UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 25, 2014 at 10:30 a.m.

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1. 13-25332-E-7 TIMOTHY/TRACI SHIELDS — MOTION TO COMPEL ABANDONMENT
DBJ-7 Douglas B. Jacobs — 8-1-14 [156]

Final Ruling: No appearance at the September 25, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on August 1, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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). 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 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 Motion for Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Timothy and Tracy Shields ("Debtor") requests the court to order the Trustee to abandon property commonly known as 2778 El Noble Ave., Oroville, California (the "Property"). This Property is encumbered by the lien of Wells Fargo Bank, N.A., securing claim of $119,181.37. FN.1. The Declaration of Debtor has been filed in support of the motion and values the Property to be $80,000.00.

FN.1. The Debtor states in the instant motion and supporting declaration that the value of Wells Fargo Bank, N.A.'s lien is $120,000.00 while Debtor's Schedule D states that the value of Wells Fargo Bank, N.A.'s lien is $120,150.00. Upon review of Wells Fargo Bank, N.A. claim (Claim No. 11), the amount of the lien is reported as $119,181.37. For purposes of this motion, the court will use the amount Wells Fargo Bank, N.A. values the lien.

Michael Dacquisto, Chapter 7 Trustee, filed notice of non-opposition on August 5, 2014.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (note 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 Abandon Property filed by Timothy and Traci Shields ("Debtor") 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 Compel Abandonment is granted and that the Property identified as:
>
> 1. 2778 El Noble Ave., Oroville, California
>
> and listed on Schedule A by Debtor is abandoned to Timothy and Traci Shields by this order, with no further act of the Trustee required.

2. 13-25332-E-7 TIMOTHY/TRACI SHIELDS MOTION TO COMPEL ABANDONMENT
DBJ-8 Douglas B. Jacobs 8-1-14 [162]

Final Ruling: No appearance at the September 25, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on August 1, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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). 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 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 Motion for Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Timothy and Tracy Shields ("Debtor") requests the court to order the Trustee to abandon property commonly known as 2088 Marilyn Driver, Chico, California (the "Property"). This Property is encumbered by the liens of Wells Fargo Bank, N.A. and Union Bank, securing claims of $234,000.00. The Declaration of Debtor has been filed in support of the motion and values the Property to be $80,000.00.

Michael Dacquisto, Chapter 7 Trustee, has not filed any opposition to this motion.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

CHAMBERS PREPARED ORDER
The court shall issue an Order (not 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 Abandon Property filed by Timothy and Traci Shields ("Debtor") 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 Compel Abandonment is granted and that the Property identified as:
>
> 1. 2088 Marilyn Drive, Chico, California
>
> and listed on Schedule A by Debtor is abandoned to Timothy and Traci Shields by this order, with no further act of the Trustee required.

3. 12-92570-E-12 COELHO DAIRY
JPJ-1 Thomas O. Gillis

OBJECTION TO CLAIM OF STATE FUND, CLAIM NUMBER 28
7-29-14 [515]

Final Ruling: No appearance at the September 25, 2014 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, and Office of the United States Trustee on July 29, 2014. By the court's calculation, 55 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See 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 Objection to Proof of Claim number 28 of State Fund is continued to October 2, 2014 at 10:30 a.m in Department E of the United States Bankruptcy Court, 1200 I Street, Suite 4, Modesto, California.

Jan Johnson, the Trustee, ("Objector") requests that the court disallow the claim of State Fund ("Creditor"), Proof of Claim No. 28 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $2,749.38. Objector asserts that the Claim has not been timely not timely filed. *See* Fed. R. Bankr. P. 3002(c).

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir.

2006).

However, after review of the proof of service for the instant motion, the court cannot determine that process has been effectively served by mail to meet the minimum constitutional due process requirements. It appears that State Fund was served with the instant motion to a P.O. Box. See Proof of Service, Dckt. 518. Service upon a post office box is plainly deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); *see also Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) ("Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously."). Based on the P.O. Box, the court cannot determine if there is anyone at the P.O. Box who can accept service or if the P.O. Box is merely a payment drop box where checks are imaged for presentment to banks for payment.

Additionally, State Fund is a "public enterprise fund." Cal. Ins. Code §§ 11773 & 11770. The State Fund website lists Vernon Steiner as President and CEO of State Fund. http://www.statefundca.com. However, reviewing the 2013 Statutory Annual Report on the website, Carol R. Newman is listed as the Acting President and CEO and Peter A. Guastamachio as Acting CFO. Additionally, in State Fund's 2013 Annual Statement, State Fund's statutory home office is listed at 333 Bush St., 8th Floor, San Francisco, California. A cursory search of State Fund's website revealed an actual address and actual individuals in which service could properly be served.

While an objection to claim is not a motion for purposes of Federal Rule of Bankruptcy Procedure 9013, proper service and Due Process are still necessary components for the court to hear the objection. Due process requires that notice be served in such a way that it is "reasonably calculated, under all the circumstances, to apprise interested parties... of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Even under this low reasonableness threshold, it does not appear that the State Fund was properly served with notice of this objection. The fact that a cursory search of State Fund provides the names of at least two officers and a street address in San Francisco indicates that service on a P.O. Box, an address that, incidentally, does not show up on a quick search, is not "reasonably calculated" to reach those involved at the State Fund and provide notice of the Debtor's objection to claim.

Based on the evidence before the court, the Objection to the Proof of Claim is continued to October 2, 2014 at 10:30 a.m. in Department E of the United States Bankruptcy Court, 1200 I Street, Suite 4, Modesto, California.

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 Objection to Claim of State Fund, Creditor filed in this case by Jan Johnson, Trustee 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 objection to Proof of Claim Number 28 of State Fund is continued to October 2, 2014 at 10:30 a.m. in Department E of the United States Bankruptcy Court, 1200 I Street, Suite 4, Modesto, California.

IT IS FURTHER ORDERED that any supplemental pleadings and evidence concerning the proper and sufficient service of process for the Objection to Claim shall be filed and served on or before September 29, 2014.

4. 14-23471-E-11 ERROL/SUZANNE BURR
DNL-3 Iain A. MacDonald

MOTION TO EMPLOY STEVEN A. LEWIS AS SPECIAL COUNSEL
9-11-14 [159]

Tentative Ruling: The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on September 11, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion to Employ is granted.

Chapter 11 Trustee, Susan K. Smith, seeks to employ special counsel pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Steven A. Lewis, as special counsel to assist the Trustee in evaluating the bankruptcy estate's interest in the legal malpractice claims against Raymond Shine in Adversary Proceeding NO. 14-02184-E ("Malpractice Case"); and potential legal malpractice claims against the law firm of Stoel Rives (collectively "Malpractice Claims"), pursuant to an hourly fee agreement.

The schedules of the Debtors-in-Possession, Errol and Suzanne Burr, identify an interest in Sierra County Superior Court Case No. 6310 (the "Property Dispute Case"). The Property Dispute Case involves a long-running boundary dispute between the Debtors-in-Possession and Gary Zolldan, Linda Zolldan, and the Zolldan Family Trust (collectively known as the "Zolldans"). The Debtors-in-Possession and Zolldans have been embroiled in litigation relating to the pending Property Dispute Case for approximately 10 years. Also among the assets of the estate of the Debtors-in-Possession is their interest in the Malpractice Case.

Debtors-in-Possession, individually and as trustees of the Burr Family Trust commenced the Malpractice Case by filing a malpractice complaint, commencing Sierra County Superior Court Case No. 7195. The complaint alleges that Raymond Shine committed malpractice in his former representation of the Debtors-in-Possession in the Property Dispute Case. The Malpractice Case has been stayed since it was filed, pending a resolution in the Property Dispute Case.

Debtors-in-Possession have scheduled the value of their interest in the Malpractice Case as "unknown," and do not claim an exemption against this case. On June 24, 2014, the Debtors-in-Possession filed a notice of removal of the Malpractice Case. On July 14, 2014, Raymond Shine filed his motion to remand the same. On August 14, 2014, the court entered an order granting BSK-1, the Trustee and Raymond Shine's application to continue the hearing on the remand motion to October 9, 2014, and to continue the initial status conference in the removed Malpractice Case to October 15, 2014, pending the Trutsee's evaluation of the claims asserted in the Malpractice Case, Dckt. No. 22. In or around April 2012, after the Debtors-in-Possession discharged Raymond Shine as counsel in the property dispute case, Debtors-in-Possession retained Stoel Rives to continue the legal representation.

Trustee seeks authorization to employ the Lewis Firm to evalute the estate's interest in the Malpractice claims and to advise the Trustee regarding the most favorable course of action to the estate as to such claims. The Lewis Firm has agreed to cap its fee for evaluation of the Malpractice Claims to $7,500.

The Lewis Firm's representation will be limited to determining whether it is the best interest of the estate to prosecute the malpractice claims. If after the evacuation, the Trustee wishes to employ the firm as special counsel to pursue the claims, the parties will enter into a separate written agreement and seek bankruptcy court approval of the same.

The Motion states that Steven A. Lewis, the sole member of the Lewis Firm, has conducted a conflicts check to determine whether any conflicts of interest exist in the case between the Lewis Firm and interested parties. Steven A. Lewis has identified the following connections:

- In the early 1990s, Mr. Lewis had an attorney-client relationship with Raymond Shine in an unrelated matter.

- Prior to the Trustee's appointment, Debtors-in-Possession retained the Waltz Law Firm to represent them in the Malpractice Case; Patrick Waltz, one of the members of the Waltz Law Firm, has retained Mr. Lewis as an expert consultant/witness in an unrelated legal

malpractice case currently pending in Sacramento County Superior Court.

- Mr. Lewis and his predecessors in interest in the Lewis firm have been involved in a number of unrelated matters in which the Waltz Law Firm represented an opposing party.

- Mr. Lewis once acted as an arbitrator in an unrelated matter in which Patrick Waltz was involved.

- Raymond Shine retained Betsy Kimball of Kimball and Wilson, LLP, to represent him in the malpractice case; Mr. Lewis and Ms. Kimball were co-shareholders of Lewis & Kimball, APC between 1985-1990.

- Counsel for Trustee, J. Luke Hendrix, has also had a past attorney-client relationship with Ms. Kimball, and Ms. Kimball has retained Mr. Lewis and her former law firm to serve as an expert consultant/witness in unrelated matters. Mr. Lewis has previously served as a consultant for the State Board of Equalization in an unrelated matter.

- The Zolldans have retained Kronick, Moskovitz, Tiedmann & Girard as their counsel in the Property Dispute case; Mr. Lewis served as a pro tem judge at a settlement conference with respect to an unrelated matter in which the firm was involved.

- In the past, Mr. Lewis also had an attorney-client relationship with the Trustee's general counsel, Desmond, Nolan, Livaich & Cunningham. In addition, Mr. Lewis has worked with Desmond, Nolan, Livaich & Cunningham in an unrelated matter, in which the Lewis Firm and Mr. Lewis served as special counsel to another bankruptcy trustee, J. Michael Hopper, and the Trustee's general counsel served as Mr. Hopper's general counsel.

- The Lewis firm has no prior connections, however, with Debtors' bankruptcy attorneys of record, and has never been employed by the Trustee in any matter unrelated to this case.

The court notes that Mr. Lewis has identified a significant amount of connections, as counsel having formed attorney-client relationships with Raymond Shine and Kronick, Moskovitz, Tiedmann & Girard, and having served as an expert consultant/witness for Patrick Waltz, Betsy Kimball, creditor the State Board of Equalization, and other involved entities in the past. However, the court recognizes that these myriad relationships between Mr. Lewis and other lawyers, firms, and creditors in the Sacramento and more generally, the Sacramento County and Central Valley Area may be inevitable, given the smaller degrees of separation that set the legal community and lawyers practicing this region apart from one another.

The court is mindful of Mr. Lewis's past engagements in a wide range of cases in the district, alternating between roles as an attorney, special counsel, and as an expert consultant/witness in many different malpractice cases. The level of connections to different attorneys in this community is not surprising, given Mr. Lewis's reportedly extensive specialization in matters involving risk management, malpractice law and avoidance, and ethics

consultations and active practice and services provided from his base office in Sacramento. Although the list generated by Mr. Lewis identifying potential conflicts of interest is quite lengthy, the court does anticipate Mr. Lewis's connections to the parties in the matter to interfere with Mr. Lewis's limited duties of determining whether the bankruptcy estate should prosecute the Malpractice Claims filed by the Debtors-in-Possession is a prudent course of action, and the precise extent of the estate's interest in the claims.

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, the court's determination that counsel does not appear to hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Steven A. Lewis as counsel for the Chapter 11 estate on the terms and conditions set forth in the Hourly Fee Agreement filed as Exhibit A, Dckt. No. 163. The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Chapter 11 Trustee 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 Employ is granted and the Chapter 11 Trustee is authorized to employ Steven A. Lewis as counsel for the Chapter 11 Trustee on the terms and conditions as set forth in the Contingency Fee Employment Agreement filed as Exhibit A, Dckt. 163.
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

5. 12-36884-E-7 JENNY PETTENGILL
Richard A. Hall

CONTINUED STATUS CONFERENCE
AMENDED VOLUNTARY PETITION
7-16-13 [112]

Debtor's Atty: Richard A. Hall

Notes:

Set by special court order dated 8/11/14 [Dckt 202] re existence and documentation of Corrigan Finance Limited. Personal appearances required.

[MF-1] Declaration of Terry A. Szucsko in Support of Corrigan Finance Limited's Assertion of its Existence and Authority filed 8/22/14 [Dckt 208]

Trustee's Status Conference Statement filed 9/9/14 [Dckt 215]

6. 14-22186-E-11 HOLISTIC ANIMAL CARE SERVICES, INC. A NEVADA
C. Anthony Hughes

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
3-4-14 [1]

Final Ruling: No appearance at the September 25, 2014 Status Conference is required.

Debtor's Atty: C. Anthony Hughes

The court having ordered this bankruptcy case dismissed, **the Status Conference is removed from the Calendar.**

Notes:

Continued from 4/16/14

Operating Reports filed: 6/3/14 [Mar, Apr], 6/14/14, 7/28/14

[JTK-1] Civil Minute Order - all claims stated in Motion dismissed without prejudice except for Relief from the Automatic Stay and Determination of Single Asset Bankruptcy Case filed 4/27/14 [Dckt 49]

[UST] United States Trustee's Motion to Convert or Dismiss Case filed 8/25/14 [Dckt 63], set for hearing 9/25/14 at 10:30 a.m.

7.	**14-22186-E-11**	**HOLISTIC ANIMAL CARE**	**UNITED STATES TRUSTEE'S MOTION**
	UST-1	**SERVICES, INC. A NEVADA**	**TO CONVERT OR DISMISS CASE**
		C. Anthony Hughes	**8-25-14 [63]**

Final Ruling: No appearance at the September 25, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on August 25, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss or Convert the Bankruptcy Case 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 Dismiss the Bankruptcy Case under is granted and the case is dismissed.

Tracy Hope Davis, the United States Trustee for the Eastern and Northern Districts of California and the District of Nevada ("the United States Trustee") files this motion to convert or dismiss this Chapter 11 case pursuant to 1112(b)(1) of title 11 of the United States Code against the Debtor-in-Possession, Holistic Animal Care Services, Inc. A Nevada Corporation.

The United States Trustee argues that this case should be dismissed. The debtor is a corporation. The Debtor-in-Possession's primary business asset is certain commercial real property located in Sacramento, California. However, relief from the automatic stay was granted as to that real property asset. As a result, there has been a diminution of the estate. Rehabilitation of the debtor's business operations is not reasonably likely.

BACKGROUND

On March 4, 2014, Holistic Animal Care Services, Inc. A Nevada Corporation filed a voluntary petition for relief under Chapter 11 to commence this case. Docket No. 1, Petition. The Debtor-in-Possession is a corporation. The president of Debtor-in-Possession is Carole Ann Baird ("Baird"). The Debtor-in-Possession is represented by counsel, C. Anthony Hughes.

On October 22, 2013, Ms. Baird commenced a Chapter 13 case, Case No.

13-33618, in this bankruptcy court ("Baird's bankruptcy case"). Baird's bankruptcy case is presently pending in Chapter 7. There was one real property asset in Baird's bankruptcy case, commonly known as 5441 Hackberry Lane, Sacramento, California 95841 ("5441 Hackberry Lane"). *See* Case No. 13- 33618, Docket No. 17, Schedule A. There is one real property asset in this case, 5441 Hackberry Lane. See Docket No. 1, Schedule A.

The United States Trustee describes the court as having found that the Debtor filed the petition for this case in bad faith under the "new debtor syndrome." Dckt. No. 53, Civil Minutes Granting Motion for Relief from Automatic Stay (JTK-1).

The Debtor-in-Possession was newly formed before this case commenced. Less than one month before this case commenced, the principal of Debtor-in-Possession, Baird, purported to transfer the real property known as 5441 Hackberry Lane to the Debtor, for no consideration, and without court authorization while Baird's personal bankruptcy case was pending. On May 15, 2014, the Court granted relief from the automatic stay, concerning 5441 Hackberry Lane, in this case. Civil Order. Dckt. No. 54.

The June 2014 monthly operating report, filed in this case, shows the Debtor-in-Possession has generated no income while this case has been pending. Dckt. No. 61. No Monthly Operating Reports have been filed for July 2014 or August 2014.

Commencement of Case in Bad Faith

The United States Trustee argues that this case was commenced in "bad faith." Certain factors are generally present in "bad faith" cases:

> (1) The debtor has one asset. (2) The secured creditors' lien encumbers that asset. (3) There are generally no employees except for the principals. (4) There is little or no cash flow, and no available sources of income to sustain a plan of reorganization to make adequate protection payments. (5) There are few, if any, unsecured creditors whose claims are relatively small. (6) There are allegations of wrongdoing by the debtor or its principals. (7) The debtor is afflicted with the "new debtor syndrome" in which a one-asset equity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors. (8) Bankruptcy offers the only possibility of forestalling loss of the property.

See *In re Stolrow's, Inc*., 84 B.R. 167, 170 (B.A.P. 9th Cir. 1988). Additional factors the Court may consider include whether the debtor has any ongoing business to reorganize, and whether the case is essentially a two-party dispute capable of prompt adjudication in a state court or other forum. See, *e.g*., *In re St. Paul Self Storage Ltd.*, 185 B.R. 580, 582-83 (B.A.P. 9th Cir. 1995). "There is no bright, talismanic number of factors which must exist to find bad faith; the weight of any given factor depends on the facts and circumstances of the case." See, *e.g., In re Chu*, 253 B.R. 92, 95 (S.D. Cal. 2000)(affirming bankruptcy court's conversion of Chapter 11 case where debtor had only one significant creditor that became a creditor as a result of a state court judgment, and where debtor filed his bankruptcy petition to collaterally attack

the state court judgment and preclude creditor from obtaining recovery).

Here, the United States Trustee asserts that the Debtor-in-Possession is afflicted with the "new debtor syndrome." Indicia of the "new debtor syndrome" include: (1) transfer of distressed property into a newly created corporation; (2) transfer occurring within a close proximity to the bankruptcy filing; (3) transfer for no consideration; (4) the debtor has no assets other than the recently transferred property; (5) the debtor has no or minimal unsecured debt; (6) the debtor has no employees and no ongoing business; and (7) the debtor has no means, other than the transferred property, to service the debt on the property. See *In re Duvar Apt., Inc*., 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996) (granting relief from stay due to bad faith).

Here, the Court made findings that the petition for this case was filed in bad faith under the "new debtor syndrome," Dckt. No. 53, and that such findings were made when it issued an order granting relief from the automatic stay. See Dckt. No. 54. The Debtor-in-Possession is a corporation that was newly formed before this case commenced. See Dckt. No. 53. Less than one month before this case commenced, the Debtor's principal, Baird, transferred 5441 Hackberry Lane to the Debtor, for no consideration, and without court authorization while Baird's personal bankruptcy case was pending.

The Court's order granting relief from stay was a final order. *See Cimarron Investors v. WYID Properties* (*In re Cimarron Investors*), 848 F.2d 974, 975 (9th Cir.1988). The Court's finding that this case was filed in bad faith is the law of the case. See *Wiersma v. Bank of the West* (*In re Wiersma*), 483 F.3d 933, 941 (9th Cir. 2007).

There is "cause" to convert or dismiss this case, due to "bad faith."

Although a debtor's bad faith in filing a bankruptcy petition is not listed as a reason for dismissal under section 1112(b)(4) of the Bankruptcy Code, bankruptcy courts have held that a lack of good faith in filing a Chapter 11 petition establishes "cause" for dismissal. *See In re Detienne Associates Ltd. Partnership*, 342 B.R. 318, 323 (Bankr. D. Mont. 2006)(citing, e.g., *In re Stolrow's, Inc*., 84 B.R. at 170, among other circuit decisions cited). *See also, e.g., In re Can-Alta Properties*, Ltd., 87 B.R. 89, 91 (B.A.P. 9th Cir. 1988).

There is "cause" to dismiss or convert this case, because there is a diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

Section 1112(b)(4)(A) of the Bankruptcy Code provides "cause" for conversion or dismissal under section 1112(b)(1) if, in a Chapter 11 case, there is a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . ." See 11U.S.C. §§ 1112(b)(1). -(b)(4)(A). The two elements under section 1112(b)(4)(A) must be shown by the moving party to establish "cause:" (1) a substantial or continuing loss to or diminution of the estate, and (2) the absence of a reasonable likelihood of rehabilitation. *See, e.g., In Products Int'l Co.*, 395 B.R. 101, 110 (Bankr. D. Ariz. 2008).

1. The first element, whether there is a "substantial or continuing loss to or diminution of the estate," is satisfied here.

The United States Trustee argues that there has been a diminution of the estate, in this case. The post-petition loss of value or depreciation of estate assets demonstrates "diminution." *See In re Schriock Constr., Inc.*, 167 B.R. 569, 575, n.8 (Bankr. N.D. 1994). Actual, or even potential, loss of estate assets to foreclosure or to relief from the automatic stay demonstrates "diminution." *See Khan v. Rund* (*In re Rund)*, 12 WL 2043074, *5-6 (B.A.P. 9th Cir., June 6, 2012).

In this case, relief from stay was granted as to the Debtor's primary business asset, 5441 Hackberry Lane. Dckt. No. 54.

2. The second element, the absence of a reasonable likelihood of rehabilitation, is satisfied here.

"The absence of a reasonable likelihood of rehabilitation" does not require the moving party to show that the debtor could not conceivably confirm a plan, but rather that the debtor's business prospects do not "justify continuance of the reorganization effort." 7 ALAN RESNICK ET AL., COLLIER ON BANKRUPTCY § 1112.04[6][a][ii] (16th ed. 2012). "Rehabilitation" does not include liquidation; it means the restoration of a business's viability. See, e.g., In re 15375 Memorial Corp., 386 B.R. 548, 552 (Bankr. D. Del. 2008) (citing Loop Corp. v. United States, 379 F.3d 511, 515-16 (8th Cir. 2004).

Here, the United States Trustee asserts that the rehabilitation of the business operations of the Debtor-in-Possession is not reasonably likely. Relief from stay was granted as to the Debtor-in-Possession's primary business asset, 5441 Hackberry Lane. As a result, the Debtor-in-Possession's reorganization prospects now appear dim. With or without 5441 Hackberry Lane, the most recently filed monthly operating report shows that the Debtor has generated no income while this case has been pending. Dckt. 61, June 2014 Operating Report. The United States Trustee argues it is improbable the Debtor will be able to propose a feasible plan of reorganization or to successfully fund a plan of reorganization. "Rehabilitation" of the Debtor is not reasonably likely in this case.

D. The interests of creditors are best served by dismissal of the case.

The bankruptcy court has broad discretion to determine whether conversion or dismissal of a Chapter 11 case is in the best interest of the creditors and the estate, driven by case-specific circumstances. Cf., *In re Staff Inv. Co.*, 146 B.R. 256, 260 (Bankr. E.D. Cal. 1992) (finding conversion in lieu of dismissal is warranted, where debtor betrays an intention to re-file a new bankruptcy case following dismissal of the current case, so to obtain a new automatic stay).

The United States Trustee submits that the dismissal of this case best serves the paramount interest of creditors. See 11 U.S.C. § 1112(b)(1). There appear no non-exempt assets that may be administered by a trustee for the benefit of creditors, were this case converted to one under Chapter 7. Furthermore, given that the Court has granted relief from stay with regard to the primary business asset of Debtor-in-Possession, the United States Trustee does not recommend the appointment of a Chapter 11 trustee.

STANDARD

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson),* 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n 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 sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

In the court's ruling on the Motion for Relief from the Automatic Stay filed by Creditor Scott B. Lee, in his capacity as the Trustee of the Scott Lee and Elizabeth Aghbashian Family Trust (or "Creditor") in this case, the court discussed its finding of bad faith in the context of cause to grant relief the stay with respect to the Creditor pursuant to 11 U.S.C. § 362(d). In the court's discussion of bad faith, which concluded in a finding that the Debtor-in-Possession in this case has not made a sufficient showing to overcome the prima facie case of bad faith filing, the court discussed the "new debtor syndrome" when noting the recent transfer of assets effected by the principal of the Debtor-in-Possession itself.

The court stated:

> The existence of bad faith in commencing a bankruptcy case constitutes cause for granting relief from the stay pursuant to § 362(d). *Duvar Apt. v. FDIC (In re Duvar Apt.)*, 205 B.R. 196, 200 (B.A.P. 9th Cir. Cal. 1996). A broad review of relevant cases reveals certain patterns and conduct that have in specific cases been characterized as bad faith, which include:
>
> > (1) a perceived improper impact on nonbankruptcy rights;
> >
> > (2) a recent transfer of assets, i.e., the "new debtor syndrome" cases;
> >
> > (3) an inability to reorganize; and
> >
> > (4) unnecessary delay, i.e., serial filings.
>
> 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The concept of bad faith filing should

be used sparingly to deny bankruptcy relief to statutorily eligible debtors only in extraordinary circumstances. *Id.*

The "new debtor syndrome" is described as,

> a pattern of conduct which exemplifies bad faith cases. [citations omitted] Indicia of the new debtor syndrome include: (1) transfer of distressed property into a newly created corporation; (2) transfer occurring within a close proximity to the bankruptcy filing; (3) transfer for no consideration; (4) the debtor has no assets other than the recently transferred property; (5) the debtor has no or minimal unsecured debt; (6) the debtor has no employees and no ongoing business; and (7) the debtor has no means, other than the transferred property, to service the debt on the property. In re Yukon Enter., Inc., 39 Bankr. 919, 921 (Bankr. C.D. Cal. 1984).

In re Duvar Apt., 205 B.R. at 200.

> Here, the court finds sufficient bad faith to warrant Creditor relief from the automatic stay. Debtor is an entity which manifest the indices of "new debtor syndrome." On October 22, 2013, Baird commenced her individual Chapter 13 case, Case No. 13-33618, in this bankruptcy court, which is presently pending in Chapter 7. E.D. Cal. Bankr. Case 13-33618, Dckt. 1. The subject real property was the only real property asset in that case. *Id.* Baird transferred the subject real property to the Debtor on or about November 14, 2013, the same date the Debtor was incorporated. Creditor's Exhibit 18, Dckt. 21.
>
> However, at that time, the subject real property was property of the estate of Baird's individual bankruptcy case and had not been abandoned. A review of the docket shows no court order in Baird's individual bankruptcy case authorizing Baird to transfer the subject real property, which occurred approximately 4 months before the commencement of this case. See E.D. Cal. Bankr. Case 13-33618. On November 14, 2013, Creditor filed a motion for relief from the automatic stay and on January 21, 2014, the Court entered its order granting relief from stay allowing Creditor to complete his nonjudicial foreclosure proceedings against the property. *Id.* at Dckt. 59. On February 7, 2014, Baird executed a Grant Deed to the subject real property in favor of Debtor, and on February 14, 2014, the Grant Deed was recorded. Creditor's Exhibit 18, Dckt. 21.

Civil Minutes, Dckt. No. 53. The court then noted that the transfer of the real property from Ms. Baird was made to the Debtor-in-Possession for no consideration. Gee Declaration, Dckt. 34. The transfer, effected without consideration from the receiving, Debtor-in-Possession party, was troubling to the court on multiple fronts; first, no request for court approval of Ms. Baird's use, sale, or lease of the property pursuant to 11 U.S.C. § 363 was filed and heard by this court in Ms. Baird's individual Chapter 13 bankruptcy

case.

Second, the court noted that the Grant Deed for the property was recorded four days after the Creditor, Scott B. Lee, as the Trustee of the Scott Lee and Elizabeth Aghbashian Family Trust in this case, had caused a Notice of Sale to be recorded in the nonjudicial foreclosure proceedings setting the sale for 1:30 p.m. on Tuesday, March 4, 2014. Creditor's Exhibit 14, Dckt. 21. It was observed that the Debtor-in-Possession filed its chapter 11 petition on March 4, 2014, just hours before the Trustee's Sale set for 1:30 p.m. that same date. Dckt. 1.

This case bears all the hallmarks as one being filed by a "new debtor" who will engage in the tactic of creating a new entity (or activating a dormant shell entity, which is possibly the case for this Debtor-in-Possession corporation, which contains only one overencumbered, singular asset also claimed by Ms. Baird), on the eve of foreclosure or other creditor action to seize title to a troubled asset for the purpose of invoking the automatic stay. This conduct effectively shields the untroubled assets and the transferred asset from the burdens of Chapter 11, and away from the reach of the foreclosing or creditors to which the debtor may be indebted. In this circuit, a "new debtor syndrome" case is presumptively filed in bad faith; an honest intend to reorganize is irrelevant. *In re Thirtieth Place, Inc*., 30 B.R. 503 (B.A.P. 9th Cir. 1983).

The court has previously echoed the Trustee's concerns in examining the case and noting that the Debtor-in-Possession only one major asset, the subject real property, which Ms. Baird as the principal of the Debtor-in-Possession (and having the fiduciary duties that follow) transferred into a newly created corporation after the automatic stay was lifted as to the Scott B. Lee, as the Trustee of the Scott Lee and Elizabeth Aghbashian Family Trust in her individual bankruptcy case. This unauthorized transfer occurred four months before the commencement of this case and was done for no exchange of consideration.

In considering the entirety of the record of the Debtor-in-Possession including the voluntary petition, the Monthly Operating Reports of the Debtor-in-Possession, Dckt. Nos. 56, 57, 59, and 61, which show no positive cash flow in the form of disbursements and excess receipts being received by the bankruptcy estate (with current assets and liabilities remaining the same, on account of the transferred property and singular asset of the estate), as well as the documentation and evidence provided by the United States Trustee and Creditor in support of its Motion for Relief, the overwhelming evidence militates in favor of dismissal and a finding of "bad faith" in the filing of this case. This court determines the presence of many of the factors outlined in *In re Stolrow's, Inc*., 84 B.R. 167, 170 (B.A.P. 9th Cir. 1988), as indications that the bankruptcy case has been filed in bad faith, so as to circumvent the requirements that those filing for relief under the Bankruptcy Code be forthright in the prosecution of their case, and that debtors are making an honest attempt to pay off its creditors and organize.

This does not appear to be the case for the instant Debtor-in-Possession. The Debtor-in-Possession has listed no other real estate assets other than the transferred subject real property. Additionally, the Debtor-in-Possession has no or minimal unsecured debt; of the three general unsecured debts in this case, totaling $3,500, two of the general unsecured debts in this

case (El Rinchak and Jesse Cole) pre-date the existence of the Debtor. Petition, Dckt. No. 1. The Debtor has no employees and presently receives no income. It appears the Debtor has no means, other than the transferred property, to service the debt on the property.

Based on the foregoing factors, the Debtor-in-Possession has not rebutted the presumption bad faith filing under the new debtor syndrome. Additionally, the Debtor-in-Possession and its principal, Ms. Baird, have not come forward with credible testimony suggesting otherwise. At the hearing held on the Motion for Relief from the Automatic Stay, JTK-1, filed by Scott B. Lee, as the Trustee of the Scott Lee and Elizabeth Aghbashian Family Trust against the Debtor-in-Possession with respect to the real property commonly known as 5441 Hackberry Lane, Sacramento, California, the court stated that it did not find the Debtor's testimony to be credible that the creation of this new entity has been created as part of a good faith, bona fide economic endeavor. The evidence shows that Ms. Baird had orchestrated the creation of a new legal entity, Debtor-in-Possession, whose "sole purpose is to be the title holder for the subject real property and prevent foreclosure on the property by filing for chapter 11 relief while Baird and her other business endeavors continue to use the property."

Here, the Debtor-in-Possession has not shown that there is any ongoing business to reorganize. The Debtor-in-Possession newly formed before this case commenced. See Dckt. No. 53. As the United States Trustee has stated, less than one month before this case commenced, the Debtor's principal, Baird, transferred 5441 Hackberry Lane to the Debtor, for no consideration, and without court authorization while Baird's personal bankruptcy case was pending (providing grounds for the Chapter 13 Trustee appointed to Ms. Baird's case for the recovery of this unauthorized post-petition transfer under 11 U.S.C. §§ 549 and 550).

The court has already determined, in its ruling on the Motion for Relief from the Automatic Stay, that the unauthorized transfer of this property to a newly formed legal entity solely controlled by the same individual, "was a deliberate attempt as a stay to foreclosure." The court ruled that the filing of the present petition was part of a scheme to delay, hinder, or defraud Movant with respect to the Property by both the transfer of an interest in the property and the filing of multiple bankruptcy cases" under 11 U.S.C. § 362(d)(4). Dckt. No. 53.

Additionally, the Debtor-in-Possession appears to have no means of effectuating a legitimate reorganization. This bankruptcy case can simply be reduced a two-party dispute between the Debtor-in-Possession and the secured lender, which has already obtained relief from the stay, thereby thwarting the Debtor-in-Possession's apparent attempt to only forestall the loss of the property by filing this case–-with no viable means of achieving a reorganization of the Debtor-in-Possession's finances. The use of Chapter 11 for a newly created entity for the continued use by Ms. Baird (a debtor in her own case) of her other businesses, and not to reorganize or rehabilitate an existing enterprise, is a misuse of the reorganization process. *In re Powers*, 135 Bankr. 980, 996 (Bankr. C.D. Cal. 1991)(quoting *In re Victory Constr. Co., Inc.*, 9 Bankr. 549, 565 (Bankr. C.D. Cal. 1981)).

Lastly, the dismissal of this case, rather than conversion to a case under Chapter 7 of the Bankruptcy Code, best serves the paramount interest of

creditors. See 11 U.S.C. § 1112(b)(1), as there are no non-exempt assets that may be administered by a trustee for the benefit of creditors.

The court finding that there is cause for dismissal due to the Debtor-in-Possession 's bad faith filing of its Chapter 11 petition pursuant to 11 U.S.C. § 1112(b)(4) and an absence of a reasonable likelihood of rehabilitation of the estate, and the Motion filed by the United States Trustee is granted and the case is dismissed.

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 Dismiss the Chapter 13 case filed by the Chapter 13 Trustee 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 Dismiss is granted and the case is dismissed.

8. 07-27123-E-13 PGM-5 — DOREEN GASTELUM — Peter G. Macaluso — MOTION TO COMPEL — 9-15-14 [155]

Final Ruling: No appearance at the September 24, 2014 hearing is required.

The Movant, Debtor Doreen M. Gastelum, having filed a Withdrawal of the Motion to Compel Discovery Pursuant to Rule 37 For Failure to Cooperate in Discovery and Request for Costs against Creditor pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Compel Discovery Pursuant to Rule 37 For Failure to Cooperate in Discovery and Request for Costs against Creditor was dismissed without prejudice, and the matter is removed from the calendar.**

9. 12-36884-E-7 HLC-3 — JENNY PETTENGILL — Richard A. Hall — MOTION FOR TURNOVER OF PROPERTY — 9-9-14 [210]

Tentative Ruling: The Motion for Turnover was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers

opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 9, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion for Turnover was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Turnover is granted.

John Roberts, Chapter 7 Trustee, ("Trustee") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1590 N. Lake Boulevard, Tahoe City, California (APN No. 094-160-008) (the "Property")by Jenny Pettengill ("Pettengill-Debtor").

MOTION

Trustee asserts that the Pettengill-Debtor filed a voluntary Chapter 13 petition on September 9, 2012 which was converted to Chapter 7 on July 1, 2013. Pettengill-Debtor's Schedule B, which was filed on July 16, 2013 (Dckt. 112) lists the Property as community property. Trustee alleges that the Pettengill-Debtor has been in possession of and residing in the Property at all times since the petition date, without paying any rent, and without insurance, and without the consent of the Trustee. Trustee argues that Pettengill-Debtor's community property interest in the Property is property of her bankruptcy estate as that term is defined at 11 U.S.C. § 541(a)(1), which Trustee is obliged to liquidate as part of his duties.

Pettengill-Debtor's former husband, Stanislav Lazutkine, filed his own voluntary Chapter 7 case in bankruptcy, Case No. 13-21893-B-7, on February 13, 2013, but has denied any interest in the Property beyond a mere possessory

interest, title to which is held as a matter of public record by an entity which calls itself "Corrigan Finance Limited, a corporation organized under the laws of Nevis Island." Trustee also notes that Debtor caused to be filed with the Placer County Recorder's Office on February 2, 2011, a "Notice of Pending Action" against the Property in connection with Debtor's marital dissolution proceeding pending against Pettengill-Debtor's then-husband Mr. Lazutkine in the Placer County Superior Court (Case No. SDR-0037138).

Pettengill-Debtor's and Mr. Lazutkine's case were "administratively consolidated" by operation of the "Order Approving Administrative Consolidation," which expressly approved a stipulation regarding the protocol for employing a broker to list and market the Property. Dckt. 187. Under the terms of the Order Approving Administrative Consolidation," Trustee and Corrigan Finance Limited, with the input of Captain Enterprises, LLC (Pettengill-Debtor's largest unsecured creditor) agreed to jointly retain Chase International Real Estate ("Broker"), BRE Licence No. 01802170) to assist the Trustee in the listing, marketing, and lease and/or sale of the Property. Trustee's motion to employ Broker was granted on June 30, 2014. Dckt. 199. The order authorizing employment also required that "neither the Chapter 7 Trustee nor Corrigan Financial Limited are authorized or permitted to place any tenant or other person (rent paying or non-rent paying) without further authorization of the court. The Motion for such authorization may be filed and heard in conjunction with a motion to authorize the use of rent monies to pay any expenses relating to the Property (such as insurance, property taxes, utilities, and other normal, regular expenses to protect and preserve the Property) as required by Paragraph 10 and 11 of the Stipulated Order of the court filed on February 16, 2014 (Dckt. 187)." Dckt. 199.

Trustee asserts that while Pettengill-Debtor has cooperated with Broker to access the Property for purposes of showing it to potential buyers, negotiations between the Trustee, through his legal counsel, and Pettengill=Debtor, through her legal counsel, for the payment of rent in exchange for continued occupation of the Property have been fruitless. Trustee alleges that on September 3, 2014, Pettengill-Debtor's attorney called Trustee's counsel to negotiate the terms of a surrender of the Property.

Trustee is now seeking an order for turnover of the property because Pettengill-Debtor has no cognizable legal entitlement to possess the Property since the appointment of Trustee. Trustee further asserts that Trustee reserves the right to collect rent for the post-petition tenancy. Trustee adds that if Pettengill-Debtor agrees to vacate and in fact does vacate the Property before the court orders her to turnover possession, then Pettengill-Debtor's liability to the Trustee for rent will be limited accordingly.

In summary, Trustee submits that Pettengill-Debtor acknowledged community property interest in the Property as "property of the estate" which is subject to turnover by Pettengill-Debtor who currently Possesses the Property without the consent of the court of the Trustee, and prays for an order which compels Pettengill-Debtor to immediately turnover the Property to Trustee, and granting Trustee such other relief, including but not limited to the issuance of a writ of possession should Debtor fail to cooperate voluntarily.

OPPOSITION

No opposition has been filed to this motion by the Debtors or other parties in interest.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Pettengill-Debtor deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

Pettengill-Debtor states under penalty of perjury on Amended Schedule B,

> “Debtor asserts a community property interest in
> the real property located at
> 1590 N. Lake Blvd.
> Tahoe, City, CA”

Amended Schedule B, Dckt. 112. Congress has provided, as a matter of federal law, that property of the bankruptcy estate includes,

> “All interests of the debtor and debtor’s spouse in community property as of the commencement of the case that is –
>
> (A) under the sole, equal, or joint management and control fo the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor’s spouse, to the extent that such interest is so liable.”

11 U.S.C. § 541(a)(2).

As a matter of California law, all community property is subject to the

joint control and management of either spouse. Cal. Fam. Code §§ 760, 910, 1100, 1102. In addition to the Statutory Provisions, the Pettengill-Debtor herself has been in possession and control of this property which she states is community property during this case and continuing to the September 2014 hearing on this Motion.

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Upon the court’s review of Trustee’s motion and the facts surrounding this contentious property interest, the court finds that the Property is “property of the estate” and Trustee is entitled to turnover under 11 U.S.C. § 541. No basis exists for Pettengill-Debtor withholding possession of the admitted (by Pettengill-Debtor) property of the bankruptcy estate.

The court does note, however, that it is not determining that the Property is in fact community property for all purposes. Instead, the community property classification of the Property is only for purposes of the instant Motion for Turnover.

The court orders that the Property be turned over by noon on October 15, 2014. The turnover of this admitted community property, which has been uninsured and Pettengill-Debtor has possessed without payment of rent, has been at issue in this case for months. Presumably, Pettengill-Debtor and her experienced counsel have made the necessary plans for Debtor to immediately vacate this property of the Estate and not continue in possession not permitted by the Trustee.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Turnover of Property filed by the Trustee 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 for Turnover of Property is granted.
>
> **IT IS FURTHER ORDERED** that Jenny Pettengill (“Pettengill-Debtor”) shall deliver on or before noon on October 15, 2014, possession of the real property commonly

known as 1590 N. Lake Boulevard, Tahoe City, California (APN No. 094-160-008) (the "Property"), to John Roberts, the Chapter 7 Trustee, or his designee, with all of the Debtor's personal property, personal property of any other persons which Debtor has allowed to be placed on the Property, and each of them, allowed access to the Property; and any other person or persons that Debtor allowed access to the Property, removed from the Property.

This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).

10. 13-21893-E-7 STANISLAV LAZUTKINE MOTION FOR TURNOVER OF PROPERTY
HLC-3 Richard A. Hall 9-9-14 [130]

Tentative Ruling: The Motion for Turnover was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 9, 2014. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

The Motion for Turnover was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Turnover is granted.

John Roberts, Chapter 7 Trustee, ("Trustee") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1590 N. Lake Boulevard, Tahoe City, California (APN No. 094-160-008) (the "Property") by Jenny Pettengill ("Pettengill-Debtor").

MOTION

Trustee asserts that Stanislav Lazutkine ("Lazutkine-Debtor") filed a voluntary Chapter 7 petition on February 13, 2013. Under the penalty of

perjury, Lazutkine-Debtor has not asserted that he owns or has an interest as community property in the Property. In fact, Lazutkine-Debtor has denied any interest in the Property beyond a mere possessory interest, title to which is held as a matter of public record by an entity which calls itself "Corrigan Finance Limited, a corporation organized under the laws of Nevis Island."

Lazutkine-Debtor's former wife, Pettengill-Debtor, filed her own voluntary Chapter 13 case in bankruptcy, Case No. 12-36884, on September 9, 2012, which was converted to Chapter 7 on July 1, 2013. Lazutkine-Debtor's Schedule B, which was filed on July 16, 2013 (Dckt. 112) lists the Property as community property. Trustee alleges that Pettengill-Debtor has been in possession of and residing in the Property at all times since the petition date, without paying any rent, and without insurance, and without the consent of the Trustee. Trustee argues that Pettengill-Debtor's community property interest in the Property is property of her bankruptcy estate as that term is defined at 11 U.S.C. § 541(a)(1), which Trustee is obliged to liquidate as part of his duties. Trustee also notes that Pettengill=Debtor caused to be filed with the Placer County Recorder's Office on February 2, 2011, a "Notice of Pending Action" against the Property in connection with Pettengill-Debtor's marital dissolution proceeding pending against Lazutkine-Debtor in the Placer County Superior Court (Case No. SDR-0037138).

Lazutkine-Debtor's and Pettengill-Debtor's cases were "administratively consolidated" by operation of the "Order Approving Administrative Consolidation," which expressly approved a stipulation regarding the protocol for employing a broker to list and market the Property. Dckt. 187. Under the terms of the Order Approving Administrative Consolidation," Trustee and Corrigan Finance Limited, with the input of Captain Enterprises, LLC (Pettengill-Debtor's largest unsecured creditor) agreed to jointly retain Chase International Real Estate ("Broker"), BRE Licence No. 01802170) to assist the Trustee in the listing, marketing, and lease and/or sale of the Property. Trustee's motion to employ Broker was granted on June 30, 2014. Dckt. 199. The order authorizing employment also required that "neither the Chapter 7 Trustee nor Corrigan Financial Limited are authorized or permitted to place any tenant or other person (rent paying or non-rent paying) without further authorization of the court. The Motion for such authorization may be filed and heard in conjunction with a motion to authorize the use of rent monies to pay any expenses relating to the Property (such as insurance, property taxes, utilities, and other normal, regular expenses to protect and preserve the Property) as required by Paragraph 10 and 11 of the Stipulated Order of the court filed on February 16, 2014 (Dckt. 187)." Dckt. 199.

Trustee asserts that while Pettengill-Debtor has cooperated with Broker to access the Property for purposes of showing it to potential buyers, negotiations between the Trustee, through his legal counsel, and Pettengill-Debtor, through her legal counsel, for the payment of rent in exchange for continued occupation of the Property have been fruitless. Trustee alleges that on September 3, 2014, Pettengill-Debtor's attorney called Trustee's counsel to negotiate the terms of a surrender of the Property.

Trustee is now seeking an order for turnover of the property because Pettengill-Debtor has no cognizable legal entitlement to possess the Property since the appointment of Trustee. Trustee further asserts that Trustee reserves the right to collect rent for the post-petition tenancy. Trustee adds that if Pettengill-Debtor agrees to vacate and in fact does vacate the Property before

the court orders her to turnover possession, then Pettengill-Debtor's liability to the Trustee for rent will be limited accordingly.

In summary, Trustee submits that Pettengill-Debtor acknowledged community property interest in the Property as "property of the estate" which is subject to turnover by Pettengill-Debtor who currently possesses the Property without the consent of the court of the Trustee, and prays for an order which compels Pettengill-Debtor to immediately turnover the Property to Trustee, and granting Trustee such other relief, including but not limited to the issuance of a writ of possession should Pettengill-Debtor fail to cooperate voluntarily.

OPPOSITION

No opposition has been filed to this motion by Lazutkine-Debtor, Pettengill-Debtor, or other parties in interest.

DISCUSSION

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Pettengill-Debtor deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Pettengill-Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Pettengill-Debtor turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).
Pettengill-Debtor states under penalty of perjury on Amended Schedule B,

> "Debtor asserts a community property interest in
> the real property located at
> 1590 N. Lake Blvd.
> Tahoe, City, CA"

Amended Schedule B, Dckt. 112. Congress has provided, as a matter of federal law, that property of the bankruptcy estate includes,

> "All interests of the debtor and debtor's spouse in community

property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control fo the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

11 U.S.C. § 541(a)(2).

As a matter of California law, all community property is subject to the joint control and management of either spouse. Cal. Fam. Code §§ 760, 910, 1100, 1102. In addition to the Statutory Provisions, the Pettengill-Debtor herself has been in possession and control of this property which she states is community property during this case and continuing to the September 2014 hearing on this Motion.

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Upon the court's review of Trustee's motion and the facts surrounding this contentious property interest, the court finds that the Property is "property of the estate" and Trustee is entitled to turnover under 11 U.S.C. § 541. No basis exists for Pettengill-Debtor withholding possession of the admitted (by Pettengill-Debtor) property of the bankruptcy estate.

The court does explicitly state, however, that it is not determining that the Property is in fact community property for all purposes. Instead, the community property classification of the Property is only for purposes of the instant Motion for Turnover.

The court orders that the Property be turned over by noon on October 15, 2014. The turnover of this admitted community property, which has been uninsured and Pettengill-Debtor has possessed without payment of rent, has been at issue in this case for months. Presumably, Pettengill-Debtor and her experienced counsel have made the necessary plans for Debtor to immediately vacate this property of the Estate and not continue in possession not permitted by the Trustee.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Turnover of Property filed by the Trustee 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 for Turnover of Property is granted.

IT IS FURTHER ORDERED that Jenny Pettengill ("Pettengill-Debtor") shall deliver on or before noon on October 15, 2014, possession of the real property commonly known as 1590 N. Lake Boulevard, Tahoe City, California (APN No. 094-160-008) (the "Property"), to John Roberts, the Chapter 7 Trustee, or his designee, with all of the Debtor's personal property, personal property of any other persons which Debtor has allowed to be placed on the Property, and each of them, allowed access to the Property; and any other person or persons that Debtor allowed access to the Property, removed from the Property.

This Order constitutes a judgment (Fed. R. Civ. P. 54(a) and Fed. R. Bankr. P. 7054, 9014) and may be enforced pursuant to the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure (including Fed. R. Civ. P. 69 and Fed. R. Bankr. P. 7069, 9014).