UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 6, 2016 at 10:00 a.m.

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

Tentative Ruling: The motion will be denied without prejudice.

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

11 U.S.C. § 362(g) provides that:

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

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

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

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

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

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

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

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

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

2. 14-31810-A-7 MAHMOOD DEAN — MOTION FOR SUMMARY JUDGMENT
15-2050 DL-1
JOHNSON ET AL V. DEAN — 8-1-16 [32]

Tentative Ruling: The motion will be denied.

The defendant in this proceeding, Mahmood Dean, the debtor in the underlying chapter 7 case, moves for summary judgment on the plaintiffs' claim for relief under 11 U.S.C. § 727(a)(5).

Section 727(a)(5) requires the denial of a bankruptcy discharge when the debtor has failed to satisfactorily explain "any loss of assets or deficiency in assets to meet the debtor's liabilities."

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

The motion is based on the fact that in the plaintiffs' other claim for relief under 11 U.S.C. § 523(a)(2)(B), they allege that the defendant did not lose assets but misrepresented their value. The asset at issue in both claims is the defendant's interest in a family trust. In other words, the defendant argues that the two claims are inconsistent and mutually exclusive — *i.e.*, the defendant cannot be asserting a section 727(a)(5) along with a section 523(a)(2) claim.

The court disagrees. Many times claims and allegations in a complaint are asserted in the alternative. This is no different. It is obvious that the defendant cannot prevail on both claims, with respect to the same asset. But, this is not basis for dismissing one claim in favor of another. Only the evidence at trial will show on which claim the plaintiffs will prevail, if on any.

3. 16-20912-A-11 SEAN SUH'S CARE HOMES, INC.
CLH-1 ALEJANDRO DELA CRUZ VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
7-7-16 [60]

Final Ruling: The hearing on this motion has been continued to October 17, 2016 at 10:00 a.m. Docket 91.

4. 16-25217-A-11 WEST LANE PROPERTIES INC.
STATUS CONFERENCE
8-9-16 [1]

Tentative Ruling: None. Appearances required.

5. 16-25123-A-11 MARCO PALMA
STATUS CONFERENCE
8-4-16 [1]

Tentative Ruling: None. Appearances required.

6. 16-22330-A-7 WINNIEFREDO/LORAINE MACANDOG
16-2136 MACANDOG PLC-1
TRAVIS CREDIT UNION V. MACANDOG ET AL.,
MOTION TO DISMISS ADVERSARY PROCEEDING
8-5-16 [7]

Tentative Ruling: The motion will be granted.

Defendants Winnifredo and Loraine Macandog, the debtors in the underlying bankruptcy case, seek dismissal of the claim for relief under 11 U.S.C. § 523(a)(2)(B) pursuant to Fed. R. Civ. P. 12(b)(6) and for failure plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

The defendants applied for a vehicle financing loan on or about July 23, 2015. The loan was ultimately purchased by the plaintiff. In the application, the defendants represented that their rent was $500 a month and Winnifredo Macandog received salary of approximately $9,600 a month with Southwest Airlines. The defendants filed the underlying bankruptcy case on April 13, 2016, approximately nine months later. In their schedules, they identified Winnifredo Macandog's salary with Southwest Airlines as $6,067 a month and their rent payments as $1,500 a month.

The plaintiff filed the complaint on July 5, 2016, asserting in part that the loan application was a materially false statement in writing, given the different salary and rent figures in the bankruptcy petition documents.

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

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

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

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

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

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

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

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

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

11 U.S.C. § 523(a)(2) provides that an individual is not discharged "from any debt for money . . . , to the extent obtained by- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;" or "(B) use of a statement in writing- (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive."

The section 523(a)(2)(B) requirements have been stated by the Ninth Circuit as follows: (1) a representation of fact by the debtor, (2) that was material, (3) that the debtor knew at the time to be false, (4) that the debtor made with the intention of deceiving the creditor, (5) upon which the creditor relied, (6)

that the creditor's reliance was reasonable, and (7) that damage proximately resulted from the representation. Candland v. Insurance Co. of N. America (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

The complaint's sole basis for asserting that there were material false statements on the loan application is that the salary and rent figures in the application are materially different from the salary and rent figures in the bankruptcy schedules, filed approximately nine months after the loan application.

However, the assertion of falsity in the loan application is not plausible based on the figures in the bankruptcy schedules, given the passage of the nine months between the loan application and the filing of the schedules. During those nine months, Winnifredo Macandog could have easily changed employment positions or been demoted within Southwest Airlines, explaining his lower salary figure in the schedules. Similarly, in the nine-month period, the defendants could have moved their housing, resulting in a rent increase to $1,500 a month. The passage of the nine months between the loan application and bankruptcy schedules makes the falsity assertion a mere possibility. This does not satisfy the pleading standard prescribed by Rule 12(b)(6).

In other words, the complaint lacks sufficient facts to state an actionable misrepresentation on the loan application for purposes of section 523(a)(2)(B).

Also, the complaint has no facts that would negate the relevance of the nine-month period. For example, the complaint does not say anything about whether the defendants changed their address between the time they applied for the loan and when they filed their bankruptcy case.

Further, the complaint pleads the reliance element of section 523(a)(2)(B) without any factual support. It says that the plaintiff "justifiably and reasonably relied" on the loan application. Docket 1 at 4.

But, the complaint does not say why the plaintiff's reliance was reasonable. There are no facts in the complaint that are relevant to the reliance element. For example, it does not say that the plaintiff would not have purchased the loan had the defendants' salary and rent figures been as stated in the bankruptcy schedules.

By failing to plead facts to support the reliance element of section 523(a)(2)(B), the complaint also fails the requirements of Fed. R. Civ. P. 9(b).

For every claim of fraud the complaining party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). "The plaintiffs must include the 'who, what, when, where, and how' of the fraud." Lane v. Vitek Real Estate Indus. Group, 713 F. Supp. 2d 1092, 1102 (E.D. Cal. 2010).

There is nothing factual—much less particular—in the complaint about the reliance element. Accordingly, the motion will be granted and the section 523(a)(2)(B) claim will be dismissed with leave to amend. The plaintiff shall have 14 days from the final hearing on this motion to file an amended complaint.

7. 15-29136-A-12 P&M SAMRA LAND INVESTMENTS L.L.C. ORDER TO SHOW CAUSE 8-18-16 [248]

Tentative Ruling: The court will assess additional sanctions against attorney Noel Knight and the debtor.

The court issued this order to show cause in connection with its August 15, 2016 ruling on a motion to compel discovery by creditor Ag-Seeds Unlimited. The purpose of the OSC was to provide attorney Noel Knight and the debtor with opportunity to address why the court should not assess additional sanctions against them, beyond the sanctions requested by Ag-Seeds.

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

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

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

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

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

A violation of an order is willful when the respondent knows of the order and intentionally performs the action violating it. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002).

Mr. Knight and the debtor have responded to the OSC by contending that the debtor has complied with all discovery requests propounded by Ag-Seeds.

But, Mr. Knight and the debtor have not responded or attempted to further explain their conduct outlined in the court's ruling on Ag's motion to compel heard on August 15. Mr. Knight and the debtor have not addressed why the court should not assess additional sanctions against them, beyond the sanctions requested by Ag-Seeds in the motion to compel heard on August 15. Docket 246.

Turning to the merits of the OSC, the court held in its ruling on Ag's motion to compel that:

"*The debtor's failure to:*
- produce documents on June 17;
- pay the sanctions by June 17—which were assessed jointly and severally against both the debtor and its counsel;
- appear at the June 20 examination;
- produce the requested bank statements, cancelled checks, check registers, balance sheets, Quicken/Quickbook records, documents relating to all its four loans secured by the real property; and
- provide the basic information asked for by Ag at the July 15 examination of Paul Samra,

amounts to bad faith and willful violation of the court's June 13 order by both the debtor and its counsel, Noel Knight."

Docket 246 at 6.

"*At the July 15 examination, Paul Samra denied knowing nearly all the information sought by the questions posed from Ag's counsel. The examination was worthless and a waste of time. Mr. Samra denied knowing even basic information about the debtor's operations.*"

Docket 246 at 5.

And, "*the debtor has done virtually nothing to respond to this subpoena as ordered by the court.*" "*[T]he debtor made no effort to gather the documents sought by the subpoena.*" Docket 246 at 5. Yet, "*[t]he debtor's counsel, Noel Knight, had communicated with Ag's counsel about the subpoena for several months prior to the July 15 examination.*" Docket 246 at 6.

"*The knowledge of the subpoena by Mr. Knight is imputed on the debtor, as Mr. Knight is the debtor's counsel and agent in this case.*" Docket 246 at 6.

The foregoing excerpts from the court's ruling on Ag's motion to compel paint a troubling picture of attorney Noel Knight and his client, the debtor. Mr. Knight and the debtor will stop at nothing to disobey a court order, even multiple times, when it will serve their interests.

Even more troubling, this pattern of disobedience to the discovery orders has continued beyond the August 15 hearing on Ag's motion to compel. See Docket 300 (the debtor's "further commentary on" this order to show cause). In the latest evasive maneuver by Mr. Knight and the debtor not to produce the information propounded in discovery by Ag, Mr. Knight now claims that Paul Samra actually knows little or nothing about the information sought by Ag.

"Mr. [Paul] Samra has stated to Ag-Seeds counsel many times that he spends his time on the soil and leaves certain administrative matters to other parties[,] . . . he is a more than capable farmer . . . but the reality is that he's

neither star witness nor smooth talker for situations such as a 2004; but nevertheless he's operating in good faith."

Docket 300 at 2.

However, by admitting now that Paul Samra knows little or nothing of the information sought by Ag, Noel Knight and the debtor have once again manifested utter disregard for this court's orders.

The court's March 23, 2016 order authorizes Ag to examine the debtor. Docket 59. Ag's subpoena expressly directs the debtor to "designate the person(s) with most knowledge of the areas of examination set forth in section 5 of the attached application." Docket 57. Section 5 of Ag's 2004 examination application includes:

"*Creditor further requests that, pursuant to F.R.B.P. 9014 and 7030, Debtor appear through the person or person(s) most knowledgeable as to the following:*
(a) the business operations of Debtor in the last three years;
(b) the revenues and expense of Debtor in the last three years;
(c) the sources of cash of Debtor in the last three years;
(d) the expenditures of Debtor in the last three years;
(e) the loans obtained by Debtor in the last three years; and
(f) the use of loan proceeds by Debtor in the last three years."

Docket 56 at 4.

Nevertheless, after five months of litigation, multiple motions to compel and multiple orders for sanctions against Noel Knight and the debtor, over a relatively simple motion for a 2004 examination and document production, Mr. Knight and the debtor now claim that the person they have been tendering for the 2004 exam, Paul Samra, knows little or nothing of the debtor's financial affairs. No wonder Paul Samra was not answering the questions of Ag's counsel at his July 15 2004 examination.

Noel Knight and the debtor then have not been tendering the person "most knowledgeable" about the debtor's financial affairs. In other words, by tendering Paul Samra for the 2004 examination, when they did, Noel Knight and the debtor have been further violating the court's March 23, 2016 2004 exam order and the subsequent orders on Ag's motions to compel.

This further confirms that Mr. Knight and the debtor will stop at nothing to disobey a court order, even multiple times, when it will serve their interests. When confronted with one deception, Noel Knight and the debtor change their story to satisfy their purposes. Their egregiousness of conduct is quite troubling. The court is not convinced that the sanctions it assessed against them pursuant to Ag's motion to compel, heard on August 15, is sufficient to deter them from engaging in further violations and disregard of court orders.

Accordingly, the court will assess additional joint and several sanctions against Noel Knight and the debtor in the amount of $2,000. Such sanctions are designed to coerce future compliance by Noel Knight and the debtor with orders of this court. The sanctions shall be paid into the United States Treasury no later than seven days after entry of the order on this order to show cause. The payment shall be tendered to this court's clerk's office.

8. 15-29136-A-12 MAS-2 — P&M SAMRA LAND INVESTMENTS L.L.C. — MOTION TO DISMISS CASE 6-13-16 [155]

Tentative Ruling: The motion will be denied without prejudice.

The court continued the hearing on this motion from July 11, 2016. The court did not reopen the record for further filings in connection with this motion.

Creditor Ag-Seeds Unlimited moves for conversion to chapter 7 (with consent from the debtor) or dismissal, on the basis of unreasonable delay that is prejudicial to creditors.

The debtor and creditors IRA Services Trust Co. CFBO, Shankuntala D. Saini, The Socotra Fund, L.L.C., Gary E. Roller, Trustee of the Gary E. Roller Profit Sharing Plan and Pettit Revocable Trust, dated March 29, 1999, oppose dismissal.

11 U.S.C. § 1208(c)(1) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

Conversion of a chapter 12 case to chapter 7 may be granted pursuant to a request by the debtor under 11 U.S.C. § 1208(a) or pursuant to a request by a party in interest, such as a creditor, under 11 U.S.C. § 1208(d). The court may convert the case on a motion by a party in interest only "upon a showing that the debtor has committed fraud in connection with the case." 11 U.S.C. § 1208(d).

The court has seen nothing in the record before it suggesting that the debtor has committed fraud in connection with this case.

On the other hand, dismissal of the case is not in the best interest of the debtor's creditors. It may be in the best interest of the movant. But, it is not in the best interest of the debtor's other creditors, as it is evident from the creditors' responses to this motion. The court then is not inclined to dismiss the case.

More, the movant has other remedies for the debtor's failure to obey court discovery orders, including, without limitation, relief under Fed. R. Bankr. P. 2005 and further sanctions against the debtor and the debtor's counsel. The motion will be denied without prejudice.

As the court did not reopen the record when it continued the hearing on this motion from July 11, the renewed opposition to the motion by IRA Services Trust Co. CFBO, Shankuntala D. Saini, filed on August 22, 2016, will be stricken. Docket 252.

9. 15-29136-A-12 MAS-4 — P&M SAMRA LAND INVESTMENTS LLC — MOTION TO CONVERT CASE 8-8-16 [240]

Final Ruling: The motion will be dismissed without prejudice because it was not served on all creditors as required by Fed. R. Bankr. P. 2002(a)(4). For example, Scott Chau and Henry Thiel were not served with the motion. Dockets 243, 4, 5.

In addition, some creditors (IRA Services Trust Co. CFBO and Skankuntala D. Saini) were not served with the motion, even though their counsel were served. Docket 243. Fed. R. Bankr. P. 9013 and 9014(a) provide that a request for an order shall be made by a motion. Fed. R. Bankr. P. 9014(b) further provides that a motion must be served in the manner provided for service of a summons and a complaint. Fed. R. Bankr. P. 7004(b) permits service of a summons and a complaint by first class mail. But, nothing in Fed. R. Bankr. P. 7004 permits service on a respondent's attorney to the exclusion of the respondent. Accordingly, service is defective.

10. 15-29136-A-12 P&M SAMRA LAND INVESTMENTS L.L.C. VS. AG-SEEDS UNLIMITED — OBJECTION TO CLAIM — 5-31-16 [130]

Tentative Ruling: The court will abstain from adjudicating the underlying state law claims of the subject proof of claim.

The debtor objects to the general unsecured proof of claim (POC 6-2) of Ag-Seeds Unlimited in the amount of $210,010.82. The proof of claim is based on state law tort causes of action against the debtor, pending in state court and involving conspiracy to defraud and successor liability. The objection seeks to litigate the merits of those claims by requesting their dismissal for failure to state a claim.

The court will abstain from adjudicating the underlying causes of action. Abstention under 11 U.S.C. § 1334(c)(1) is warranted here. The statute provides that "Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." This is known as discretionary abstention.

In the Ninth Circuit, the factors that a court must consider when deciding whether to abstain include:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,

(2) the extent to which state law issues predominate over bankruptcy issues,

(3) the difficulty or unsettled nature of the applicable law,

(4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

(7) the substance rather than form of an asserted "core" proceeding,

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

(9) the burden of [the bankruptcy court's] docket,

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor parties.

Christensen v. Tuscon Estates, Inc. (In re Tuscon Estate, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990) (citing Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Serv., Inc.), 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)) (cause for lifting the stay may exist where a state court proceeding involves the same issues pending before the bankruptcy court); see also Chey v. Cohen (In re Chey), Case Nos. CC-09-1253-PaMoB, CC-09-1254-PaMoB, SA 09-13917 RK, SA 09-13910 RK, 2010 WL 6466579, at *6-8 (B.A.P. 9th Cir., Apr. 12, 2010)..

Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

Discretionary abstention is appropriate here because there is a pending state court action filed by creditor Ag-Seeds, naming the debtor, two other related farming entities and several individuals as defendants. The action was filed on November 6, 2014, approximately two years ago. It involves only two claims, a state law conspiracy to defraud claim against all defendants and a state law successor liability claim against the entity defendants.

The action does not involve any federal law, much less federal bankruptcy law. The claims are factually complex as they involve years of litigation between Ag and the Samra individuals and entities. Aside from the necessity of a liquidated claim for administration of a confirmed chapter 12 plan, the state court litigation has no relation to the subject bankruptcy case.

The abstention will not affect the administration of this bankruptcy estate. Even if some or all claims were litigated in this court, such litigation would still survive any plan confirmation by the debtor, meaning that the plan must still provide in full for the eventuality of Ag's complete success on the claims against the debtor.

This objection to Ag's proof of claim is a core proceeding merely in form. The substance of the proof of claim is the pending state law claims in state court.

Importantly, this court has no subject matter jurisdiction over any of the claims against the defendants in the state court action, other than those against the debtor. It would then be unfeasible for this court to segregate for adjudication the claims against the debtor, while allowing the remaining claims to continue against the other defendants in state court. The claims against the debtor are directly anchored in the claims against individuals such as Paul Samra and Steven Samra, over which this court has no subject matter jurisdiction.

For instance, the successor liability claim against the debtor is wholly dependent on the conspiracy to defraud claims against Paul Samra and Steven Samra, as those individuals are involved in the day-to-day operations of the

debtor and Ag accuses them of seeking to defraud by using the debtor as a shield to protect them from personal liability.

The facts giving rise to the state court action are intertwined within every claim asserted by Ag there, including the claims against the debtor.

Also, the state court is the best forum for adjudication of all claims against all defendants, including the debtor. The state court litigation has been pending for nearly two years now, meaning that the state court has resolved many pre-trial issues already. If this court were to become involved now, many pre-trial issues may have to be relitigated, further protracting already old litigation.

And, given the extensive and numerous claims against the other defendants in the state court action, the court is convinced that the debtor's attempt to litigate the merits of the state court claims with this objection is forum shopping. The litigation of all state law claims, including those against the debtor, belong in state court. The court will abate this objection until the state court litigation has been completed.

11. 11-23741-A-12 JANET BOGUE — MOTION FOR ENTRY OF DISCHARGE
MWB-4 — 6-4-16 [65]

Tentative Ruling: The motion will be granted.

The court continued the hearing on this motion from July 25, in order for the debtor to supplement the record. The debtor has filed additional papers in support of the motion. An amended ruling from July 25 follows.

The debtor asks the court to enter her chapter 12 discharge.

11 U.S.C. § 1228(a) provides that:

"Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(9) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(9) of this title; or

(2) of the kind specified in section 523(a) of this title."

This case was filed on February 15, 2011. The court confirmed the debtor's chapter 12 plan on November 15, 2011. Docket 52. The debtor does not have any domestic support obligations.

First, the trustee filed a final report on June 11, 2014 and the report was

approved on December 22, 2014. Dockets 54 and 58. The trustee's report demonstrates that the debtor has made the payments required by the plan and that the trustee has made the payments to creditors required by the plan. Dockets 52 & 54. The requirement imposed by 11 U.S.C. § 1228(a) that the debtor receive a discharge only after completion of all payments under the plan has been satisfied.

Second, the debtor has filed a certificate in connection with this motion that the debtor is not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. See 11 U.S.C. § 1228(a); Docket 67 at 2. No objection has been filed to that certificate and the time to file an objection has expired.

Finally, by service of this motion, the debtor has given all creditors notice that 11 U.S.C. § 522(q)(1) is not applicable, and that there is no pending proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind specified in section 522(q)(1)(B). Dockets 71 & 72. No creditor has objected to this notice. This satisfies the requirements of 11 U.S.C. § 1228(f).

Therefore, no earlier than 10 days after the hearing on this motion, the clerk shall enter the debtor's discharge. See 11 U.S.C. § 1228(f).

12. 15-25585-A-7 MATTHEW WATERS — MOTION FOR SUMMARY JUDGMENT
15-2162 MF-1
FERLMANN V. MCCRACKEN — 8-8-16 [23]

Tentative Ruling: The motion will be denied.

The plaintiff, Stephen Ferlman, who is the chapter 7 trustee in the underlying bankruptcy case, seeks summary judgment on the 11 U.S.C. § 365(i) counterclaim by the defendant, Lisa McCracken (now Hattig), seeking conveyance of the bankruptcy estate's interest in a real property in San Francisco, California, in which Ms. Hattig was part owner with the debtor, Matthew Waters. The property is a single family residence.

Ms. Hattig and the debtor had a long-term relationship, living on the property together from 2002 through 2003 under a lease agreement. In 2003, they purchased the property, holding title as joint tenants. Their relationship terminated in or about November 2007. The debtor continued to live on the property until December 2008 or January 2009. As they were unable to agree on what to do with the property, Ms. Hattig sued the debtor in state court. They then entered into a settlement agreement, providing that Ms. Hattig will pay $30,000 to the debtor in exchange for conveyance of his interest in the property.

The settlement fell apart though, due to a disagreement over how to resolve an unanticipated lien on the property. Ms. Hattig did not pay the $30,000 and the debtor did not deliver the grant deed. The debtor then filed the underlying chapter 7 case on July 13, 2015.

The debtor's bankruptcy estate filed this adversary proceeding on August 14, 2015, asserting a claim against Ms. Hattig under 11 U.S.C. § 363(h), seeking to sell the property. In responding to the complaint, Ms. Hattig asserted a counterclaim under 11 U.S.C. § 365(i), seeking to compel the estate to transfer its interest in the property to her, pursuant to the pre-petition settlement agreement with the debtor.

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no genuine issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323.

11 U.S.C. § 365(i) provides that:

"*(1) If the trustee rejects an executory contract of the debtor for the sale of real property . . . under which [contract] the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property . . . .*

"*(2) If such purchaser remains in possession—*

"*(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and*

"*(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.*"

For purposes of Ms. Hattig's section 365(i) claim, the subject executory contract is the settlement agreement between the parties. The plaintiff's contention is that section 365(i) is inapplicable because Ms. Hattig did not "possess" the property under the settlement agreement for purposes of section 365(i). The plaintiff points out that her possession of the property was due to an already partial interest in the property, based on the grant deed she and the debtor received when they purchased the property in 2003.

But, this is an overly simplistic reading of section 365(i). The provision was obviously drafted without an anticipation of the buyer already owning a partial interest in the property, pursuant to which he would be entitled to possession regardless of the executory contract.

The question under section 365(i) then is whether Ms. Hattig's possession of the property was exclusive of the debtor's right to possess the property under their settlement agreement. In other words, did Ms. Hattig acquire the debtor's rights of the property by the mere fact she entered into the settlement agreement?

Section 365(i) protects buyers of real property who have taken possession of it under the sale agreement before the transaction has been consummated. While section 365(i) does not say that the buyer's possession must be to the complete exclusion of the seller, the buyer must have some right to possess it.

The record here is devoid of evidence about what happened to Ms. Hattig's possession of the property when she entered into the settlement agreement. At the time Ms. Hattig entered into the settlement agreement, she clearly had a possessory interest in the property based on her existing partial ownership interest. She acquired that interest via the 2003 grant deed conferring ownership upon both her and the debtor.

The record does not indicate whether her possessory interest in the property was somehow enlarged under the settlement agreement, upon entering in it, to the exclusion of the debtor. Hence, the court cannot grant summary judgment as to the section 365(i) counterclaim.

The motion will be denied as to the section 363(h) claim as well. That provision requires that the sale's benefit to the estate outweighs the detriment to the co-owner.

The motion, however, provides insufficient detail about the net benefit to the estate from the sale. For example, it says nothing about the reimbursable expenses Ms. Hattig paid for the property. The motion does not identify those expenses and does not explain whether or not the estate would have to give credit to Ms. Hattig for them. It also says nothing about any settlement agreement rejection damages Ms. Hattig would be entitled to under section 365(i), if she prevails under that provision. This is important as the court is not granting summary judgment on the 365(i) counterclaim. And, the motion does not say what happened to the unanticipated lien on the property. The court cannot tell whether the plaintiff has taken that lien into consideration in adding up the encumbrances on the property. The court will not speculate about these issues either.

The motion will be denied.

13. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO REMOVE TRUSTEE 8-2-16 [204]

Tentative Ruling: The motion will be denied without prejudice.

Aiad Samuel, one of the debtors (not in possession) in this case, moves for removal of the chapter 11 trustee, Scott Sackett.

The trustee, the U.S. Trustee and creditor Fairview Holdings, II, L.L.C. have filed responses to the motion.

11 U.S.C. § 324(a) prescribes that "The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause."

Removal of the trustee for cause is at the discretion of the bankruptcy court. "Once assigned to a particular case, a panel trustee can be removed from a pending case only if the bankruptcy court finds 'cause' after notice and a hearing. Brooks v. United States, 127 F.3d 1192, 1193 (9th Cir.1997); 11 U.S.C. § 324(a). '[A]lthough sufficient cause is not defined in the Bankruptcy Code, it is left for the courts to determine on a case by case basis.' 3 Collier on Bankruptcy ¶ 324, 02, at 324–3 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.2006)." Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 845 (9th Cir. 2008).

*"It is well established that 'cause' may include trustee **incompetence**, **violation of the trustee's fiduciary duties**, **misconduct** or **failure to perform the trustee's duties**, or **lack of disinterestedness** or **holding an interest adverse** to the estate. Id. at 324-3 to 324-4. Such cause must be supported by specific facts, Schultz Mfg. Fabricating Co., 956 F.2d at 692, and the party seeking removal has the burden to prove them. Alexander v. Jensen-Carter (In re Alexander), 289 B.R. 711, 714 (8th Cir.BAP2003), aff'd, 80 Fed.Appx. 540 (8th Cir.2003). This listing is illustrative, but not exhaustive.*

"In relevant part, the Code defines a 'disinterested person' as one that: (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor ..., or for any other reason.

"11 U.S.C § 101(14)(E)."

Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d 832, 845 (9th Cir. 2008).

The movant contends that the trustee has not been inspecting the estate's properties; has not been maintaining the properties by, for example, not maintaining security; has not been paying bills (taxes, insurance and utilities on the properties); has not collected rents from the properties.

The movant seeks the court to:

- order the trustee to explain his failure to maintain the properties,
- remove the trustee,
- deny his compensation,
- order the trustee to collect funds held by Tri Counties Bank,
- order the trustee to pay Edward Smith's attorney's fees from the estate,
- grant him leave to file a plan to bring him back as a debtor in possession in this case,
- convert this into a proceeding where the movant can be a debtor in possession,
- set this motion for an evidentiary hearing.

The motion will be denied. It is not supported by any admissible evidence. There is no declaration or affidavit establishing any of the factual assertions in the motion. Nor are the attachments to the motion authenticated by a declaration.

Given the lack of any admissible evidence with this motion, the court will not be setting an evidentiary hearing. Evidentiary hearings are reserved only for when there are disputed material factual issues. Without admissible evidence, there can be no disputed material factual issues.

Also, even if the motion did not have the above deficiencies, the photos attached are of such poor quality that the court cannot discern anything from them. Docket 204.

The trustee's compensation is not before the court at this time.

Also, the court will not order the trustee to collect any funds. The trustee has statutory duties specifying what the trustee is required to do. And, the court has no evidence, much less admissible evidence, that the trustee is not

or will not be collecting funds to which the estate is entitled including those held at Tri Counties Bank.

Finally, the court will not order the trustee to pay Edward Smith's attorney's fees. Edward Smith was representing the debtors. But, as they are not in possession, Mr. Smith's attorney's fees have nothing to do with the estate. The debtors are not in charge of the estate and in representing the debtors, Mr. Smith was not benefitting the estate in any way. More, Mr. Smith is no longer the movant's attorney. The court granted a substitution for Mr. Smith as to the movant on August 25. Docket 234.

The court will not grant leave for the movant to file a plan in order for the movant to be reinstated as a debtor in possession. This is not the mechanism by which a debtor is reinstated as a debtor in possession in a chapter 11 proceeding.

More importantly, nothing prohibits the movant from filing a plan. See 11 U.S.C. § 1121(a). The court will not convert the case to another proceeding either. The only other chapter the case could be converted is a chapter 7 proceeding. This makes no sense because the estate including an operating business.

In short, the movant's request for reinstatement as a debtor in possession will be denied. The debtors failed to discharge the basic duties of a debtor in possession which prompted the appointment of a trustee. Their failures included the failure to file complete and accurate bankruptcy schedules and statements. The trustee has had a difficult time piecing together much of the basic information about the debtor's rental properties. This includes, for example, the secured creditor information for the residential properties.

The debtor has failed to provide much information and documentation about the business to the trustee. See, e.g., Docket 222.

The court also rejects the movant's naked assertion that he was running the rental business at a deficit of only $5,000 a month, whereas the deficit under the trustee's operation has exceeded that amount. There is no evidence on this point. Nor can there be evidence from the movant on this point because, despite repeated requests from the trustee, the movant has been unable to produce any financial records reflecting the operational financial condition and history of the rental business.

The court has admissible evidence from the trustee that he has been maintaining the properties, paying the expenses associated with such maintenance and collecting rents. Docket 227. More, the trustee has been addressing substantial deferred maintenance issues that were not addressed by the movant for many years. As a way of example, such issues include repairs of HVAC units, parking spaces and lighting at the properties.

The court has seen nothing that would warrant removal of the trustee. The movant has not satisfied his burden of persuasion to establish cause for the removal of the trustee. The motion will be denied.

14. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO WITHDRAW AS ATTORNEY
EAS-1 — 8-11-16 [213]

Tentative Ruling: The motion will be granted in part and dismissed as moot in

part.

Attorney Edward Smith asks for permission to withdraw as counsel for the debtors, who are not in possession in this case, due to a breakdown in the attorney-client relationship.

The newly proposed counsel of record for Aiad Samuel, Richard Jare, has filed a response to the motion, stating that while he will be representing Mr. Samuel, he is not expecting to be representing Mrs. Samuel in this proceeding.

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

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

California Rule of Professional Conduct 3-700 provides that:

"*(A) In General.*

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

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

"*(B) Mandatory Withdrawal.*

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

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

any person; or

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

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

"*(C) Permissive Withdrawal.*

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

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

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

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

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

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

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

The court entered an order on August 25, 2016, approving the substitution of employment of Richard Jare as counsel for Mr. Samuel. Docket 234. Given this, the motion will be dismissed as moot as to Mr. Samuel.

As to Mrs. Samuel, the analysis is different. The movant has had serious difficulties in representing the debtors in this case because they have failed to provide him with requested documents and have been taking unilateral actions at representing themselves in this proceeding, without his authorization. Such actions have included the filing of motions, without the consent or authority of the movant. As such, the movant has been unable to carry out his duties as their counsel.

This is cause for permitting the movant's withdrawal pursuant to California Professional Conduct Rule 3-700(C)(1)(d) as to Mrs. Samuel. The court will permit the movant's withdrawal from this case as to Mrs. Samuel. The motion will be granted as to Mrs. Samuel.

15. 14-31393-A-11 GAJENDRA/MUNA ADHIKARI — MOTION TO APPROVE COMBINED DISCLOSURE STATEMENT AND PLAN
DRE-4 — 8-2-16 [71]

Final Ruling: The motion will be dismissed without prejudice because it violates Fed. R. Bankr. P. 2002(b), which requires at least 28 days' notice of the time for filing objections to: the approval of disclosure statements and the confirmation of a chapter 11 plan. And, under Local Bankruptcy Rule 9014-1(f)(1), written responses to a motion are due at least 14 days prior to the hearing on the motion. Hence, motions brought under Rule 2002(b) require at least 42 days' notice (28 + 14 = 42).

The subject motion was served only on August 2, 2016, thus providing only 35 days' notice. This does not satisfy Rule 2002(b).

The motion will be dismissed also because the debtors are seeking the approval of a combined plan and disclosure statement. Such combined plans and disclosure statements are available only to small business debtors and the debtors are not small business debtors. The court has already admonished the debtors for filing a combined plan and disclosure statement last year, in connection with their third version of a plan and disclosure statement.

16. 14-31393-A-11 GAJENDRA/MUNA ADHIKARI — MOTION TO CONVERT OR DISMISS CASE
UST-1 — 8-5-16 [76]

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

The U.S. Trustee moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that: (1) failure to prosecute the case, causing a delay that is prejudicial to creditors; and (2) failure to comply with a court order requiring plan and disclosure statement to be filed by March 19, 2015.

The debtor opposes the motion contending that the delay in proposing a plan has been due to inability to formulate a plan.

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

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . . ; (E) failure to comply with an order of the court." 11 U.S.C. § 1112(b)(4)(A), (E).

The above instances of cause are not exhaustive. Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortgage Entities), 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000). For instance, unreasonable delay that is

prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). Consolidated Pioneer at 375, 378; In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtors filed this case on November 19, 2014. Although the court had ordered them to file a plan and disclosure statement no later than March 19, 2015, the debtors did not file their first plan and disclosure statement (combined) until July 17, 2015. Even then, they did not set a hearing on their plan and disclosure statement.

The debtors filed their second combined plan and disclosure statement on November 13, 2015, but the court dismissed the motion due to failure to comply with Rule 2002(b). The debtors filed a third combined plan and disclosure statement on December 30, 2015. The court denied that motion for various reasons, including that only small business debtors are entitled to propose a combined plan and disclosure statement and the debtors are not small business debtors.

The debtors have done much to delay the prosecution of this bankruptcy case. They first disobeyed a court order prescribing a deadline for filing of the plan and disclosure statement. After a four month delay, they filed the plan and disclosure statement, but they did not set a hearing.

It took them a year since filing only to set a hearing on a plan and disclosure statement — the second version of the plan and disclosure statement. When they finally did set a hearing, they did not comply with the notice requirements for Fed. R. Bankr. P. 2002(b) motions, resulting in dismissal of their motion.

When they finally reached a hearing on the merits, their combined version of the plan and disclosure statement were replete with deficiencies. Docket 62.

It has taken the debtors seven more months, after the prior and third version of their plan and disclosure statement (filed on December 30, 2015), to file another plan and disclosure statement. This latest and fourth version of the plan and disclosure statement contain the same or similar errors found in prior versions.

For instance, the debtors have once again failed to comply with the notice requirements of Fed. R. Bankr. P. 2002(b) and have once again proposed a combined plan and disclosure statement, even though they are not small business debtors. The debtors were told in connection with their third plan and disclosure statement that only small business debtors may file a combined plan and disclosure statement. Docket 62.

Given the foregoing, the court concludes that the delays in this case have been intentional and the debtors have caused substantial prejudice to creditors. This is cause for conversion or dismissal under section 1112(b).

Further, the debtors cannot propose a feasible plan. They have no source of income except for the nursing employment of one of them. Yet, the California Franchise Tax Board has filed a priority tax claim for $216,180.47 and an unsecured tax claim for $189,052.47. The IRS has also filed an unsecured tax claim for $835,503. With such vast tax claims and small disposable income ($300 a month), it is difficult to conceive a feasible chapter 11 plan. Docket 1, Schedules I and J. The debtors themselves admit that they have been unable to formulate a feasible plan. Docket 84 at 3.

This is further cause for conversion or dismissal under section 1112(b).

Finally, the debtors own no real property and have scheduled only approximately $25,000 of personal property assets, at least $15,000 of which are encumbered and the rest are exempt. Docket 1, Schedules A, B, C, D. As there is little to no prospect of a feasible plan, and the debtors do not have nonexempt and unencumbered assets for liquidation in a chapter 7 proceeding, dismissal is in the best interest of the creditors. The motion will be granted and the case will be dismissed.