UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

August 21, 2014 at 3:30 p.m.

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1. 13-90901-E-12 ANDREW NAPIER — **CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 5-9-13 [1]**

Debtor's Atty: Scott A. CoBen

Notes:

Continued from 6/12/14 to be heard in conjunction with Trustee's motion to dismiss.

[JPJ-1] Motion to Dismiss continued to 8/21/14 at 2:30 p.m.

Status Conference Statement of Leysa R. Napier filed 7/17/14 [Dckt 230]

Amended Schedule B filed 8/7/14 [Dckt 239]

2. 13-90901-E-12 ANDREW NAPIER
JPJ-1 Scott A. CoBen — **CONTINUED MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS 4-8-14 [206]**

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of

the United States Trustee on April 8, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to xxxxx the Motion to Dismiss and xxxxxxx.

PRIOR HEARING

The Chapter 12 Trustee seeks dismissal of the case on the basis that the Debtor is $23,320.79 delinquent in plan payments, which represents three (3) months of the plan payment. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6).

Counsel for Debtor responded, stating that Debtor will be current by the date of this hearing. Debtor did not offer any evidence concerning his default or how he would be able to cure such a substantial default.

The Debtor has failed, or refused, to provide any testimony under penalty of perjury with his original opposition to the Motion to Dismiss. Rather, the court is provided only with a short, one-line response. Dckt. 216.

Further, no explanation is provided as to why the Debtor has defaulted under the confirmed plan, why such default should not likely reoccur, and how the Debtor could come up with the "extra" money to cure the defaults.

OVERVIEW OF CURRENT BANKRUPTCY CASE

This not being the Debtor's first bankruptcy case, and not first Chapter 12 bankruptcy case in which he confirmed and then default on the plan, the court continued the hearing for further briefing and presentation of evidence. Additionally, the Debtor's ex-wife brought to light allegations that the Debtor has not truthfully and accurately disclosed his assets, has made multiple misrepresentations to the court and creditors, and has not filed or prosecuted his bankruptcy cases in good faith. FN.1.

FN.1. As with all "ex-'s (ex-spouse, ex-partner, ex-director, ex-client), the court does not assume that the allegations are true. However, it is usually one of the "ex-'s" who has knowledge of a debtor's misdealings. The Chapter 12 Trustee, creditors, and U.S. Trustee (with an occasionally referral to the U.S. Attorney) are usually up to the task of addressing such allegations and misconduct, if it occurs and comes to light. However, in some situations the "interests" of such parties may not align with how the misconduct is a substantial abuse of the federal judicial process and federal courts.

This court has previously conducted a general review of the Debtor's multiple prior bankruptcy cases and multiple defaults. This is Debtor's third case since March 2010. The Debtor has already been "challenged" in this case with complying with the Bankruptcy Code, fulfilling his fiduciary obligations, and being forthright with the court. As stated by the court in the Civil Minutes from the confirmation hearing,

> "In his declaration, the Debtor states that Exhibit A is his budget showing $5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes $75,000.00 a month in gross income and the $67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement.
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> [FN.1.]
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> Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.
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> In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of $28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of $83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were $55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was $43,057 delinquent in plan payments, with another monthly payment of $19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.
>
> Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013.
>
> In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make $7,050 a month payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt.

75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of $66,000 and monthly non-personal expenses of $56,880. This resulted in his testimony that his average monthly net income was $9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was $34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

...

(6) The debtor will be able to make all payments under the plan and to comply with the plan;

Court Finding: This element is the most problematic for the Debtor in Possession. For two prior cases the Debtor's in Possession testimony under penalty of perjury as to the financial operation of his business and assurances that the two prior confirmed plan were feasible have turned out to be inaccurate. The declaration in the present case is devoid of any evidence from which the court can determine whether the Debtor's in Possession conclusions that the current Plan is feasible are realistic.
The Debtor in Possession argues that he has so significantly changed his business in the last several months that no historic data is relevant. He further argues that he has paid a significant amount to creditors under the prior two plan. As the court noted at the hearing, when a person has a business which generates substantial cash flow and has substantial debt to be paid, making partial payment two prior times and defaulting is not a significant victory. Though significant payments were made, significant defaults occurred and significant claims went unpaid.

The creditor support the Plan, from which the court infers that they believe the Plan is feasible. The court will rely on this inference as "evidence" presented by the creditors their withdrawal of oppositions and affirmative support at the confirmation hearing.

Though sketchy at best, the court will find that this plan is "feasible as any possible plan could be in this case" and give the Debtor in Possession and creditors what they want confirmation of the Plan. As the court admonished the Debtor in Possession at the confirmation hearing, if he defaults under this Plan, the court expects him to immediately address the default with his counsel. In the past, it appears that the Debtor ignored the defaults and left it to the Chapter 12 Trustee to file and obtained orders dismissing the case.

Civil Minutes, Dckt. 186.

In confirming the Plan, the court noted that the Debtor was getting a second second-chance, and should not squander it. It appears that he has, spending monies for purposes other than performing his confirmed Chapter 12 Plan. His ex-wife, has raised significant issues concerning the information provided to this court under penalty of perjury by Mr. Napier. While the court acknowledges that an ex-spouse may not be the most unbiased, often times an "ex-" (spouse, partner, business associate) may provide accurate information.

The Chapter 12 Trustee reported that the Debtor appeared at the Trustee office today (May 22, 2014) to make a payment of over $30,000.00. Debtor's counsel that $25,000.00 of these monies represent an advance payment of future work to be done by the Debtor for a customer. No explanation is provided as to how the Debtor, in the ordinary course of business, without having to "borrow" against future work which has not been done, can make the payments promised under the confirmed Plan.

UNITED STATES TRUSTEE'S RESPONSE

On July 23, 2014, the United States Trustee filed a response in support for the motion to dismiss. After laying out the background of the case, notably the multiple bankruptcy filings of the Debtor, the United States Trustee reviews subsequent developments since the May 22 continuance.

Following the May 22nd continuance, the United States Trustee performed a Bankruptcy Rule 2004 Examination of the Debtor, pursuant to the June 3, 2014 order authorizing the examination. Dckt. 226. On July 9, 2014, the Debtor produced a number of documents including Debtor's bank statements for the period covering January 1, 2013 through May 31, 2014 ("Applicable Period"). On July 16, 2014, the Bankruptcy Rule 2004 Examination of the Debtor took place.

In the response, the United States Trustee notes all of the serious concerns that arose from the Bankruptcy Rule 2004 Examination. These include:

1. During the Applicable Period, the Debtor spent more than $50,000 on airline tickets, hotels and other travel expenses. See Exhibit 8, Dckt. 232; see also Spyksma Declaration, at ¶ 8.3, Dckt. 233;

2. During the Applicable Period, the Debtor spent more than $12,000 at restaurants. See Exhibit 9, Dckt. 232; see also Spyksma Declaration, at ¶ 9, Dckt. 233;

4. During the Applicable Period, the Debtor spent more than $18,000 on goods and services that could be considered luxuries (or, at least, do not appear to have been reasonably necessary for the Debtor's maintenance or support). Exhibit 10, Dckt. 232; see also Spyksma Declaration, at ¶ 10, Dckt. 233;

5. The Debtor failed to disclose his interest in the TriCounties 6036 bank account on Schedule B. This account was open on the

Petition Date. Compare Schedule B, at item 2, Dckt. 1 with Exhibit 4 at p.58, Dckt. 232;

6. The Debtor failed to disclose his rental of a storage space (at StorKwik SelfStorage) on his Schedules and Statements (including on Schedule G). Compare Dckt. 1 with Exhibit 20 at pp. 247-48, Dckt. 232;

7. During the Applicable Period, the Debtor's deposits into his bank accounts totaled only $622,194.16. See Exhibit 1, Dckt. 232; Spyksma Declaration, at ¶11, Dckt. 233. On average, that is less than $37,000 per month ($622,194.16 / 17 months). This is substantially less than what the Debtor reported on his Schedule I($75,000), or what he projected in his Plan Declaration (at least $65,000). In fact, the Debtor's monthly income never once reached $75,000 during the four full months preceding the filing of this case. See Exhibit 11 to the Response. The discrepancy calls into question the accuracy of Schedule I and the Plan Declaration at the time that they were prepared;

8. The $25,000 payment mentioned in the Civil Minutes for the hearing on the Motion to Dismiss was funded by Roy Reeves. According to the Debtor, Mr. Reeves buys and sells dirt. The $25,000 represents an advance for future work. However, even as of July 16, 2014, the Debtor still had not started the work. There is no contract between the parties. Exhibit 20 at pp. 258-62, Dckt. 232;

9. As noted above, in his Plan Declaration, the Debtor testified that he had no domestic support obligations. See ¶ 13, supra. While this statement was true, it was arguably misleading. That is because Ms. Leysa Napier had filed an application for spousal support in June 2013. The Debtor filed a responsive declaration on July 12, 2013 (i.e., only 10 days before the Plan Declaration was filed). See Exhibits 14 and 15, Dckt. 232. Unquestionably, the request for spousal support was relevant to the whether the Debtor's plan was feasible.

After laying out the concerns, the United States Trustee argues that under 11 U.S.C. § 109(g), the debtor may be ineligible from filing a new bankruptcy case for 180 days because of a willful failure to appear before the Court in proper prosecution of the case. Under Section 109(g), there are two elements that must be satisfied: 1) the debtor must have filed to appear before the Court in proper prosecution of the case (leading to the dismissal of the debtor's case) and 2) the failure must have been "willful."

Applying these factors, the United State Trustee argues that both are satisfied as to the Debtor. As to the first element, the United States Trustee first reviews applicable law. The United States Trustee argues that a debtor's failure to make plan payments can constitute "a failure. . .to appear before the court in proper prosecution of the case." *See In re King*, 126 B.R. 777, 780-81 (Bankr. N.D. Ill. 1991) ("Section 109(g) does not merely require a debtor to come physically before the bankruptcy judge when

the case is set. Willful failure to 'appear before the court in the proper prosecution of the case' can also include a Chapter 13 debtor's willful failure to pay under his plan."); *In re Wen Hua Xu*, 386 B.R. 451, 457 (Bankr. S.D.N.Y. 2008) ("[C]ourts have held that this section can apply to a debtor's willful failure to pay under a chapter 13 plan…. 'Proper prosecution,' in this context must necessarily encompass, at the least, compliance with the statutory duties of a debtor."). Applying the law, the United States Trustee asserts that the element is satisfied because the Debtor has failed to make substantial payments in the instant case as well as in Debtor's two prior cases.

As to the second element, the United States Trustee argues that willful" means "deliberate or intentional, rather than accidental or that which is beyond the debtor's control." *See In re Wen Hua Xu*, 386 B.R. at 455. But repeated failures to abide statutory or judicial directives do support an inference of willful conduct. *See id.* at 456. Applying the law, the United States Trustee argues that the Debtor had the clear financial ability to make the plan payments but instead chose to superfluously spend an exorbitant amount of money on hotels, airline tickets, and other luxuries. The United States Trustee argues that this strongly suggests an inference of willfulness. *See, e.g.*, *In re King*, 126 B.R. at 779 ("The Debtors are therefore well able to make payments due to the Trustee under their Plan …. They have willfully failed to do so despite knowing of their obligation to do so and having the financial ability to do so.") (emphasis added); *In re Patel*, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985) (failure to make plan payments was willful where "[c]reditors have been forced to wait for payments that were never made, while petitioner has prospered.") (emphasis added).

The United States Trustee asks for the court to enter an order (1) dismissing the case under Section 1208(c) and (2) bar the Debtor from filing a new case for 180 days pursuant to Section 109(g).

CHAPTER 12 TRUSTEE SUPPLEMENTAL PLEADINGS

On August 6, 2014, the Chapter 12 Trustee filed a supplemental brief to the motion to dismiss in support of having the motion denied.

In his support, the Chapter 12 Trustee argues that after review of the case, it would be in the best interest of the creditors to keep the case open. While the Chapter 12 Trustee does note that the Debtor remains to be delinquent of one plan payment in the amount of $8,500.79, he argues that keeping the case going is best for the creditors.

The Chapter 12 Trustee states that he has reviewed the Bankruptcy Rule 2004 Examination transcript and reviewed the financial statements to conclude that the Debtor makes enough money to support the remainder of the plan as well as the business.

The Chapter 12 Trustee suggests and argues that the court should appoint an accountant to act as the Debtor's accountant and bookkeeper in order to ensure that the Debtor makes the remaining plan payments. Furthermore, the Chapter 12 Trustee argues that the Debtor should be ordered to file Monthly Operating Reports and be required to attend status

conferences at least quarterly to ensure compliance with the plan.

The court knows nothing about the person identified as "Ralph Juarez" by the Trustee as a possible accountant and bookkeeper for the Debtor. The Trustee states that if the court does not dismiss the case then the Chapter 12 Trustee shall filed a motion for Mr. Juarez to be employed.

Interestingly, the Chapter 12 Trustee's supplemental response is devoid of any legal authority for appointing an "accountant" or a "bookkeeper" to take over the fiduciary and other Plan duties of a Chapter 12 Debtor in a Chapter 12 case. The Chapter 12 Trustee does not provide the court with any authorities for the Chapter 12 Trustee to select and have appointed an "accountant" or a "bookkeeper" for the Debtor in a Chapter 12 case. FN.2.

FN.2. In connection with this case, it has been made clear to the court that this Chapter 12 case can be converted to one under Chapter 7, with the Chapter 7 trustee authorized to continue in the operation of the business as the independent fiduciary. 11 U.S.C. § 1208(d). Additionally, pursuant to 11 U.S.C. § 105(a) and applicable state law, the court can appoint a receiver under the Chapter 12 Plan to take control of the assets, perform the plan, and then turn the business and assets back over to the Debtor upon completion of the plan.

The Chapter 12 Trustee has provided as an exhibit correspondence from the proposed "accountant" and "bookkeeper" as to his understanding of his duties. Clearly, he does not see it as a task other than inputting the information from the Debtor and then doing with it what the Debtor says. "I believe that the majority of the work would be done by my general staff with my oversight." Exhibit A, Dckt. 237. The court is at somewhat of a loss, based on the pleadings filed, how the Chapter 12 Trustee is suggesting that having bookkeeping staff do the work remedies the substantial breaches, misrepresentations, and diversions of monies by Debtor.

DEBTOR'S RESPONSE

On August 7, 2014, Debtor filed a response. Debtor argues that the motion to dismiss should be denied.

In his response, the Debtor admits to not be current on his plan payments but that "it is anticipated that [Debtor] will be current on his plan payments by the time of the [August 21st hearing]." Dckt. 240.

In support for denying the motion to dismiss, the Debtor argues that: 1) all of the creditors receiving payments under the plan oppose the dismissal of the case; 2) the Chapter 12 Trustee opposes the dismissal of the case subject to the appointment of an accountant; and 3) Debtor has paid all domestic support obligations and has no further domestic support obligations.

The Debtor concludes by arguing that it is not in the best interest of the creditors to dismiss the case. Furthermore, while admitting that the Debtor "has spent money that should have been devoted to plan payment,"

Debtor asserts that "the remedy for this behavior is the appointment of [an accountant] to take control of [Debtor's] finances leaving [Debtor] to drive the tractors." Dckt. 240.

The Debtor provides his testimony in opposition to the Motion. In his declaration he states,

a. Debtor supports Trustee's recommendation for the Debtor to have an accountant;

b. Debtor supports Trustee's recommendation that monthly operating reports be filed timely;

c. Debtor supports Trustee's recommendation that quarterly status conferences be held;

d. Debtor wants the accountant to be the disbursing agent to receive payments from Debtor's customers, make payments to the Chapter 12 Trustee, and then release funds to Debtor for his business expenses.

Declaration, Dckt. 241. As discussed below, the Debtor provides scant evidence of what monies were misspent, how that occurred, or why he would not be working to continue improperly diverting monies notwithstanding having a bookkeeper. The Declaration is pregnant with foreshadowed future diversions.

Though professing to have the bookkeeper handle all of the monies, Debtor says that while the bookkeeper will receive "all" payments from clients and make disbursements to the Chapter 12 Trustee, the only disbursements to be made to the Debtor will be "to pay business expenses." Debtor has previously stated that his only income is from this business. Schedule I, Dckt. 1 at 32; Statement of Financial Affairs Responses to Questions 1 and 2, *Id.* at 35; Declaration in Support of Confirmation, ¶ 6, incorporating Exhibit A, Dckts. 10, 11; and Declaration in Support of Confirmation, ¶ 12, incorporating Exhibit A, Dckts. 152, 153.

This testimony under penalty of perjury taken as true, then the Debtor would have no money for paying any personal expenses. The Debtor's ability to pay his personal expenses is dependent (based on the evidence to date) on using monies earned from the operation of his business. Thus, in saying that the bookkeeper will disburse monies to him only for business expenses, Debtor is also stating that he has additional monies or will be secretly collecting monies from his business, diverting them around the bookkeeper.

The above testimony relating, to the extent it does, to misrepresentation to the court and creditors, and the diversion of monies, covers a total of five lines in the declaration. Debtor then spends fourteen lines testifying as to what a bad person his ex-spouse is and how he has determined that his ex-spouse routinely makes false statements to the court. (The irony of the Debtor reaching such a determination as to another is not lost on the court, and presumably on the Chapter 12 Trustee and the U.S. Trustee.)

CREDITOR STATEMENTS SUPPORTING DEBTOR'S CONTINUED POSSESSION AND CONTROL UNDER PLAN NOTWITHSTANDING MISREPRESENTATIONS, BREACHES OF FIDUCIARY DUTY, AND DIVERSION OF PLAN MONIES

Bankruptcy cases can make for strange bedfellows, and a good Chapter 11 or 12 attorney can find the common ground by which plans can be confirmed with broad creditor support. These compromises relate to issues concerning creditor liens, priority of payment, why some dividend is better than no dividend, and the like. However, a "deal" between a debtor and creditors does not work for the creditors to "sanctify and absolve" parties for conduct to corrupt the federal judicial process and commit fraud upon the court.

Four creditors have provided the court with their claim specific response to the Trustee's Motion. These statements are as follows:

A. CNH Capital America, LLC Response, Dckt. 244, states in its entirety,

> "Creditor, CNH CAPITAL AMERICA, LLC, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> Creditor, CNH CAPITAL AMERICA, LLC, opposes the dismissal of the case."

B. NAEDA Financial Ltd., L.P., Response, Dckt. 245, states in its entirety,

> "Creditor, NAEDA Financial Ltd,. L.P., submits the following in response to the motion to dismiss case filed by the Chapter l2 Trustee.
>
> Creditor, NAEDA Financial Ltd., L.P., opposes the dismissal of the case. Creditor, NAEDA Financial Ltd., L.P., is satisfied with the confirmed plan and opposes the dismissal of the case."

C. Mesa Leasing, Inc. Response, Dckt. 246, states in its entirety,

> "Creditor, MESA LEASING, INC., submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> Creditor, MESA LEASING, INC., opposes the dismissal of the case. Creditor, MESA LEASING, INC., is satisfied with the confirmed plan and opposes the dismissal of the case."

D. Deere & Company Response, Dckt. 247, states in its entirety,

> "Creditor, DEERE & COMPANY, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> So long as the Debtor remains current on his plan payments, DEERE & COMPANY opposes the dismissal of the case."

These "Responses" by the Creditors raise several questions. First, none of them address, or appear to reflect any knowledge of the Debtor having diverted substantial amounts of money ($80,000.00) to his personal use (travel, lodging, and luxuries), leading to the defaulted plan payments.

Second, The Deere & Company response can be read (less charitably then as phrased by the Debtor) as stating, "so long as the Debtor pays us on the deal we made, he can misrepresent to and defraud the court – just as long as we get ours."

At the hearing, the court will afford sufficient time for the attorneys for each of these creditors to provide the court with their client's respective analyses and position as it relates not merely to a default in plan payment, but the diversion of the monies and misrepresentations to the court.

DISCUSSION

The United States Trustee's response provides succinctly all of the problems with Debtor's case. Ranging from excessive and unjustifiable spending on luxury goods to failure to disclose bank accounts and support obligations, the Debtor has not been forthright in this case. As discussed below, the court finds multiple grounds to grant the motion to dismiss.

11 U.S.C. § 1208(c) authorizes the bankruptcy court to dismiss a case for cause. In relevant part, such causes that constitute for cause are:

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;. . .
>
> (4) failure to commence making timely payments required by a confirmed plan;. . .
>
> (6) material default by the debtor with respect to a term of a confirmed plan;. . .
>
> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
>
> (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. 1208(c).

While "bad faith" is not specifically listed as one of the

enumerated causes to justify dismissal under § 1208(c), bad faith may constitute cause for dismissal. *Leavitt v. Soto* (*In re Leavitt*), 171 F. 3d 1219, 1224 (9th Cir. 1999) (bad faith held to be cause for dismissal under chapter 13's mirrored statute, § 1307(c)). When determining whether a debtor filed his petition in bad faith, a court must apply a totality of the circumstances, considering the following factors:

(1) Whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;

(2) The debtor's history only intended to defeat state court litigation;

(3) Whether the debtor only intended to defeat state court litigation; and

(4) Whether egregious behavior is present.

In re Pandol, No. 10-19733-B-12, 2010 Bankr. LEXIS 6495, at *2 (Bankr. E.D. Cal. Sept. 29, 2010) (citations omitted).

It is painfully obvious that the Debtor has not followed the terms of the confirmed Plan. The Debtor has been spending an exorbitant amount of money outside of the confirmed Plan. $50,000 for travel expense, $12,000 at restaurants, and $18,000 on luxury goods and services are most certainly not terms of any Chapter 12 confirmed plan. Debtor here took it upon himself to act outside the terms of the Plan and spend money (a large amount of it) on items and services that were not for the betterment of the estate or creditors. FN.3.

FN.3. It is equally curious that the Debtor, so strapped for cash and ability to generate a profit, justified confirming a Chapter 12 Plan with a 0.00% dividend to creditors holding general unsecured claims, but during the first year of the Plan has been able to spend $80,000.00 for travel, lodging, and luxuries. This further impugns the Debtor's credibility and ability to serve as a plan administrator in a bankruptcy case.

Applying the causes under § 1208(c) to the instant case, there are multiple grounds in which dismissal is proper. The Debtor has grossly mismanaged funds by spending superfluous and unnecessary monies on travel, restaurants, and hotels instead of putting that money towards fulfilling the Plan obligations. Through this gross mismanagement, there has been a substantial diminution of the estate (upwards of $80,000 in the past year and a half alone). The multiple filings of the Debtor which all led to dismissal and the inability for the Debtor to follow the terms of the Plan make rehabilitation highly unlikely. Lastly, the Debtor did not disclose the domestic support obligations (or the potential of such, assuming that the Debtor acted in some form of good faith) and failed to timely pay such obligations after confirmation of the plan.

Most notably, the Debtor remains to be delinquent on payments. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6). On this ground alone, there is sufficient basis to dismiss the case. The evidence concerning the superfluous and unjustifiable spending on non-essential goods suggests that the Debtor willfully ignored the terms of the plan and chose not to make the plan payments in order to take vacations to Las Vegas. Lavish vacations were not part of the Debtor's plan.

Furthermore, the Debtor has not been forthright with the court from the start of this case. In short, the Debtor has **only** acted in bad faith. Debtor did not disclose an interest in a bank account at the time of filing the petition. Debtor failed to disclose the existence of domestic support obligations. Debtor has provided little to no explanation concerning the discrepancies in Schedules I and J of Debtor's petition and his sworn declarations for the instant motion. Debtor failed to sufficiently explain where large sums of money, such as the $25,00.00 advance for future work in which the Debtor has not provided any contract of the future work nor explanation of the terms of such advance, "magically" appear from to satisfy Debtor's obligations.

Debtor is constantly hiding the ball, hoping that satisfying any deficiencies will cure any and all problems (fraud, misrepresentation, and breach of fiduciary duties) that have run rampant in this case from the get go. Debtor has acted on his own accord in spending estate funds without providing any authorization, justification, or permission. For example, Debtor has not provided any explanation on where he got the past due domestic support obligation payment nor under what authority he was acting under to pay such past due payments. Overall, Debtor has acted egregiously, whether it be through the gross spending of estate funds outside the Plan's terms or acting without any authority and diminishing the value of his Chapter 12 estate.

The Chapter 12 Trustee and Debtor's suggestion that hiring an accountant will cure the deficiencies and problems that the case has experienced so far is unpersuasive. The plan nor the court should provide for professional "babysitters" so that the Debtor may be left "to drive the tractors off the cliff a fifth time." Such a bookkeeper (or in this situation the non-professional staff of the bookkeeper actually doing the work) would not be able to cure the breaches or prevent them in the future.

The Debtor, first as the Debtor in Possession and then as the Plan Administrator is a fiduciary to the bankruptcy estate and plan estate. The Chapter 12 Plan provides that the property of the estate shall revest in the Debtor upon confirmation. Order, First Amended Chapter 12 Plan attached, ¶ 5.01, Dckt. 193. Even though revested in the Debtor, the property remains subject to the Bankruptcy Code, including 11 U.S.C. § 363. Collier on Bankruptcy, Sixteenth Edition, ¶ 1227.02. The Debtor has chosen to take on the responsibility to serve as the plan administrator, and handle the plan estate monies in the same manner as an independent fiduciary could (and is now proposed) to hold and control those assets. The court would well anticipate the Debtor being the first to the courthouse if the accountant/bookkeeper had used $80,000.00 of the monies for the purposes

used by the Debtor through this confirmed Plan.

A trust (fiduciary relationship) is created as a matter of California law when there is a transfer of assets by which one obtains control and another is to share in the profits. *Schaake v. Eagle Automatic Can. Co.*, 135 Cal. 472 (Cal. 1902). A fiduciary owes a duty "to act with the utmost good faith for the benefit of the other party." *Persson v. Smart Inventions, Inc.*, 125 Cal.App.4th 1141, 1160 (Cal.Ct.App. 2005) (citing *Bacon v. Soule*, 19 Cal.App. 428, 434 (Cal.Ct.App. 1912))(internal quotations omitted).

Therefore, because of the delinquent payments and the apparent willfulness in not abiding by the terms of the Plan and the failure to provide any explanation or justification for spending outside the terms of the Plan, the relief is proper pursuant to 11 U.S.C. § 1208. However, it remains to be determined if the relief should be dismissal with only an six month prohibition on filing yet a fourth bankruptcy case in four years, dismissal of the bankruptcy case with prejudice, or conversion to a case under Chapter 7. Alternatively, if the Debtor were to prosecute a plan amendment which provided for an appointment of a receiver to take control of the business and assets for the term of the Plan and the diverted $80,000.00 and additional monies paid to the ex-spouse were accounted for, the court would have yet another option.

3. 11-94410-E-11 SAWTANTRA/ARUNA CHOPRA
RMY-2 Robert Yaspan

APPROVAL OF DISCLOSURE STATEMENT FILED BY JOINT DEBTORS
7-9-14 [882]

Tentative Ruling: The Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

Local Rule 2002 (b) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 11 Trustee, parties requesting special notice, and Office of the United States Trustee on July

9, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Disclosure Statement is not approved.

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: December 30, 2011

Background: The Debtors are physicians and real estate developers.

Creditor/Class	**Treatment**	
Administrative Expenses	**Claim Amount**	
	Impairment	

	Professional Fees: Robert Yaspan Law Office $250,000, or as ordered by Court Paid in full on the effective date. Clerk's office fees: estimated $500 paid in full on effective date UST Fees: Estimated $1,500 paid in full on effective date Chapter 11 Trustee: $39,493 expected to be higher but no additional sums have yet been sought - paid in full on effective date Attorney for Chapter 11 Trustee: $141,114 expected to higher but no additional sums have yet been sought - paid in full on effective date Trustee's Accountant: $28,50 expected to be higher but no additional sums have yet been sought - paid in full on effective date Law Offices of Peter Fear: $40,000 paid in full on the effective date Weiland (former non-employed counsel to Debtor during period of time Chapter 11 Trustee was in place): $250,000 - not a priority claim, dealt with in Class 7 Sanjiv and Sheena Chopra: $310,000 loan to Debtors while Trustee was in possession - paid in full on effective date	
Priority Tax Claims	**Claim Amount**	$104,000
	Impairment	unimpaired
	Based on Proofs of Claim already filed by IRS. The EFFECTIVE DATE CLAIM of this creditor will be paid over a period of time, in 28 monthly installments (assuming an effective date in September, 2014) with interest paid as provided by the statute at 3%. The monthly payment is estimated to be $4,470.01. The amount and number of payments will vary based on the timing of the Effective Date.	
Class 1.1 County of Stanislaus, Real Estate Taxes	**Claim Amount**	$15,047
	Impairment	Unimpaired

	This creditor claims a lien first in priority against F STREET in the amount of $15,047 as computed through July 31, 2014. As neither the Debtor nor the estate personally owes this money, it will be left to be paid by the foreclosing creditor, the $700K ASSIGNEES. This ESTATE, and the Debtors, will pay nothing. This creditor is unimpaired and undisputed.	
Class 1.2	**Claim Amount**	$729,389.30 disputed
	Impairment	Unimpaired
	This creditor asserts a claim in the approximate amount of $729,389.30 as a first lien priority against the F STREET property subject to the real estate tax claimant (according to the POC). However, the Debtor is informed and believes, that the creditor now asserts that the claim is for $983,595.62. In addition, subject to the outcome of the LIEN LITIGATION, this creditor asserts a second lien position against 007 and a third lien position against 029. The claims of this creditor against 007 and 029 will be dealt with elsewhere. Treatment: The Debtor believes that the value of the F STREET property is at least equal to the sum of the EFFECTIVE DATE AMOUNTS claimed by the Class 1.1 and Class 1.2 creditors. The appraisal obtained by the Debtors as to this property is in the amount of $856,000. The Debtor will file a motion to value F STREET for Plan purposes, and for the purpose of calculating how much, if any, of the Class 1.2 claim exists after the surrender of the F STREET property to the Class 1.2 claimant and, if any portion of the claim does exist, it will be paid in full from the refinance escrow for the sale of the 007 and 025. This creditor is unimpaired as to the priority of this Class 1.2. This creditor is disputed as to amount.	
Class 1.3 County of Stanislaus, Real Estate Taxes as to Oakdale	**Claim Amount**	$10,500
	Impairment	Unimpaired

	This creditor claims a lien first in priority against OAKDALE in the amount of $10,500. Whatever be the EFFECTIVE DATE AMOUNT, this creditor will be paid by the Debtor according to law over five years from the Effective Date at 18% interest. This creditor is unimpaired and undisputed. If the EFFECTIVE DATE AMOUNT is $10,500 the creditor will be paid $255.00 per month.	
Class 1.4 New Era Capital, LLC as to Oakdale	**Claim Amount**	$230,730.88
	Impairment	Impaired
	This creditor asserts a claim in the approximate amount of $230,730.88 as a first lien priority against the OAKDALE property after the real estate tax claimant. The claimant has delivered the note and deed of trust to the TRUSTEE, whose counsel now holds the subject documents in custody. Whether this claim is held by NEW ERA, the Disbursing Agent, or the TRUSTEE, the Debtor will make payments on the claim for the benefit of the administrative and Class 4 general unsecured creditors over six years with a 30 year amortization, at 4% interest, at which point it will be paid off in full. Payments will be made to the Trustee of CCT. If the EFFECTIVE DATE AMOUNT is $270,000 the monthly payment will be $1,289.02.	
Class 1.5 Triunfo Acquisition, LLC ast Oakdale Property	**Claim Amount**	$55,000
	Impairment	Impaired

	This creditor asserts a judgment lien against the OAKDALE property and the HILLCREST property. However, it is an undersecured claimant as to this property (OAKDALE). The Debtor believes that the value of the OAKDALE property is $336,000 and the value of TRIUNFO's interest in the OAKDALE property is therefore $55,000. Treatment: The Debtor will file a motion to value the OAKDALE property and this Class 1.5 creditor will retain a lien secured by the OAKDALE property in the amount equal to the fair market value of the property determined by the COURT, less the amounts determined to be owed to the Class 1.3 and 1.4 creditors. Whatever the EFFECTIVE DATE AMOUNT may be, the Debtor will make payments on the obligation over 10 years, with a 30-year amortization, at the FEDERAL JUDGMENT RATE. At an EFFECTIVE DATE AMOUNT of $55,500 for this class, the monthly payment will be $233.99 per month. All amounts remaining will be paid in the 121 ''month after the Effective Date, or upon the sale of the property, whichever occurs first. This creditor is impaired but, except as to the actual amount of the Class 1.5 secured claim, the creditor is undisputed. To the extent that the allowed claim of TRIUNFO is greater than the sum of the allowed claim of the Class 1.5 and the Class 1.12 claims, that excess shall be allowed as a general unsecured claim in Class	
Class 1.6 County of Stanislaus Real Estate Taxes as to Banner court	**Claim Amount**	$41,423
	Impairment	Unimpaired
	This creditor claims a lien first in priority against BANNER COURT in the amount of approximately $41,423 as of July31,2014. Whatever be the EFFECTIVE DATE AMOUNT, this creditor will be paid by the Debtor according to law over five years from the Effective Date at 18% interest. This creditor is unimpaired and undisputed. If the EFFECTIVE DATE AMOUNT is $41,423 the creditor will be paid $1,052.00 per month.	
Class 1.7 CLS as to Banner Court, assignee of BOW	**Claim Amount**	$1,804,000
	Impairment	Impaired

	This creditor asserts a first lien priority against BANNER COURT after the real estate tax claimant in the amount of $1,804,000. The Debtor believes the value of BANNER COURT to be $1,936,000, and this creditor is therefore fully secured. Whatever be the EFFECTIVE DATE AMOUNT, the creditor will retain its lien only to that amount, which will be paid at 5%, or at some other rate ordered by the COURT, over the next 25 years. If the EFFECTIVE DATE AMOUNT is $1,804,000 then the monthly payment to this class claimant will be $9,140.60. The Debtor will investigate the claim of CLS and, therefore, the amount and priority is disputed.	
Class 1.8 Don Mosco as to Banner Court	**Claim Amount**	$918,549.99 estimate
	Impairment	Impaired
	This creditor asserts a second lien priority against the BANNER COURT property in the amount of approximately $918,549.99 (or higher). The claim is undersecured as to this property and it will be paid in full under the treatment below in Class 1.15. The claim is impaired, but the amount and priority are not disputed. Any balance due to this creditor will be treated in Class 1.15 below.	
Class 1.9 Bulmaro Palafox	**Claim Amount**	$102,000
	Impairment	Impaired
	This creditor asserts a third lien priority against the BANNER COURT property in the amount of approximately $102,000. The claim is totally "underwater", i.e.,undersecured, and it will be removed from the property either by consent, or by order of COURT after valuation. The claim is impaired, but the amount and priority are not disputed. Any balance due to this creditor will be treated in Class 1.25 below and then, if necessary, in the general unsecured creditor class (Class 4).	
Class 1.10 County of Stanislaus, Real Estate Taxes as to Hillcrest	**Claim Amount**	
	Impairment	unimpaired
	This creditor is current This class is only being retained as a placeholder pending the actual date of confirmation. It is not expected that the claimant will have an allowable claim as the current administrative tax. Whatever be the EFFECTIVE DATE AMOUNT this creditor will be paid by the Debtor according to law over five years from the Effective Date at 18% interest This creditor is unimpaired and undisputed.	

Class 1.11 BOW	**Amount**	$383,667
	Impairment	Unimpaired
	This creditor asserts a claim of approximately $383,667 as a first lien claim directly after the tax claimant This creditor is current and will remain so, retaining all of its contractual rights under this Plan. This creditor is unimpaired and undisputed as to this Class 1.11 claim.	
Class 1.12 Triunfo Acquisition, LLC as to Hillcrest property	**Amount**	
	Impairment	Impaired
	This creditor asserts a judgment lien against the OAKDALE property and the HILLCREST property. However, it is an undersecured claimant as to this property (HILLCREST). Treatment: The Debtor will file a motion to value the HILLCREST property and this Class 1.12 creditor will retain a lien secured by the HILLCREST property in the amount equal to the fair market value of the property determined by the COURT, less the amounts determined to be owed to the Class 1.10 and 1.11 creditors. The Debtor believes that the fair market value of HILLCREST is $953,000. If so the EFFECTIVE DATE AMOUNT of this class would be $558,000. Whatever that amount may be, the Debtor will make payments on the obligation over 10 years, with a 30-year amortization, at the FEDERAL JUDGMENT RATE. This payment amount would be $2,352.55 per month. All amounts remaining will be paid in the 121 st month after the Effective Date, or upon the sale of the property. This creditor is impaired but, except as to the actual amount of the Class 1.12 secured claim, the creditor is undisputed. To the extent that the allowed claim of TRIUNFO is greater than the sum of the allowed claim of the Class 1.5 and the Class 1.12 claims, that excess shall be allowed as a general unsecured claim in Class 4.	
Class 1.13 County of Stanislaus, Real Estate Taxes as to 007	**Amount**	$87,847
	Impairment	Unimpaired
	The claim is $87,847 as of July 31,2014. This creditor will be paid in full from the real estate escrow relating to the refinance of 007. This creditor is undisputed.	
Class 1.14 County of Stanislaus, Real Estate Taxes as to 025	**Amount**	$87,840
	Impairment	Unimpaired

	The claim is $87,847 as of July 31,2014. This creditor will be paid in full from the real estate escrow relating to the refinance of 025. This creditor is undisputed.	
Class 1.15 Don Mosco as to 007	**Amount**	$940,000
	Impairment	Unimpaired
	This creditor will be paid in full from the real estate escrow relating to the refinance of 007 and, if so paid, will give up his undersecured claim against BANNER COURT, and his participation in the general unsecured creditor class. The amount to be paid this creditor is approximately $940,000, or higher, if the allowed claim is greater. The creditor has estimated the claim at $1,190,000 as of June, 2014.	
Class 1.16 $700K Assignees as to 007	**Amount**	
	Impairment	Impaired
	This creditor asserts a claim inferior in priority to the claim of Class 1.15 as against 007. The claim is undersecured and it will be removed from the property either by consent, or by order of COURT after valuation. The Debtor believes that this claimant is below the water line, i.e., the claim is totally undersecured, and, accordingly, this creditor is not entitled to any payment in this class. The claim is impaired, but the amount and priority are not disputed. Any balance due to this creditor is expected to be paid in full in connection with the treatment accorded in Class 1.2 above and then, if necessary, in this class (if needed and available) and then in the general unsecured creditor class (Class 4).	
Class 1.17 New Era Capital, LLC as to 025	**Amount**	$700,000
	Impairment	Impaired
	This creditor asserts a claim in the approximate amount of $700,000 as a first lien priority against 025 after the real estate tax claimant. The claimant has delivered the note and deed of trust to the TRUSTEE, whose counsel now holds the subject documents in custody. Whether this claim is held by NEW ERA or the TRUSTEE, the Debtor will turn over the refinance proceeds, estimated to be $1,250,000, less the amounts due to the Class 1.14 claimant, and the relevant costs of sale.	
Class 1.18 County of Stanislaus, Real Estate Taxes as to 09	**Claim Amount**	$47,315
	Impairment	Unimpaired

	This creditor claims a lien first in priority against 029 in the amount of approximately $47,315. As neither the Debtor nor the estate personally owes this money, it will be left to be paid by BLEDSOE, the foreclosing creditor. This creditor is unimpaired and undisputed.	
Class 1.19 County of Stanislaus, Real Estate Taxes as to 030	**Claim Amount**	$12,241
	Impairment	Unimpaired
	This creditor claims a lien first in priority against 030 in the amount of approximately $12,241. As neither the Debtor nor the estate personally owes this money, it will be left to be paid by BLEDSOE, the foreclosing creditor. This creditor is unimpaired and undisputed.	
Class 1.20: Bledsoe	**Claim Amount**	
	Impairment	Impaired
	This creditor will be allowed to foreclose and take back 029 and 030 as of the Effective Date.	
Class 1.21 $1.25 Mill Assignees	**Amount**	
	Impairment	Impaired
	These creditors are expected to be "sold out juniors", and will not be paid in this class. Rather, the allowed claim of this claimant will be treated as a general unsecured claim in Classes 4 and 5 unless this claimant is either: (a) successful in the LIEN LITIGATION in establishing a priority over BLEDSOE, or (b) settles the LIEN LITIGATION in a manner that allows some recovery directly from 029. In this latter case, the claimants' general unsecured claim allowed amount in Classes 4 and 5 will be computed as: (c) the amount of the allowed claim, less (d) the amount recovered from 029, or the proceeds of 029.	
Class 1.22 $700K Assignees	**Amount**	
	Impairment	Impaired

	These creditors are expected to be "sold out juniors", and will not be paid in this class. Rather, the allowed claim of this claimant will be treated as a general unsecured claim in Classes 4 and 5, unless this claimant is either: (a) successful in the LIEN LITIGATION in establishing a priority over BLEDSOE, or (b) settles the LIEN LITIGATION in a manner that allows some recovery directly from 029. In this latter case, the claimants' general unsecured claim allowed amount in Classes 4 and 5 will be computed as: (c) the amount of the allowed claim, less (d) the amount recovered from 029, or the proceeds of 029.	
Class 1.23 $550K Assignees	**Amount**	
	Impairment	Impaired
	These creditors are expected to be "sold out juniors", and will not be paid in this class. Rather, the allowed claim of this claimant will be treated as a general unsecured claim in Classes 4 and 5 unless this claimant is either: (a) successful in the LIEN LITIGATION in establishing a priority over BLEDSOE, or (b) settles the LIEN LITIGATION in a manner that allows some recovery directly from 030. In this latter case, the claimants' general unsecured claim allowed amount in Classes 4 and 5 will be computed as: (c) the amount of the allowed claim, less (d) the amount recovered from 030, or the proceeds of 030.	
Class 3 General Unsecured Creditors with claims of $2,000 or less	**Amount**	
	Impairment	Unimpaired
	This convenience class of unsecured claims consists of those creditors whose claims are $2,000 or less, or who reduce their claims to $2,000. These creditors shall be paid in full on the Effective Date. These creditors are unimpaired.	
Class 4 General Unsecured Creditors other than specified in Classes 3, 5 or 6	**Amount**	
	Impairment	Impaired
	Approximately 13% paid over 60 months plus the pro rata net proceeds of the litigation re the NOTES and the Danville foreclosing creditors. Payments to be made quarterly starting on the 60th day after the Effective Date in the amount of the CLASS 4 MONTHLY PAYMENT times three, or a quarterly payment of $31,020 for 60 months.	

Class 6: General Unsecured claim of Loanvest	**Claim Amount**	
	Impairment	Impaired
	This claimant shall be paid in full settlement of its claims the sum of $100,000 two years after the Effective Date, and a further $125,000 three years after the Effective Date. This claimant shall not receive any dividend under any other provision of this Plan; nor shall it have a claim under any other provision of this Plan.	
Class 7: Weiland	**Claim Amount**	
	Impairment	Impaired
	This creditor shall receive one payment of$10,000 from the Estate through the Disbursing Agent one year after the Effective Date.	
Class 8: RMY	**Claim Amount**	$250,000
	Impairment	Unimpaired
	Paid on Full on the Effective Date from the contribution of the Debtors' exempt profit sharing plan. Estimated at $250,000, or as ordered by the COURT.	
Class 9: Sanjiv and Sheena Chopra	**Claim Amount**	
	Impairment	Unimpaired
	Paid in full on the Effective Date by setoff from the Purchase Price to be paid. Estimated at $310,000, which represents the repayment to the claimant of a loan to pay certain expenses of the Debtors during the Chapter 11 proceeding.	
Class 10: New Era, LLC	**Claim Amount**	
	Impairment	Impaired
	This creditor will contribute any dividends or distributions received under Classes 1.4 and 1.17 above to the payment of administrative claims, and Classes 3 and 4 of the general unsecured claimants, as described in the spreadsheets attached as Exhibit 12 to the Disclosure Statement.	
Class 11: Interest holders (Debtors)	**Claim Amount**	
	Impairment	Impaired

	Debtors shall retain all property of the estate and any other property to which Debtors had a right to prior to the Petition Date and as to which Debtors may obtain rights to receive in the future. APPLICATION OF THE ABSOLUTE PRIORITY RULE: Debtors assert that the absolute priority rule does apply to the confirmation of this plan based on the facts of the case. Debtors propose to apply all of their disposable income for the five-year duration of the case to make payments to unsecured creditors. Therefore, the restrictions of the absolute priority rule should not limit this Plan. However, the Debtors anticipate that they will deposit $100,000 from the PSP by the Effective Date as additional working capital should a "new value" consideration be required. Debtors are impaired.

A. C. WILLIAMS FACTORS PRESENT

__Y__ Incidents that led to filing Chapter 11

__Y__ Description of available assets and their value

__Y__ Anticipated future of the Debtor

__Y__ Source of information for D/S

__Y__ Disclaimer

__Y__ Present condition of Debtor in Chapter 11

__Y__ Listing of the scheduled claims

__Y__ Liquidation analysis

_____ Identity of the accountant and process used

____ Future management of the Debtor

__Y__ The Plan is attached

In re A.C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

OBJECTIONS:

Bledsoe Fischer Creditors/Mid Valley Assignees

The Bledsoe Fischer Creditors and the Mid Valley Assignees object to the Debtors' proposed Disclosure Statement because it fails to provide adequate information about the legal basis for administrative priority payment of approximately $810,000 in unsecured post-petition claims against debtors incurred after appointment of the Chapter 11 Trustee; the lien

priority dispute; what claim objection, avoiding powers or other causes of action will be prosecuted; what creditors will be paid; when they will be paid; how they will be paid if the United States succeeds in the prosecution of its forfeiture claims; and a host of other matters. Finally, the proposed Disclosure Statement describes a Plan that is unconfirmable on its face: it fails to resolve or provide for the forfeiture claims of the United States, admits that the best interest test is not satisfied, and improperly pays non-estate creditors.

Chapter 11 Trustee, Gary Farrar

Gary Farrar, the Chapter 11 Trustee, ("Trustee") opposes the disclosure statement on the basis that the Disclosure Statement does not provide adequate information in a number of respects.

First, Trustee states that subsequent to the filing of the Disclosure Statement, the Bledsoe Creditors and the Mid Valley Assignees have obtained relief from the automatic stay, effective August 21, 2014, as to the real properties located at APN 078-015-029 ("029 Parcel") and APN 078-015-029 ("030 Parcel") in the Dale Road Project Because the Disclosure Statement does not address the termination of the automatic stay, or the impending foreclosure of the 029 Parcel and the 030 Parcel, it does not contain adequate information.

Second, Trustee states that concurrently herewith, the Trustee will file three (3) motions to abandon real property assets [HSM-022, HSM-023, and HSM-024]. The Trustee seeks to abandon the estate's interests in all real properties other than: (1) the real property located at APN 078-015-025 in the Dale Road Project ("025 Parcel"), and (2) 1317 Oakdale Road, Modesto, California ("Oakdale Road Property"). Moreover, in light of the limited number of retained properties the Trustee intends to administer, the Trustee intends to file a motion to convert this case to Chapter 7. If the Trustee's conversion motion is granted, this will moot the Plan and Disclosure Statement.

Third, Trustee states Section 11.0.2 (p.1 0) describes the events leading to the Chapter 11 filing, stating that the Mid Valley Assignees are junior on the 029 Parcel and the 030 Parcel of the Dale Road Project. The priority of liens on those parcels remains in dispute, and is the subject of litigation which has not been resolved.

Trustee further states that Section II.E.1 (a)(8) (p.11) states that the Trustee is holding $40,000.00 "whose status is in doubt." Trustee argues that this is inaccurate, as there is no dispute about these funds, which were contributed to the estate.

Trustee also states that Section IV.A.4(5) (p.17) provides that the Plan is to be funded in part from the above $40,000.00. The funds are required for current and anticipated administrative expenses at this time.

Trustee states that Section IV.A.3 (p.16) describes the mechanism by which the Debtors propose to sell the 007 Parcel and the 025 Parcel for $2,500,000.00 to DALLC, an entity which will be owned 90% by the Debtors' son and daughter-in-law, Sanjiv and Sheena Chopra ("Sanjiv and Sheena"). The

Disclosure Statement does not provide adequate information about the sources of the purchase funds, particularly in light of the fact that Sanjiv and Sheena are recently reorganized debtors in their own Chapter 11 case, which was pending in Department E. Additional information about Sanjiv and Sheena, buyer qualifications, funding, and related issues will need to be disclosed before the Disclosure Statement will contain adequate information in this regard.

Additionally, the Trustee argues that the Disclosure Statement provides that Mr. Yaspan will serve as trustee of the Chopra Creditors Trust, and plan disbursing agent, but does not contain adequate information concerning Mr. Yaspan's connections to Sanjiv and Sheena as their previous Chapter 11 counsel, or in connection with their confirmed plan.

Further, Trustee states that Section IV.B.1 (p.18) provides that Mr. Yaspan will be paid $250,000 for attorneys' fees in connection with the plan, but provides no basis for this calculation. Further, there is no explanation of the basis for compensation to counsel, not employed by the estate, for Debtors out of possession.

Trustee also argues that Section IV. 8.1 (p.19) states that Weiland firm, the Debtors' previous counsel, will have a claim for $250,000 for attorneys' fees in connection with the Plan not to be paid as priority. Again, there is no basis provided for this calculation. Further, there is no explanation of the basis for compensation to counsel, not employed by the estate, for Debtors out of possession.

Furthermore, Trustee argues that Section IV.B.1 (p.19) states that $310,000 will be paid to Sanjiv and Sheena on the effective date of the Plan, in connection with a loan made to the Debtors while the Trustee was in possession. Trustee provides that there is absolutely no explanation of this loan. There was no approval of post-petition financing since the Trustee was appointed. There is no basis for repayment of this claim as a priority claim. Further, the Disclosure Statement does not contain adequate information concerning potential connections/conflicts related to the status of Sanjiv and Sheena as purported creditors of the estate and proposed joint venture partners under the proposed Plan.

Trustee also argues that Section IV.C.1.2 (p.23) anticipates payments in connection with a New Era Capital, LLC ("NEC") note over a period of years and Class 10 addresses NEC contributions (p.39). NEC has already delivered assignments of its claims to the Trustee.

Lastly, Trustee states that the Disclosure Statement does not contain information concerning the pending federal criminal action (United States v. Aruna Chopra), or its anticipated impacts on this case and the Plan, including with respect to the cause of action for civil forfeiture, or how the Debtors anticipate resolving that cause of action.

Elizabeth and Michael LaPlante, Trustees

Michael LaPlante and Elizabeth LaPlante, Trustees of the LaPlante Family Trust; Larry Cleveland, Trustee of the Larry Cleveland 401(k) Profit Sharing Plan; Gregory Smith and Amanda Smith, Trustees of the Gregory and

Amanda Smith Family Trust dated 19 March 2007; Ted Smith and Joyce Smith, Trustees of the Ted and Joyce Smith Trust, John A. Miller Retirement Account; Vida B. Harris, Trustee of the Vida B. Harris Revocable Living Trust dated April 1, 1992; John A. and C. Jeanie Miller, Trustees of the Miller Family Trust dated November 2 1, 2000; and George H. Lehman, Trustee of the George H. Lehman Family Trust, its assignees 3 and/or successors object to the Disclosure Statement does not provide adequate information due to the following:

1. Debtors have provided no factual or legal basis, and have cited no authority, to allow the removal of Creditor's lien on the Parcel 7, Modesto Property. In light of the election of Creditor to proceed with its 1111(b)(2) treatment, the Disclosure Statement does not provide for any basis for the Debtors to proceed.

2. Debtors have alleged no facts or authority to remove Creditor's lien on the Parcel 7, Modesto Property. The Disclosure Statement provides for liens senior to Creditor's lien in the amount of $1,277,847 on the Parcel 7, Modesto Property. In attached appraisal to the Debtors' Disclosure Statement, the Debtors list the value of the Parcel 7, Modesto Property as $3,331,472.00. As there is equity in Parcel 07, Modesto Property and Creditor is making an 1111(b)(2) election, the Debtors would have to initiate an adversary proceeding in order to attempt to remove Creditor's lien.

3. Debtors provide that they will remove Creditor's lien from the Parcel 7, Modesto Property either by consent or order of the Court after valuation. Debtors have not specified when an adversary proceeding or motion will be filed. Creditor does not consent to the removal of its lien and the Debtors have not specified whether a motion or adversary proceeding is to be filed prior to confirmation, prior to the "Effective Date" or at some unknown time in the Plan. Accordingly, the treatment to be approved under the Plan cannot be determined at this time and may take years if an adversary proceeding is required. Therefore, Creditor has not been provided with adequate information to accept or reject the Plan.

Commercial Loan Solutions, LLC

Creditor Commercial Loan Solutions, LLC opposes the Disclosure Statement on the basis that it does not contain adequate information due to the following:

1. The Disclosure Statement lists various entities of the Debtors, but fails to provide any valuation or supporting documents to sufficiently evidence the true value of these assets. Moreover, Debtors merely state that Chopra Development Enterprises, Inc. as "unknown values." There is no further information on these entities, their intended purpose, their business operations, or what the Debtors intend to do with them.

2. Debtors disclose that Aruna has been indicted in a federal proceeding. Disclosure Statement, p. 10. There is no further information on this proceeding any resulting liability which may affect the estate and terms of the Plan. Moreover, even though Sawtantra has not been indicted, there is no explanation or confirmation that she (and the estate) will remain unaffected by the proceedings against Aruna or whether any future potential liability may be linked to Sawtrantra, which is especially pertinent since the Plan contemplates having Sawtantra alone manager the real estate businesses and medical practice.

3. The Disclosure Statement describes CLS as the "alleged assignee" of Bank of the West. There is no explanation of why CLS's priority or status as a secured creditor or assignee of Bank of the West is questionable, what actions the Debtors intend to take in connection therewith, and the potential effect it will have on the estate and the Plan.

4. Under the administrative claims, Debtors list "Expenses arising in the ordinary course of 11 business" but states that this amount "Varies." Even if the exact dollar amount cannot be determined, there should be some reasonable range provided for adequate disclosure.

5. Debtors note that certain creditors have obtained extensions to file a nondischargeability claim. There is no further information on what these potential claims are and how they would affect the Plan if the Court does so determine that the underlying debts are not dischargeable.

6. Debtors state that Exhibit 1 to the Disclosure Statement is "Amended Schedules A, B and C Filed on September 20, 2013." However, only amended Schedule B and C are actually attached

7. The liquidation analysis must show that creditors will receive more under the Plan than through a Chapter 7 liquidation. The liquidation analysis provided by Debtors does not set forth any reliable or authenticated financial information. Moreover, it appears that unsecured creditors may receive more under a Chapter 7 liquidation. [Disclosure Statement, p. 52.] Therefore, Debtors have not conclusively shown that creditors will be better off with this Plan.

8. The Disclosure Statement fails to provide reliable, authenticated financial data or adequately explain the accounting and valuation methods used to provide such information. There is an absence of evidence, supporting documents or simple explanation as to how the figures were determined.

Creditor also states that the plan described by the Disclosure Statement is not confirmable.

DEBTORS' RESPONSE

Debtors state that many events have occurred since the filing of this Second Amended Plan of reorganization and that the Disclosure Statement is going to have to be amended to discuss the changes and the effects upon the Debtor's case. These changes include the following:

1. Court has released the automatic stay on the Bledsoe-Fisher parcels.

2. The LaPlante Creditors have filed a Notice of Election under 11 U.S.C. § 1111(b)(2) which will necessitate a review and amendment of the Disclosure Statement and Plan

3. The Trustee seeks the abandonment of several of the Debtor's properties. The Debtors have opposed the abandonment since this might create a tax nightmare for the Debtors. As the abandonment motions were only filed on 14-day notice about five days ago, the Debtors have not yet been able to do the "what if' analysis if the motions to abandon are granted, and the Court does not also order the turnover of the "NOL", or net operating losses, related to the specific properties to the Debtors.

4. For all of these reasons, and before considering the various objections of the creditors to the adequacy of the Disclosure Statement, the Debtors serve notice that the Plan and Disclosure Statement need to be adjusted to consider, and disclose, these recent events.

Debtors respond to Commercial Loan Solutions, LLC, stating that Debtor will amend the Disclosure Statement to provide the requested information and will consider the other objections at confirmation.

Debtors also respond to the objections of Bledsoe Fischer Creditors and Mid Valley Assignees, explaining that the forfeiture issue does not require a delay in the prosecution of the plan for various reasons. Debtors state the best interest test must be amended because of the recent events stated above. Debtor also clarify several other issues brought up by these Creditors.

Debtors state that the election of the LaPlante Creditors also calls for an amendment of the Disclosure Statement, since this was not contemplated at the time this Disclosure Statement was drafted.

Debtors also respond to the Trustee's Objections, clarifying some of their language and seeking revisions to the current Disclosure Statement.

Debtors conclude that while the objections are extensive, they are "fixable" within the context of an expected amendment.

DISCUSSION:

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains

"adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A.C. Williams, supra*.

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D.Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. In re Michelson, 141 B.R. 715, 718-19 (Bankr. E.D.Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

The court agrees that the Disclosure Statement does not provide adequate information, not only due to the "changed circumstances" from the time of the filing (motions for relief from stay, creditor's 11 U.S.C. § 1111(b)(2) election, Trustee's abandonment) but also because several issues have been excluded, as conceded by the Debtors in their response.

Though referenced, there are several items which require more than a passing response from the Debtors. The first relates to the disclosed $310,000.00 post-petition loan having been made by Sanjiv and Sheena Chopra to the Debtors when they were debtors in possession. In reviewing the docket for the Sanjiv and Sheena Chopra Chapter 11 case (no. 11-93411) the court cannot find an order authorizing the loan of monies from one bankruptcy estate to the other. Further, a review of the Sanjiv and Sheena Chopra Schedules and Statement of Financial Affairs states under penalty of perjury that no pre-petition loan or transfer was made to the Debtors.

A review of the court's docket in this bankruptcy case did not disclose any order authorizing the Debtors, as debtors in possession, to borrow money from Sanjiv and Sheena Chopra or the Sanjiv and Sheena Chopra bankruptcy estate. The monthly operating reports in the Sanjiv and Sheena Chopra bankruptcy case do not disclose any such loan or transfer to the Debtors or their estate.

In reviewing the Disclosure Statement approved by the court in the Sanjiv and Sheena Chopra bankruptcy case, the court could not identify the disclosure of a $310,000.00 loan having been made to this bankruptcy estate or that there was a $310,000.00 administrative expense asset. The court's

order confirming the Sanjiv and Sheena Chopra Chapter 11 plan was entered on February 21, 2014, almost exactly six months prior to this hearing.

This raises serious concerns for the court as to whether the two debtors in possession and their respective professionals, as fiduciaries of the two estates, were able to operate as independent fiduciaries or had undisclosed conflicts and interests which fundamentally impaired their ability to serve in those roles.

The court is further troubled by a Plan term which appears to try and circumvent the requirements of 11 U.S.C. §§ 327, 328, 329, 330, and 331 – Debtor determination and allowance of $250,000.00 post-petition attorneys' fees for counsel for the then Debtors in Possession for which no authorization to employ was sought or obtained and for which no fees have been allowed by the court.

The Disclosure Statement is not approved.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion For Approval of the Disclosure Statement filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve the Disclosure Statement is denied.

4. 14-91023-E-11 JOSEPH TEDESCO — STATUS CONFERENCE RE: VOLUNTARY PETITION
7-16-14 [1]

Debtor's Atty: David C. Johnston [proposed]

Notes:

Meeting of Creditors scheduled for 8/20/14 at 10:00 a.m.

Debtor's Chapter 11 Status Report filed 8/8/14 [Dckt 18]

[DCJ-1] Application of Debtor in Possession for Authority to Employ Attorney filed 8/10/14 [Dckt 20], set for hearing 8/21/14 at 3:30 p.m.

STATUS CONFERENCE SUMMARY

Jospeh Tedesco, the Debtor in Possession, (ΔIP) has commenced and had dismissed or converted two prior Chapter 11 cases. In each of the two prior unsuccessful cases he was represented by the same counsel as proposed to represent him in the present Chapter 11 case. The first Chapter 11 case was filed on April 7, 2010, and dismissed on February 18, 2011. 10-91296. In determining that relief was proper, the court found,

> "Since the filing of this case on April 7, 2010, debtor has not filed a plan or disclosure statement. The Debtor's failure to file necessary documents strongly suggests both that the debtor is not taking is obligations as a chapter 11 debtor-in-possession seriously and that the debtor has no intention of reorganizing in bankruptcy."

10-91296, Civil Minutes, Dckt. 146. The court elected to dismiss the case as requested by the Debtor, rather than convert it as argued by the Trustee, giving the Debtor a break.

Debtor immediately turned around and filed a second Chapter 11 bankruptcy case on March 3, 2011. 11-90779. In converting the second bankruptcy case to one under Chapter 7 (April 27, 2011), the court found that the Debtor was merely abusing the bankruptcy laws with filing the second case and not attempting to engage in a good faith, bona fide Chapter 11 reorganization. *Id.*, Civil Minutes, Dckt. 34.

August 21, 2014 Status Report - Filed August 8, 2014, Dckt. 18

ΔIP states that the estate consists of a shopping center, duplex, small rental house, and a resort rental in Aptos, California. He further states that pre-petition the Debtor made the monthly payments on his loan, but has defaulted on property tax payments, which are calculated to be $114,000.00 in default by the creditor.

ΔIP states that on or before September 30, 2014, the ΔIP will file a Chapter 11 Plan.

In this Fourth Bankruptcy Case, Debtor and Counsel have filed the basic pleadings (Schedules and Statement of Financial Affairs) and a Status Report (Dckt. 18). Schedule A lists four properties – commercial ($2,500,000.00 value - $1,998,713.00 debt), condo ($625,000.00 value - $447,583.00 debt), duplex ($250,000.00 value - $342,138.00 debt), and a small house ($95,000.00 value - $50,417.00 debt) owned by Debtor. Dckt. 16 at 3. On Schedule B owning personal property with a value of $26,889.00. Of this $10,000.00 is for household goods/personal effect, $10,.00000 for back rent owed by tenants, $5,000.00 for a 2005 Silverado (224,000 miles), $1,329.00 in a business checking account, and $560.00 in a personal checking account. *Id.* at 4-6.

On Schedule D Debtor lists several creditors with secured claims. These include Stanislaus County owed $114,000.00 in property taxes on the commercial property and Westamerica Bank owed $1,884,713.00 secured by the commercial property. No creditors are listed on Scheduled E (priority

unsecured claims) or Schedule F (general unsecured claims).

On Schedule I, Debtor lists having $23,800.00 in net monthly income from his business. *Id.* at 16. No list of business expenses is attached to Schedule I. Schedule J lists $24,591.00 in total expenses, most of which appear to be business expenses. For personal expenses Debtor states under penalty of perjury the following:

A.	Rent/Mortgage	($ 650.00)
B.	Electricity	($ 0.00)
C.	Water/Sewer/Garbage	($ 0.00)
D.	Telephone/Cable/Internet	($ 0.00)
E.	Food/Housekeeping	($ 300.00)
F.	Clothing/Laundry	($ 200.00)
G.	Personal Care	($ 25.00)
H.	Medical/Dental	($ 65.00)
I.	Transportation	($ 300.00)
J.	Entertainment	($ 0.00)
K.	Health Insurance	($1,046.00)
L.	Vehicle Insurance	($ 60.00)

Id. at 17-18. All of the other expenses appear to be business expenses.

Based on these expenses, Debtor computes his Monthly Net Income to be $21.00.

In his Status Report, Debtor while he has been able to stay current on the mortgage payments for his investment properties, he is $114,000.00 in default on property taxes. Westamerica Bank asserted the default in the taxes (the senior lien) on the property securing its claim as a default and appears to have taken steps to foreclose. Debtor states that to avoid the "substantial expense of foreclosure proceedings" he commenced the Fourth Chapter 11 Case to confirm a plan to pay the delinquent property taxes.

For a Plan Debtor does not intend to sell any assets, but "reorganize." The Status Report does not identify what caused the default in the property taxes or how Debtor can pay the delinquent taxes and future taxes, in addition to the other expenses (person and business) which he states are all current as of the filing of the case.

On July 30, 2014, the Stanislaus Tax Collector filed a secured proof of claim in the amount to $88,823.69. Proof of Claim No. 1. The "Default Date" stated on the attachment to the Proof of Claim is June 30, 2010.

5. 14-91023-E-11 JOSEPH TEDESCO
DCJ-1 David C. Johnston
HEARING RE: MOTION TO EMPLOY DAVID C. JOHNSTON AS ATTORNEY(S)
8-10-14 [20]

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties on August 12, 2014. 9 days notice of the hearing was provided.

On July 16, 2014, Joseph R. Tedesco, the Chapter 11 Debtor and Debtor in Possession ("Tedesco") commenced the present voluntary Chapter 11 bankruptcy case. Tedesco is represented in the present bankruptcy case by David Johnston ("Counsel"). The Schedules and Statement of Financial Affairs were filed on July 31, 2014. Dckt. 16. On August 10, 2014, Tedesco filed a motion to authorization for the employment of Counsel and his attorney in this bankruptcy case.

This is not Tedesco's first bankruptcy case in recent years. In each of his prior cases he has been represented by Counsel. These prior cases are summarized as follows.

Chapter 11 Case No. 14-90205 (Third Bankruptcy Case).

Tedesco commenced the Third Bankruptcy Case, a voluntary Chapter 11 case, on February 14, 2014. No Statement of Financial Affairs, Schedules, or List of Twenty Creditors Holding the Largest Unsecured Claims were filed. The Third Bankruptcy Case was dismissed on March 10, 2014. Order, 14-90205 Dckt. 18.

Chapter 11 Case No. 11-90779 (Second Bankruptcy Case).

Tedesco commenced the Second Bankruptcy Case, a voluntary Chapter 11 case, on March 3, 2011. In his Status Report filed on March 18, 2011, Tedesco reported that he intended to confirm a plan which did not impair the claim of Westamerica Bank. Status Report, 11-90779 Dckt. 18. The court authorized the employment of Counsel as the attorney for the Debtor in Possession. *Id.*, Dckt. 33. On April 27, 2011, the case was converted to one under Chapter 7 by the court. The conversion was precipitated by Tedesco having obtained the dismissal of his first bankruptcy case by representing that he would not merely be refiling a case, and then filed the Second Bankruptcy Case shorting after the dismissal (rather than conversion) of the prior case. In ordering the conversion, the court stated,

> The Status Report filed by the Debtor states that he owns real property estimated to have a value of $5,219,015. Of this, $3,100,000 is represented to the value of a small shopping center on McHenry Avenue. The Status Report advises the court and parties in interest that the Debtor had a previously Chapter 11 case, during which several properties were foreclosed. FN.1.
>
> ---
> FN.1. The Status Report fails to disclose that the prior Chapter 11 case was dismissed on February 18, 2011 for

failure to prosecute. It further fails to state that the court granted the Debtor's request that the case be dismissed, rather than converted to one under Chapter 7. It was expressly represented to the court that the Debtor would not merely file a new bankruptcy case if the prior case was dismissed. The present Chapter 11 case was filed on March 3, 2011, fifteen (15) days after the entry of the order dismissing the prior Chapter 11 case. The same counsel represented the Debtor in both the prior Chapter 11 case and the instant case.

The Debtor identifies only WestAmerica Bank as having cash collateral in this case. It is stated that the Debtor intends to reach a cash collateral agreement sometime in the future. Though the case was filed on March 3, 2011, no stipulation for the use of cash collateral has been filed and no order authorizing the use of cash collateral has been obtained from the court. No use of cash collateral is allowed absent either the agreement or order of the court. 11 U.S.C. § 363(c)(2). The docket reflects that U.S. Bank, N.A. and BAC Home Loans Servicing, L.P. have filed notices of perfection of assignment of rents. Schedule D filed by the Debtor lists at least 16 secured claims (excluding property taxes).

April 20, 2011 Notes

A survey of the prior Chapter 11 case is necessary to consider his compliance with the Scheduling Order, Dckt.6, and his ability to fulfill his fiduciary obligations as debtor-in-possession. The prior Chapter 11 case, no. 10-91296, was filed on April 7, 2010. The order dismissing the case was entered on February 18, 2011. Dckt. 147. The U.S. Trustee filed a Motion to dismiss or convert the case. Grounds for seeking the dismissal or conversion of the case included the failure to file a monthly operating report, the delinquent filing of monthly operating reports, the monthly operating reports providing incomplete information, failure of the Debtor to attach check registers to the monthly operating reports, the monthly operating reports showing continuing losses, and no disclosure statement or plan being filed by the Debtor. The U.S. Trustee argued that the case should be converted to one under Chapter 7 because the Debtor had non-exempt assets which could be administered for the benefit of the Estate and creditors.

The Debtor's opposition was that he was current on his post-petition obligations and had no employees. Further, that the Debtor has minimal unsecured debt, $76,000.00, as compared to the secured debt of $5,600,000.00. The Debtor also stated that he intended to immediately file a plan and disclosure statement, and the delay had been caused by an illness of his counsel. This

opposition is dated November 20, 2010.

The court continued the hearing on the motion to January 19, 2011, to coincide with what was represented to be the anticipated hearing date on the motion for approval of the disclosure statement that the Debtor would be shortly filed. No plan and disclosure statement were filed, and the U.S. Trustee's motion was continued to February 9, 2011, to be heard in conjunction with the continued status conference in that case. The court continued the hearing to afford the Debtor and counsel a final opportunity to prosecute the Chapter 11 case.

At the February 9, 2011, the court determined that the Debtor had still not filed a plan and disclosure statement. Further, the court determined that the Debtor was not prosecuting the Chapter 11 case. In reviewing the docket in case no. 10-91296, the court notes that there are no affirmative motions filed by the Debtor. The only actions taken by the Debtor were in response to creditors and other parties in interest prosecuting their interests in the case (motions for relief, motion to convert or dismiss). Over the ten months of that Chapter 11 case, the Debtor appears to have accomplished little than collect rents. No order or stipulation authorizing the use of cash collateral appears on the docket. In determining to dismiss the case rather than convert it as requested by the U.S. Trustee, the court accepted the express representations by counsel for the Debtor that there would not merely be a refiling of case following the dismissal.

The refiled Chapter 11 case appears to be a continuation of the non-productive bankruptcy strategy of this Debtor. Though recognizing that there is cash collateral, no stipulation has been filed or order entered authorizing the use of cash collateral. Rather, the Debtor merely intends to address the express prohibition on the use of cash collateral at a later date. Further, the Debtor fails to disclose cash collateral of other creditors. It may be that he intends to let the creditors foreclose on those properties and is not worried about the use of cash collateral. It may be that there is no cash collateral being generated by those properties. However, it is not for the court and parties in interest to guess as to whether the Debtor is complying with the Bankruptcy Code.

The Debtor offers no explanation in his Status Report as to what transpired in the 15 days from dismissal to the filing of this case that eviscerates his representation that a repeat case would not be filed. The court appreciates that events change and debtors may have an epiphany concerning what may be accomplished in a bankruptcy case. However, when express representations and findings have been made in a prior case, it is incumbent on the party to

> clearly describe those changes for the court and parties in interest. Based on the information provided, the conclusion is that this Debtor is merely engaging in non-productive repeat filing of bankruptcy cases. This abuse of the Bankruptcy Code and parties in interest is not approved by the court.
>
> At the hearing counsel for WestAmerica Bank appeared, stating that he had only learned of the bankruptcy filing today (April 20, 2011). No cash collateral stipulation has been reached with the bank and no authorization to use cash collateral has been ordered by the court. The Debtor in Possession has used cash collateral in violation of 11 U.S.C. § 363(c)(3).

Civil Minutes, 11-90779 Dckt. 34. Ultimately, the Chapter 7 Trustee filed a Report of No Distribution (June 2, 2010 Docket Entry) and the case was closed, with Tedesco receiving his discharge (Dckt. 94).

Bankruptcy Case No. 10-91296 (First Bankruptcy Case).

Tedesco commenced the First Bankruptcy Case, a voluntary Chapter 11 case, on April 7, 2010. As addressed above, the First Bankruptcy Case was dismissed as pleaded by Tedesco, rather than converted and sought by the U.S. Trustee, on February 18, 2011. Order, 10-91296 Dckt. 147.

REVIEW OF CURRENT, FOURTH BANKRUPTCY CASE

In this Fourth Bankruptcy Case, Tedesco and Counsel have filed the basic pleadings (Schedules and Statement of Financial Affairs) and a Status Report (Dckt. 18). Schedule A lists four properties – commercial ($2,500,000.00 value - $1,998,713.00 debt), condo ($625,000.00 value - $447,583.00 debt), duplex ($250,000.00 value - $342,138.00 debt), and a small house ($95,000.00 value - $50,417.00 debt) owned by Tedesco. Dckt. 16 at 3. On Schedule B owning personal property with a value of $26,889.00. Of this $10,000.00 is for household goods/personal effect, $10,.00000 for back rent owed by tenants, $5,000.00 for a 2005 Silverado (224,000 miles), $1,329.00 in a business checking account, and $560.00 in a personal checking account. *Id.* at 4-6.

On Schedule D Tedesco lists several creditors with secured claims. These include Stanislaus County owed $114,000.00 in property taxes on the commercial property and Westamerica Bank owed $1,884,713.00 secured by the commercial property. No creditors are listed on Scheduled E (priority unsecured claims) or Schedule F (general unsecured claims).

On Schedule I, Tedesco lists having $23,800.00 in net monthly income from his business. *Id.* at 16. No list of business expenses is attached to Schedule I. Schedule J lists $24,591.00 in total expenses, most of which appear to be business expenses. For personal expenses Tedesco states under penalty of perjury the following:

A. Rent/Mortgage.....($ 650.00)
B. Electricity.....($ 0.00)

C.	Water/Sewer/Garbage	($ 0.00)
D.	Telephone/Cable/Internet	($ 0.00)
E.	Food/Housekeeping	($ 300.00)
F.	Clothing/Laundry	($ 200.00)
G.	Personal Care	($ 25.00)
H.	Medical/Dental	($ 65.00)
I.	Transportation	($ 300.00)
J.	Entertainment	($ 0.00)
K.	Health Insurance	($1,046.00)
L.	Vehicle Insurance	($ 60.00)

Id. at 17-18. All of the other expenses appear to be business expenses.

Based on these expenses, Tedesco computes his Monthly Net Income to be $21.00.

In his Status Report, Tedesco while he has been able to stay current on the mortgage payments for his investment properties, he is $114,000.00 in default on property taxes. Westamerica Bank asserted the default in the taxes (the senior lien) on the property securing its claim as a default and appears to have taken steps to foreclose. Tedesco states that to avoid the "substantial expense of foreclosure proceedings" he commenced the Fourth Chapter 11 Case to confirm a plan to pay the delinquent property taxes.

For a Plan Tedesco does not intend to sell any assets, but "reorganize." The Status Report does not identify what caused the default in the property taxes or how Tedesco can pay the delinquent taxes and future taxes, in addition to the other expenses (person and business) which he states are all current as of the filing of the case.

On July 30, 2014, the Stanislaus Tax Collector filed a secured proof of claim in the amount to $88,823.69. Proof of Claim No. 1. The "Default Date" stated on the attachment to the Proof of Claim is June 30, 2010.

While the court generally approves employment for this experienced Counsel and other attorneys in Chapter 11 and Chapter 12 cases, before doing so the court believes that a hearing is necessary. While promising a "reorganization," Tedesco states that he has $21.00 in Monthly Net Income and substantial unpaid property taxes. As with prior bankruptcy cases, it appears that the best Tedesco and Counsel are doing is promising a repeat of the impossible. Even considering the Statement of Current Monthly Income (the six-month average immediately proceeding the filing of the bankruptcy case), Tedesco reports that he had an average of $23,821.00 in gross income and $21,245.00 in expenses, for a net of $2,576.00 a month. *Id.* at 29. (This does not include the $812.00 a month in Social Security Income.) In reviewing the expenses on Schedule J, which are consistent with the expenses on the Statement of Current Monthly Income, there does not appear to be any provision for paying the current property taxes.

Therefore, the court ordered that a hearing on the Application to Employ David C. Johnston as counsel for the Debtor in Possession to be conducted with responses to the *Ex Parte* Application to be presented at the hearing.

6. 11-94224-E-11 EDWARD/ROSIE ESMAILI **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 12-12-11 [1]**

Debtors' Atty: David C. Johnston

Notes:

Continued from 6/12/14

Operating Reports filed: 7/14/14 (Parts 1-7)

[KMR-1] Motion for Relief from Automatic Stay filed 7/9/14 [Dckt 482], set for hearing 8/21/14 at 10:00 a.m.

7. 11-94146-E-11 DOMINIC/MARIA DEPALMA **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 12-2-11 [1]**

Debtors' Atty: Naresh Channaveerappa

Final Ruling: No appearance at the August 21, 2014 Status Conference is required.

The Status Conference is continued to 3:30 p.m. on October 2, 2014.

Notes:

Continued from 6/26/14. The Trustee was to proceed with moving to close the case prior to continued status conference.

Operating Reports filed: 7/31/14 [May], 7/31/14 [June]

The Trustee filed a Status Report on August 14, 2014. Dckt. 512. The Trustee reports that he, the Franchise Tax Board, and the title company which transmitted proceeds from the sale of property to the Franchise Tax Board for Estate taxes. New Forms 593 are to be flied with the taxing agency.

8. 12-93049-E-11 MARK/ANGELA GARCIA CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 11-30-12 [1]

Debtors' Atty: Mark J. Hannon

Notes:

Continued from 5/1/14

Operating Report filed: 5/12/14, 6/13/14, 7/11/14

[MLM-5] Order granting motion to sell property [821 Inyo Avenue, Modesto, CA] filed 5/7/14 [Dckt 362]

[MLM-6] Order granting motion to sell property ["Most Wanted Wine, Co." name, label, two domains/websites, and all inventoried bottled and barreled wine produced by the "Most Wanted Wine Co."] filed 5/20/14 [Dckt 368]

[PA-1] Ex Parte Application for Order Authorizing Employment of Pino & Associates/Substitute in as Counsel for the Trustee filed 7/31/14 [Dckt 380]; Order granting filed 8/4/14 [Dckt 385]

9. 12-91564-E-11 POCH TAN AND SAMEAN CHUM CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 5-31-12 [1]

Debtors' Atty: Anthony D. Johnston

Notes:

Continued from 3/6/14

10. 12-92479-E-12 DAVID/ESPERANZA AGUILAR — CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 9-17-12 [1]

Debtors' Atty: Nelson F. Gomez

Notes:

Continued from 5/22/14. On or before 7/10/14 Debtors in Possession to file an election to convert the case to one under Chapter 7 or file, serve, and set for hearing an amended Plan and motion to confirm and supporting pleadings. Failure to file either shall result in the entry of an order dismissing this case without further notice or hearing.

[NFG-2] Amended Chapter 12 Plan filed 7/10/14 [Dckt 71]

[NFG-2] Debtors' Motion to Confirm Amended Chapter 12 Plan filed 7/10/14 [Dckt 69], set for hearing 8/21/14 at 3:30 p.m.

11. 12-92479-E-12 NFG-2 DAVID/ESPERANZA AGUILAR Nelson F. Gomez — MOTION TO CONFIRM CHAPTER 12 PLAN 7-10-14 [69]

Tentative Ruling: The Motion to Confirm Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 10, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Confirm has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the

hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Confirm is denied without prejudice.

The Debtors seek confirmation of their Chapter 12 Plan. No opposition has been filed.

Debtors propose a 36 month plan with monthly payments of $994.00. Debtors propose to pay the following debt through the plan:

1. Administrative expenses - Trustee's Fees by statute;

2. Secured claim of OneWest Bank $779.17/month for the life of the plan with Debtors to pay creditors directly for the remaining 204 months. Creditor is to receive total payment of $115,630.00 as the secured portion of its claim, together with interest at the rate of 5% per annum from September 1, 2014, in 240 fully amortized monthly payments of $779.17 each.

3. Unsecured creditors will receive a 0.9% dividend. Unsecured debt totals $505,000.

The court's review of the proposed plan indicates that the Debtor-in-Possession does not provide a liquidation analysis. Rather, the Debtor-in-Possession testifies the legal conclusion that "The value, as of the effective date of the Amended Plan, of property to be distributed under the Amended Plan to allowed unsecured claims is 0.9%, which is more than the amount that would be paid to such claims if the estate of the Debtors was liquidated under Chapter 7 of the Bankruptcy Code, which is 0.0%." Declaration, Dckt. 72.

Compliance with 11 U.S.C. § 1224 - Confirmation Requirements:

Upon review of the proposed Chapter 12 Plan, as amended, the evidence in the form of the declaration of David Tafolla Aguliar, the Debtor, and arguments of counsel, the court makes the following findings of fact and conclusions of law with respect to the motion to confirm the Chapter 12 Plan pursuant to 11 U.S.C. § 1225.

(1) the plan complies with the provisions of Chapter 12 of the Bankruptcy Code and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the

debtor were liquidated under chapter 7 of the Bankruptcy Code on such date;

> The court cannot determine whether, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date. Other than the factual and legal conclusion as to this fact stated by the Debtor, the court is not provided with any evidence to allow the court to make such a determination.

(5) with respect to each allowed secured claim provided for by the plan–

> (A) the holder of such claim has accepted the plan;
>
> (B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor has not provided the court with evidence that they will be able to make all payments under the plan and to comply with the plan.

This court learned early on that "budgets" presented by plan proponents in Chapter 11, 12, and 13 cases were often comprised of the "necessary numbers" to generate the required plan payment. After several cases in which the "budgets" testified to under penalty of perjury by debtors and put forward by they attorneys (subject to Fed. R. Bankr. P. 9011) turned out to be mere "make believe," the court has required plan proponents to provide evidence of how the numbers are generated and why they are credible. Generally this is shown through historical information concerning the operation of the business (which in Chapter 11 cases may include the monthly operating reports), with explanations as to what has changed to decrease expenses or increase income.

When this bankruptcy case was filed on September 17, 2012, the Debtors stated on Schedule I that the monthly income from the business was $3,865.00 a month. Dckt. 16 at 22. On Schedule J the Debtors list business expenses of ($1,664.00) to generate the $3,865.00 of business income. *Id.* at 16. The Statement of Financial Affairs lists income from the business of $19,809.00 ($2,476 per month) in 2012, $21,929.00 ($1,827 a month) in 2011, and $13,312.00 ($1109 a month) in 2010.

Now, in support of confirmation two years later, Debtors state that the monthly business income is ($5,582.00), based on the historical data for the period January through June 2014. FN.1.

FN.1. Exhibit A is a six month snapshot which does not state the income and expenses in monthly amounts, but rather a six month total.

However, there is one glaring omission in this budget – no provision is made for payment of state and federal income and self-employment taxes. No evidence has been provided to show that Debtors are either exempt from such taxes or that Debtors will not be obligated to pay any taxes.

(7) The Debtors have failed to provide evidence that they have paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation, or that no such obligation exists.

Based on the failure to provide a proper liquidation analysis, failure to explain or support the data provided under the exhibits, and failure to provide evidence as to a domestic support obligation, the motion is denied without prejudice.

The Plan does not comply with 11 U.S.C. § 1225 and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 12 Plan filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied and the proposed Chapter 12 Plan is not confirmed.