptcy Code. To prevail under that subsection, a creditor must demonstrate that the debtor's conduct giving rise to the claim was both willful and malicious. Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 711 (9th Cir. 2008). The willfulness component "is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002). The maliciousness element requires "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).

The Bankruptcy Appellate Panel has recently ordered published a decision in which the Panel held that a jury's punitive damages award that is based on a finding of either malice, oppression, or fraud, without specifying which of the three the jury found, is not entitled to preclusive effect on the willfulness component of the § 523(a)(6) test. Plyam v. Precision Dev., LLC (In re Plyam), BAP No. CC-14-1362, 2015 Bankr. LEXIS 1538, at *28 (9th Cir. BAP May 5, 2015). The Panel interpreted Geiger as, first, "effectively adopt[ing] a narrow construction and the most blameworthy state of mind included within the common understanding of malice in fact." Id. at 11-12. "Second, as the Supreme Court clarified in Geiger, recklessly inflicted injuries do not satisfy the § 523(a)(6) willfulness requirement. This necessarily includes all degrees of reckless conduct, whether arising from recklessness simple, heightened, or gross . . . ." Id. at 12 (citation omitted). In light of these two points, which the Panel found to be "critical to any § 523(a)(6) willfulness determination" (id. at 11), the Panel then analyzed in depth the definitions of malice (intentional and despicable), oppression, and fraud in California's punitive damages statute, Cal. Civ. Code § 3294. The Panel concluded that "[o]nly Intentional Malice and fraud expressly require an intent to cause injury. As a result, only those findings satisfy the § 523(a)(6) willfulness requirement for the purposes of issue preclusion. Conversely, Despicable Malice and oppression, which arise from acts in conscious disregard of another's rights or safety, fail to satisfy the requisite state of mind for § 523(a)(6) willfulness." Id. at *14-15.

At the heart of the plaintiff's complaint in this proceeding are allegations that the defendants willfully infringed the plaintiff's trademarks and copyrights and sold counterfeit products using the plaintiff's trademarks on the defendants' website. The infringement allegations are found in paragraphs 17 through 27 of the plaintiff's Statement of Undisputed Facts; the counterfeiting allegations are in paragraphs 28 through 36. For the allegations of infringement, the only "evidence" cited are (1) a few selected pages of the transcripts of the defendants' depositions and (2) the plaintiff's complaint in the district court action. As to the critical element of the defendants' subjective intent or belief, the only allegation is that a side-by-side comparison of images and text from the plaintiff's website and the defendants' website "evidenced Infringement Defendants' intent to deceive customers into believing that the [defendants' store] was affiliated, connected, or associated with the Assemblies of God." Memo., at 7:12-13. The only citation is to the plaintiff's district court complaint, which is not evidence in this proceeding. Even for the allegations that do not address the defendants' motives or beliefs, the only citation is to the district court complaint. Thus, the plaintiff cites only the district court complaint for the allegations in paragraphs 24 through 27 that the defendants "did not have authorization to establish a web store to resell Assemblies of God's products"; that they "without authorization, used Plaintiff's Product Images . . . [and] Products Descriptions to promote their products"; and that they "sold products through the Internet, which was an unauthorized medium for resale of Assemblies of God products." Memo., at 7:12-13, 7:23-8:4.[6]

Further, the plaintiff has added its counsel's own characterization of certain portions of the defendants' deposition testimony. For example, in the particular portion of the transcript cited by the plaintiff, defendant Dustin Bole testified he registered all but two of 33 domain names itemized on a list attached to the deposition transcript. Yet counsel characterizes that testimony as follows: "Debtors admit they registered more than 30 domains that include Plaintiff's trademarks." Memo., at 6:5-6. And whereas Dustin Bole testified he and his father (a co-defendant in the district court action) purchased patches from the one of the plaintiff's district offices and sewed them onto jackets purchased from a third party, counsel translates that testimony as this: "[T]he Debtors also admit they use a third party to create counterfeit goods at Debtors' request." Memo., at 8:21-22.

Counsel has continued this pattern in the plaintiff's reply to the defendants' opposition, where counsel incorrectly states that the defendants have admitted all of the following: that they "knew of and used Plaintiff's Trademarks [and] looked up Plaintiff's trademark registrations prior to undertaking the infringing activities"; that they "registered at least 30 website domains . . . that deliberately incorporated a large number of Plaintiff's Trademarks"; and that Dustin Bole "had sole access to control of the [defendants'] website, the conduit through which they sold the infringing and counterfeit products." Plaintiff's Reply, filed May 27, 2015 ("Reply"), at 5:27-6:6. Counsel do themselves no favors when they put their own slant on their opponents' actual language in an attempt to get a motion granted.

The issues in this § 523(a)(6) action are heavily fact-based and depend at least in part on the subjective motives and beliefs of the defendants. The court would not be inclined to dispose of issues like these by way of summary judgment even in the absence of opposition; such a disposition would be particularly inappropriate where, as here, the plaintiff's factual allegations are disputed by the defendants. As discussed above, the plaintiff must demonstrate that the defendants had a subjective motive to inflict injury or that they believed injury

was substantially certain to result from their conduct. The defendants have asserted they had the plaintiff's permission to use its product images and descriptions. They claim the plaintiff mailed them a CD with copies of its product images and descriptions, along with guidelines and instructions for their use. In reply, the plaintiff has submitted an affidavit of its Chief Operating Officer, Sol Arledge, Jr., who testifies that "[t]he General Council of the Assemblies of God has never provided Dustin Bole or Karen Bole . . . with permission to use its copyright protected images and text . . ." (Plaintiff's Ex. W, at 1:19-24), and that "[t]he General Council of the Assemblies of God has never provided Dustin Bole or Karen Bole . . . with a CD containing the Product Images and Product Descriptions used by [them] . . . ." Id. at 2:1-3.

Thus, it is clear there is competing evidence on the issues of permission in general and the CD in particular. However, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.[7] Here, there are genuine disputes as to material factual issues in this case that are not appropriately resolved by way of summary judgment. Those issues include, but are not necessarily limited to, whether the defendants had the plaintiff's permission to use its product images and descriptions, whether they thought they had the plaintiff's permission, whether they had or thought they had the plaintiff's permission to resell items purchased from the plaintiff on the defendants' website, whether they had or thought they had the plaintiff's permission to resell items purchased from the plaintiff at all,[8] whether the defendants acted with a subjective motive to injure the plaintiff, whether they believed injury was substantially certain to result from their conduct, and whether they acted with just cause or excuse.

In arriving at this conclusion, the court is aware of the plaintiff's Objections and Responses to Debtors' Additional Statement of Facts and the plaintiff's Motion to Strike Based on Plaintiff's Objections to Evidence Submitted by Debtors in Opposition to Summary Judgment. The plaintiff raises a host of objections to the defendants' responses to the plaintiff's Statement of Undisputed Facts, including that certain of their responses are inconsistent with Karen Bole's deposition testimony, that certain responses misstate applicable law, and that every reference to the CD the defendants allegedly received from the plaintiff is inadmissible as not based on the best evidence of the CD; namely, an original version of it. As to the last of these, the defendants' deposition testimony, submitted by the plaintiff, suggests the CD was lost, and there is no evidence at this stage of bad faith on the part of the defendants in that regard. Thus, one of the exceptions of Fed. R. Evid. 1004 might apply. As to that particular aspect of the motion to strike, the motion is denied.

As to the other responses the plaintiff seeks to strike, the court has not relied on those responses in this decision, and thus, has no need to rule on the motion to strike. Thus, as to the other responses, the plaintiff's objections will be overruled and the motion to strike will be denied as moot.

Finally, the plaintiff has submitted an affidavit of its counsel, Tiffany Gehrke, who purports to identify as true and correct copies all of the exhibits filed in support of the motion at the outset and four new exhibits filed with the plaintiff's reply. The new exhibits consist of cease and desist letters allegedly mailed to the defendants, signed by another of the plaintiff's attorneys, along with certified mail return receipts purporting to confirm delivery on the defendants, and an alleged email string between Ms. Gehrke and an unnamed individual at GoDaddy.com

regarding a Digital Millennium Copyright Act ("DMCA") "takedown notice" for the defendants' website. (Also filed as new exhibits but not referenced in Ms. Gehrke's affidavit are additional pages from the transcripts of the defendants' depositions, one page from each.)

Ms. Gehrke testifies she personally accessed the defendants' website after the DMCA takedown notices had been submitted, found that the website had become inactive, and accessed it again later, only to find that "the infringing material had been re-activated on the . . . website." Plaintiff's Ex. R, at 5:13. This testimony depends on the alleged fact of the DMCA takedown notices, whereas the email string between Ms. Gehrke and GoDaddy.com is hearsay. Ms. Gehrke also testifies that in the fall of 2010, when she tried to access the defendants' website from her work computer, she received a notification that access was denied, whereas she was able to access it from other computers. This testimony supports an argument in the plaintiff's original memorandum of points and authorities that the defendants blocked the plaintiff and its counsel from accessing their website. The cited deposition testimony is that Dustin Bole put the plaintiff's and its counsel's IP addresses into his computer with the intent of receiving notification when they accessed the site, not to block their access. Again, this is a factual issue that is in dispute; to determine it would require the court to weigh the evidence on both sides, which is not the court's role at this stage. In short, Ms. Gehrke's affidavit does not turn the court from its conclusion that there are genuine disputes as to material factual issues in this case that are not appropriately resolved by way of summary judgment.

Finally, however, apparently to avoid this conclusion, the plaintiff cites case law that is either not applicable or not persuasive. The plaintiff begins with the proposition, supported by case law, that even if the defendants did not know their goods were counterfeit, "the mere selling of counterfeit goods is still infringement." Reply, at 8:24 (citation omitted). The plaintiff also cites cases holding or stating that ignorance is no defense to violations of the Lanham Act (federal trademark infringement law) and that the Lanham Act is a strict liability statute, and a case indicating that "failure to defend [oneself] against allegations of trademark counterfeiting is indicative of willfulness." Reply, at 9:13-14 (citation omitted). These principles and the cases cited have no relevance to the standard, required to prove "willfulness" under § 523(a)(6), of a subjective motive to inflict injury or a belief that injury is substantially certain to result from the defendants' conduct.

The plaintiff also cites Smith v. Entrepreneur Media, Inc. (In re Smith), 2009 Bankr. LEXIS 4582 (9th Cir. BAP 2009), for the following two propositions: (1) that "'intentional infringement is tantamount to intentional injury under bankruptcy law' because 'it is impossible to separate the 'conduct' of trademark infringement from the 'injury' of trademark infringement when considering the defendant's intent,'" and (2) that "'[t]rademark infringement is a categorically harmful activity.'" Memo. at 9:6-13, quoting Smith, 2009 Bankr. LEXIS 4582, at *26-27. The Panel did make those statements in Smith, and this court does not disagree with them. However, in Smith, the district court, in an action preceding the defendant's bankruptcy filing, had held a trial after which the court found that the defendant "intended to infringe and intended to exploit [the plaintiff's] goodwill for his own benefit" (Smith, at *30), findings the Panel held "were essential before the district court could order disgorgement of [the debtor's] profits and award [the plaintiff] its attorneys' fees." Id.

The court finds the Panel's remarks in Smith are not applicable on this motion

for summary judgment; instead, the plaintiff's position here is foreclosed by the Ninth Circuit's holding in Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702 (9th Cir. 2008), which the court finds to be directly on point here. Barboza was a § 523(a)(6) case based on alleged willful infringement of a copyright. A jury trial was held in a pre-petition district court case in which the judge had instructed the jury, in essence, that it had three options in determining whether the defendants "willfully" infringed the plaintiff's copyrights: it could find that (1) "the Defendants knew they were infringing the Plaintiff's copyrights"; (2) "they acted with reckless disregard as to whether they were doing so"; or (3) the Defendants reasonably and in good faith believed that they were not infringing the Plaintiff's copyrights . . . ." 545 F.3d at 705, quoting the trial judge. One or the other of the first two findings would establish willful infringement; the third would not.

The jury returned a verdict of willful infringement, but did not indicate whether it had found the defendants knew they were infringing the copyrights or acted with reckless disregard. The district court entered judgment for the plaintiff, and the defendants then filed for bankruptcy. The plaintiff filed a complaint to determine the judgment to be nondischargeable under § 523(a)(6) and the bankruptcy court, on the plaintiff's motion for summary judgment, found that there was uncontroverted evidence that the defendants knew of the plaintiff's copyright, which, "in combination with the jury finding of willful infringement," demonstrated that "the infringement constituted a willful injury within the meaning of § 523(a)(6)." 545 F.3d at 706. The Bankruptcy Appellate Panel affirmed, finding the "willful" component from the fact that the defendants knew of the plaintiff's copyright at the time they infringed it.

The Ninth Circuit reversed and remanded, concluding that "in viewing all facts and drawing all inferences in the light most favorable to the [the defendants], there is a genuine issue of material fact as to whether [the defendants] acted willfully within the meaning of 11 U.S.C. § 523(a)(6), and thus summary judgment was improper." 545 F.3d at 707. The court's decision was grounded in the proposition that "[t]he term 'willful' as used in copyright infringement cases is not equivalent to 'willful' as used in determining whether a debt is nondischargeable under the bankruptcy code." Id. (citations omitted). "Even though recklessness is sufficient for a finding of willful copyright infringement, the Supreme Court has clearly held that injuries resulting from recklessness are not sufficient to be considered willful injuries under § 523(a)(6) of the Bankruptcy Code and are therefore insufficient to merit an exemption to dischargeability." Id. at 708, citing Kawaauhau v. Geiger, 523 U.S. at 60-61. Because the jury in the district court action could have made its "willful infringement" finding based on recklessness rather than on a knowing violation, and because the debtors in the nondischargeability action presented evidence that would have supported a finding of recklessness, the bankruptcy court erred in granting summary judgment. Id. at 709-11.

Here, the defendants claim they had permission to use the plaintiff's trademarks on their website; the plaintiff claims the exact opposite – that the defendants did not have such permission. Clearly, the evidence of the two parties is directly at odds, and the court could reach any number of different findings from the evidence presented thus far as to the issues of willfulness and maliciousness. Since the court's job in considering a summary judgment motion is not to weigh the evidence, but only to determine whether there are genuine issues of fact for trial (see Anderson, 477 U.S. at 249), summary judgment is not appropriate here.

On a motion for summary judgment, "all justifiable inferences are to be drawn

in [favor of the non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citation omitted). Further, "[t]he court must view all the evidence in the light most favorable to the nonmoving party." Barboza, 545 F.3d at 707. Here, viewing the evidence in the light most favorable to the defendants, and drawing justifiable inferences in favor of the defendants, the court concludes that there are genuine issues of material fact that should be tried as to the defendants' state of mind when they undertook the allegedly infringing activity. The court does not mean to suggest there may not be other triable issues of material fact.

For example, there is no admissible evidence that the amount of the debt the plaintiff would have deemed nondischargeable, $6,141,714, accurately reflects the amount of the plaintiff's damages from the alleged infringement. As already discussed, the court will not give preclusive effect to the district court's judgment, and the plaintiff has submitted no other evidence on the issue of its damages. The court recognizes that in the Ninth Circuit, at any rate, intentional infringement is viewed as inherently harmful to the holder of the trademark. See Smith, 2009 Bankr. LEXIS 4582, at *31, and cases cited therein. Thus, "even when a trademark owner cannot prove direct competition or direct damages in the form of their own lost profits, it still may be appropriate in cases of intentional infringement to award statutory damages equal to the profits obtained by the infringer as a result of its infringing conduct." Id. at *31-32.

In its application for a default judgment in the district court case, the plaintiff cited statutory law on trademark infringement permitting an award of statutory damages of not more than $2,000,000 per counterfeit mark per type of goods or services sold or offered for sale, and under the Anticybersquatting Consumer Protection Act, permitting statutory damages at between $1,000 and $100,000 per domain name. Plaintiff's Ex. L-1, p. 12, citing 15 U.S.C. § 1117(c)(2) and (d). In its default judgment, the court awarded the plaintiff $50,000 per domain name for 32 domain names, for a total of $1,600,000; $750,000 per infringing use of counterfeit marks with respect to six types of goods, totaling $4,500,000; plus the outstanding balance due on the defendants' account, $11,154, and attorney's fees and costs of $30,560. As already discussed, the judgment will not be afforded preclusive effect here. Further, the plaintiff has presented nothing to show how the district court selected the $50,000 and $750,000 figures from the available ranges, and this court has no basis in admissible evidence on which to conclude that those figures are just. See 15 U.S.C. § 1117(c)(2) and (d) [court may award statutory damages within the applicable ranges "as the court considers just."].

One issue remains to be addressed. The plaintiff analyzes the district court's award of damages on the plaintiff's breach of contract claim, $11,154.76, separately from the award of damages for trademark infringement. Citing the defendants' responses to the plaintiff's Statement of Undisputed Facts and the defendants' deposition testimony, the plaintiff concludes that "Debtors admit that they ordered products from Plaintiff using multiple aliases after Plaintiffs refused to continue selling to their prior accounts." Reply, at 7:7-8. The plaintiff also cites the affidavit of Mr. Arledge filed in the district court action, allegedly "quantifying the injury resulting from Debtors' deceptive attempts to avoid payment on these outstanding invoices." Id. at 7:12-13. From those statements, the plaintiff concludes that "Plaintiff has proven the breach of contract resulting in willful and malicious injury for which the district court awarded damages of $11,154.64." Id. at 7:14-15. The court has reviewed the defendants' responses and deposition testimony cited by the plaintiff, and finds there are genuine issues of material facts as to whether the defendants acted willfully and maliciously, within the meaning of § 523(a)(6), when they failed to pay their bills.

The court concludes that the plaintiff has failed to meet its burden of producing evidence sufficient to show that there are no genuine issues of material fact, and the motion will be denied. The court will hear the matter.

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1 A distinction is made in the case of a federal court judgment in a case based on diversity jurisdiction, as opposed to federal question jurisdiction. In diversity cases, "federal law incorporates the rules of preclusion applied by the State in which the rendering court sits." Taylor v. Sturgell, 553 U.S. 880, 891, n.4 (2008). Here, the plaintiff's district court action was, according to the jurisdictional predicates cited in the complaint – 28 U.S.C. § 1331 (federal question jurisdiction) and § 1338 (jurisdiction of cases arising under federal copyright law), grounded in federal law, not diversity.

2 "Fairness hinges on whether the party, at the time of the earlier action, could foresee that the issues now subject to estoppel could be significant in the future litigation." Palombo, 456 B.R. at 60.

3 As public policy considerations, the plaintiff cites, first, the considerations underlying the doctrine of issue preclusion itself – "preservation of the integrity of the judicial system, promotion of judicial economy, and protecting litigants from harassment by vexatious litigation" (Memo., at 23:25-27, citing Shepard v. Conklin (In re Shepard), 2009 Bankr. LEXIS 4533, at *28-29 (9th Cir. BAP 2009)). If these policies were sufficient to apply issue preclusion to federal court default judgments, they would subsume the general rule entirely. The plaintiff adds that not applying the doctrine here would "encourage the dishonest debtors to continue to act in such a way that they harm innocent plaintiffs and undermine a plaintiff's ability to protect its rights." Memo. at 24:1-2. This "policy" would arguably create a blanket exception from the general rule in every dischargeability case in which the plaintiff urges as preclusive a default judgment from a federal court. The plaintiff has cited no authority, and the court has found none, for the proposition that any such exception exists.

4 "Air Canada's claim for indemnity is based on the existence of the judgment in Gibbs' favor, which could not stand without the finding of gross negligence or willful misconduct on the part of Air Canada. Therefore, we find that Air Canada is bound by that finding in its indemnification action against Aircraft Services." Id. at 1536.

5 Nor may the court take judicial notice of the factual allegations in the complaint. See 2 Barry Russell, Bankruptcy Evidence Manual § 201.5 at 55-59 (2014-2015 ed.) [taking judicial notice of a court's files and records establishes only the fact of the filing of the various documents, not the truth of factual assertions therein.].

6 The plaintiff has attempted to shore up its evidentiary showing with affidavits of its counsel and its Chief Operating Officer, filed with the plaintiff's reply to the defendants' opposition. Those will be discussed below. For now, it is significant that the only evidence submitted at the time the motion was filed that was not directed to the issue of service on Karen Bole or filed in the district court case were a few excerpts from the transcripts of the defendants' depositions, and even those excerpts are not cited as support for the critical factual allegation as to the defendants' intent or for the additional infringement allegations in paragraphs 24 through 27 of the Statement of Undisputed Facts.

7 Mr. Arledge states that his testimony is based on his personal knowledge of the facts "and [his] review of documents in [his] possession . . . ." Plaintiff's Ex. W, at 1:14-15. He adds that "[i]n the scope of [his] employment, [he] receive[s] information from other employees pertaining to Assemblies of God's trademarks and copyright protected material." Id. at 1:16-17. He does not indicate which of his testimony is based on his personal knowledge and which on his review of documents or information from other employees. Thus, Mr. Arledge's testimony appears to be hearsay, and the foundation for his testimony is so weak the court would likely give it little weight. The important point here, however, is that Mr. Arledge's affidavit plainly demonstrates that there are genuine disputes as to facts that are critical to the plaintiff's § 523(a)(6) claim.

8 There is a statement in the plaintiff's Statement of Undisputed Facts that the plaintiff permitted certain "approved and pre-authorized customers to use its product names for resale." Memo., at 4:10-11. There is also a suggestion that certain account holders were permitted to sell products to members inside their districts. "Assemblies of God did not permit account holders, like the Infringement Defendants, to sell the church's products online or sell products to members outside of Infringement Defendants' district." Memo., at 4:23-25. There is conflicting evidence as to whether the defendants were "approved and pre-authorized customers" permitted to resell the plaintiff's products. Mr. Arledge testifies they were not; the defendants contend they were. The plaintiff's invoices to the defendants listed the person the products were "sold to" as The Ranger Supply Store, which suggests the products the defendants were purchasing were intended for resale, although the court is making no factual findings in that regard. There is also insufficient evidence to permit a determination of whether the defendants were aware of the online or outside-the-district restrictions – they claim they were not.

38. 14-24788-D-11 CHRISTIAN/AMANDA BADER
RLC-7

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF REYNOLDS LAW CORPORATION FOR STEPHEN M. REYNOLDS, DEBTORS' ATTORNEY(S)
3-27-15 [110]

DEBTOR DISMISSED:

03/06/2015
JOINT DEBTOR DISMISSED:
03/06/2015

Final ruling:
This matter is removed from calendar as a duplicate of Item 23 on this calendar.

39. 15-21564-D-7 DUWONE LASHLEY
ICE-1

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
5-14-15 [11]

40. 10-42050-D-7 VINCENT/MALANIE SINGH — MOTION TO SET ASIDE DEFAULT JUDGMENT
12-2444
BURKART V. THOMSON — 6-12-15 [91]
ADV. CLOSED: 12/03/2014

Tentative ruling:

This is the motion of the defendant in this adversary proceeding to set aside the default judgment against him. For the following procedural reasons, the motion will be denied without prejudice to the defendant filing a new motion.

The motion will be denied because it does not comply with the court's local rules. The motion does not contain a docket control number, is not accompanied by a separate notice of hearing, and is not accompanied by admissible evidence in support of the motion. Any future motion to set aside the default judgment, or for any other relief, must be set for hearing on either 14 days' or 28 days' notice, in accordance with LBR 9014-1(f), and the notice of hearing must advise the potential respondent whether and when written opposition must be filed, and must contain the additional information required by the local rule. Further, there is no evidence of service on the plaintiff. As to all of these procedural matters, the defendant is advised to review the court's local rules, especially LBR 9014-1, which are available at the Clerk's Office or on the court's website, www.caeb.uscourts.gov.

The court recognizes that the defendant is representing himself, without an attorney. However, individuals representing themselves are nevertheless held to compliance with applicable rules. Local District Court Rule 183(a), made applicable herein by LBR 1001-1(c).

The court will hear the matter.