UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

October 15, 2013 at 10:00 a.m.

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1. 12-27806-A-11 DALE/CARMEN BRUMBAUGH — MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY (FEES $46,500, EXP. $882.22) 9-24-13 [215]
WFH-7

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the trustee's counsel, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

Wilke, Fleury, Hoffelt, Gould & Birney, LLP, attorney for the chapter 11 trustee, has filed its first and final motion for approval of compensation. The requested compensation consists of $46,500 in fees and $882.22 in expenses, for a total of $47,382.22. This motion covers the period from August 14, 2012 through September 12, 2013. The court approved the movant's employment as the trustee's attorney on October 3, 2012. In performing its services, the movant charged hourly rates of $275, $295, $325, $330, $385, and $390.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) attending the meeting of creditors, (2) reviewing operating reports, (3) negotiating with the debtors' creditor secured by the real property, (4) negotiating and preparing a forbearance agreement among the trustee, the secured creditor and the debtors, (5) obtaining court approval of the forbearance agreement, (6) evicting the debtors from the property, (7) assisting the trustee with the sale of the real property, (8) addressing issues relating to the debtors' 2012 crop and the debtors' interference with the harvest, and (9) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved.

2. 12-27806-A-11 DALE/CARMEN BRUMBAUGH
WFH-8

MOTION TO APPROVE COMPENSATION OF CHAPTER 11 TRUSTEE (FEES $24,565, EXP. $199.75)
9-24-13 [220]

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

The motion will be granted.

The chapter 11 trustee, David Flemmer, has filed his first and final motion for approval of compensation for services rendered during the chapter 11 portion of the case. The requested compensation consists of $24,565.46 in fees (reduced from $46,696.75 in actual fees incurred, for compliance with the statutory cap of 11 U.S.C. § 326(a)) and $199.75 in expenses, for a total of $24,765.21.

This motion covers the period from August 28, 2012 through the present. This case was filed as a chapter 12 proceeding on April 23, 2012 and was converted to chapter 11 on August 17, 2012. The court appointed the movant as chapter 11 trustee on or about August 24, 2012. The movant provided 119.15 hours of services to the estate and charged an hourly rate of $395.

The court is satisfied that the requested compensation does not exceed the cap of 11 U.S.C. § 326(a).

The movant's chapter 11 compensation should not be aggregated with his compensation as a chapter 7 trustee. See Gill v. Wittenburg (In re Fin. Corp. of America), 114 B.R. 221, 224-25 (B.A.P. 9th Cir. 1990); see also Tiffany v. Gill (In re Fin. Corp. of America), 946 F.2d 689 (9th Cir. 1991) (affirming Fin. Corp., 114 B.R. 221).

The movant's compensation is subject to 11 U.S.C. § 330(a), which permits only reasonable compensation for actual and necessary services rendered by the movant. See Gill v. Wittenburg (In re Fin. Corp. of America), 114 B.R. 221, 224-25 (B.A.P. 9th Cir. 1990). The 11 U.S.C. § 330(a) criteria includes an assessment of the nature of services, extent of services, value of services, time spent on services, and cost of comparable services. Tiffany v. Gill (In re Fin. Corp. of America), 946 F.2d 689 (9th Cir. 1991).

The instant case was filed as a chapter 12 proceeding on April 23, 2012. The court converted the case to a chapter 11 proceeding on August 17, 2012. The movant was appointed as a chapter 11 trustee on or about August 24, 2012.

During the chapter 11 portion of the case, the movant is disbursing $426,309.29 in connection with the administration of the estate's assets, which included an olive crop and a real property. This means that the cap under 11 U.S.C. § 326(a) on the movant's compensation as chapter 11 trustee is $24,565.46 ($1,250

(25% of first $5,000) + $4,500 (10% of next $45,000) + $18,815.46 (5% of next $950,000 - actually only $376,309.29)). Hence, the requested compensation of $24,565.46 does not exceed the cap of 11 U.S.C. § 326(a).

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) analyzing the debtors' assets, (2) preparing for and attending the meeting of creditors, (3) preparing operating reports, (4) negotiating with the debtors' creditor secured by the real property, (5) negotiating a forbearance agreement among the trustee, the secured creditor and the debtors, (6) taking action to evict the debtors from the property, (7) selling the real property, and (8) liquidating the debtors' 2012 crop and addressing the debtors' interference with the harvest.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The compensation will be approved.

3. 12-27806-A-11 DALE/CARMEN BRUMBAUGH — MOTION TO DISMISS CASE 9-24-13 [225]
WFH-9

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

The trustee is asking the court to dismiss the case pursuant to 11 U.S.C. § 1112(b)(1) and (4) as all estate assets have been administered.

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

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

The trustee holds approximately $122,359 from the liquidation of the debtors' 2012 olive crop and the sale of their real property. There are no other assets for the trustee to liquidate. From the funds held by the trustee, the court is approving the payment of administrative expenses, including fees and costs for the trustee's counsel in the total amount of $47,382.22 and the trustee's fees and costs in the total amount of $24,765.21. And, the trustee will be paying $50,400 to the debtors on account of their exemption in the real property. Given the foregoing, this estate has been administered and there is no likelihood of further reorganization or rehabilitation. Accordingly, the foregoing is cause for dismissal of the case. The case cannot be converted to chapter 7 because there are no other assets that could be liquidated for the benefit of the creditors and the estate.

4. 13-32417-A-11 BALBIR/SAWARNJIT SEKHON — MOTION TO VALUE COLLATERAL
MRL-1
VS. HERITAGE BANK OF COMMERCE — 10-1-13 [21]

Tentative Ruling: The motion will be granted in part and denied in part without prejudice.

The debtors move for an order valuing their hotel business property in Redding, California, in an effort to strip down the sole mortgage on the property and treat it as a partially-unsecured and dischargeable claim.

In addition, the debtors are asking the court to value the personal property at the hotel, including beds, television stands, television sets, microwaves, refrigerators, night stands, lamps, irons and ironing boards, chairs, tables, bedding, couches, commercial washer, commercial dryers, and tools and equipment. The personal property is additional collateral for HBC's claim that is secured by the real property.

For more information about the personal property that is the subject of the motion, parties in interest should review the motion papers.

The standard for the valuation of personal property that is not acquired for personal, family, or household purposes is not 11 U.S.C. § 506(a)(2), *i.e.*, "the price a retail merchant would charge for property of that kind considering the age and condition of the property." The value of personal property "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U.S.C. § 506(a)(1).

The personal property here is used primarily for business purposes, namely the operation of the debtors' hotel business. The 11 U.S.C. § 506(a)(2) replacement value standard does not apply. The debtors are reorganizing and are seeking a valuation to strip down HBC' secured claim. Thus, the replacement value of the personal property is what the debtors would pay to buy the same used property, considering the age and condition of the property.

The debtors value the personal property at $21,440. Their valuation is based solely on their opinion of value and does not include an assessment of the age and condition of the property and how much they would pay to buy the same used personal property. The debtors then have not provided sufficient evidence of the personal property's replacement value.

Another reason for denying the valuation of the personal property is that Schedules B and D do not accurately reflect the value of the property and the amount of HBC's claim secured by the property. Schedules B and D say that the debtors' hotel personal property has a value of only $1,000 and that HBC's claim secured by that property totals only $1,000. The schedules then contradict the representations in this motion.

Accordingly, this part of the motion will be denied without prejudice.

As to the real property, 11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence. It provides that "a plan may- modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence."

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is a secured claim only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

The debtors contend that, based on their opinion, the property has a value of $900,000. Docket 23; Schedule A.

A debtor's opinion of value in the schedules is evidence of value and it may be conclusive in the absence of contrary evidence. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The court has received no evidence refuting the valuation of the property by the debtors.

According to the motion, the real property is subject to $9,573 in outstanding property taxes and a mortgage held by Heritage Bank of Commerce in the amount of $1,758,651.15.

The property is not the debtors' residence and thus the anti-modification provision of 11 U.S.C. § 1123(b)(5) does not apply.

HBC's mortgage claim against the property is partially unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property. HBC's claim will be stripped down to the value of the property minus the outstanding property taxes, or $890,427 ($900,000 minus $9,573). Its claim in excess of $890,427 will be an unsecured claim. This part of the motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

5. 13-32417-A-11 BALBIR/SAWARNJIT SEKHON — MOTION TO EMPLOY
MRL-4 — 10-1-13 [24]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to Local Bankruptcy Rule

9014-1(f)(2). Consequently, the creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtors request authority to employ Liviakis Law Firm, PC as bankruptcy counsel for their estate. Liviakis will assist the debtors with the administration of the chapter 11 estate. The proposed compensation is a hybrid of flat and hourly fee rates.

The proposed flat fee of $15,300 is for the typical work involving administration of the chapter 11 estate, including representing the debtors at the meeting of creditors and the IDI, preparing first day motions, preparing lien avoidance and valuation motions, preparing and prosecuting plan confirmation, objecting to claims, responding to stay relief motions, etc.

Other services, including "(1) defending you against any complaint filed by the trustee or any other party in interest to deny your discharge; (2) defending you against any complaint filed by any creditor to except its debt from discharge; (3) defending you against any complaint filed by the trustee to avoid or to recover any transfer of property which you made before the filing of your chapter 7 petition; (4) prosecuting any complaint which you are obligated to file for a determination that any indebtedness is dischargeable; (5) appealing any order of judgment which is entered against you; (6) any legal work necessary after your chapter 11 case is closed, converted, dismissed, or once you begin the payment phase of your plan," will be provided at hourly fee rates. The debtors will be paying a $500 monthly post-petition retainer to the movant on account of its hourly rate services.

11 U.S.C. § 1107(a) provides that a debtor in possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to employ professional persons under 11 U.S.C. § 327(a). This section states that, subject to court approval, a trustee may employ professionals to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including . . . on a contingent fee basis."

The court concludes that the terms of employment and compensation are reasonable. Liviakis is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment will be approved. The court does not approve any compensation to Liviakis, whether from pre or post-petition retainer paid by the debtor.

6. 13-32417-A-11 BALBIR/SAWARNJIT SEKHON — MOTION TO VALUE COLLATERAL
MRL-5
VS. BANK OF AMERICA, N.A. — 10-1-13 [28]

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

The motion will be granted.

The debtors move for an order valuing their residence in Redding, California, in an effort to strip off the third mortgage on the property held by Bank of America and treat it as a wholly unsecured and dischargeable claim.

11 U.S.C. § 1123(b)(5) permits a chapter 11 debtor to modify the rights of secured claim holders, other than claims secured only by the debtor's principal residence. It provides that "a plan may- modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence."

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is a secured claim only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

The debtors contend that the property has a value of $425,000. This is based solely on their opinion of value. Docket 30.

According to the debtors, the property is subject to three deeds of trust, the first one in favor of Sovereign Bank, securing a claim of approximately $418,035.41, the second deed in favor of Tri Counties Bank, securing a claim of approximately $79,900, and the third deed in favor of BofA, securing a claim of approximately $105,876.

11 U.S.C. § 1123(b)(5)'s anti-modification provision applies only to secured claims. This means that a wholly unsecured claim on the debtors' primary residence may be avoided. Stated differently, the anti-modification clause of section 1123(b)(5) does not apply to secured creditors holding completely unsecured claims, even if they are secured by the debtor's primary residence.

See Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1227 (9th Cir. 2002); see also Lam v. Investors Thrift (In re Lam), 211 B.R. 36, 40-41 (B.A.P. 9th Cir. 1997).

BofA's third priority claim against the property is wholly unsecured within the meaning of 11 U.S.C. § 506(a)(1) because the estate has no equity in the property, after the deduction of Sovereign Bank's first mortgage and Tri Counties Bank's second mortgage. Hence, BofA's third mortgage will be stripped off, making it a wholly unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

7. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO APPROVE DISCLOSURE STATEMENT 8-27-13 [157]
DRE-18

Tentative Ruling: The motion will be denied.

The debtors ask for approval of their disclosure statement filed on August 27, 2013.

The U.S. Trustee opposes approval of the disclosure statement, outlining numerous deficiencies.

The disclosure statement will not be approved because it does not have adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

The disclosure statement has the following deficiencies:

(1) As noted by the U.S. Trustee, the disclosure statement:

- does not discuss the receipt of post-petition rent payments from the debtors' corporation, Lart (page 6);

- does not adequately discuss why Lart should be able to make the increased $9,500 monthly payments to the debtors in years 2 through 5 of the plan (page 6);

- is not clear about Mrs. Giri's income as it appears that the income listed in the disclosure statement is inconsistent with the debtors' operating reports (page 8);

- does not appear to address Mr. Giri's income (page 8), which, according to the operating reports, has been $1,844 a month; but, this figure is inconsistent with the projected plan budget, which lists his income at $2,400 a

month; this discrepancy is not explained; and

- the payroll deductions in the projected plan budget and the operating reports are inconsistent and this should be explained (in the plan budget, $1,700 a month, whereas $1,836 a month in the operating reports).

(2) The disclosure statement should update the information on the road construction at the debtors' place of business, as that construction is over or nearly over.

(3) The disclosure statement is not clear about how the debtors will come up with the additional funds ($5,152) necessary to fund the proposed plan. The proposed monthly plan payment totals $12,652.07, whereas the debtors have been making post-petition and pre-confirmation adequate protection payments, to the bank holding the mortgage on their business property, of only $7,500.

(4) The disclosure statement is not clear about precisely how the debtors will use the $38,178 in funds of cash on hand and how the debtors will deal with payment shortfalls after those funds are exhausted.

(5) The statement on page 12 that "If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will be classified as a general unsecured claim" is not true as to all secured claims. Apparently, only Huntington National Bank's claim is part of the general unsecured class of claims. This language should be corrected.

(6) The treatment of Bank of the West's claim is not clear as it seems to provide for modification of only the claim's interest rate, while providing for payment of the claim's principal in full, yet the proposed payment of $920.83 a month for 60 months pays only $50,000 of the claim's $74,424 principal. The court notes that there has been no valuation motion as to the claim of Bank of the West.

(7) The disclosure statement should state what is the actual amount of general unsecured claims and should state which secured claims are being treated in part or in whole as general unsecured claims and pursuant to what authority, *i.e.*, granted motion to value collateral.

Notably, the court has granted only one valuation motion, as to the collateral of Huntington National Bank. The court notes that the debtors have not yet submitted an order granting that motion (DCN DRE-17). The court will not allow the debtors to move forward with plan confirmation unless and until they lodge an order granting that motion. See Docket 155. Once again, there has been no valuation motion as to the claim of Bank of the West.

(8) The amount of general unsecured claims in the plan should be corrected to be consistent with the amount in the disclosure statement.

(9) After the amount of general unsecured claims is updated, the disclosure statement should list the correct dividend to general unsecured creditors.

(10) Given the confusion over what is the aggregate amount of general unsecured claims and which claims are included in the calculation, the court will require the debtors to list all general unsecured claims in the disclosure statement, along with claim amounts and the source of where the amounts were obtained.

(11) The liquidation analysis should be corrected as it assumes that all real property will be foreclosed and that deficiency claims will be asserted, diluting the dividend to general unsecured creditors. The debtors have been historically current on the payments for their residence in Rocklin, California and the Tupelo Drive rental property, and the Shady Lake Court property is unencumbered. The court then is not persuaded that there will be a foreclosure on these properties in the event the case is converted to chapter 7.

Further, even if there were a foreclosure on any of the real properties, including the gas stations and car wash property, the liquidation analysis takes no account of California's anti-deficiency laws, *i.e.*, one action rule, etc. See, e.g., Cal. Civ. Proc. Code §§ 580b and 580d. The court agrees with the U.S. Trustee that excluding the "anticipated" deficiency judgments against the debtors would net more than double the dividend currently projected by the debtors; it will increase from $36,000 to $72,168.

(12) With the change in the liquidation analysis, the debtors should update their plan feasibility analysis, given that the dividend to general unsecured creditors has increased by over 100%.

8. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO DISMISS CASE 3-12-13 [65]
UST-1

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

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have violated an order of the court because they paid their counsel fees for unlawful detainer action work without order of this court, the debtors have accomplished nothing since the case was filed was filed five months ago, and there is no reasonable likelihood of rehabilitation.

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

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

The order approving the employment of the debtors' counsel D. Randall Ensminger states: "No compensation is permitted except upon court order following application pursuant to 11 U.S.C. § 330(a)." Docket 30. Nevertheless, Mr. Ensminger admits to receiving $1,250 from the debtors for the eviction of a tenant from one of the debtors' two rental properties.

Stating that "[h]ad they or undersigned counsel realized that court permission was required it would have been requested on an emergency basis," Mr. Ensminger blames ignorance for his failure to obtain a court order approving the payment of the $1,250. Opposition at 4. Mr. Ensminger does not offer to pay back the funds received from the debtors and has made no effort to apply even for retroactive approval of the fees.

The debtors and Mr. Ensminger have violated this court's employment approval order. Docket 30.

The court notes that after the filing of this motion and after the April 19 and June 17 hearings on this motion, Mr. Ensminger has agreed to return the $1,250 he charged the debtors for the eviction work. Docket 147. Although this has mitigated in part Mr. Ensminger's violation of the employment order, the fact remains that he collected the fees in violation of the employment order and that he agreed to return them only five months after this motion was filed.

Further, the court agrees with the U.S. Trustee that there has been delay by the debtors that is prejudicial to creditors. This case was filed on October 2, 2012. This motion was filed on March 12, 2013. Prior to the filing of this motion, the debtors had not filed any valuation motions and the debtors' two cash collateral motions were dismissed by the court. Dockets 32 & 53.

The debtors filed a plan and disclosure statement on January 30, 2013, but they did not set the approval of the disclosure statement for hearing. Also, the plan and disclosure statement were filed as a single document, a total of six pages in length (Docket 63), even though the debtors are not a small business debtor. Unless the debtors are a small business debtor, they are not allowed to file the plan and disclosure statement as a single document. See 11 U.S.C. § 1125(f)(1).

More, the disclosure statement and plan have gross deficiencies on the face of the six-page document, including, without limitation, conclusory liquidation and feasibility analyses, the classification and treatment of claims is incomplete, no narrative or otherwise history of the debtors' pre-petition financial condition and what precipitated the filing, no future financial projections with stated assumptions, no discussion of how the road construction at the debtors' gas station business has affected the financial affairs of the business and no discussion of how the debtors are planning to confirm a plan given that the road construction hampering business will not be completed until August of 2014 and the debtors' monthly operating reports reflect the debtors' inability to fund a plan.

The March 2013 report reflects that the debtors have netted cumulatively a negative $2,247 during the life of this case. Docket 85.

The February 2013 report indicates that the debtors had netted cumulatively $1,763. Docket 73. According to the February 2013 report, in that month the debtors lost $4,009 and in January 2013 they lost $6,153. Docket 73. The January 2013 report (mislabeled as January 2012) indicates that the debtors had netted cumulatively a negative $3,389. Docket 64.

These figures do not take into account that the debtors have not been paying the mortgage on the gas station property. The gas station business, via the debtors' Lart Group, Inc. operator corporation, is the debtors' principal source of income.

In reviewing the debtors' reports, the court has noticed also that the reports are inconsistent and contain contradictory information. For instance, the February 2013 report says that in the prior month (January 2013), the debtors lost $6,153, whereas the January 2013 report (mislabeled as January 2012) reflects positive net cash receipts of $3,881 and reflects the prior month's receipts (December 2012) as a negative $6,153. Docket 64. The reports are in need of some serious corrections.

The reports are deficient also in reporting the financials of the debtors' corporation, Lart Group, Inc., which runs the gas station business and makes lease payments to the debtors for use of the gas station property. The debtors use the lease payments to pay the mortgage on the property. As of the time this motion was filed, Lart had not been making any lease payments to the debtors and they had not been making any payments on account of the mortgage on the property. The lack of transparency with respect to Lart's financials is a serious concern because the debtors control whether and when Lart will make lease payments to them individually.

On the other hand, the court does not have evidence of how much income is coming into Lart and where that income is going. The only evidence the court has is that Lart has been operating the gas station business and generating some revenue, albeit not making any lease payments to the debtors, and the debtors have not been paying the mortgage on the property.

It was not until this motion was filed that the debtors agreed to prompt Lart to make "reduced" lease payments to them in the amount of $7,500.

The court does not understand why the debtors are characterizing the $7,500 in lease payments from Lart as "reduced" when the motion states that the lease payments should be in the amount of $5,500, which is the approximate amount of the mortgage on the property.

The lease payments from Lart apparently started on April 3, 2013, apparently for the first time post-petition. The debtors do not say when Lart stopped making lease payments to them pre-petition and when exactly they stopped making the mortgage payments.

The debtors predict that Lart's $7,500 in lease payments can "continue in that amount until the construction is completed and a six month period for business to return to normal is allowed for." Opposition at 2-3.

However, the court is not persuaded that Lart is able to maintain $7,500 lease payments to the debtors, given that Lart did not make lease payments for at least eight months pre-petition and the construction project inhibiting business will not be completed until August of 2014. Motion at 2, 3.

More important, while the court does not have Lart's financials, even if Lart is able to make the $7,500 of lease payments until completion of the construction project, the debtors have not explained why Lart did not make such payments for the eight months pre-petition and for the last six months post-petition. Lart is an entity the debtors own and control. Yet, they have not explained what has changed that Lart is now able to pay $7,500 a month. The construction project is still ongoing.

From the above, the court concludes that the debtors have either not been honest about whether and to what extent Lart has been able to make lease payments to the debtors or Lart is unable to make the asserted $7,500 in payments until the construction project is completed. Either way, there is cause for conversion or dismissal of the case. If the debtors have not been honest about Lart's operation of the gas station, they have mismanaged the estate. See 11 U.S.C. § 1112(b)(4)(B). If Lart is unable to maintain the lease payments to the debtors, in light of Lart's post-petition failure to make lease payments, there is substantial or continuing loss to or diminution of the estate and an absence of a reasonable likelihood of rehabilitation. See 11 U.S.C. § 1112(b)(4)(A). The debtors have stated that their gas station

business will not "return to normal" "until the [two-year] construction is completed and a six month period [after completion of the construction]." Opposition at 2-3; Docket 63 at 2.

In conclusion, the debtors' failure to obey this court's orders, the delay in obtaining plan confirmation, the lack of transparency as to Lart's financials, the lack of explanation as to how Lart is suddenly able to make $7,500 in lease payments, and the nominal positive income reported for the life of this case are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

As the debtors own a rental property with a value of $60,000, free and clear of any encumbrances, the court concludes that conversion to chapter 7 is in the best interest of the creditors and the estate. Schedule A. The case will be converted to a chapter 7 proceeding.

9.	10-44128-A-11 IIF-20	TIMOTHY/SHANNON COXEN	MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY (FEES $85,100, EXP. $2,300.46) 8-1-13 [224]

Tentative Ruling: The motion will be granted in part and denied in part.

Illyssa Fogel, attorney for the debtors, has filed her first and final motion for approval of compensation. The requested compensation consists of $85,100 in fees and $2,300.46 in expenses, for a total of $87,400.46.

The U.S. Trustee has filed a limited objection to the motion.

After the motion and objection to the motion were filed, the movant and the U.S. Trustee have entered into a stipulation whereby the movant has agreed to reduce her request for fees by $7,500, to $77,600 in fees and $2,300.46 in expenses, for a total of $79,900.46. In return, the U.S. Trustee has agreed to withdraw his objection.

The requested compensation covers the period from July 13, 2010 through January 16, 2013. The court approved the movant's employment as the debtors' attorney on October 14, 2010. In performing its services, the movant charged hourly rates of $150 and $350.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) assisting the debtors with the administration of the chapter 11 estate, (2) communicating with the debtors and the creditors, (3) preparing petition documents, including amendments to petition documents, (4) preparing and prosecuting valuation motions, (5) defending a motion to convert or dismiss the case, (6) assisting the debtors in their compliance with requirements of the U.S. Trustee, (7) attending court hearings, (8) attending the IDI and meeting of creditors, (9) preparing and prosecuting the plan and disclosure statement, (10) addressing issues raised by stay relief motions, (11) analyzing proofs of claim, and (12) preparing and filing employment and compensation motions.

With the two exceptions below, the court concludes that the compensation is for actual and necessary services rendered in the administration of this estate.

First, the court will not approve any fees and costs incurred by the movant before the filing of the petition. The court does not approve fees and costs incurred or advanced pre-petition. To the extent the movant was owed fees and/or costs for pre-petition services and they were not paid before the filing of the petition, the movant was just like any other creditor of the debtors on the petition date. Hence, such fees and costs should have been dealt with in the now confirmed plan.

Second, the court will decrease to $80 an hour any fees requested by the movant and charged by any of her assistants at $150 an hour. The court does not have evidence of the education, experience and qualifications of the movants' assistants, warranting an hourly rate of $150.

The movant shall recalculate the fees and costs in light of the foregoing changes and submit an order on this motion to the court, accordingly. The U.S. Trustee shall sign off on the order before submission to the court. Except as provided above, the requested compensation will be approved.

10. 12-35330-A-12 BETTE SPAICH — MOTION TO COMPEL
BS-12 — 9-16-13 [125]

Tentative Ruling: The motion will be conditionally granted.

The debtor is asking the court to compel Auction.com, LLC to respond to a subpoena issued on August 22, 2013 for the production of documents related to bidder accounts, pre-auction bids and bid records for Alfred Nevis I and or The Nevis Co., covering the period of July 2010 until the present.

Auction.com opposes the motion, stating that its policies preclude it from disclosing non-public, personal information except when it is in response to a valid subpoena, court order or other legal process.

Auction.com has not challenged the validity of the subpoena. It merely says that it is uncertain about the relationship between the debtor and Mr. Nevis and The Nevis Co, and it is uncertain about whether Mr. Nevis has had the opportunity to intervene to oppose the production of information pursuant to the subpoena. Auction.com claims that it "was required to object to the subpoena to permit this Court to determine if the scope, breadth and substance of the information sought by the subpoena is appropriate."

In other words, Auction.com was not certain if the subpoena was proper so it objected to the subpoena just in case it was not proper.

The hearing on this motion was continued from September 30, 2013, to allow the debtor to serve Mr. Nevis and The Nevis Co. with this motion. Mr. Nevis was served with the motion papers prior to the September 30 hearing, on September 17, but The Nevis Co. was not served on that date. Docket 142. Both Mr. Nevis and The Nevis Co. were served with the motion papers on September 30, 2013. Docket 151.

Subject to hearing from Mr. Nevis and The Nevis Co., the court will grant the motion and enter an order compelling Auction.com to produce the information requested by the debtor. The opposition contains no evidence that warrants a protective order or the quashing of the subpoena served on Auction.com. The motion will be conditionally granted.

11. 12-35330-A-12 BETTE SPAICH — OBJECTION TO CLAIM
BS-6
VS. INTERNAL REVENUE SERVICE — 6-5-13 [82]

Tentative Ruling: The objection will be dismissed without prejudice as moot.

The debtor objects to claim no. 4 of the IRS.

The hearing on this objection was continued from July 22, 2013. The court set a briefing schedule.

The IRS has filed a "Status Report" for this objection, stating that it has amended its claim and that "the issue raised in the Objection is resolved."

Given that the IRS has amended the claim to which the debtor objects, this objection will be dismissed without prejudice as moot.

12. 12-35330-A-12 BETTE SPAICH — MOTION FOR ORDER DEEMING REQUESTS FOR ADMISSION ADMITTED, LIMITING SANCTIONS AND MONETARY SANCTIONS O.S.T. 9-30-13 [144]
BS-13

Tentative Ruling: The motion will be granted in part.

The debtor askS for sanctions against creditors John Roth and Michael Roth, as well as their counsel, Jason Burgess.

John Roth has failed to appear for a deposition scheduled by the debtor and has failed to respond to requests for admission set 2 and interrogatories set 1. The debtor also complains that while Jason Burgess, counsel for John Roth and Michael Roth, advised the debtor that the Roths would not be appearing at the September 25, 2013 depositions, Michael Roth appeared on the morning of September 25 at the deposition. John Roth did not appear.

Fed. R. Civ. P. 36(a)(3), as made applicable here by Fed. R. Bankr. P. 7036, provides a responding party to requests for admission, with 30 days to respond. The effect of not responding to a request for admissions is that the "matter is admitted, unless within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Fed. R. Civ. P. 36(a)(3).

Fed. R. Civ. P. 37(b)(2), as made applicable here by Fed. R. Bankr. P. 7037, provides that:

"If a party or a party's officer, director, or managing agent— or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination."

John Roth failed to respond to the requests for admission set 2 by September 24, 2013, as ordered by the court in its order of September 26, 2013. Docket 139. Given this, the court will treat the requests for admission set 2 as admitted.

John Roth failed to respond to the interrogatories set 1 by September 24, 2013, as ordered by the court in its order of September 26, 2013 either. Docket 139.

John Roth also did not appear at the September 25, 2013 deposition, as ordered by the court in its order of September 26, 2013. Docket 139.

This is the second time John Roth has refused to respond to discovery propounded by the debtor and has refused to appear at a deposition. The court held a hearing on September 16, 2013 on the debtor's motion to compel discovery, resulting in the order directing John Roth and Michael Roth to appear for depositions and for John Roth to have another opportunity to respond to requests for admission and interrogatories. Given John Roth's repeated failures to respond and appear for discovery, and his disregard for this court's orders, the court will hold him in contempt of court and will strike all his pleadings already filed with the court, pertaining to the pending confirmation of debtor's chapter 12 plan. The court will order such sanctions as it concludes that John Roth's conduct amounts to deceptive practices that hinder, delay and undermine the integrity of this judicial proceeding.

As further sanction against John Roth, the court will order John Roth to pay creditor David Chandler for losing six hours of time when John Roth failed to appear at his prior scheduled deposition. Docket 147 at 3. John Roth shall pay Mr. Chandler for six hours of his time at Mr. Chandler's standard hourly rate as an attorney, in the district where Mr. Chandler practices more than 50% of the time. If it is the Northern District of California, Mr. Chandler's hourly rate is $520 an hour. The court does not have evidence of what is Mr. Chandler's hourly rate in the Eastern District of California. John Roth shall pay this as a compensatory sanction to Mr. Chandler no later than October 21, 2013.

Further, Mr. Burgess' cancelling of the September 25 depositions of John Roth and Michael Roth after 5:00 p.m. on September 24, but then appearing in the morning of September 25 with Michael Roth at the deposition anyway, warrants sanctions against Mr. Burgess. Mr. Burgess' conduct also amounts to deceptive practices that hinder, delay and undermine the integrity of this judicial proceeding.

The court will order Mr. Burgess to pay Mr. Chandler for losing two hours of

time on September 25 due to the last-minute cancellation of the depositions of John Roth and Michael Roth by Mr. Burgess.

Mr. Burgess shall pay Mr. Chandler for two hours of his time at Mr. Chandler's standard hourly rate as an attorney, in the district where Mr. Chandler practices more than 50% of the time. Docket 147 at 3. If it is the Northern District of California, Mr. Chandler's hourly rate is $520 an hour. The court does not have evidence of what is Mr. Chandler's hourly rate in the Eastern District of California. Mr. Burgess shall pay this as a compensatory sanction to Mr. Chandler no later than October 21, 2013.

The court will order Mr. Burgess also to reimburse the debtor and Mr. Chandler for any costs pertaining to the September 25, 2013 deposition, including travel expenses to and from the deposition, and court reporter fees. The court has evidence in the record that the debtor has incurred $520 in reporter fees and $100 in travel expenses. Docket 146 at 5. The court will award $100 in travel expenses to Mr. Chandler as well. Mr. Burgess shall reimburse the debtor and Mr. Chandler for the above expenses no later than October 21, 2013.

As further sanctions, the court will order Michel Roth to appear once again for a deposition, at the time and place convenient to the debtor and Mr. Chandler, on at least 48 hours notice. If Michael Roth fails to appear, once again cancels the deposition but then appears anyway, or exhibits further sanctionable conduct, the court is likely to order further sanctions against Michael Roth.

No other sanctions will be awarded. The motion will be granted in part.

13. 11-39843-A-7 LILIA KRYVOSHEY — MOTION TO DISMISS ADVERSARY PROCEEDING
12-2221 KEK-1
9-5-13 [51]
KRYVOSHEY V. DEUTSCHE BANK NATIONAL TRUST COMPANY ET AL

Tentative Ruling: The motion will be granted in part.

Defendants Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc. ask for dismissal of all claims in the plaintiff's first amended complaint, without leave to amend, pursuant to Fed. R. Civ. P. 12(b)(6).

The motion will be denied as unnecessary as to Deutsche Bank because the court has already ruled that Deutsche Bank was not properly served with the FAC:

"The motion will be dismissed as moot as to Deutsche Bank National Trust Company because the proof of service for that defendant (Docket 36) indicates that Deutsche Bank was not served with the first amended complaint (Docket 29). The proof of service for Deutsche Bank states that the purported agent for service of process, CT CORP, is not an agent for Deutsche Bank. Docket 36.

The court rejects the plaintiff's contention that service is satisfied somehow because Deutsche Bank failed 'To Ensure Its's Agent For Service Of Process Is Accurately Listed With the State Of California Office Of The Secretary Of State.' Proper service under Fed. R. Bankr. P. 7004(b)(3) is a prerequisite before the court would consider ruling against anyone."

Docket 66, September 30, 2013 Ruling on Motion to Extend Time to File Response to First Amended Complaint.

With respect to MERS, aside from asserting claims against parties not named in the FAC (naming defendants as DOES 1 to 100 is not permitted in federal court) - such as Power Default Services, Inc. and American Home Mortgage Servicing Inc. - the plaintiff has asserted four causes of action against MERS, including:

- (CLAIM 1) a claim to determine that the defendants have no "secured or unsecured claim against property of the estate in bankruptcy,"

- (CLAIM 2) a claim to determine that the defendants do not hold "perfected and secured claim in the residential real estate of the Debtor and the property of this estate in bankruptcy and that all of the said Defendants are estopped and precluded from asserting an unsecured claim against this estate pursuant to Sections 105(a), 502(b)(1), 506 and 544(a) of the Bankruptcy Code and Rule 3007 of the Bankruptcy Rules,"

- (CLAIM 3) a claim seeking actual and punitive damages and equitable relief under 11 U.S.C. §§ 362(a) and 105(a) "for intentionally foreclosing and filing a motion for relief from stay knowing defendants, in particularly DBNTC, as trustee for the Trust did not have standing, and for filing false proofs of claim and false declarations," and

- (CLAIM 4) a claim for fraudulent, deceptive, unfair and illegal practices pursuant to "California Civil Code § 1750 et seq. and California Business and Professions Code Section 17200."

Only the trustee has standing to assert claims for the bankruptcy estate.

To establish standing, a plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

The prudential requirements of standing are: (1) the litigant must assert his own legal interests and not those of third parties, known as the real party interest; (2) the litigant must assert an injury peculiar to himself or to a distinct group of which he is a part; and (3) the interest of the litigant must be within the "zone of interests" to be protected by the statute under which his claim arises. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

The plaintiff's bankruptcy case is still open and the court has not ordered any of the estate's claims abandoned. See 11 U.S.C. § 554. The plaintiff has no apparent prudential standing to assert claims for the bankruptcy estate.

Admittedly, abandonment is imminent given the trustee's report of no distribution. Nonetheless, once abandoned, this court will not have subject matter jurisdiction over the claims because these are only "related to" a case under title 11. The trustee issued a no asset report on August 26, 2013,

indicating that she will not be administering any assets for the benefit of creditors.

Thus, claim 1 will be dismissed because it implicates solely property of the estate, but the trustee will not be administering any property of the estate. Claim 2 - to the extent it does not involve the estate, the wrongful foreclosure aspect of claim 3 - which is based solely on state law, and claim 4 - which is based also solely on state law, should be dismissed as the court lacks subject matter jurisdiction over such claims.

The court should dismiss claim 3 as well, because it fails to state a claim upon which relief can be granted. The claim does not seek damages for violation of the automatic stay. Rather, it seeks damages "for . . . filing a motion for relief from stay knowing defendants, in particularly DBNTC, as trustee for the Trust did not have standing, and for filing false proofs of claim and false declarations." This is an issue that should have been raised in connection with the motion for relief from the automatic stay.

The plaintiff has not established her constitutional standing to assert the remainder of claim 3. To have such standing, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

The plaintiff has not shown that she has suffered some actual or threatened injury due to alleged illegal conduct of the defendants. Specifically, the court sees no actual or threatened injury to the plaintiff from the alleged lack of standing of Deutsche Bank in filing a motion for relief from the automatic stay that was not granted, and the defendants' filing of purported false proofs of claim and false declarations. Proof of claim 9 filed by Deutsche Bank will not be paid because the bankruptcy is a no-asset case.

In conclusion, the four claims in the FAC will be dismissed as to MERS, without leave to amend. The plaintiff has no standing to assert claims 1, 2, 3 (wrongful foreclosure aspect) and 4. Also to the extent the claims involve nonbankruptcy law, this court has no subject matter jurisdiction over the claims, as the plaintiff's bankruptcy case is over.

Lastly, given the discussion above, the court sees no set of facts that would transform the automatic stay aspect of claim 3 into an actionable cause of action. Notably, this case has been pending for nearly 1.5 years and the plaintiff has come up with no actionable claim involving the automatic stay. The court also notes that the plaintiff has not responded to this motion.

14. 11-39843-A-7 LILIA KRYVOSHEY — STATUS CONFERENCE
12-2221 — 5-14-13 [29]
KRYVOSHEY V. DEUTSCHE BANK
NATIONAL TRUST COMPANY ET AL

Tentative Ruling: None.

15. 06-20046-A-11 LARGE SCALE BIOLOGY CORPORATION
FWP-80

MOTION FOR APPROVAL OF FINAL DISTRIBUTION UNDER DEBTOR'S FIRST AMENDED JOINT PLAN OF LIQUIDATION
9-5-13 [1276]

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

The motion will be granted.

The plan administrator, Randy Sugarman, asks the court to approve the final distribution of funds under the terms of the confirmed chapter 11 plan. The proposed final distribution is to the class 3B general unsecured creditors. The funds to be distributed consist of approximately $75,000 in net remaining proceeds generated by the liquidation of the debtor's assets and the prosecution of litigation.

The administrator also asks for: authority to distribute unclaimed distributions or treat such distributions as unclaimed property, consistent with the terms of the plan; not pay DeMinimus claims (of less than $25) as provided by the terms of the plan; and confirm that there is no need to establish a disputed claims reserve "as no disputes remain regarding allowance of Claims."

The administrator is holding approximately $87,000, from which $9,384 will be paid for administrative expenses and $2,925 will be paid for U.S. Trustee fees, leaving approximately $75,000 for distribution to the class 3B general unsecured creditors. Given that there are no outstanding disputes over the allowance of the claims the administrator is proposing to pay, the court will grant the motion and approve the payment of the creditors in accordance with the distribution schedule in Docket 1279. Distributions may be made in accordance with the terms of the plan.

The court will also allow the administrator to distribute unclaimed distributions or treat such distributions as unclaimed property, consistent with the terms of the plan, and will allow the administrator not to pay DeMinimus claims of less than $25 as prescribed by the plan. As no disputes remain regarding allowance of the claims, there is no need to establish a disputed claims reserve. The motion will be granted.

16. 06-20046-A-11 LARGE SCALE BIOLOGY CORPORATION
FWP-81

MOTION FOR FINAL DECREE
9-5-13 [1281]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii)

is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The plan administrator moves for an order entering final decree and re-closing the case as the administrator has liquidated all assets under the debtor's confirmed plan and is about to make all final distributions under the plan.

11 U.S.C. § 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Similarly, Fed. R. Bankr. P. 3022 provides that "[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

The administrator is holding approximately $87,000, from which $9,384 will be paid for administrative expenses and $2,925 will be paid for U.S. Trustee fees, leaving approximately $75,000 for distribution to the class 3B general unsecured creditors. The court has authorized the final distribution to the class 3B creditors. There are no outstanding disputes over the allowance of the claims the administrator is proposing to pay. There are no outstanding motions or proceedings either.

The plan has been fully administered. Accordingly, the court will enter a final decree and close the case. The motion will be granted.

17. 06-20046-A-11 FWP-82 — LARGE SCALE BIOLOGY CORPORATION — MOTION FOR ORDER DISCHARGING PLAN ADMINISTRATOR AND HIS PROFESSIONALS 9-5-13 [1285]

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

The motion will be granted.

The plan administrator moves for an order discharging him and his professionals from the terms of the plan, upon his making of the final distribution and upon the acceptance by the taxing authorities of the final tax returns for the consolidated debtor.

The administrator is holding approximately $87,000, from which $9,384 will be paid for administrative expenses and $2,925 will be paid for U.S. Trustee fees,

leaving approximately $75,000 for distribution to the class 3B general unsecured creditors. The court has authorized the final distribution to the class 3B creditors. There are no outstanding disputes over the allowance of the claims the administrator is proposing to pay. There are no outstanding motions or proceedings either. The plan has been fully administered.

The court will discharge the administrator and his professionals from their obligations under the terms of the plan. The discharge shall be effective upon the making of the final distribution and upon the acceptance by the taxing authorities of the final tax returns for the consolidated debtor. The motion will be granted.

18. 13-21454-A-11 CAH-31 — TRAINING TOWARD SELF RELIANCE, A CALIFORNIA — MOTION TO FILE CLAIM AFTER BAR DATE 9-13-13 [190]

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

The motion will be granted.

The debtor is asking that the late-filed proofs of claim of Jennifer Wenger and Shannon Helton be deemed timely filed. The claims (claims 8 and 9) were filed on September 13, 2013, whereas the claims bar date in this case was May 29, 2013.

Fed. R. Bankr. P. 9006(b)(1) provides that "Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the debtor; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

Jennifer Wenger and Shannon Helton are former employees of the debtor. Jennifer Wenger worked for the debtor for eight years, until early July 2013. Shannon Helton worked for the debtor from August 2008 until mid February 2013.

This case was filed on February 1, 2013.

The late filing of the subject proofs of claim was due to the fact that the debtor realized post-petition, in or about April 2013, that it had incorrectly classified Jennifer Wenger and Shannon Helton as exempt employees, when they should have been classified as non-exempt, hourly employees. The reclassification gave rise to the subject proofs of claim for unpaid overtime wages. The claims bar date in this case was May 29, 2013, whereas Jennifer Wenger and Shannon Helton filed their proofs of claim on September 13, 2013.

More, Jennifer Wenger and Shannon Helton did not know of the bankruptcy filing until approximately August 2, 2013, when the debtor's counsel notified them of this case. As Jennifer Wenger and Shannon Helton were not included in the debtor's schedules and did not receive notice of this bankruptcy case and the claims bar date, there is excusable neglect for deeming the proofs of claim as timely filed. The motion will be granted. The granting of this motion does not resolve any potential objections to the claims.

19. 11-47056-A-11 HILL TOP LLC
STC-1
NORMAN R. NEDDE, M.D., INC. VS.

MOTION FOR
RELIEF FROM AUTOMATIC STAY
9-17-13 [138]

Tentative Ruling: The motion will be granted.

The movant, Norman R. Nedde, M.D., Inc., seeks relief from the automatic stay as to a 2.85-acre parcel of undeveloped land in Placer County, California, pursuant to 11 U.S.C. § 362(d)(1), (d)(2), and (d)(3).

This is a single asset real estate case. The debtor has checked the box on the voluntary petition, identifying the case as a single asset real estate case, as defined in 11 U.S.C. § 101(51B). Docket 1. That provision says that "The term 'single asset real estate' means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto."

Schedule A lists two pieces of real property, the subject property and another parcel of land, 2.65 acres, also located in Placer County, California. As the court recalls from the debtor's attempts at confirming a plan, both pieces of real property are part of the same project, the Hill Top Center, involving the construction of a hotel and two mixed-use buildings in Auburn, California. The debtor expects that the two properties will generate the income, albeit investment income, to fund a plan. This meets the working definition of single asset real estate under 11 U.S.C. § 101(51B).

The debtor has admitted on the voluntary petition that this is a single asset real estate case, the debtor's real property and business structure meet the working definition of a single asset real estate, and the debtor's opposition to this motion does not challenge that this has been a single asset real estate case since the petition date. Given this, 11 U.S.C. § 362(d)(3) applies.

11 U.S.C. § 362(d)(3) provides that "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

. . .

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate."

This case was filed on November 17, 2011, nearly two years ago. The order for relief was entered on that date. The debtor did not file a plan within 90 days after the entry of the order for relief. The debtor filed a plan for the first time on March 24, 2012, 128 days after the order for relief date. Notably, that plan was never confirmed. The same is true as to the last plan filed by the debtor on June 11, 2012, over one year ago. That plan never reached confirmation because the court denied approval of the accompanying disclosure statement. Docket 89.

Further, the debtor did not commence monthly payments to the movant within 90 days after the entry of the order for relief. Only now the debtor states that "[it] does agree that Creditor is entitled to adequate protection and therefore proposes" "Adequate protection from the petition date of 11/17/2011 based on the present value of $215,000.00 at 5%." Docket 149. But, we are now in the 23rd month after the petition filing date and no such payments have been commenced. To comply with 11 U.S.C. § 362(d)(3)(B), monthly payments to the movant should have been commenced no later than February 15, 2012, 90 days after the November 17, 2011 order for relief date.

To the extent the debtor may complain because "[it] has made countless attempts in the last eight months to contact Neede and his attorney of record" so the debtor can make monthly payments to the movant, this does not undo the fact that the debtor did not commence monthly payments to the movant within 90 days after the entry of the order for relief. More important, eights months ago was still far beyond the 90-day post petition date deadline prescribed by 11 U.S.C. § 362(d)(3). As mentioned above, we are now in the 23rd month of the case.

To the extent the debtor may complain that its obligations under 11 U.S.C. § 362(d)(3) apply only 30 days after the court determines that the debtor is subject to 11 U.S.C. § 362(d)(3), the court disagrees. The court does not have to determine that 11 U.S.C. § 362(d)(3) applies, as the debtor has admitted on the voluntary petition that this is a single asset real estate case. The court's determination of whether 11 U.S.C. § 362(d)(3) applies is only relevant

when the debtor disputes that this is a single asset real estate case. Here, the debtor does not dispute this. It has admitted this as of the petition date. Docket 1. 11 U.S.C. § 362(d)(3) has been in force since the petition date.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(3) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief will be awarded.

The movant claims that the property has a value of $215,000, whereas it is encumbered by claims totaling $711,892. Docket 142. The movant's deed is the sole deed of trust on the property, securing a claim of approximately $694,515.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived. Addressing the movant's evidentiary objections and other grounds for granting relief from stay is unnecessary.

20. 12-24061-A-7 JOHN/JENNIFER EVPAK — MOTION TO
13-2240 BRR-1 — DISMISS
EVPAK ET AL V. BROWN ET AL — 9-6-13 [8]

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants, Adam Brown, Dennis Castrillo, Geoffrey Evers and Evers Law Group, PC, seek dismissal of the two claims - one for violation of the automatic stay under 11 U.S.C. § 362 and the other for violation of the discharge injunction of 11 U.S.C. § 524 - brought by the plaintiffs, John and Jennifer Evpak. The motion is brought under Fed. R. Civ. P. 12(b)(6), as made applicable here by Fed. R. Bankr. P. 7012.

The defendants ask for dismissal, arguing that the claims cannot be brought in the form of an adversary proceeding, as they are not authorized by Fed. R. Bankr. P. 7001. They contend that the claims are contested matters that are governed by Fed. R. Bankr. P. 9014 and 9020.

Fed. R. Bankr. P. 7001 provides: "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(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;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter

12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452."

As to the stay violation claim, this claim can be properly brought under Fed. R. Bankr. P. 7001(1) and (9), which allow the bringing of adversary proceedings "to recover money or property" and "to obtain a declaratory judgment relating to any of the foregoing." The stay violation claim has been brought pursuant to 11 U.S.C. § 362(k), which allows for the recovery of "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages," for willful violation of a stay. 11 U.S.C. § 362(k)(1).

The Bankruptcy Code gives the plaintiffs a private right of action under 11 U.S.C. § 362(k), allowing for the recovery of money in the form of damages. An adversary proceeding is permitted by Fed. R. Bankr. P. 7001(1). It is also permitted by Fed. R. Bankr. P. 7001(9), as stay violation claims require the court also to declare that a violation has taken place.

Importantly, the plaintiffs have not invoked the court's contempt power in bringing the stay violation claim. The court sees no mention of contempt of court in the complaint, with regard to the stay violation claim. The only reference is to 11 U.S.C. § 362.

The court rejects the defendants' argument that the stay violation claim requires a motion because it is not a proceeding to recover money or property under Fed. R. Bankr. P. 7001(1). The defendants contend that they have not taken any money or property from the plaintiffs and, thus, the stay violation claim cannot possibly be seeking to recover money or property. According to the defendants, Fed. R. Bankr. P. 7001(1) would apply only if they had obtained money or property of the plaintiffs in the process of violating the stay.

This interpretation of Rule 7001(1) is overly narrow and makes no sense for several reasons. First, the argument would make sense only if one limits the application of Fed. R. Bankr. P. 7001(1) solely to turnover requests. But, Rule 7001(1) is not limited only to turnover claims. The language of Rule 7001(1) is much broader than this. If Rule 7001(1) wanted to limit its application to turnover requests, it would have plainly referred to turnover requests. Yet, its language makes no mention of "turnover."

Second, Rule 7001(7) already provides that adversary proceedings include injunctions and other equitable relief, which would include affirmative injunctions and turnover requests. Limiting Rule 7001(1) to turnover requests

would make Rule 7001(7) superfluous. Rule 7001(1) is broader than the defendants' reading in that it applies to the recovery of money or property, including money in the form damages. See Dean v. Global Financial Credit, LLC (In re Dean), 359 B.R. 218, 221-22 (Bankr. C.D. Ill. 2006) (making it clear that requests for damages, including stay violation claims, fall within the purview of Fed. R. Bankr. P. 7001(1); also, discussing damages in the context of Rule 7001 and noting that damages are generally not available in contested matters); see also Rogers v. B-Real, LLC (In re Rogers), 391 B.R. 317, 321 (Bankr. M.D. La. 2008).

Third, limiting the application of Rule 7001(1) as argued by the defendants would not allow any claims for damages to be litigated as adversary proceedings. Aside from Rule 7001(1), no other part of the rule allows for the recovery of money.

For instance, under the defendants' reading of Rule 7001(1), a trustee may seek to avoid a transfer in an adversary proceeding only if he is seeking to recover the property transferred, *i.e.*, money or other property. Their reading of the rule would prevent that trustee from recovering the value of the transferred property in an adversary proceeding because, according to them, Rule 7001(1) applies solely to the recovery of the transferred property. See 11 U.S.C. § 550(a) (outlining the options for recovery after the avoidance of a transfer).

Notably, Rule 7001(1) does not limit the recovery of money or property to money or property *transferred*. This is another clue that the rule is much broader than the defendants are making it.

Another example of the problems with the defendants' interpretation of Rule 7001(1) is the litigation of more common claims for damages, such as breach of contract claims. Their interpretation would mean that no one can litigate the collection of receivables in an adversary proceeding because such actions are not seeking the recovery of money or property - rather, they are seeking the recovery of damages. The same would be true for tort actions - which are much more akin to stay violations - such as fraud, embezzlement, and conversion.

This court's broad interpretation of the application of Rule 7001(1) is also consistent with legal authority within the Ninth Circuit. In re Rugroden, 481 B.R. 69, 72 (Bankr. N.D. Cal. 2012) (allowing the recovery of damages under 11 U.S.C. § 362(k) in an adversary proceeding); In re Schweizer, 354 B.R. 272, 281 n.5 (Bankr. D. Id. 2006) (citing to Rule 7001(1) and noting in the context of TILA violation claims that a claim for damages should or, at the least, can be prosecuted in an adversary proceeding).

Fourth, another reason for allowing a stay violation claim to be brought in an adversary proceeding is that it is a claim for damages, meaning that more procedural protections are warranted - as available in an adversary proceeding - than for matters that may be brought solely as contested matters.

The motion will be denied as to the stay violation claim.

As to the discharge violation claim, there is no private right of action under the Bankruptcy Code. See 11 U.S.C. § 524; Barrientos v. Wells Fargo Bank, 633 F.3d 1186, 1188-89, 1191 (9th Cir. 2011); Walls v. Wells Fargo Bank, 276 F.3d 502, 508-09 (9th Cir. 2002); Cady v. SR Fin. Services (In re Cady), 385 B.R. 756, 757-58 (Bankr. S.D. Cal. 2008).

And, pursuant to Barrientos v. Wells Fargo Bank, 633 F.3d 1186, 1191 (9th Cir.

2011), contempt proceedings for violation of 11 U.S.C. § 524 must be brought by a motion and not via an adversary proceeding. Barrientos at 1190-91 (noting that when an injunction already exists, the enforcement of the injunction does not require another injunction, *i.e.*, another adversary proceeding; it requires an order of contempt). While this court does not have to agree with Barrientos, it has to follow it as it is binding legal authority on this court.

The court is not persuaded by the plaintiffs that after Barrientos the discharge violation claim can be litigated in an adversary proceeding. The plaintiffs' reference to Walls v. Wells Fargo Bank, 276 F.3d 502, 504 (9th Cir. 2002) and the district court's referral of Ms. Walls' "claims for contempt" to the bankruptcy court are not helpful. Walls at 504. The plaintiffs are contending that because the Ninth Circuit in Walls did not disturb the district court's referral of the contempt claims to the bankruptcy court, and because Barrientos relied on Walls in reaching its holding, somehow Barrientos and Walls allow the discharge violation claim to be litigated in this adversary proceeding.

The court disagrees. Walls "did not disturb" the district court's referral of the contempt claims to the bankruptcy court because - in its own words -

"Walls moved to refer the core bankruptcy issues to the bankruptcy court. The district court granted Walls's motion by referring her claims for willful violation of the automatic stay, and for contempt on account of the alleged violation of the automatic stay and the discharge injunction, to the bankruptcy court. Neither this referral, nor these claims, are before us on appeal."

Walls at 505.

This court then reads nothing in Walls to allow the plaintiffs to litigate their discharge violation claim in this adversary proceeding.

The court understands the plaintiffs' frustration with being able to litigate only the stay violation claim in the adversary proceeding and not the discharge violation claim, even though both claims arise from the same factual nucleus. However, if the plaintiffs wish to bring both claims as contested matters, they may do so because stay violation claims may be brought as a contested matter.

The motion will be granted in part and denied in part.

21. 12-24061-A-7 JOHN/JENNIFER EVPAK — STATUS CONFERENCE
13-2240 — 7-22-13 [1]
EVPAK ET AL V. BROWN ET AL

Tentative Ruling: None.

22. 12-27062-A-11 CECIL PULLIAM — MOTION FOR
MRL-7 — FINAL DECREE
9-10-13 [114]

Final Ruling: The hearing on this motion has been continued to October 28, 2013 at 10:00 a.m.

23. 13-22486-A-12 STEVEN SAMRA
WAC-2

MOTION TO CONFIRM PLAN
7-22-13 [78]

Final Ruling: This motion will be dismissed as moot because the case was dismissed on October 8, 2013. Docket 106.

24. 12-23595-A-7 JEFFREY PHILLIPS
13-2068 KY-1
PHILLIPS V. DEPARTMENT OF HEALTH AND HUMAN SERVICES

MOTION FOR LEAVE TO AMEND COMPLAINT
9-6-13 [52]

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

The motion will be granted.

The plaintiff, Jeffrey Phillips, is asking the court to grant leave for him to file a second amended complaint, dropping his 11 U.S.C. § 523(a)(8) and add some facts pertaining to his 42 U.S.C. § 292f(g) student loan dischargeability claim.

Fed. R. Civ. Proc. 15(a)(1), as incorporated by Bankruptcy Rule 7015, provides that "[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier."

Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

Absent undue delay, bad faith, dilatory motive, or prejudice to the opposing party, a presumption exists in favor of granting leave to amend. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Rule 15(a)(3) provides that "[u]nless the court order otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."

The defendant, the U.S. Department of Health and Human Services, has not responded to this motion. And, the court perceives no undue delay, bad faith, dilatory motive, or prejudice to the defendant. Accordingly, the court will grant leave for the plaintiff to file his SAC. As the defendant has been served with the complaint already, its response shall be due within 14 days after the October 15, 2013 hearing on this motion.