

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

**Honorable Ronald H. Sargis**  
Chief Bankruptcy Judge  
Sacramento, California

**September 20, 2018 at 11:00 a.m.**

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1.	<a href="#"><u>14-29361-E-7</u></a> <a href="#"><u>17-2178</u></a>	<b>WALTER SCHAEFER</b> <b>DNL-3</b>  <b>HUSTED V. PECHBRENNER</b>	<b>MOTION FOR ENTRY OF AMENDED</b> <b>JUDGMENT</b> <b>8-8-18 [40]</b>
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**DUE TO THE CALENDARING CONFLICT ARISING WITH THE**  
**CENTRAL CALIFORNIA BANKRUPTCY ASSOCIATION ANNUAL CONFERENCE**  
**THE HEARING IS CONTINUED**

**Tentative Ruling:** 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.  
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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Chapter 7 Trustee on August 8, 2018. By the court’s calculation, 43 days’ notice was provided. 28 days’ notice is required.

The Application for Amended Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The hearing on the Application for Amended Judgment has been continued to**  
**11:00 a.m. on October 4, 2018.**

## CONTINUANCE OF HEARING

This Adversary Proceeding relates to persons and assets in multiple judicial systems and law - the United States and Costa Rica. There have been prior extensive proceedings in the related bankruptcy case concerning the property of the Bankruptcy Estate, Condo 184, that is the subject of this Adversary Proceeding.

For the court's September 20, 2018, hearings, the judge to whom the Adversary Proceeding and underlying bankruptcy case are assigned is not able to conduct the hearings. He is attending to court matters and the Central California Bankruptcy Association annual conference in the Fresno Division of this Court. Another experienced bankruptcy judge is hearing the Department E matters that day. In light of the long history of this cases and now the "Complaint" by Debtor concerning the Plaintiff-Trustee (discussed below), it would be unfair to the Parties and the experienced judge set to hear the Department E matters on September 20, 2018, to have that other judge hear this Application. Therefore, the court continues the hearing.

Continuing the hearing will afford Defendant the additional benefit of being able to engage counsel in the United States to appear in this court. To date, he has failed to appear, assert any rights, and make any demand for payment. The "Complaint" documents sent to the court through the U.S. Trustee do not an opposition to the present Application make.

However, from reading the "Complaint" documents, if proceeding in good faith, Defendant merely seeks to be paid what he is owed for working on Condo 184 during this bankruptcy case. He asserts a lien against Condo 184, contending that it is enforceable as a matter of Costa Rican law. He professes he is only seeking to be paid, affirmatively stating that he is not attempting to impede the Plaintiff-Trustee in fulfilling her statutory obligations to recover all property of the Bankruptcy Estate, wherever located in the world; liquidating such property; and then properly paying creditors' claims, secured and unsecured. <sup>FN.1</sup>

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FN.1. As a matter of United States Law, whatever rights a bankruptcy debtor has in any property, anywhere in the world, "wherever located" become property of the bankruptcy estate for the Chapter 7 bankruptcy trustee to enforce and administer. 11 U.S.C. § 541(a). Thus, it is not for the Debtor to "transfer" the property to the trustee, but for the trustee to assert, control, and administer the property and property rights.  
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Taken at his word as stated in the Complaint, Defendant only needs to have his counsel in Costa Rica obtain local counsel here in the Eastern District of California. Defendant's secured claim can be documented, his valid and enforceable lien rights shown, Condo 184 sold by the Plaintiff-Trustee, and Defendant paid for his documented, valid, and enforceable lien rights. (The court references these "documented, valid, and enforceable lien rights not because it doubts Defendant's assertion, but to make it clear that United States Bankruptcy Law puts the burden on the creditor to make the initial showing of its claim and right to be paid – the filing of a proof of claim – as Defendant's U.S. counsel will likely quickly advise Defendant).

This continuance should allow for a prompt resolution of this dispute, as well as permitting Defendant to address with the Plaintiff-Trustee the \$15,000.00 sanctions axe dangling over his head that the Plaintiff-Trustee has not yet sought to drop.

## **REVIEW OF APPLICATION TO AMEND JUDGMENT**

Kimberly Husted, the Chapter 7 Trustee, (“Plaintiff”) filed the instant Application for Amended Default Judgment (the “Application”) on August 8, 2018. Dckt. 40. Plaintiff seeks to amend the entry of default judgment against Michael Pechbrenner (“Defendant”) in the instant Adversary Proceeding No. 17-02178 to include a monetary judgement in the amount of \$190,000.00 for the value of the Debtor and Estate’s interest in real property commonly known as 184 Los Delfines, Tambor, Costa Rica (“Property”), and to issue new sanctions against Defendant for his continued non-compliance with this court’s Judgement and Orders.

### **Entry of Judgment and Orders in this Adversary Proceeding**

#### **Entry of Judgement in This Adversary Proceeding**

The instant Adversary Proceeding was commenced on September 20, 2017. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on September 20, 2017. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 66.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 30, 2017. Dckt. 10. Plaintiff filed its initial Motion for Default Judgement on December 12, 2017. Dckt. 12.

At the January 25, 2018, hearing, the court found Defendant was served personally in accordance with the Federal Rules of Civil Procedure and the Hague Convention, and sufficient time has elapsed for Defendant to appear in this case. Dckt. 20.

In granting the Motion for Entry of Default Judgement on January 31, 2018, the court issued the following order:

**IT IS ORDERED, ADJUDGED, AND DECREED** that judgment is granted for Kimberly Husted, the Plaintiff Chapter 7 Trustee, and against Michael Pechbrenner, the Defendant; determining that Kimberly Husted, the Plaintiff Chapter 7 Trustee, through ABC Trustee of California Sociedad Anonima, a Costa Rican Entity, by which Plaintiff Chapter 7 Trustee holds title to property commonly known as 184 Los Delfines, Tambor, Costa Rica, has all the right, title, and interest to said property, and that Michael Pechbrenner, the Defendant, has no right, title, or interest to said property, and that Defendant does not have any lien against said property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant Michael Pechbrenner, and his agents and representatives, shall immediately vacate and turnover possession of the real property commonly known as 184 Los Delfines, Tambor, Costa Rica, to Kimberly Husted, the Plaintiff Chapter 7 Trustee, and her agents and representatives, as directed by Ms. Husted.

*Further, that if Plaintiff Chapter 7 Trustee subsequently determines that the physical turnover of the Property is not in the best interests of the Bankruptcy Estate, Plaintiff Chapter 7 Trustee may seek a supplemental or amended judgment for a monetary judgment for the value of the Property.*

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the request for the issuance of a prospective corrective sanction in the event of the failure of Defendant Michael Pechbrenner, and his agents and representatives' failure, to forthwith comply with the above mandatory injunction, is reserved for consideration by post-judgment motion for the entry of an order imposing compensatory and corrective sanctions or incarceration (to induce compliance with the mandatory injunction).

Additionally, the court reserves for post-judgment determination of the referral of this Adversary Proceeding to the United States District Court for the exercise of the district court judge's Article III civil and criminal contempt powers in the event that Defendant Michael Pechbrenner, or his agents or representatives, fail to comply with the mandatory injunction after the issuance of this court's order for compensatory and corrective sanctions. The referral to the District Court may include a recommendation for the issuance of a punitive criminal monetary sanction and/or incarceration.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that no claims for damages arising from the violation of the automatic stay are presented in the Complaint before the court, and any such claims shall properly be brought pursuant to a motion for contempt in the Bankruptcy Case, No. 14-29361, or as permitted by the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, in an adversary proceeding if jointed with other claims for which such adversary proceeding is required. Kimberly Husted, the Plaintiff Chapter 7 Trustee, as the prevailing party shall file and set for hearing as appropriate a costs bill and a post-judgment motion for attorney's fees as provided by Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054. Any award of costs or attorney's fees shall be enforced as part of this judgment.

Judgement, Dckt. 26 (emphasis added).

### **Motion for Contempt**

Plaintiff filed a motion seeking an order holding Defendant in contempt for violating the court's Judgment and granting compensatory and corrective sanctions on February 22, 2018. Dckt. 31. The court granted the motion on March 22, 2018, noting that Defendant not only failed to comply with the court's judgement, but apparently had filed a lawsuit in Costa Rica contradicting what this court has adjudged already. Dckts. 36 and 37.

The court issued an Order holding Defendant in contempt, requiring Defendant to deliver possession of the Property by April 10, 2018, at 12:30 p.m. or have judgement entered against Defendant in the amount of \$15,000.00 in corrective sanctions. Order, Dckt. 37. The Order also notified Defendant that further noncompliance with the court's January 31, 2018, judgment may result in referral of this Adversary Proceeding to the United States District Court for the exercise of the district court judge's Article III civil and criminal contempt powers. *Id.*

### **Review of Application for Amended Default Judgement**

The Plaintiff's Application states the following grounds with particularity (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007):

1. On January 31, 2018, the Court entered Judgment for Plaintiff-Trustee determining that the Plaintiff-Trustee holds title to the Condo 184 Property and for the turnover of possession of Condo 184 by the Defendant to Trustee. Motion ¶ 6, Dckt. 40.
2. The Judgment provides that issuance of sanctions for failure to comply with the Judgment will be the subject of post-judgment motions. Order, p. 2:15-27; Dckt. 26.
3. The Judgment further provides:

“Further, that if Plaintiff Chapter 7 Trustee subsequently determines that the physical turnover of the Property is not in the best interests of the Bankruptcy Estate, Plaintiff Chapter 7 Trustee may seek a supplemental or amended judgment for a monetary judgment for the value of the Property.”

Order, *Id.* at 2:12-14.

4. On March 22, 2018, the court entered an order finding Defendant in contempt for failure to turnover the Property as required by the judgment, further ordered Defendant to turnover the Property by 12:30 p.m. (Local Costa Rica Time) on April 10, 2018, and that corrective sanctions in the amount of \$15,000.00 would be imposed if Defendant failed to so comply. Order, Dckt. 37; Motion ¶ 9, Dckt. 40.
5. The Defendant presently occupies and exercises control over Condo 184, over the objection of the Trustee, and in defiance of the Judgment. Motion ¶ 10, Dckt. 40.
6. On August 24, 2016, the court entered an order in the parent bankruptcy case granting DNL-22, the Trustee's application to employ C21 BEACH

AREA PROPERTIES, LOCATED AT LOS DELFINES GOLF & COUNTRY CLUB, PLAYA TAMBOR COSTA RICA (“Broker”) as the estate’s broker to market Condo 184. Joseph Callahan, a real estate agent for the Broker, has advised the Trustee that the fair market value of the Property is approximately \$190,000.00. Motion ¶ 11, Dckt. 40.

7. The Defendant has received copies of both the Judgement and Order. The Defendant has refused to comply with the court’s orders and remains in possession of Condo 184, obfuscating the Trustee’s efforts to market and sell the Property for the benefit of estate creditors. *Id.*, at 3:23-25.
8. The Defendant presently occupies and exercises control over Condo 184. *Id.*, ¶ 10.

Plaintiff provides the Declaration of Kimberly Husted, Chapter 7 Trustee, to support the facts stated within the Application. Dckt. 42.

Plaintiff also provides the Declaration of Joseph Callahan, a real estate professional licensed to practice in Costa Rica with 18 years’ experience. Dckt. 43. Callahan states he is the exclusive broker for the Los Delfines Golf & Country Club, and values the Property at \$190,000.00 given the current “buyer’s market” in Tambor and required repairs. *Id.*

## **APPLICABLE LAW**

### **Judgment for Turnover of Property**

The Bankruptcy Code provides that any person in possession of property of the bankruptcy estate—here, the 184 Los Delfines, Tambor, Costa Rica Property—must turnover such property or value of the property to the trustee in the bankruptcy case—here, Plaintiff in this Adversary Proceeding. 11 U.S.C. § 542(a). The order or judgment for turnover of the property is enforceable by way of contempt. *Maggio v. Zeitz*, 333 U.S. 56, 67–68 (1948); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983). Such contempt proceeding by the bankruptcy court is for “enforcement” (corrective sanctions), not “punishment.” “Punishment” sanctions are issued by the District Court.

If the property of the estate is not or cannot be turned over, at the election of the trustee the court makes the determination of the value as part of the relief available under 11 U.S.C. § 542(a) and then enters a monetary judgment for that amount. Such may be by a supplemental judgment or order. *See* general discussion of this process in *In re Pilate*, 487 B.R. 345 (Bankr. D.D.C. 2013).

## **ANCILLARY DOCUMENTS SENT TO COURT BY DEFENDANT**

On September 17, 2018, a “Complaint” <sup>FN.2</sup> and supporting documents sent by Defendant Michael Pechbrenner to the Office of the United States Trustee were delivered to the court. Those documents are filed with the main bankruptcy case, no. 14-29361, under Docket No. 451.

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FN.2. The court puts the word “Complaint” in quotes to distinguish it from the complaint commencing this Adversary Proceeding.  
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In his email to the U.S. Trustee, Defendant states that he is making a complaint against the Trustee and that these documents should be sent to the judge (which they were as requested by Defendant) prior to the September 20, 2018, hearing.

The “Complaint” attached to the email is in letter form. Defendant states that he has not retained a lawyer with respect to this “Complaint.” Defendant asserts that the Trustee and her attorney have filed false documents in the courts in both the United States and Costa Rica. He further asserts that he is not connected with the Debtor, Walter Schaefer, nor does he have “jurisdiction” to assert a claim in Mr. Schaefer’s bankruptcy case.

Defendant contends that he is a creditor of Mr. Schaefer, having done work on Condo 184. His “Complaint” does not state when the work was done, but he states that a lien was registered on June 20, 2016. This was almost two years after Mr. Schaefer commenced his bankruptcy case and eighteen months after the case was converted to one under Chapter 7.<sup>FN.3</sup>

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FN.3. Walter Schaefer commenced his voluntary Chapter 13 case on September 18, 2014, which was converted to one under Chapter 7 by Order entered on January 31, 2015 (Dckt. 48).  
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Defendant also includes a discussion of his non-lawyer opinion concerning the Plaintiff-Trustee setting up a new corporation to take title to the property, ascribing various nefarious motives. Clearly, Defendant was not a participant in the Chapter 7 case and the challenges created by the Debtor in delaying, deflecting, and blocking the Plaintiff-Trustee’s efforts to fulfill her duties and obtain possession of Condo 184 as property of this bankruptcy estate.

Defendant also recounts disputes concerning his asserted lien on Condo 184.

The “Complaint” continues, asserting that Defendant has a lien on Condo 184, the Plaintiff-Trustee has filed an Amended Schedule D showing a secured claim (14-29361; Amended Schedule D, Dckt. 365) for Defendant.

The “Complaint” concludes with Defendant stating that he does not want to interfere with the liquidation of the property of the bankruptcy estate, but that it must be done properly under both United States and Costa Rica law. Further, Defendant states he will cooperate with the Plaintiff-Trustee so long as his lien interest is recognized and paid.

Though claiming only a “lien” against Condo 184, Defendant details his fight to stay in possession of Condo 184.

Defendant then provides an email thread of discussions between Defendant and counsel for the Plaintiff-Trustee. In his email dated November 27, 2016, Defendant affirmatively states that he has a claim

for services provided, which he seeks to enforce under Costa Rica law. He does not believe that if he were to release his lien and transfer his claim to “American law,” such would be recognized by Costa Rica law.

Defendant affirmatively states that his only objective is to get paid the debt he is owed. Further, that his attorney is scheduled to meet with Plaintiff-Trustee’s Costa Rican attorney.

The other attachments appear to be in Spanish, for which no English translation is provided.

### **Defendant’s Desire to be Paid**

To the extent that Defendant has a lien on Condo 184 for work done on Condo 184, and such lien is enforceable, then he and the Plaintiff-Trustee should be allies in getting Condo 184 delivered to the Plaintiff-Trustee, marketed, and sold. Defendant would be paid for the obligation secured by the lien and the Plaintiff-Trustee would be able to proceed with administering the bankruptcy estate.

But this would necessitate Defendant not occupying Condo 184, not retaining possession of Condo 184, and not blocking the Plaintiff-Trustee’s ability to have her real estate agent market Condo 184 for sale. Much of Defendant’s “Complaints” are inconsistent with a creditor who is only seeking to be paid on his secured (lien) claim. Such may arise from Defendant not being knowledgeable of the clear Bankruptcy Laws that provide for such creditor’s rights and not availing himself of engaging an attorney in the United States to help Defendant be quickly paid on his secured (lien) claim to the extent it is valid. (This court adds this reference to “valid” not because it questions such claim, but to make it clear that the right of a creditor to be paid turns on the applicable law, which in this case may be a hybrid on United States and Costa Rica law.)

### **RULING**

This Adversary Proceeding commenced September 20, 2017. Dckt. 1. Despite diligently pursuing a Judgement and corrective sanctions to acquire and liquidate the Property for the benefit of the Estate, over a year out Defendant has continually thwarted those efforts. As a result, Plaintiff is seeking to recover from Defendant the value of the Property, as entitled to under 11 U.S.C. § 542(a).

The Application provides statements with particularity reviewing the history of this Adversary Proceeding, the entry of the Judgment for turnover of Condo 184 to the Plaintiff-Trustee, and Defendant’s continued possession and control over Condo 184. The Trustee provides her testimony that Defendant continues in possession of Condo 184. Dec. ¶ 11, Dckt. 42.

Plaintiff-Trustee provides evidence that the value of Condo 184 is \$190,000.00. Declaration, Dckt. 43.

In the relief sought paragraph at the end of the Application, Plaintiff-Debtor first requests that the court amend the judgment to “include” a monetary judgment for \$190,000.00, the value of Condo 184. For the request to amend the current judgment to “include a judgment in the amount of \$190,000.00,” the Plaintiff-Trustee has not provided the court with any legal authority for issuing a dual turnover order and monetary judgment for the amount of the property to be turned over.



The Bankruptcy Code provides in 11 U.S.C. § 542(a) that an entity in possession of property of the bankruptcy estate (here, Condo 184) shall turnover to a bankruptcy trustee (here, the Plaintiff-Trustee) the property or the value of such property. The court's Judgment provides for the turnover of the Property to the Plaintiff-Trustee. That has not occurred, though the Trustee has attempted to enforce the Judgment by an order compelling turnover at the cost of corrective sanctions if Defendant fails (though Plaintiff-Trustee has not sought an order awarding the corrective sanctions and giving her Costa Rica attorney the opportunity to enforce such order.)

Thus, it appears that the Trustee seeks a judgment which adjudicates the turnover of Condo 184 and a monetary judgment of \$190,000.00. The Plaintiff-Trustee does not explain how such a Janus-relief Judgment would be constructed, how the court orders the turnover of the property and a judgment for \$190,000.00, or the effect paying the \$190,000.00 would have with respect to the title to Condo 184.

### **Denial Without Prejudice of Request for Additional Sanctions**

The relief sought then includes a request that the court "issue additional sanctions against the Defendant for his continued non-compliance with the Judgment and Order." On this second point, Plaintiff-Trustee offers no legal authority how the court can just "issue additional sanctions" as part of a motion to amend the judgment. No points and authorities is provided on when sanctions may properly be issued or how this Article I bankruptcy court judge issues sanctions retrospectively for failure to comply with the court's Judgment and Order.

The court notes that it appears that Plaintiff-Trustee could obtain an order for \$15,000.00 of corrective sanctions for Defendant's failure to comply with the prior order and turnover Condo 184 by April 10, 2018, as required by this court's March 22, 2018 Order. Dckt. 37. The Plaintiff-Trustee has not sought the entry of an order for the \$15,000.00 corrective monetary sanctions.

The Plaintiff-Trustee has not filed a further motion for the court to set higher corrective monetary sanctions or requesting that the court refer this to the United States District Court for a District court judge to exercise his or her punitive sanction power, including incarceration for failure to comply with an order of this court.

The court denies without prejudice any request, to the extent stated, in the present Motion for issuance of "additional sanctions." The setting of additional corrective sanctions, the award of corrective sanctions based on the court's prior order, or the referral of Defendant's failure to comply with an order of this court will be the subject of separate motions filed by the Plaintiff-Trustee.