UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 20, 2018 at 10:00 a.m.

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1. 16-24304-A-7 CHRISTOPHER JOHNSON — MOTION FOR EXAMINATION AND FOR PRODUCTION OF DOCUMENTS (CHRISTOPHER L. JOHNSON) 5-8-18 [34]
17-2007 SHB-2
MILES V. JOHNSON

Final Ruling: The hearing on this motion has been continued by the parties to September 17, 2018 at 10:00 a.m. Docket 43.

2. 17-25004-A-11 SARINA BRYSON — MOTION TO CONFIRM AMENDED PLAN 5-19-18 [100]
MRL-5

Tentative Ruling: The motion will be conditionally granted.

The debtor seeks confirmation of its amended chapter 11 plan filed on May 19, 2018. Docket 100.

Subject to reviewing the ballots at the hearing, the motion will be granted and the plan will be confirmed.

3. 18-20608-A-11 ANTIGUA CANTINA & GRILL, INC. — MOTION TO CONVERT OR TO DISMISS CASE 6-20-18 [86]
UST-1

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

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

The U.S. Trustee moves for conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b), arguing loss to or diminution of the estate, no reasonable likelihood of rehabilitation, partial delinquency of $375 in quarterly fees to the U.S. Trustee for the first quarter of 2018, and failure to file operating reports for April and May 2018.

11 U.S.C. § 1112(b)(1) provides that "*on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter*

to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter; [and] (K) failure to pay any fees or charges required under chapter 123 of title 28." 11 U.S.C. § 1112(b)(4)(A), (F), (K).

This case was filed on February 2, 2018. From the petition date until March 31, 2018, the debtor's cash diminished from $10,925.47 to $248. See Dockets 29 & 48.

Further, on May 16, 2018, the court granted relief from stay with respect to the debtor's principal asset, a commercial real property in Sacramento, California, to the first priority mortgagee on the property, BRAE86GEOPROP, L.L.C. Dockets 77 & 79. This removed the last layer of protection for the debtor's main asset from creditors. The debtor's only asset that could potentially fund a reorganization plan, its real property, is no longer protected in this bankruptcy. As the debtor is unable to make mortgage payments to BRAE86GEOPROP, with there being no automatic stay to prevent BRAE86GEOPROP from foreclosing on the property, the court sees no reasonable likelihood of rehabilitation. This is consistent with the court's similar determination in connection with the granting of relief from stay to BRAE86GEOPROP. Docket 77 at 2 (noting "lack of a reasonable prospect of reorganization").

Furthermore, when granting stay relief, the court made serious findings about the debtor's inability to pay non-mortgage creditors as well. "*Over the last several years, various creditors have recorded liens against the property due to the debtor's failure to pay debts. This includes a lien for $135.11, recorded by the City of Sacramento on December 21, 2017 for unpaid utilities; a lien for $133.96, recorded by the City of Sacramento on November 19, 2015 for unpaid utilities; a lien for $1,632.75, recorded by the California Employment and Development Department on June 22, 2015 presumably for inability to pay unemployment benefits; a lien for $4,730.36, recorded by the California Franchise Tax Board on June 10, 2015; a lien for $14,138.65, recorded by U.S. Foods, Inc. on May 29, 2015; a lien for $1,632.87, recorded by the California Employment and Development Department on March 18, 2015, presumably for inability to pay unemployment benefits; inability to pay property taxes, precipitating a tax sale for the property, scheduled for February 26, 2018, etc. Docket 4 at 5-7; Docket 41 at 4-5.*" Docket 77 at 2.

The totality of the foregoing inescapably indicates loss to or diminution of the estate and no reasonable likelihood of rehabilitation.

Next, the debtor has not filed operating reports for April and May of 2018. Nor has the debtor paid the U.S. Trustee fee for the first quarter of 2018. Docket 89. The debtor has not filed a response to this motion either.

The foregoing deficiencies and failures amount to cause for conversion to chapter 7 or dismissal, under section 1112(b)(1).

As the movant has identified assets that could be liquidated for the benefit of creditors, including scheduled Alley Katz business inventory with a value of $161,825, liquor license with a value of $40,000, and the Alley Katz business with a value of $650,000, conversion to chapter 7 would be in the best interest of the estate and the creditors. Docket 29, Schedule A/B. Accordingly, the motion will be granted and the case will converted to chapter 7.

4. 10-32210-A-7 SCOTT/PAULA DEITZEL — ORDER TO APPEAR FOR EXAMINATION (SCOTT C. DEITZEL) 5-16-18 [146]
10-2403
WOLLEN ET AL V. DEITZEL ET AL

Tentative Ruling: Appearance is mandatory. At 10:00 a.m., just prior to the commencement of the calendar, the judgment debtor and counsel for the plaintiff shall approach the courtroom deputy, the judgment debtor shall be administered the oath, and then the parties shall retire to a conference room off the courtroom for the examination.

5. 18-20310-A-7 DEAN KARADUNIS — ORDER TO SHOW CAUSE 6-18-18 [10]
18-2085
KARADUNIS V. KARADUNIS

Tentative Ruling: The adversary proceeding will be dismissed.

The plaintiff, Rhonda Karadunis, did not pay the filing fee of $350 when she filed the complaint in this proceeding, as required by 28 U.S.C. § 1930(b). See also 28 U.S.C. § 1914. This is cause for dismissal.

6. 10-34418-A-11 CORINA DRAGNEA — MOTION FOR JUDGMENT ON THE PLEADINGS OR TO DISMISS ADVERSARY PROCEEDING 6-15-18 [17]
17-2248 DAS-1
DRAGNEA V. DRAGNEA

Tentative Ruling: The motion will be denied.

Defendant (and debtor in the underlying bankruptcy case), Corina Dragnea, moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).

The complaint asserts claims under 11 U.S.C. § 523(a)(5) and (a)(15). The plaintiff contends that the defendant's chapter 11 discharge in the underlying bankruptcy case does not discharge debts arising in the parties' marriage dissolution case, and more specifically the defendant's approximately $150,000 debt to the plaintiff arising from the parties' pre-petition marital settlement agreement.

The parties filed for divorce in 2005. A judgment for dissolution was entered in September 2007, incorporating the terms of a marital settlement agreement between the parties. See POC 3-1 (attaching September 2007 judgment of dissolution of the parties' marriage, with a portion of the marital settlement agreement). The defendant filed the underlying chapter 11 case on June 1, 2010. On June 15, 2010, the plaintiff filed a proof of claim in the bankruptcy case for $150,000 based on the marital settlement agreement. POC 3-1.

The defendant filed multiple versions of a chapter 11 plan and disclosure statement. After many continuances, the court approved the defendant's disclosure statement on April 18, 2012 and confirmed her plan on July 26, 2012. Case No. 10-34418, Dockets 239 & 268. In connection the earlier unsuccessful

attempts to confirm a plan, the denied confirmation because the plan did not provide for the plaintiff's $150,000 claim.

For instance, on June 11, 2012, the court posted a ruling that provided:

"*The court will deny plan confirmation also because and to the extent the plan does not address Mr. Dragnea's $150,000 claim against the estate. He filed a timely proof of claim on June 15, 2010. The deadline for filing proofs of claim was October 6, 2010.*"

On July 9, 2012, the court ruled:

"*The court will deny plan confirmation also because and to the extent the plan does not address Mr. Dragnea's $150,000 claim against the estate. He filed a timely proof of claim on June 15, 2010. The deadline for filing proofs of claim was October 6, 2010.*"

On July 18, 2012, the plaintiff executed and the defendant filed with the court the plaintiff's ballot, voting to accept the defendant's chapter 11 plan. Docket 265. On the ballot, the plaintiff identifies himself as "[t]he undersigned, the holder of a Class_____ claim against the Debtor in the unpaid amount of $45,000 $ [*sic*]." Id. The $45,000 figure is handwritten by the plaintiff. The ballot is signed by him. Id.

On July 19, 2012, the plaintiff filed a pleading titled "Withdrawal of Objection," dismissing his objection to the defendant's plan confirmation. Dockets 247 & 266.

As a result, the court confirmed the defendant's chapter 11 plan on July 26, 2012. Docket 268.

On December 26, 2017, the court granted the defendant's motion for entry of discharge. Docket 379. The order granting the motion was entered on January 24, 2018. Docket 382. The court entered the defendant's chapter 11 discharge on January 24, 2018. Docket 383. The order granting the debtor's discharge has not been appealed and it is now final.

On December 27, 2017, the plaintiff filed the instant adversary proceeding. The defendant filed an answer to the complaint on March 1, 2018.

Fed. R. Civ. P. 12(c), made applicable here by Fed. R. Bankr. P. 7012(b), provides that "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings."

The standard for judgment on the pleadings is the same as that of a motion to dismiss. New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004).

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

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded

factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

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

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

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

The Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

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

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

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

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

"If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces

evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The motion asks the court to consider much more than the complaint and the answer. For instance, it refers in detail to what the defendant's chapter 11 plan says about the treatment of the plaintiff's claim. Docket 19 at 2. It says that the order granting the defendant's discharge was not appealed. Id. It asserts that whether or not the plaintiff's claim is dischargeable, it was paid in full — the confirmed chapter 11 plan compromised the claim to an amount lesser than what the plaintiff was awarded in the divorce proceeding. Docket 19 at 2-3. None of these factual assertions are in complaint or answer. Dockets 1 & 7. And, the parties are just starting discovery. Their joint discovery plan provides for 120 days of discovery after adjudication of the subject motion.

The court is unprepared to grant a motion for summary judgment prior to the completion of discovery. The motion will be denied.

7. 10-34418-A-11 CORINA DRAGNEA — CONTINUED STATUS CONFERENCE
17-2248 — 12-27-17 [1]
DRAGNEA V. DRAGNEA

Tentative Ruling: Appearances required.

8. 15-29136-A-12 P&M SAMRA LAND — MOTION FOR
18-2095 INVESTMENTS L.L.C. — TEMPORARY RESTRAINING ORDER O.S.T.
P&M SAMRA LAND INVESTMENTS, — 7-11-18 [9]
L.L.C. V. AGSEEDS UNLIMITED

Tentative Ruling: The motion will be denied.

The plaintiff in this proceeding, P&M Samra Land Investments, L.L.C., the debtor in the underlying chapter 12 case, seeks a temporary restraining order against the defendant Ag-Seeds Unlimited to prevent it from collecting a judgment from parties other than the debtor/plaintiff. The plaintiff complains that Ag's collection activities are hampering the plaintiff's ability to reorganize. The plaintiff has confirmed a plan and the debtor's assets are being administered in accordance with the terms of the plan.

The plaintiff complains that the defendant is enforcing judgments entered against the plaintiff's principals, Manjit Samra and Steven Samra, and a related corporation, Stone Lake Farm Enterprises, Inc., also owned and operated by the Samra family.

The court cannot award relief to parties who are not parties to this adversary proceeding. Manjit Samra, Steven Samra, and Stone Lake Farm Enterprises, Inc. are not parties. Only P&M Samra Land Investments and Ag are parties.

The motion would be denied, however, even if this issue were overlooked.

As a general rule, the automatic stay of 11 U.S.C. § 362(a) protects only the debtor, property of the debtor, or property of the estate. It does not protect non-debtor parties or their property. While the Bankruptcy Code provides for a co-debtor stay, it is available only in chapter 13 proceedings. See 11 U.S.C. § 1301(a). This is a chapter 12 proceeding.

Also, nothing in the plaintiff's chapter 12 plan enjoined the defendant from enforcing orders or judgments entered against non-debtor parties. See Docket 453. Nor is there a basis for such an injunction. See, e.g., 11 U.S.C. § 524(g) (contemplating injunctive relief in connection with a chapter 11 discharge only). This bankruptcy case is a chapter 12 case.

The court will not disregard the separateness of the debtor from the beneficiaries of the injunctive relief, Manjit Samra, Steven Samra, and Stone Lake Farm Enterprises. There is no evidence they are, in substance, the alter ego of the debtor/plaintiff.

In this case, then, 11 U.S.C. § 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor. Boucher v. Shaw, 572 F.3d 1087, 1092 (9th Cir. 2009); Chugach Forest Products, Inc. v. N. Stevedoring & Handling Corp. (In re Chugach Forest Products, Inc.), 23 F.3d 241, 246 (9th Cir. 1994).

The Ninth Circuit has consistently refused to apply the unusual circumstances exception to the above rule.

"*We have refused to extend the automatic stay to enjoin claims against a contractor-debtor's surety, even though a surety bond guarantees the contractor-debtor's performance. See In re Lockard, 884 F.2d 1171, 1178-79 (9th Cir.1989). In Lockard, we reasoned that extending the stay was inappropriate because the surety, not the contractor-debtor, puts its property directly at risk of liability to creditors in the event of nonpayment by the contractor-debtor, and therefore a surety bond is not property of the bankruptcy estate. Id. at 1178. We found that this was the case even though allowing a claim against the surety would trigger the surety's right to recourse against the debtor. Id. Similarly, the automatic stay does not protect the property of parties such as officers of the debtor, even if the property in question is stock in the debtor corporation, and even if that stock has been pledged as security for the debtor's liability. Advanced Ribbons, 125 B.R. at 263.*

"*We have never addressed the question whether a company's bankruptcy affects the liability of its individual managers under the FLSA. But our case law regarding guarantors, sureties and other non-debtor parties who are liable for the debts of the debtor leaves no doubt about the answer: the Castaways bankruptcy has no effect on the claims against the individual managers at issue here.*"

Boucher at 1092-93.

The Ninth Circuit has held that the usual preliminary injunction standard applies to stays of proceedings against non-debtors under 11 U.S.C. § 105(a). Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1094 (9th Cir. 2007).

"*The BAP relied on the 'unusual circumstances' doctrine the Fourth Circuit developed in Piccinin, which provides an exception to the general rule that the automatic stay does not apply to actions against non-debtors. Piccinin held that the automatic stay may be extended if unusual circumstances make the interests of the debtor and the non-debtor defendant inextricably interwoven. 788 F.2d at 998–1004 (affirming stay of actions against debtor's officers under a combination of § 362(a), § 105(a), and the court's inherent equitable*

powers); see also S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.), 817 F.2d 1142, 1147-50 (5th Cir.1987) (extending the § 362(a) automatic stay to action against debtor's alleged alter egos). The BAP treated the 'unusual circumstances' doctrine and the usual preliminary injunction standard as separate and distinct bases for affirming the stay. That is error, because the 'unusual circumstances' doctrine does not negate the traditional preliminary injunction standard. As we have noted, stays under the doctrine, 'although referred to as extensions of the automatic stay, were in fact injunctions issued by the bankruptcy court after hearing and the establishment of unusual need to take this action to protect the administration of the bankruptcy estate.' Chugach Forest Prods., 23 F.3d at 247 n. 6 (quoting Patton v. Bearden, 8 F.3d 343, 349 (6th Cir.1993)). Indeed, Piccinin itself applied the usual preliminary injunction standard in affirming the stay. 788 F.2d at 1008."

Excel at 1096.

"The majority of circuits that have reviewed injunctions staying actions against non-debtors have applied the usual preliminary injunction standard." Excel at 1094. "We hold that the usual preliminary injunction standard applies to stays of proceedings against non-debtors under § 105(a)." Excel at 1094.

"*We hold that a debtor seeking to stay an action against a non-debtor must show a reasonable likelihood of a successful reorganization. 'The inquiry for a preliminary injunction necessarily focuses on the outcome of a later proceeding, at which time the merits of the questions giving rise to the litigation will be decided.' Commonwealth Oil, 805 F.2d at 1189. Within the confines of the instant adversary proceeding, however, there is no "later proceeding" at which time Excel's claims will reach final disposition. Excel has already received the maximum injunctive relief—a stay until confirmation of a reorganization plan—that the bankruptcy court could grant. See Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.), 885 F.2d 621, 624-27 (9th Cir.1989) (bankruptcy courts lack the power to issue injunctions that outlast plan confirmation). In this context, the most relevant 'future proceeding' is the debtor's reorganization. Because Excel's claim is ultimately that arbitration would harm its ability to reorganize, it makes sense to require a showing of a 'reasonable likelihood of a successful reorganization.' Homestead Holdings, Inc. v. Broome & Wellington (In re PTI Holding Corp.), 346 B.R. 820, 826 (Bankr. D. Nev. 2006) (considering likelihood of success in reorganization under merits prong of preliminary injunction inquiry); see also Eagle-Picher Indus., 963 F.2d at 859-60 (same); In re Monroe Well Serv., Inc. 67 B.R. 746, 751-52 (Bankr. E.D. Pa. 1986) (same); Otero Mills, Inc. v. Sec. Bank & Trust (In re Otero Mills, Inc.), 21 B.R. 777, 779 (Bankr. D.N.M. 1982) (same); but see FTC v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 264 B.R. 634, 653 (C.D. Cal. 2001) (collecting conflicting cases). Moreover, because the gravamen of Excel's adversary complaint is that the arbitration would harm the bankruptcy estate, adopting Appellants' approach would collapse the traditionally distinct merits and hardship prongs into a single hardship inquiry."*

Excel at 1095-96.

"*In sum, our usual preliminary injunction standard applies to applications to stay actions against non-debtors under § 105(a). In granting or denying such an injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization, the relative hardship of*

the parties, and any public interest concerns if relevant."

Excel at 1096.

"Temporary restraining orders are governed by the same standard applicable to preliminary injunctions." Quiroga v. Chen, 735 F. Supp. 2d 1226, 1228 (D. Nev. 2010).

"*The temporary restraining order 'should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.'*"

Quiroga at 1228 (quoting Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423, 439 (1974)).

The standard for both TROs and preliminary injunctions has changed in the last 12 years and examination of those changes is warranted.

Prior to the decision in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008), the Ninth Circuit applied the following "sliding scale" or "two sets of criteria" test: "*[A] plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The alternative test requires that a plaintiff demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.*" Quiroga at 1228 (quoting Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007)). "*These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.*" Id.; see also Fed. R. Civ. P. 65 & Fed. R. Bankr. P. 7065.

Then came Winter, which held that the party seeking the injunction must show that irreparable harm is *likely*, not just possible. Winter at 20. The Ninth Circuit restated the standard then as a four-prong test, including the "*likely* to suffer irreparable harm" language promulgated by Winter. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing to Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) for the recent changes in the standard in the Ninth Circuit).

Then, a later Ninth Circuit case revisited the sliding scale test applied prior to Winter, concluding that Winter did not entirely abolish that test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-35 (9th Cir. 2011). The Cottrell court said that:

"*The majority opinion in Winter did not, however, explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by this circuit and others. Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits. [(Citations omitted).] This circuit has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips*

sharply in [plaintiff's] favor.' [(Citations omitted).] That test was described in this circuit as one alternative on a continuum. [(Citations omitted).] The test at issue here has often been referred to as the 'serious questions' test."

Cottrell at 1131.

"*[W]e hold that the 'serious questions' approach survives Winter when applied as part of the four-element Winter test. In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met.*"

Cottrell at 1132.

A more recent formulation by the Ninth Circuit of the proper standard for granting preliminary injunctive relief is in Farris v. Seabrook, 677 F.3d 858, 864 (9th Cir. 2012). There, the court held that:

"*A [party] seeking a preliminary injunction must show that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest. [Citing to Winter at 20.]*

"*We have also articulated an alternate formulation of the Winter test, under which '"serious questions going to the merits" and a balance of hardships [or equities] that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.' [Citing Cottrell at 1135.]*"

The plaintiff has not met its burden of persuasion. The motion does not establish that the plaintiff is likely to succeed on the merits. The plaintiff has confirmed a chapter 12 plan in the bankruptcy case. There is nothing convincing in the record demonstrating that Ag is violating the plan or hampering its administration. The plaintiff alleges that Ag's conduct will have "significant monetary effect" on the plaintiff. "It has diverted financial resources that could be otherwise directed towards the Plaintiff's reorganization." "Enforcement activities . . . will unduly pressure and distract [the plaintiff] from the task of running its operation and working on the many tasks necessary for proper administration of its' [*sic*] Plan." Docket 9 at 5-6.

However, there is nothing in the record to support this conjecture. There are no facts to support a "significant monetary effect," "diverted financial resources," specific "[e]nforcement activities," or "unduly pressur[ing] and distract[ing] [the plaintiff] from . . . its operation and . . . proper administration."

The plaintiff has not established a relationship or connection between what Ag is doing and what is happening in the chapter 12 case.

Aside from saying that the plaintiff will suffer "due to lack of either credit or financing," the motion does not say what specific harm the plaintiff will suffer if the court does not issue the restraining order. Docket 9 at 6.

Moreover, the plan is not premised on the plaintiff obtaining credit or financing. The plaintiff's ability to fund the plan was based on its future

disposable income. "The funds necessary for implementing the Plan shall be derived from such farming operations." Docket 453 at 8.

In other words, if what Ag is doing is affecting the plaintiff's ability to obtain credit or financing, this should not have an impact on the plaintiff's ability to complete its chapter 12 plan.

Given the foregoing, the motion will be denied.

9. 18-22245-A-11 PLUSH GROUP CORPORATION — MOTION FOR RELIEF FROM AUTOMATIC STAY
TF-1
PETER P. BOLLINGER 2003, L.L.C. VS. — 6-27-18 [40]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The movant, Peter B. Bollinger 2003, L.L.C., seeks to terminate the automatic stay with respect to the lease of commercial real property in Citrus Heights, California, where the debtor operates a business.

Delinquent pre-petition lease payments are approximately $125,000. Outstanding post-petition lease payments, through June 30, 2018, are approximately $23,500.

The original tenant on the subject lease was Alley Katz Brewery & Restaurant, L.L.C., which leased the property in March 2015. On August 16, 2017, after Alley Katz defaulted on the lease, the movant filed an unlawful detainer action. In September 2017, Alley Katz assigned the lease in part to the debtor. Alley Katz and the debtor then stipulated to a judgment for damages and the surrender of possession of the property to the movant. Dockets 43 & 45. The parties agreed that the debtor would vacate the property but it did not. Docket 45 Ex. B. The movant then filed the stipulations and requested a judgment. But, before the state court could issue a judgment, the debtor filed this bankruptcy case.

The movant is seeking relief from stay to continue the prosecution of the unlawful detainer.

The debtor has no interest in the lease. It cannot be assumed. The debtor's tenancy interest, if any, terminated pre-petition, when the debtor executed the stipulation agreeing to vacate the property and permit entry of the judgment for possession. Docket 45. The stipulation for surrender of the property was the debtor's forfeiture of any interest in the lease. The stipulation for surrender was the debtor's answer to the complaint. See Docket 45 at 4, ¶ 7. The tenancy terminated pre-petition. See In re Windmill Farms, Inc., 841 F.2d 1467, 1470 (9th Cir. 1988).

Accordingly, relief will be granted for cause pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to continue with the unlawful detainer action and recover possession of the property as permitted by the state court.

No monetary claim may be collected from the debtor. The movant is limited to recovering possession of the property to the extent permitted by the state court. No other relief will be awarded.

No fees and costs are awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506.

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

10. 16-25749-A-7 ROBERT GARZA AND MARIA — MOTION TO
17-2147 HERRERA DNL-1 — DISMISS ADVERSARY PROCEEDING
SMITH V. GARZA ET AL — 6-21-18 [33]

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

The plaintiff, Susan Smith, the trustee in the underlying chapter 7 case, seeks dismissal of this action, including a single revocation of discharge claim, against the debtors in the underlying case, Robert Garza and Maria Herrera. The basis of the complaint is that the defendants did not turn over to the trustee tax refunds.

Fed. R. Civ. P. 41(a)(2), as made applicable here via Fed. R. Bankr. P. 7041, provides that "*Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.*"

After this action was filed, the defendants amended their exemptions to exempt the tax refunds in question, also resulting in payment in full of all dischargeable debt. As such, the plaintiff no longer finds utility in seeking to overturn the defendants' bankruptcy discharge. Given this, the court will dismiss complaint. No counterclaims were asserted by the defendants. The motion will be granted and the complaint will be dismissed in its entirety.

11. 16-25749-A-7 ROBERT GARZA AND MARIA — CONTINUED STATUS CONFERENCE
17-2147 HERRERA — 8-2-17 [1]
SMITH V. GARZA ET AL.,

Tentative Ruling: Appearances required.

12. 17-22481-A-7 WILLIAM LANDES — MOTION TO
17-2244 UST-1 — COMPEL
U.S. TRUSTEE V. LANDES — 6-22-18 [17]

Tentative Ruling: The motion will be granted.

The plaintiff, the United States Trustee, seeks to compel the production of five categories of documents from the defendant, William Landes, the debtor in the underlying chapter 7 case. The categories include:

— Request No. 22 (tax documents pertaining to TCG, L.L.C.),
— Request No. 35 (tax documents pertaining to JSB, L.L.C.),
— Request No. 50 (prenuptial and postnuptial agreements between the defendant and his former wife),
— Request No. 470 (statements pertaining to financial accounts, including any Charles Schwab accounts), and
— Request No. 483 (statements pertaining to financial accounts, including any canceled checks).

The requests were served on the defendant on March 22, 2018 and were due by April 23. Subsequently, the parties agreed to extend the deadline to May 15. The defendant did not produce all requested documents by May 15. Rather, it continued to produce documents to the plaintiff piecemeal, after May 15. The last time the record reflects a production by the defendant was June 5. As of the time of filing this motion, June 22, the defendant had not produced the above documents. Nor did the defendant represent to the plaintiff that any of the above documents are not within his possession, custody, or control.

The plaintiff seeks attorney's fees in having to prepare and prosecute this motion.

The defendant opposes the motion, contending that he has no records or documents responsive to Request Nos. 22, 35, 50, or 470. As to Request No. 483, the defendant says that he has produced all documents. He does not say when all Request 483 documents were produced.

Fed. R. Civ. P. 34(a) and (b), made applicable here via Fed. R. Bankr. P. 7034, provides:

"*(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):*

"*(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:*

. . .

"*(b) Procedure.*

"*(1) Contents of the Request. The request:*

"*(A) must describe with reasonable particularity each item or category of items to be inspected;*

"*(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and*

"*(C) may specify the form or forms in which electronically stored information is to be produced.*

"*(2) Responses and Objections.*

"*(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or -- if the request was delivered under Rule 26(d)(2) -- within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be*

ordered by the court.

"*(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.*

"*(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.*

"*(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.*

"*(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:*

"*(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;*

"*(ii)* If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

"*(iii) A party need not produce the same electronically stored information in more than one form.*"

Fed. R. Civ. P. 37(a)(3)(B)(4), as made applicable here by Fed. R. Bankr. P. 7037, provides that:

"*(3) Specific Motions.*

. . .

"*(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:*

. . .

"*(iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.*"

Rule 37(a)(5)(A)-(C) further provides that:

"*(5) Payment of Expenses; Protective Orders.*

"*(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:*

"*(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;*

"*(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or*

"*(iii) other circumstances make an award of expenses unjust.*

"*(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.*

"*(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.*"

First, while the court will not force anyone to produce documents that are not in their possession, custody, or control, the defendant has not established that he has no possession, custody, or control of the documents demanded by Request Nos. 22, 35, 50, or 470.

A party is deemed to have control over documents if he or she has a legal right to obtain them. Clark v. Vega Wholesale Inc., 181 F.R.D. 470, 472 (D. Nev. 1998). A respondent to document requests must provide not only the documents or information within his immediate knowledge or possession. He is under an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control. Mundo v. Carmona, Case No. 1:16-cv-01687-AWI-MJS, 2018 WL 1083889 (E.D. Cal., Feb. 28, 2018). "If the producing party has the legal right or the practical ability to obtain the documents, then it is deemed to have 'control,' even if the documents are actually in the possession of a nonparty." In re Flag Telecom Holdings, Ltd. Sec. Litigation, 236 F.R.D. 177, 180 (S.D.N.Y. 2006).

The defendant merely says that he has had nothing to do with the limited liability companies in question and has no documents pertaining to Request Nos. 22, 35, 50, or 470. Docket 28 at 3-4. This is far from stating that the debtor has no possession, custody, or control of the documents.

The defendant has testified before that he opened some of the accounts as to which documents are now sought. For example, as to Request 470, the defendant has testified in the past that he opened one or more Charles Schwab accounts for a child. Docket 23, Ex. 1 at 25, lns. 5-7. This strongly suggests that while the defendant may not have possession of documents, he likely has custody

or control of them. He must produce documents and information reasonably available to him from his employees, agents, or others subject to his control. The response says nothing about this.

Moreover, the defendant's response is not supported by a declaration. The only supporting declaration is from the defendant's counsel, Douglass Jacobs. Dockets 28 & 29. But, Mr. Jacobs could have no personal knowledge of what documents are in the possession, custody, or control of the defendant. To the extent Mr. Jacobs is repeating statements from the defendant, Mr. Jacobs' statements are hearsay. Fed. R. Evid. 801(c), 802.

There is no evidence in the record that the defendant is unable to produce the documents in question. Thus, the defendant does not deny not producing the documents and has produced no evidence of justifiable non-disclosure.

Also, the defendant does not say that he told the plaintiff prior to filing this motion of his inability to produce documents. The defendant raised this point only after the motion was filed.

Second, the defendant has raised no objections or privileges as to the document production requests in question. The defendant also does not dispute that he did not produce all requested documents by the initial April 23 deadline or by the later agreed May 15 deadline.

The plaintiff's attempts to obtain disclosure without court action have been in good faith and sufficient. The plaintiff was not required to keep going back and forth with the defendant, responding to every letter or disclosure to remind the defendant that disclosures are still lacking. The defendant received the complete set of the document production requests at the end of March. The plaintiff agreed to extend the disclosure deadline from April 23 to May 15. At a further meet and confer on May 22 and 24, the defendant told the plaintiff to file this motion if she is unsatisfied with the disclosures. Docket 20 at 3. The defendant was producing documents as late as May 30 and June 5. This motion was not filed until June 22.

The defendant's complaint that the plaintiff did not tell him what had not been produced is not compelling. The defendant failed to match the documents produced to the different requests, leading to much confusion. Docket 19 at 18-19; see also Fed. R. Civ. P. 34(b)(2)(E)(i) (prescribing that "[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request"). The confusion has been evident in the defendant's misstatements to the plaintiff. When producing documents at various stages, the defendant stated that many documents were produced when in fact they were not produced. Docket 21 at 5.

Given the multiple opportunities for the defendant to produce the documents or explain his inability to do so, the plaintiff was not required to respond to the defendant's May 30 and June 5 letters, reminding the defendant yet again that documents were missing.

Third, as to Request No. 483, the court has no declaration from the defendant establishing that all documents have been produced. Nor is there evidence when this production took place, if it did.

The court will grant the motion, compelling the defendant to produce documents in each of the five categories requested by the plaintiff. The defendant shall comply with the production no later than seven days after entry of the order

granting this motion. In the event the defendant does not have possession, custody, or control of requested documents, he should attest to such in writing under the penalty of perjury, and submit it to the plaintiff.

Finally, as the court is granting the relief requested by the motion, it will award attorney's fees to the plaintiff. See Fed. R. Civ. P. 37(a)(5)(A). As discussed above, the exceptions of Rule 37(a)(5)(A)(i)-(ii) do not apply. And, the court finds no other circumstances making an award of attorney's fees unjust.

Although the defendant complains about the large volume of documents that were requested, this does not make the filing of this motion unjust. The defendant could have filed a motion for a protective order, or sought additional time to organize, label, and produce the requested documents. The defendant did not do this. In short, this motion was necessitated by the defendant's lax attitude toward the production of documents.

The motion was necessary. The $275 hourly rate of the plaintiff's counsel is reasonable, given his 22-year experience and depth of litigation experience. The plaintiff's counsel, Edmund Gee, has worked with the United States Trustee for over 10 years and litigates cases such as this one on regular basis. Given the length of the motion (12 pages), memorandum of points and authorities (20 pages), reply (9 pages), four declarations (16 pages), separate statement (8 pages), and exhibits (560 pages), the 24.4 hours spent by Mr. Gee on this motion was reasonable and necessary. Importantly, this does not include the plaintiff's time for preparing for the July 20 hearing, appearing at the hearing, and preparing orders or further other pleadings relating to the motion, post-hearing. The time spent on this motion was necessary and the requested fees are reasonable.

The court also notes that the defendant does not dispute the reasonableness of the requested fees.

Unless the parties agree otherwise, the court will award attorney's fees in the amount of $6,710 (24.4 hours x $275/hour).

13.	17-28292-A-7 18-2040 WAGNER V. KEMPKER	JESSICA KEMPKER OSJ-1	MOTION TO DISMISS ADVERSARY PROCEEDING 6-4-18 [24]

Final Ruling: This motion will be dismissed as moot because the adversary proceeding was dismissed in its entirety on June 18, 2018. Docket 33.