UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 16, 2016, at 2:30 p.m.

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1. **10-27601-E-13 RONALD/TRINA SPEAR**
16-2194
SPEAR ET AL V. BANK OF AMERICA, N.A. ET AL

STATUS CONFERENCE RE: COMPLAINT
9-15-16 [1]

Plaintiff's Atty: Scott J. Sagaria
Defendant's Atty: Unknown

Adv. Filed: 9/15/16
Answer: None

Nature of Action:
Declaratory judgment
Validity, priority or extent of lien or other interest in property

Notes:

The Status Conference is removed from the calendar, the court having issued an Order Dismissing this Adversary Proceeding pursuant to the request of Plaintiff-Debtor (Fed. R. Civ. P. 41(a)(1)(A)(i)).

NOVEMBER 16, 2016 STATUS CONFERENCE

No answer having been filed and there being proof of service on at least Bank of America, N.A., the court surmises that the creditor and Plaintiff-Debtor have been working to get the second deed of trust reconveyed. That would be consistent with similar complaints filed in other adversary proceedings.

At the Status Conference, Plaintiff-Debtor reported that the parties have requested that this adversary proceeding be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and submitted by ex parte motion. The court grants the ex parte motion (Dckt. 8), dismisses this adversary proceeding, and removes the matter from the calendar.

SUMMARY OF COMPLAINT

Ronald Spear and Tina Spear ("Plaintiff-Debtor") filed a complaint seeking a determination that any obligation owed by the Plaintiff-Debtor under their completed Chapter 13 Plan that is secured by a second deed of trust has been paid and the deed of trust is void. The Complaint alleges three causes of action. The First Cause of Action sounds in declaratory relief. The First Cause of Action asks for a judgment stating that the discharge granted in their Chapter 13 case is really a discharge.

The Second Cause of Action is one for the court to "extinguish" the second deed of trust. The court is uncertain of any legal authority for the court to "extinguish" interests in real property.

However, these two causes of action sound in a quiet title claim, asserting that whatever obligation existed to be secured by the deed of trust, that debt has been satisfied. No obligation remains for the deed of trust to secure. The Complaint alleges that in the bankruptcy case the court made a Section 506(a) value determination, finding that the claim secured by the second deed of trust was $0.00 and that the balance of the obligation was a general unsecured claim. In the Third Cause of Action, it is alleged that Plaintiff-Debtor completed the Chapter 13 Plan. Completion of the Plan would then permanently fix the debt secured by the second deed of trust at $0.00.

The plan having been completed and there being no obligation secured by the second deed of trust, it is rendered void by operation of California law (and possibly 11 U.S.C. § 506(d)). The court has addressed the legal underpinnings of "lien stripping" in two decisions, *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff'd*, 469 B.R. 803 (E.D. Cal. 2012) (discussion of "lien striping" in Chapter 13 case); and *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal 2013).

The first two causes of action can be fairly read as requesting a judgment of the court quieting title and determining that the second deed of trust is void and of no legal force and effect (as opposed to *extinguishing* an interest in the real property).

The Third and Fourth Causes of Action seek $500.00 in statutory damages and attorneys' fees pursuant to California Civil Code § 2941, and attorneys' fees pursuant to contract. These requests are consistent with the court's interpretation of the first two Causes of Action.

SUMMARY OF ANSWER

The Complaint names Bank of America, N.A. and Bank of New York Mellon as the Defendants. Both are federally insured financial institutions. No answers have been filed. The court notes that the summons and Complaint appear to have been personally served on the agent for Bank of America, N.A., but not served on Bank of New York Mellon. Dckt. 7.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff-Debtor alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2, Dckt. 1. In its answer, ---------- admits the allegations of jurisdiction and core

proceedings. Answer ¶¶ X, X, Dckt. X. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

2. **16-21305-E-13 RODERICK/ROSEMARIE TAPNIO** **CONTINUED STATUS CONFERENCE**
16-2155 **RE: AMENDED COMPLAINT**
TAPNIO ET AL V. PARTNERS FOR PAYMENT RELIEF DE II, LLC'S ET **10-20-16 [29]**

Plaintiff's Atty: Peter Macaluso
Defendant's Atty:
Dhruv M. Sharma [Wells Fargo Bank, N.A.] Party dismissed on 9/13/16
Unknown [Partners for Payment Relief De II, LLC]

The Status Conference is continued to xxxxxxxxxxxxxxxxxx.

Adv. Filed: 8/1/16
Answer: None

1st Amd Complaint filed: 8/1/16
Answer: None

2nd Amd Complaint filed: 10/20/16
Answer: None

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 10/12/16. Plaintiff-Debtor to file and serve an amended complaint and summons on or before 10/21/16. If the amended complaint and summons are not timely filed, the Adversary Proceeding shall be dismissed without prejudice for lack of prosecution, without further notice or hearing.

Amended Complaint filed 10/20/16 [Dckt 29]

NOVEMBER 16, 2016 STATUS CONFERENCE

Roderick Tapnio and Rosemarie Tapnio, the Plaintiff-Debtors, filed their Amended Complaint on October 20, 2016. It was served on October 25, 2016. Certificate of Service, Dckt. 31. The Amended Complaint recounts the travails of the Plaintiff-Debtor in their Chapter 13 case that was filed on March 2, 2016. The case was dismissed on March 31, 2016, for failure to file documents. On April 4, 2016, a "Trustee's Deed Upon Sale was conducted" on the Plaintiff-Debtor's residence, and on April 5, 2016, the court vacated the order dismissing the bankruptcy case.

The Amended Complaint states that on April 5, 2016, "the proper was sold in foreclosure." It appears that this allegation is that the trustee's deed under the deed of trust was delivered on April 5, 2016, the sale having been conducted on April 4, 2016. It is asserted that the issuance, delivery, and acceptance of the trustee's deed on April 5, 2016, violated the automatic stay in the Plaintiff-Debtor's bankruptcy case once the dismissal order was vacated on April 5, 2016.

3. 16-25210-E-13 MARCO SIERRA
16-2184
U.S. TRUSTEE V. SIERRA

STATUS CONFERENCE RE: COMPLAINT
9-8-16 [1]

Plaintiff's Atty: Allen C. Massey
Defendant's Atty: unknown

Adv. Filed: 9/8/16
Answer: none

Nature of Action:
Injunctive relief - other

The Status Conference is continued to 2:00 p.m. on February 22, 2017.

Notes:

Notice of Related Cases filed 9/9/16 [Dckt 7]

Request for Entry of Default by Plaintiff filed 10/19/16 [Dckt 9]; Entry of Default and Order re Default Judgment Procedures filed 10/20/16 [Dckt 11]

[UST-1] Motion for Default Judgment filed 10/27/16 [Dckt 13], set for hearing 1/12/17 at 1:30 p.m.

SUMMARY OF COMPLAINT

Tracy Hope Davis, the U.S. Trustee for Region 17 ("Plaintiff-Trustee") has filed a Complaint for injunctive relief against Marco Sierra ("Defendant-Debtor"). The Complaint alleges that the Defendant-Debtor's current and five prior bankruptcy cases in this District are part of a series of twenty-three bankruptcy cases filed by Defendant-Debtor and insiders of Defendant-Debtor.

Plaintiff-Trustee requests that the court enjoin Defendant-Debtor from filing another bankruptcy case for a period of eight years, unless it is authorized after a pre-filing review by the chief bankruptcy judge in the district in which Defendant-Debtor desires to file a bankruptcy case.

SUMMARY OF ANSWER

No Answer has been filed.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff-Trustee alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶ 2, Dckt. 1.

MOTION FOR DEFAULT JUDGMENT

Plaintiff-Trustee has filed a motion for entry of a default judgment, which is set for hearing on January 12, 2017, at 1:30 p.m.

4. **07-27123-E-13** **DOREEN GASTELUM** **CONTINUED STATUS CONFERENCE**
PGM-6 **RE: MOTION TO MODIFY ORDER FOR EVIDENTIARY HEARING**
6-12-15 [186]

Debtor's Atty: Peter G. Macaluso

Notes:
Continued from 10/12/16 to allow the Parties to document their settlement and conclude this matter.

The Status Conference is xxxxxxxxxxxxxxxxxxxxxxxxxxx.

STATUS REPORT FILED BY DEBTOR

On November 9, 2016, Debtor filed her Status Conference Statement, which points are outlined as follows:

A. Debtor believes that the City of Chicago has not provided documentation that title to the 61st Street Property has been transferred from Debtor to the City.

B. Additionally, title to the 45th Street Property and the 356 W. 45th Street Property are also to be transferred.

C. It has not been documented that the City of Chicago has no post-petition claims relating to the properties that it is asserting, or may attempt to assert, against the Debtor.

STATUS REPORT FILED BY CITY OF CHICAGO

On November 10, 2016, the City of Chicago filed its Status Conference Statement for this Motion and reports the following:

A. On October 25, 2016, the City of Chicago completed its judicial lien sale of the 61st Street Property. The City recorded the Judicial Deed on November 1, 2016.

B. Completion of this sale resolves the outstanding issues for which a stipulation would be required.

C. The attempts to meet and confer between the City of Chicago's counsel and Debtor's counsel have not culminated in the dismissals of the various actions now pending.

Status Report, Dckt. 227.

5. **16-20734-E-13 EUGENE SPENCER**
16-2059
SPENCER V. SPENCER, III

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-25-16 [1]

Plaintiff's Atty: Mark A. Serlin
Defendant's Atty: Pro Se

Adv. Filed: 3/25/16
Answer: 4/25/16

Counterclaim & Jury Demand Filed: 4/25/16
Answer: 5/9/16
Amd. Answer: 5/10/16

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny

The Status Conference is xxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 6/23/16

[MAS-1] Order Denying Motion for Abstention and Remand to State Court filed 6/29/16 [Dckt 31]

NOVEMBER 16, 2016 STATUS CONFERENCE

No status reports have been filed by the parties. At the Status Conference it was reported that xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

SUMMARY OF COMPLAINT

Disarie Spencer, Plaintiff, has filed a Complaint requesting that the court determine that the obligation owed by Eugene Spencer, the Defendant-Debtor, is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and (15). Dckt. 1. The Complaint alleges that Defendant-Debtor willfully concealed and hide from Plaintiff community property assets in excess of $100,000.00 in value. A breach of fiduciary duty action was pending in the State Court when Defendant-Debtor filed his bankruptcy case.

SUMMARY OF ANSWER

Defendant-Debtor admits and denies specific allegations of the Complaint. Answer, Dckt. 7. Defendant-Debtor also alleges eighteen affirmative defenses. Defendant-Debtor filed a counter-claim that

Plaintiff hid assets from Defendant-Debtor, which are asserted to be in excess of $90,000.00. Defendant-Debtor asserts that Plaintiff breached her fiduciary duty to Defendant-Debtor.

ORDER MODIFYING AUTOMATIC STAY TO ALLOW STATE COURT TO MAKE FAMILY LAW ISSUE DETERMINATION

On June 29, 2016, the court issued an order modifying the automatic stay to allow the State Court judge to determine the respective underlying state law claims of the Plaintiff/Counter-Defendant and Defendant-Debtor/Counter-Plaintiff. Order, Dckt. 31. This court will then use such findings and conclusions in ruling on the federal bankruptcy law issues.

CONFIRMED CHAPTER 13 PLAN

In Defendant-Debtor's Chapter 13 case a Chapter 13 Plan has been confirmed, with the stipulation of Plaintiff. 16-20734; Order Confirming Plan, Dckt. 48.

The confirmation of the plan does not resolve the claims and counter-claims asserted in this action. Civil Minutes for June 14, 2016 Confirmation hearing. *Id.*, Dckt. 45 at 3.

6. 10-50941-E-13 JOEL/MAGGIE DAUGHERTY — STATUS CONFERENCE RE: COMPLAINT
16-2192
DAUGHERTY ET AL V. FLAGSTAR BANK, FSB ET AL
9-14-16 [1]

Final Ruling: No appearance at the November 16, 2016 Status Conference is required.

Plaintiff's Atty: Ryan C. Wood
Defendant's Atty: Unknown

Adv. Filed: 9/14/16
Answer: None

Nature of Action:
Validity, priority or extent of lien or other interest in property
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 2:30 p.m. on January 18, 2017, to allow Plaintiff the opportunity to have adjudicated motions for entry of default judgements (the defaults of both Defendants having been entered).

Notes:

Entry of Default and Order Re: Default Judgment Procedures [Flagstar Bank, FSB] filed 10/19/16 [Dckt 10]

Entry of Default and Order Re: Default Judgment Procedures [NPA Associates, LLC] filed 10/26/16 [Dckt 16]

7. **10-33944-E-13 ALAN/JILL MORI**
16-2027
MORI ET AL V. WELLS FARGO BANK, N.A.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-15-16 [1]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Unknown

Adv. Filed: 2/15/16
Answer: None

Nature of Action:
Declaratory judgment
Recovery of money/property - fraudulent transfer
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is removed from the Calendar, the court having dismissed the Adversary Proceeding pursuant to the stipulation of the Parties.

Notes:
Continued from 8/10/16. Counsel for Wells Fargo Bank, N.A. confirmed that settlement offers were being exchanged and that this matter will either be settled by the time of the continued status conference or an answer will be filed and this action prosecuted.

NOVEMBER 16, 2016 STATUS CONFERENCE

No answer has been filed by Wells Fargo Bank, N.A. At the August 10, 2016 Status Conference counsel for Wells Fargo Bank, N.A. warranted to the court that the matter would either be settled or an answer filed.

There being no answer, the court takes Wells Fargo Bank, N.A. at its word that this adversary proceeding has been settled.

A Stipulation to Dismiss this Adversary Proceeding was filed on November 14, 2016. Dckt. 20.

AUGUST 10, 2016 STATUS CONFERENCE

In an updated Status Report Plaintiff-Debtor reports that its application for a loan modification has been denied. Dckt. 17. Counsel for Plaintiff-Debtor has been advised that Defendant Wells Fargo Bank, N.A. will participate in this case by August 5, 2016.

The court does not understand the intention behind this language. Wells Fargo Bank, N.A. has been participating in this Adversary Proceeding since it was served with the Summons and Complaint. A review of the Docket for this Adversary Proceeding reveals that as of August 8, 2016, there has been no new participation by Wells Fargo Bank, N.A.

At the Status Conference counsel for Wells Fargo Bank, N.A. confirmed that settlement offers are being exchanged and that this matter will either be settled by the time of the continued status conference or an answer will be filed and this action prosecuted.

APRIL 20, 2016 STATUS CONFERENCE

Alan Mori and Jill Mori, the Plaintiff-Debtor, report that though no answer has been filed, Defendant Wells Fargo Bank, N.A. and Plaintiff-Debtor have met and conferred concerning this Complaint and the rights of the Plaintiff-Debtor. Plaintiff-Debtor further reports that this matter may be resolved by a loan modification, which is in process. The court continues the Status Conference to allow these parties to continue in their good faith efforts to resolve the dispute.

8. **10-29750-E-13 ANTONIO/MARIA RAMIREZ**
16-2096
RAMIREZ ET AL V. BANK OF AMERICA, N.A.

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-11-16 [1]

ADV PROCEEDING DISMISSED: 10/25/2016

Final Ruling: No appearance at the November 16, 2016 Status Conference is required.

The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.

9. **16-20852-E-11** **MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 2-16-16 [1]**

Final Ruling: No appearance at the November 16, 2016 Status Conference is required.

Debtor's Atty: J. Luke Hendrix

Operating Reports filed: 8/12/16, 9/14/16, 10/14/16

The Chapter 11 Status Conference is continued to 3:00 p.m. on December 7, 2016.

Notes:
Continued from 8/10/16. The Debtor in Possession reported that it is working with creditor Wells Fargo Bank, N.A. on cash collateral issues, as well as a possible plan. The Debtor in Possession is addressing the (unexpected) claim of Anytime Fitness relating to prior common area expense charges.

[DNL-4] Application to Employ CTR Tax Planning & Preparation as Accountant filed 8/15/16 [Dckt 80]; Order denying filed 9/26/16 [Dckt 112]

[DNL-1] Supplemental Request to Extend Use of Cash Collateral Through November 30, 2016 filed 9/6/16 [Dckt 94]; Order granting and continuing hearing to 11/17/16 at 10:30 a.m. filed 9/22/16 [Dckt 106]

[DNL-6] Application to Employ Bachecki, Crom & Co., LLP as Accountant Pursuant to a Flat Fee filed 10/6/16 [Dckt 116]; Order granting filed 11/6/16 [Dckt 134]

NOVEMBER 16, 2016 STATUS CONFERENCE

No updated Status Conference Report has been filed by the Debtor in Possession. However, the Debtor in Possession has filed a proposed plan and disclosure statement, for which approval fo the disclosure statement is set for Decmember7, 2016. Notice of Hearing, Dckt. 139. Monthly Operating Reports have been timely filed by the Debtor in Possession. No other motions are pending at this time.

10. **12-39954-E-13 JOHN/MICHELLE PINEDA**
16-2002
PINEDA, JR. ET AL V. WELLS FARGO BANK, N.A.

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
7-5-16 [18]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Adam N. Barasch

Adv. Filed: 1/5/16
Answer: None

1st Amd Complaint Filed: 7/5/16
Answer: 7/29/16

Nature of Action:
Injunctive relief - other

Notes:
Continued from 6/22/16

First Amended Complaint filed 7/5/16 [Dckt 18]

Answer to First Amended Complaint filed 7/29/16 [Dckt 24]

NOVEMBER 16, 2016 STATUS CONFERENCE

XXXXXXXXXXXXXXXXXXXX

JUNE 22, 2016 STATUS CONFERENCE

Though ordered to file updated status reports, neither the Plaintiff-Debtor nor Wells Fargo Bank, N.A. have filed updated status reports. Dckt. 12.

Plaintiff-Debtor and the Creditor request that the court continue the Status Conference, which the court grants, to hearing 2:30 p.m. on November 16, 2016, to pursue their settlement discussions and implementation.

APRIL 20, 2016 STATUS CONFERENCE

The Plaintiff-Debtor reports that the initial accounting should be completed
The court continued the Status Conference to June 22, 2016 (sixty-three day continuance) and ordered that the Parties

SUMMARY OF COMPLAINT

John and Michelle Pineda ("Plaintiff-Debtor") filed a complaint for violation of the automatic stay and objecting to the claim of Wells Fargo Bank, N.A. It is requested in the First Claim for relief that Debtor be awarded damages pursuant to 11 U.S.C. § 362(k) and be held in contempt for violating the automatic stay.

In the Second Claim for Relief, Plaintiff-Debtor objects to Proof of Claim No. 7 filed by Wells Fargo Bank, N.A.

In the Third Claim for Relief, Plaintiff-Debtor requests "declaratory relief" for a determination of the rights and obligations of the Parties. Such does not sound in declaratory relief, but as an action asserting the existing, not future rights of the parties if some act is taken, or not taken.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. *See* Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. § 2201,

> § 2201. Creation of remedy
>
> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> (b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be

definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

The Complaint does not indicate why the claims objection is not filed as a claims objection and the request for 11 U.S.C. § 362(k) relief has not been brought as a contested matter. Neither are the proper subject of an adversary proceeding.

SUMMARY OF ANSWER

Wells Fargo Bank, N.A. ("Defendant") has filed an answer that admits and denies specific allegations in the Complaint. Defendant asserts six affirmative defenses.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint "[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction...," apply to complaints in Adversary Proceedings. In addition to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the additional pleading requirement concerning whether the matters in the complaint are core or non-core:

> "Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge**."

Fed. R. Bankr. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in an adversary proceeding. Fed. R. Bankr. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matters are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

> "(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core**. If the response is that the proceeding is **non-core, it shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

Fed. R. Bank. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. § 157(b)(2) [and presumably 28 U.S.C. § 1334), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b) [without specifying any specific subsection]. Complaint ¶ 2, Dckt. 18. To the extent that an objection to claim or a proceeding for holding a party in contempt for violating the automatic stay is a non-core proceeding (not arising under the Bankruptcy Code itself), Plaintiff-Debtor provides the additional consent to the bankruptcy judge issuing all orders and the final judgment for non-core matters. *See* Fed. R. Bank. P. 7008, which incorporates Fed. R. Civ. P. 8, for the pleading of jurisdiction, core and non-core proceedings, and consent or non-consent to determination of non-core matters.

In its answer, Wells Fargo Bank, N.A. denies the allegations of federal court jurisdiction for an objection to claim and for violation of the automatic stay. Answer ¶ 2, Dckt. 24. The Answer is devoid of any statement of federal court jurisdiction.

Wells Fargo Bank, N.A. goes further, asserting that whether this proceeding is a core or non-core proceeding is a "legal conclusion" for which no response is required. Leaving the court to guess, Wells Fargo Bank, N.A. does affirmatively state that it does not consent to the bankruptcy judge issuing orders and a final judgment for non-core proceedings.

While Wells Fargo Bank, N.A. has determined it does not need to respond to allegations that all claims in this Adversary Proceeding are core proceedings, the Supreme Court in enacting the Federal Rules of Bankruptcy Procedure has mandated otherwise. In Federal Rule of Bankruptcy Procedure 7012(b), the Supreme Court requires that in answering a complaint:

> "Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings
>
> (b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. **A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core.** If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

The pleading by Wells Fargo Bank, N.A. that the allegations of core or non-core do not require any response, which statement is made subject to the warranties of Federal Rule of Bankruptcy Procedure 9011, are incorrect. They appear to violate the warranties made by counsel in Federal Rule of Bankruptcy Procedure 9011(b)(1) and (2). Failing to respond and then providing a cryptic "I will not consent to anything that I may later contend is non-core, but I will hide my contentions that must be stated in the answer" is improper conduct.

11. **14-29361-E-7** **WALTER SCHAEFER** **PRE-TRIAL CONFERENCE RE: COMPLAINT FOR REVOCATION OF DISCHARGE**
15-2214
HUSTED V. SCHAEFER
11-6-15 [1]

Plaintiff's Atty: J. Russell Cunningham
Defendant's Atty: Douglas B. Jacobs

Adv. Filed: 11/6/15
Answer: 11/24/15

Nature of Action:
Objection/revocation of discharge

Notes:
Scheduling Order -
Close of discovery 8/25/16
Dispositive motions heard by 10/20/16

Defendant's Pretrial Conference Statement filed 11/7/16 [Dckt 16]

The Pre-Trial Conference is xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

NOVEMBER 16, 2016 PRETRIAL CONFERENCE

This is an interesting, and unusual adversary proceeding. The Defendant-Debtor has substantial assets that the Chapter 7 Trustee had been impeded in taking control of from the Defendant-Debtor. The Defendant-Debtor purported to sell and take the proceeds of property of the bankruptcy estate for which he was not authorized to sell and divert the proceeds. This led to extensive litigation in the bankruptcy case.

The court notes, and it is to the Defendant-Debtor's counsel's credit, he was able to impress on the Defendant-Debtor the significance of the Defendant, including the national and worldwide jurisdiction of the federal court, including the U.S. Marshal enforcing a writ to take the Defendant-Debtor into custody at the Miami airport when he would be returning from the property in the Caribbean (which was some of the property being withheld from the Trustee).

In his Pre-Trial Brief, Defendant-Debtor's counsel theorizes that this action was brought as additional leverage (the court's paraphrasing) to ensure that the Defendant-Debtor would comply with the orders of the court and the Bankruptcy Code. Dckt. 16. Counsel argues that Defendant-Debtor has cooperated with the Trustee in recovering all of the property of the estate.

In the Plaintiff-Trustee's Pre-Trial Brief (Dckt. 18), the Trustee's recounts the contentions that Defendant-Debtor failed to disclose a condominium in Costa Rica and multiple corporations in Costa Rica. Additionally, after conversion of Defendant-Debtor's bankruptcy case to one under Chapter 7 and the appointment of the Chapter 7 Trustee, Defendant Debtor purported to sell property of the bankruptcy estate and received $220,000.00 cash, which he then disbursed to his preferred creditors. The Plaintiff-Trustee further recounts the contentions that Defendant-Debtor received rents from the Costa Rican properties, some of which were used for his personal expenses (as opposed to the rent monies used for the care and maintenance of the properties).

Discussion of Resolution at the Pre-Trial Conference

At the Pre-Trial Conference, the court put to the attorneys for the respective parties what resolution, short of trial, could be advanced by the parties that: (1) allowed the Trustee to fulfill her duties to ensure that the rights of the estate are enforced and debtors know that the provisions of the Bankruptcy Code are enforced, and (2) recognize that while conduct not consistent with the Bankruptcy Code occurred, the Defendant-Debtor, with the assistance of his counsel, "saw the light" and did take steps to correct the prior conduct.

It was discussed that **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

SUMMARY OF COMPLAINT

Kimberly Husted, Plaintiff, the Chapter 7 Trustee in bankruptcy case no. 14-29361 filed by Walter Schaefer (Chapter 7 Case), Defendant-Debtor, seeks to obtain a judgment revoking Defendant-Debtors discharge in the Chapter 7 case. The Complaint alleges the failure to disclose assets and the failure to turnover assets, once discovered, to the Chapter 7 Trustee.

SUMMARY OF ANSWER

Defendant-Debtor admits and denies specific allegations in the Complaint.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, the Complaint alleges that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(J). Complaint, 1, 3, Dckt. 1. The Defendant-Debtor admits the jurisdiction and that this is a core proceeding. Answer, 1, Dckt. 7.

The court shall issue a Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.

B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2017**.

C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2017**.

D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before **----------, 2017**.

E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before **----------, 2017**.

F. The Trial shall be conducted at **----x.m. on ----------, 2017**.

The Parties in their respective Pretrial Conference Statements, Dckts. 18, 16, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff-Trustee Kimberly J. Husted	Defendant-Debtor Walter Helge Schaefer
Jurisdiction and Venue: 1. The Complaint alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(J). Complaint, 1, 3, Dckt. 1. The Defendant-Debtor admits the jurisdiction and that this is a core proceeding. Answer, 1, Dckt. 7.	Jurisdiction and Venue: 1. The Complaint alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(J). Complaint, 1, 3, Dckt. 1. The Defendant-Debtor admits the jurisdiction and that this is a core proceeding. Answer, 1, Dckt. 7.
Undisputed Facts: 1. On September 18,2014, the Debtor commenced the above-captioned bankruptcy case by filing a voluntary Chapter 13 petition. The Debtor's case was converted to one under Chapter 7 on January 31, 2015, since which time the Trustee has served as the duly appointed trustee for the Debtor's bankruptcy estate. 2. Among the assets of the Debtor's bankruptcy estate is the Debtor's interest in: (a) certain real property commonly known as Los Delfines, Bayside, Unit #2, Tambor, Costa Rica ("First Condominium");	Undisputed Facts: a. This bankruptcy was filed on September 18, 2014. b. Plaintiff, Kimberly Husted was appointed trustee. c. Defendant owned four pieces of real property: a home in Plumas County, California; an office building in Plumas County, California, and condominiums in Costa Rica. Other than the real property,

(b) certain real property commonly known as 184 Los Delfines, Tambor, Costa Rica ("Undisclosed Condominium"); (c) certain unimproved lots in Costa Rica identified as Guanacaste Nos. 37920-000 and 37922-000 ("Lots"); and (d) corporations organized under the laws of Costa Rica which hold title to the aforementioned real properties and identified as Morena Velar S.A. ("Velar"), Free Solutions Imperial S.A. ("Free Solutions"), Bayside Tambor JVM Dos S.A. ("Bayside"), and 3101495080 S.A. ("Lot Corporations"). 3. The Debtor's original schedules disclosed the Debtor's interest in the First Condominium, valued at $300,000 and not subject to claims of lien or exemption. The Debtor's interests in the Undisclosed Condominium, the Lots, Velar, Free Solutions, Bayside, and the Lot Corporations were not disclosed in the Debtor's original schedules. 4. Post-petition, without Bankruptcy Court authority or the knowledge or consent of the Trustee, in return for $220,000, the Debtor agreed to sell the estate's interest in certain equipment and permit a buyer to use the estate's interest in commercial property to conduct an in-place auction on a mutually agreeable date. The Debtor received the $220,000 and used the proceeds to pay selected obligations. 5. On Apri19, 2015, the Trustee caused to be filed a motion for turnover of the First Condominium, documents related to the First Condominium's control and transfer, including the shares and books for Velar, and the investment accounts. The motion was granted on May 22, 2015. 6. On April 13, 2015, the Debtor testified at a FRBP 2004 examination during which he: (a) disclosed that Velar held title to the First Condominium; (b) identified a previously undisclosed interest in a deposit account in the name of Velar at a San Jose, Costa Rica branch of Banco Nationale ("BN"); (c) identified a Tambor, Costa Rica branch of Century 21 ("Century 21 ") as real estate professionals with whom the First	there are few other assets of the estate, except for some machinery and office equipment. (When this matter was first filed as a Chapter 13, all of the property was, inadvertently, left off of the schedules. They have since been amended as appropriate to allow the administration of this case.) d. Debtor acted rashly during the Chapter 13 bankruptcy, and thinking he could reduce some of his debts, entered into an agreement to sell the machinery and office equipment. That transaction was "unwound" by the Trustee, with Debtor's full cooperation. e. The Plaintiff has abandoned the office building and the home in Plumas County is exempt pursuant to California Homestead laws, leaving no value for the estate. Thus, the Trustee is in the process of liquidating the condominiums in Costa Rica. f. During the administration of the estate, Debtor spent some time in Costa Rica and stayed in one of the Condominiums. He has since vacated those premises at the trustee's request to allow it to be sold.

Condominium was listed for sale in 2014; and (d) stated there was no other real property in the world that he owned other than the real properties disclosed in his original schedules. 7. On April 17, 2015, the Debtor for the first time disclosed his interest in the Undisclosed Condominium. 8. Despite the Debtor's claims regarding Velar, Bayside held title to the First Condominium, Free Solutions held title to the Undisclosed Condominium, and the Lot Corporations held title to the Lots. 9. After the undisclosed assets were identified, the Trustee, through counsel, requested the Debtor stipulate for turnover (DNL-7), the Debtor amend his schedules and SOFA, and that the Debtor execute in the presence of a notary a consent authorizing Breedy, the Debtor's Costa Rican counsel, to deliver the contents of all files in its possession to assist with the estate's liquidation of the assets in Costa Rica. 10. The stipulation and consent were provided to the Debtor's counsel for execution on or about April 29, 2015. 11. On May 5, 2015, the Court entered an order granting DNL-7, the stipulation between the Debtor and the Trustee that provided for the Debtor to: (a) account for and turnover the legal and equitable interests of Velar, Free Solutions, Bayside, and the Lot Corporations; (b) account for and turnover the legal and equitable interests in the First Condominium, the Undisclosed Condominium, and the Lots; (c) account for and turnover the legal and equitable interests of the Debtor and the Costa Rican corporations in funds held by BN, Breedy, and Century 21; and (d) direct all agents, including BN, Breedy, and Century 21, to comply with instructions of the Trustee and her attorneys with respect to the Costa Rican corporations and properties. 12. On May 6, 2015, the Debtor's counsel emailed a copy of the Debtor signed and notarized consent	

("Notarized Consent") authorizing Breedy to deliver the contents of all files in its possession to the Trustee's special counsel. Despite emailing a copy of the Notarized Consent, the original was not provided to the Trustee. 13. On May 19, 2015, the discharge of the Debtor was entered. 14. On August 26, 2015, the Trustee, through counsel, requested that the Debtor provide the original Notarized Consent. On at least four other occasions, the Trustee's counsel made requests for the original Notarized Consent. On September 14,2015, the Debtor's counsel indicated that the Debtor was out of the country, he would return on September 27,2015, and would provide an original signature when he returned. 15. In October 20 15, the Trustee sent a text message to the Debtor requesting the original Notarized Consent or if he no longer possessed the original, a new consent. As of November 6,2016, the Debtor had not responded to the Trustee's request nor had the Trustee received the necessary documentation to obtain the legal and equitable interests in the First Condominium, the Undisclosed Condominium, the Lots, and the related Costa Rican entities. 16. On November 4, 2015, the Trustee filed DNL-15, her motion to hold the Debtor in contempt for failing to comply with the Court's turnover orders on DNL-5 and DNL-7. 17. On November 23, 2015, following the initial hearing on the motion for contempt, the Court entered an order affording the Debtor "a final opportunity to comply [with the Court's orders entered on May 5, 2015 and May 22,2015] before a Civil Sanction of$100,000 is imposed . . . ." The matter was continued to December 15, 2015, at 1 :30 p.m. for the Court to ascertain whether the Debtor complied with the Court's orders by December 14, 2015. 18. By December 15, 2015, the Debtor had not fully	

complied with the Court's orders. The biggest issues were that the Debtor had yet to sign over the shares of stock for the Costa Rica assets to the Trustee and a full accounting of rents collected had not been provided. The hearing was continued to January 7, 2016, to allow additional time to address this issue. 19. Following the hearing on December 15, 2015, the Debtor turned over $4,100 to the Trustee and represented that the sum was all the money left over in the Costa Rican accounts in which rental monies were deposited. 20. On January 5, 2016, the Debtor executed a declaration that provided an accounting of rental monies received on account of the real properties located in Costa Rica. The Debtor explained that all the rents collected were placed in and all the expenses were taken out of two accounts in Costa Rica - a Free Solutions Account and a Morena Velar Account. The Debtor further explained that he received $21,300.00 in rents and incurred $17,077.00 in expenses, of which approximately $153.00 per month was being automatically withdrawn for utilities. 21. The Free Solutions Account was previously not disclosed. 22. Account statements for the Free Solutions Account and the Morena Velar Account were eventually turned over to the Trustee. The account statements reflect that the Debtor collected approximately $21,300 in rents, of which $7,858.01 was used for personal expenses. In addition, the account statements reflect ending balances of $5,738.81, of which $4,100 was turned over to the Trustee. 23. On July 15,2016, the Court entered an order granting DNL-19, the Trustee's and the Debtor's stipulation for the Debtor to turn over to the Trustee $9,496.82, which accounts for the $7,858.01 of rents used for personal expenses and the $1,638.81 ending balance not turned over to the Trustee.	

Disputed Facts: 1. The Debtor's failure to originally disclose the other Costa Rican properties and the entities holding title to the properties impaired the Trustee's ability to protect the estate's rights as possession of the shares and books for the entities were necessary to take corporate action in Costa Rica. 2. At the time DNL-5 was filed, the Trustee had recently discovered the Debtor had stolen assets of the bankruptcy estate, the Debtor had not been cooperating with the Trustee's efforts to identify, evaluate, and preserve the bankruptcy estate's interest in the First Condominium, and the Debtor had not been responding to the Trustee's turnover demands or requests for adequate assurance that the First Condominium would not be placed out of reach of the Bankruptcy Court. 3. The Undisclosed Condominium, the Lots, Velar, Free Solutions, Bayside, and the Lot Corporations were only disclosed by amendments to schedules after the Trustee learned of the estate's interest. 4. Prior to the resolution of the contempt proceeding, the Debtor refused to obey a lawful order of the Court. Indeed, the Debtor did not comply with the Court's orders on DNL-5 and DNL-7. 5. Prior to the resolution of the contempt proceeding, the Debtor knowingly and fraudulently failed to report the acquisition and entitlement to the rental proceeds. In addition, the Debtor falsely represented the amount of the proceeds he collected and used. It was only after a review of the account statements that the Trustee learned of the true amount of proceeds that were misappropriated. Had the Trustee not reviewed the account statements, the Trustee would not have discovered the additional funds. Moreover, the Debtor later acknowledged the use as demonstrated by the stipulation for turnover. 6. The Debtor has not been cooperative throughout this proceeding, which has made it very difficult for the Trustee to perform her duties.	Disputed Facts: a. Defendant believes that Plaintiff brought this action to "ensure" Defendant's cooperation with the administration of this estate. This has been accomplished and the Defendant has done nothing to interfere with the Trustee's duties in this regard. Although the Debtor may not have acted as quickly as the Trustee requested in vacating the Costa Rican property or cooperating with the Trustee's attorneys in Costa Rica, he has complied with all of her requests and proceeded as directed to help her administer the bankruptcy. b. Nothing the Defendant has done in this matter rises to the level of an act warranting the denial of his discharge.

Disputed Evidentiary Issues: 1. None Identified.	Disputed Evidentiary Issues: 1. None Identified.
Relief Sought: 1. Revocation of the Defendant-Debtor's Discharge pursuant to 11 U.S.C. § 727(d).	Relief Sought: 1. Plaintiff-Trustee seeks denial of Defendant-Debtor's discharge.
Points of Law: 1. 11 U.S.C. § 727(d).	Points of Law: 1. 11 U.S.C. § 27(d)(3), which allows a trustee to seek revocation of the Debtor's discharge if he has committed an act specified in 727(d)(6)
Abandoned Issues: 1. None Identified.	Abandoned Issues: 1. None Identified.
Witnesses: 1. Walter Helge Schaefer 2. Kimberly J. Husted 3. Luis Carballo 4. Adolfo Breedy 5. Debbie Dugan 6. Douglas Jacobs	Witnesses: 1. Walter Helge Schaefer
Exhibits: 1. The Debtor's Voluntary Petition. 2. The Debtor's Schedules and Amended Schedules.	Exhibits: 1. Bankruptcy petition, schedules, and statement of financial affairs filed by

3. The Debtor's SOFA. 4. Complaint and Answers filed in the above-captioned adversary proceeding. 5. The Trustee's Motion for Turnover (DNL-5), related documents, supporting declarations, order, and civil minutes. 6. The Trustee's and the Debtor's stipulation for turnover (DNL-7) and related documents and order. 7. April 13,2015 deposition transcript from deposition of the Debtor. 8. August 26, 2015, September 14, 2015, and September 25, 2015 correspondences related to the compliance with the orders on DNL-5 and DNL 9. The Trustee's motion for contempt (DNL-15), related documents, supporting declarations, status reports, and civil minutes for the hearings. 10. Banco Nacional account statements for Free Solutions. 11. Banco Nacional account statements for Velar. 12. Rental agreement with tenants for 184 Los Delfines, Tambor, Puntarenas, #27402	debtors, and all amendments thereto.
Discovery Documents: 1. 2004 Examination of Debtor.	Discovery Documents: 1. None Identified.
Further Discovery or Motions: 1. None Identified.	Further Discovery or Motions: 1. None Identified.
Stipulations: 1. None Identified.	Stipulations: 1. None Identified.

Amendments: 1. Plaintiff-Trustee seeks to amend according to proof at trial to request revocation of discharge pursuant to 11 U.S.C. § 727(d)(2) [acquired property of estate, and knowingly and fraudulent failed to report, or deliver, or surrender the property to the trustee].	Amendments: 1. None Identified.
Dismissals: 1. None Identified.	Dismissals: 1. None Identified.
Agreed Statement of Facts: 1. None Identified.	Agreed Statement of Facts: 1. None Identified.
Attorneys' Fees Basis: 1. Not Claimed.	Attorneys' Fees Basis: 1. Not Claimed.
Additional Items 1. None Identified.	Additional Items 1. Defendant-Debtor asserts the following: "This adversary should be dismissed by the Plaintiff. Defendant has not refused to comply with any court order or any request of the Trustee. If the trustee is concerned that Defendant will not comply with such in the future, and then this matter should be dismissed without prejudice should that occur."
Trial Time Estimation: Not Stated	Trial Time Estimation: Not Stated

12. **15-25168-E-13** **DEBRA MCCLAIN**
15-2152

PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT FOR OBJECTION MCCLAIN V. SULLIVAN ET ALTO CLAIM; DECLARATORY RELIEF; AND RELATED STATE CAUSED OF ACTION
11-3-15 [18]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Kirk Steven Rimmer

Adv. Filed: 8/3/15
Answer: 9/11/15
Amd. Cmplt. Filed: 11/3/15
Answer: 11/15/15

The Pre-Trial Conference is xxxxxxxxxxxxxxxxxxxxxx.

Nature of Action: Declaratory judgment, Validity, priority or extent of lien or other interest in property Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Scheduling Order -
Disclose experts by 1/29/16
Close of discovery 5/30/16
Exchange expert reports by 6/30/16
Dispositive motions heard by 10/21/16

[KSR-1] Motion to Compel re production of documents/answers to interrogatories filed 2/9/16 [by Defendants] [Dckt 31]; Withdrawal of motion filed 4/5/16 [Dckt 45]

Order approving stipulation re continuing discovery cut-off filed 4/10/16 [Dckt 47]

Order Appointing Resolution Advocate and Assignment to the Bankruptcy Dispute Resolution Program filed 7/17/16 [Dckt 51]

NOVEMBER 16, 2016 PRE-TRIAL CONFERENCE

In the Complaint, the Plaintiff-Debtor asserts a claim for breach of fiduciary duty and objects to the claim of Defendants in Plaintiff-Debtor's Chapter 13 bankruptcy case. Plaintiff-Debtor's monetary claims are based on the same facts and circumstances relating to the objection to claim.

On October 13, 2016, the court issued an order dismissing Plaintiff-Debtor's Chapter 13 bankruptcy case. Bankr. E.D. Cal. 15-25168.

No pre-trial statements have been filed by either Plaintiff-Debtor or the Defendants. This Adversary Proceeding has not been dismissed by the Parties.

At the Pre-Trial Conference, it was reported to the court **xxxxxxxxxxxxxxxxxxx**.

SUMMARY OF COMPLAINT

The First Amended Complaint asserts that Defendant Sullivan breached fiduciary duties to Plaintiff-Debtor in connection with an $80,000 loan made in September 2006. Plaintiff-Debtor first seeks to have the claim of Defendants disallowed in its entirety as unenforceable. The Second Cause of Action is stated as seeking a declaration of the rights and obligations of the parties, but further requests that the lien of Defendants be voided. The Third and Fourth Causes of Action assert claims for fraud. The Complaint also requests the award of contractual and statutory attorneys fees and costs.

SUMMARY OF ANSWER

In the Answer, the Defendants admit and deny specific allegations in the First Amended Complaint. Defendants also assert four affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The First Amended Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) [allowance or disallowance of claim]. First Amended Complaint 2,3; Dckt. 18. Plaintiff-Debtor further consents to the bankruptcy judge issuing all orders and final judgment for any non-core matters included in the First Amended Complaint. 6. *Id.*

In their Answer, Dusty Sullivan, Dusty Sullivan Profit Sharing Plan, Sierra Investments Robert Chonka Profit Sharing Plan, Poly Comp Trust Company and West America Bank for the benefit of Marilyn Chiang, Dean A. Howell Profit Sharing Plan, Kenneth Meyer IRA, Connie Holt IRA, Westamerica Bank, Polycomp FBO Margo Glendenning, IRA, David N. Muraki and Judy Muraki as joint tenants custodian for Peter Muraki, minor child, admit the allegations of jurisdiction and core proceedings. Answer 2, 3, Dckt. 24. Further, Defendants admit Paragraph 4 of the First Amended Complaint (consent to bankruptcy judge issuing all orders and final judgment for non-core matters), which the court accepts as Defendants, and each of them, consents to the bankruptcy judge issuing all orders and final judgment for any non-core matters that are included in the First Amended Complaint. To the extent that any issues in this Adversary Proceeding are related to matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court. Civil Minutes, Dckt. 15; Original Scheduling Order, Dckt. 16.

13. 12-93049-E-11 MARK/ANGELA GARCIA CONTINUED MOTION TO SELL
MJH-18 Mark Hannon 10-25-16 [871]

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

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)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 25, 2016. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

The Motion to Sell Property 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 Sell Property is denied without prejudice.

The Bankruptcy Code permits the court to authorize the sale of property by a fiduciary of the bankruptcy estate (trustee, debtor in possession, or Chapter 13 debtor after a noticed hearing. 11 U.S.C. § 363. FN.1. These provisions are incorporated in the confirmed Chapter 11 Plan in this case, providing that the property described below will be sold through the bankruptcy court. Plan, Class 3 treatment terms, p.6:7–10, (which also states that United States Fire Insurance has agreed to a 20% carve-out to be disbursed to creditors holding general unsecured claims). Here, Mark Garcia and Angela Garcia, Plan Administrators under the Confirmed Chapter 11 Plan (who are also the Debtors in this case) ("Movant" or "Plan Administrators/Debtors"), seek authorization to sell the real property commonly known as 5672 Eleanor Road, Oakdale, California ("Property") under the terms of the confirmed Chapter 11 Plan.

FN.1. Unless otherwise designated, the debtor has the duty as a matter of bankruptcy law to perform the terms of the plan. 11 U.S.C. § 1142(a). The plan administrator serves in that capacity to perform the plan, not to use those powers to personally benefit the debtor, much in the similar capacity as a trustee, receiver, or other third-party who is responsible to the beneficiaries (the creditors) of the corpus of the plan. The confirmed Chapter 11 Plan provides the following definition: "'Plan Administrators' means Mark Anthony Garcia and Angela Marie Garcia. The Plan Administrators shall perform the duties and obligations under the terms of this Plan." Order, Dckt. 781; Plan attached, p. 2:10–11.

U.S. TRUSTEE'S RESPONSE

Tracy Hope Davis, the United States Trustee, filed a response on November 8, 2016. Dckt. 883. The U.S. Trustee notes, as has the court, that Plan Administrator/Debtor Mark Garcia's Declaration (Dckt. 851) is false as to statements about the proposed sale being an arm's length transaction because Plan Administrator/Debtor Mark Garcia is actually a member and owner of Interface Investment Capital, LLC ("Buyer").

The U.S. Trustee asserts that the timing of events with the present Motion suggests that Plan Administrators/Debtors have been pursuing a transaction with Buyer for a while. Buyer filed Articles of Organization with the California Secretary of State on May 17, 2016, and the proposed purchase agreement was signed on July 15, 2016.

The U.S. Trustee expresses concerns that:

A. this Motion does not provide any information as to how Buyer is going to fund $675,000.00 in cash plus an estimated $100,000.00 in repairs;

B. a profit-seeking house flipper would pay more than someone interested in residing on the Property;

C. no information has been provided about the possibility of Cal Trans using the Property for a major freeway interchange;

D. the Motion does not provide for overbidding;

E. the Motion does explain how the Plan Administrators'/Debtors' expected 20% profit from selling the property will be allocated under the confirmed plan; and

F. the Motion was filed on sixteen days' notice, short of the twenty-one days required by Federal Rule of Bankruptcy Procedure 2002(a)(2).

The court notes that the last concern has been addressed satisfactorily by the court continuing the hearing to November 16, 2016, which allowed for twenty-two days' notice.

Regarding Christopher L. Martin of Buyer, the U.S. Trustee states that he appears to have been a debtor in 2012 Bankruptcy Case No. 12-92340-E. In 2013, a Christopher Lynn Martin testified at a Rule 2004 examination in that case that he resided in Turlock, California, he had worked in the mortgage industry until 2008, and he had accepted a 2% fractional interest in real property located at 12118 Lyon Road in Hughson, California, to help some friends with a loan modification.

NOVEMBER 10, 2016 HEARING AND ORDER TO SHOW CAUSE

At the hearing, the court continued the matter to 2:30 p.m. on November 16, 2016, specially set to be heard in Courtroom 33 of the Bankruptcy Court in Sacramento, California. The court ordered the appearance of all the parties and their counsel, including a senior representative of USFI with authority to make decisions concerning USFI's claim in this case and the payment of 20% of the net sales proceeds into the Chapter 11 Plan as provided in the Chapter 11 Plan.

The court issued a separate order to show cause why; in light of the perjury committed by Mark Garcia, the failure of the Plan Administrators/Debtors acting in their personal financial interests rather than performing the plan, and the contention that counsel for the Plan Administrators/Debtors preparing pleadings, including declarations under penalty of perjury, which contain inaccurate information and not obtaining accurate information from his clients, or the Plan Administrators/Debtors providing counsel with inaccurate information; the court should not appoint a receiver under applicable California law to perform the confirmed Chapter 11 Plan and perform the fiduciary duties of a plan administrator, appoint a replacement plan administrator if requested by a party in interest, or convert this case to one under Chapter 7 for the appointment of an independent Chapter 7 Trustee fiduciary (not the Chapter 11 Trustee) to recover property and enforce rights of the estate in this bankruptcy case. That Order to Show Cause was set for hearing at a separate date and time, to afford all parties the opportunity to consider the issues and determine the legal ramifications flowing not only from such proceedings, but testimony they have, and may be included to give under penalty of perjury in connection with this bankruptcy case.

PRIOR MOTION TO SELL PROPERTY

Plan Administrators/Debtors, the Movants, originally sought to have the court approve the sale of this property, with an approximate 20% of net proceeds after payment of the senior lien and costs carve-out paid to Movants' attorney (for work done as counsel for Movants as Debtors in Possession and then as Debtors, after the Chapter 11 Trustee was appointed). When it was reported by the U.S. Trustee at the October 20, 2016 hearing on that motion that Mark Garcia, one of the fiduciary plan administrators under the Plan and one of the debtors, appeared to be a member of the proposed purchaser as disclosed in the California Secretary's of State records—which fact was not only not disclosed, but Mark Garcia testified under penalty of perjury that the Debtors and Plan Administrators did not have any interest in the purchaser—the court denied the prior motion without prejudice. Civil Minutes, Dckt. 868.

The Chapter 11 Trustee had negotiated a 20% carve-out for the bankruptcy estate. Exhibit C in support of the prior motion was an excerpt from the confirmed Plan in this case, stating that after payment of the obligation secured by the senior lien, United States Fire Insurance is to be paid 80% of the proceeds and 20% into the Plan for distribution to creditors holding general unsecured claims. Exhibit E, Dckt. 852. There are no time or other limitations on the 80%-20% split of the net proceeds.

In the prior motion, the Plan Administrators/Debtors sought to have the $21,756.00 carve-out paid to their attorney, not into the confirmed Plan for distribution to creditors holding general unsecured claims.

The Plan Administrators/Debtors and United States Fire Insurance Company then filed a "stipulation" on October 10, 2016 (Dckt. 864), that recites various "facts," as interpreted by the Plan Administrators/Debtors and concurred in by USFI. These included:

> A. The Chapter 11 Plan "incorporated" the Chapter 11 Trustee's stipulation with USFI for the 20% carve-out.
>
> B. The 20% carve-out was subject to USFI's "withdrawal of consent to the Stipulation if the Oakdale Property had not been sold within six months of the Order approving the Stipulation."
>
> C. That USFI was not withdrawing its consent under the Chapter 11 Trustee's Stipulation, but USFI was requiring that $21,756.00 of the sales proceeds (the 20% carve-out) be paid to the Plan Administrators'/Debtors' counsel.

Stipulation, Dckt. 864.

When the issue arose at the 10:30 a.m. hearing on October 20, 2016, as to whether Plan Administrators/Debtors had any interest in, and who the purchaser actually was, the court continued the hearing to 2:30 p.m. that afternoon to allow the Plan Administrators/Debtors to address this issue and clear the way for the court to approve the sale. Unfortunately, the U.S. Trustee obtained information indicating that Mark Garcia's statements under penalty of perjury of not having any interest in the purchaser were false.

At the 2:30 p.m. continued hearing on October 20, 2016, counsel for the Plan Administrators advised the court that the Plan Administrators were abandoning any attempt to recover the 20% carve-out and that all of the money would just go to USFI. This sudden abandonment of this $21,756.00 asset of the plan estate, which USFI just hours earlier was willing to have paid out under the Plan terms, was shocking.

In the proper motion to sell (Dckt. 849) the Plan Administrators/Debtors (though the motion identified them only as "Debtors," ignoring their fiduciary obligations as the Plan Administrators under the confirmed Chapter 11 Plan), the court is directed to read the declaration of Mark Garcia to discover the grounds upon which the relief is requested. Motion, ¶ 1, Dckt. 849. The motion states that the sales price is $675,000.00, the obligation secured by the senior deed of trust is stated to be ($500,000.00), USFI is to be paid ($130,000.00), and ($21,756.00) is to be paid to counsel for the Plan Administrators/Debtors. These numbers indicate that there would be ($23,244.00) in escrow fees and other obligations to be paid through escrow.

In his declaration, Mark Garcia's testimony under penalty of perjury includes the following:

> A. "I am one of the debtor(s) in this proceeding and am making this declaration in support of our motion to sell our residence." Declaration ¶ 1; Dckt. 851.

With this testimony, Mark Garcia again ignores that he is a Plan Administrator and must act in that fiduciary capacity, not merely what he seeks to gain personally as the "Debtor."

B. "The offer seems to be the fair market value of our residence at this time. Cal Trans is still considering whether to use our residential property for a major freeway interchange." Declaration ¶ 5; *Id.*

As noted at the prior hearing, the Plan Administrators/Debtors offer no testimony as to what the Plan Administrators/Debtors have done to effectively and in a commercially reasonable manner to market the property to be sold.

C. "This sale is an arm's length transaction. **Neither my wife nor myself has any personal or family relationship with the buyers**." Declaration ¶ 7; *Id.* [emphasis added].

D. "We will not receive any proceeds from the sale. **We are requesting that our attorney Mark J. Hannon receive $21,756.00 from the escrow proceeds**." Declaration ¶ 8; *Id.*

E. "We owe a total of $40,000.00 to our attorney Mark J Hannon for representation in our bankruptcy proceeding, and the sum of $21,756.00 has been approved by the court." *Id.*

Again, the Plan Administrators/Debtors, and their attorney, ignore services provided by counsel as the attorney for the Debtors when they served in the fiduciary capacity as debtor in possession (which the court removed them from for cause and appointed a Chapter 11 trustee), and seek to divert monies as the Debtors (and their counsel) wish, without regard to the Plan Administrators'/Debtors' obligations under the confirmed Chapter 11 Plan.

As stated by the court at the October 20, 2016 hearing on the prior motion and in the Civil Minutes, the identity of the buyer was very cryptically stated in the prior motion and the Real Estate Purchase Agreement. By the time of the 2:30 p.m. continued hearing on October 20, 2016, the U.S. Trustee was reporting that Mark Garcia was reported to be a member of the cryptically described buyer. Counsel for the Plan Administrators/Debtors offered no response, either way, and merely said that the Plan Administrators/Debtors were withdrawing the request to have the $21,756.00 from the sale diverted around the plan and instead be given to USFI (which had already stipulated to having the $21,756.00 diverted to Plan Administrators'/Debtors' counsel).

Terms of the Confirmed Chapter 11 Plan

The court has reviewed the actual terms of the Chapter 11 Plan (which was written and promoted by both the Debtors (whose participation was not openly disclosed) and YP Western Directory, LLC. It provides for the USFI claim in Class 3 of the confirmed Chapter 11 Plan as follows:

A. USFI will be paid monthly payments of $3,000.00 for a period of four years, with a balloon payment for the remaining balance of the $400,000.00 secured claim.

B. If the property securing the claim is sold, the holder of the first deed of trust will be paid in full.

C. "The remaining sum, after authorized expenditures, is to be paid to USFI. In that event, USFI has agreed to a 'carve-out' procedure, where 20% of the proceeds payable to USFI are to be paid to unsecured creditors."

D. The Debtors' agreement to pay the $400,000.00, plus interest, as provided in the plan was

1. "[c]onditioned upon the terms and subject to the provisions of (1) the Order approving the Chapter 11 Trustee's Motion to Compromise, entered on July 6, 2015 (Dckt. No. 649), (2) the Stipulation for Allowance and Payment of Claim No. 19-3 by United States Fire Insurance Company, subject to Bankruptcy Court approval, and (3) the Stipulation for Entry of Judgment for Non-Dischargeability of Debt, subject to Bankruptcy Court approval, which Order and Stipulations are incorporated by this reference."

This provision reads that the Debtors' agreement to pay the $400,000.00 is conditioned on those terms, not USFI's agreement to the Plan terms for the 20% carve-out for creditors holding general unsecured claims.

E. The express terms of the Plan for payment of the USFI claim are stated as:

1. "1) USFI is to receive 80% if the Net Sales Proceeds of a sale of the Debtors' residence at 5672 Eleanor Avenue, Oakdale, California 95361 (the 'Oakdale Property'), after deduction of the costs of sale senior liens as provided in the Order approving compromise entered on July 6,2015."

2. "2) The Debtors will pay the balance due after application of the Net Sales Proceeds above, if any, as provided by the Stipulation for Allowance and Payment of Claim, at $3,000.00 per month, including interest accrued on principal at six percent (6%) per annum for 48 months. The entire sum is all due and payable 48 months after the first payment, together with any accrued interest and/or late charges. . . ."

3. "In the event that the Trustee has not completed a sale of the Oakdale Property and the escrow for such sale has not closed within six (6) months of the Order approving this Stipulation, then USFI's consent to such sale shall be deemed withdrawn. In the event that the Debtors have defaulted on the monthly payments due to USFI, USFI may petition the Court for relief from automatic stay and/or default under the confirmed plan to obtain its remedies with respect to the Oakdale Property by judicial or non-judicial foreclosure."

Order Confirming Plan, Dckt. 781; Confirmed Chapter 11 Plan attached as an Exhibit.

The court's order approving the Chapter 11 Trustee's Stipulation with USFI was filed on July 6, 2015. Dckt. 649. Six months after the issuance of that order was January 5, 2016. However, the YP Western Directory, LLC and Debtors Plan was not confirmed until May 6, 2016. Dckt. 781. If the Plan

terms as written by YP Western Directory, LLC and Debtors were to mean that the six-month limitation on the Trustee being able to sell the property and recover the 20% carve-out was an additional limitation on the Plan Administrators/Debtors under the confirmed plan, then the 20% carve-out would be illusory—given that confirmation occurred four months after the time period for the Trustee to conduct a sale had expired.

At this point, the court will not presume that the plan proponents and involved creditors were actively working to mislead and defraud the court and creditors by drafting intentionally illusory, ineffective plan provisions. Rather, the more rational, good faith, bona fide interpretation of this provision is that once the Plan Administrators/Debtors took over for the Trustee under the confirmed plan, which USFI voted for, is that there was no such limitation. It is clear that USFI did not contend that such a provision was not enforceable, as it readily stipulated to the Plan Administrators'/Debtors' demand that if the Plan Administrators/Debtors conducted the sale (as part of exercising their fiduciary duties under the Plan) to have the money diverted to counsel for the Plan Administrators/Debtors.

REVIEW OF CURRENT PLEADINGS AND TESTIMONY OF MARK GARCIA

The current Motion for Authority to Sell the property was filed on October 25, 2016, five days after the October 20, 2016 hearing in which the U.S. Trustee reported the California Secretary of State information that Mark Garcia, one of the Plan Administrators/Debtors was a member in the purchasing company (two of those five days being the weekend of October 2–3, 2016). The current Motion again states that "Debtors" seek an order authorizing them, the "Debtors" to sell the property. Motion, Dckt. 871. This continues to demonstrate a lack of understanding, or more likely a refusal to accept, the fiduciary duties of a plan administrator.

The Motion alleges that the property will be sold for $675,000.00, of which $500,000.00 will be paid to the creditor holding the claim secured by the senior deed of trust and the balance of the sales proceeds, all $150,000.00, will be paid to USFI. No monies are to be paid for the 20% carve-out into the Plan to be disbursed to creditors holding general unsecured claims. This is essentially the same "fall-back" proposal made by Plan Administrators'/Debtors' counsel when the U.S. Trustee disclosed that Mark Garcia, was a member of the buyer. The court denied that request, the Plan Administrators/Debtors "folding" the estate's tent and giving away the $21,756.00 that USFI had already stipulated to being paid and the 20% provided for in the confirmed Chapter 11 Plan. FN.1.

FN.1. The court's concern in the prior hearing, and now amplified in the current Motion, is that the Plan Administrators/Debtors, their counsel, and USFI have made a backroom deal to divert the 20% portion of the sales proceeds around the Plan, away from the creditors holding unsecured claims, and into the Debtors' pockets.

The Motion further states that the holder of the senior deed of trust has relief from the automatic stay under the Plan and can then schedule a non-judicial foreclosure sale (21-day notice). Motion ¶ 9; *Id.* The Motion appears to indicate a sense of urgency, but it appears that any urgency now arises due to the Plan Administrators/Debtors failing to act timely to market and sell the property to get whatever 20% portion of the sales proceeds are due under the confirmed Chapter 11 Plan. In some respects, the Motion can be read that the Plan Administrators/Debtors are acting to advance the interests of USFI, saving it the cost and

expense of foreclosing, paying the obligation owed on the obligation secured by the senior deed of trust, and then having to own (and pay all expenses related thereto) and market (which reasonably can be estimated to take a year) the property to recover what was paid the senior lien creditor, all of the foreclosure costs and expenses, the costs and expenses of holding the real property, and the marketing and real estate commission (which at an estimated sales price of $675,000.00 would be $40,500.00 for a 6% residential real estate commission alone).

That the Plan Administrators/Debtors cannot recover the 20% portion of the sale proceeds for distribution through the Plan is unfathomable. Instead, they appear to be giving away the Plan Estate's right and power to sell the property, effectively "paying" USFI (by helping USFI avoid incurring all of the normal creditor expenses incurred in foreclosing on, owing, and selling real property collateral) for the "privilege" of acting as USFI's sales agent and selling property for which no purpose is served under the confirmed Chapter 11 Plan.

Even if there is not a backroom deal to divert a portion of the proceeds through USFI to Debtors, the real personal interest of Debtors in the transaction, at the expense of the Chapter 11 Plan creditors, is that Debtors have set up a "flipper" entity to buy the property and then resell it later for a profit. Motion ¶ 10; *Id.*

The Motion states that the money to make the purchase is being funded by Christopher L. Martin, another member of the Buyer. The declaration of "Christopher L Martin" is provided in support of the current Motion. Dckt. 874. He testifies under penalty of perjury that he is providing all of the monies for Mr. Martin and Mark Garcia to buy this property. He testifies under penalty of perjury that his business estimates are that when he and Mr. Garcia re-sell the property they will net between $130,000.00 to $150,000.00, and he will pay 20% of the net proceeds to Mark Garcia. This 20% is exactly what the Plan Administrators/Debtors should be recovering from the current sale to be paid through the confirmed Chapter 11 Plan. Mr. Martin's testimony is that the estimated net sales proceeds on which the 20% share for Debtors will be computed is exactly the net sales proceeds estimated for the current proposed sale – $150,000.00 (Declaration of Mark Garcia, ¶ 3; Dckt. 871).

Again, this testimony further demonstrates that Mark Garcia and Angela Garcia, the Plan Administrators/Debtors, will engage in any transaction they can to not fulfill their fiduciary duties to recover the 20% to be paid through the Chapter 11 Plan, but instead put it in their own pockets.

Declaration of Mark Garcia

Mark Garcia has provided a new declaration in support of the current Motion. Dckt. 873. This most recent testimony under penalty of perjury includes the following:

> A. "I am one of the debtor(s) in this proceeding and am making this declaration in support of our motion to sell our residence." Declaration ¶ 1; Dckt. 873.

Yet again, Mark Garcia ignores that he is a Plan Administrator and that he has fiduciary duties having elected to take on such position and responsibilities.

B. He is providing this declaration to correct "mistakes" and "inadvertent omissions" made under penalty of perjury in his prior declaration. Declaration ¶ 2; *Id.*

C. The property was marketed for a year by the Chapter 11 Trustee, with no sale obtained.

D. The Plan Administrators/Debtors have relied upon a real estate agent they were directed to by counsel for USFI to determine an opinion as to the value of the property. Mr. Garcia testifies:

1. "Mr. Salvato, who represents the second mortgage USFI in this case, referred a Craig Lewis, a CEO of Prudential Real Estate, to appraise my house and determine if a sale could take place. **I talked with Mr. Lewis twice**. He told me that maybe it would sell for $640,000.00, but **he did not think a sale would result in a significant dividend to USFI**." Declaration ¶ 7; *Id.* [emphasis added].

With this testimony, Mr. Garcia demonstrates that without the Plan Administrators/Debtors selling the property, with the 20% dividend recovered for disbursement through the Plan, USFI would not recover any significant payment on its junior lien position. However, if the Plan Administrators/Debtors merely recovered the 20% portion of the net sales proceeds (and did not attempt to hardball USFI into a higher percentage), $30,000.00 would be recovered for disbursement through the Chapter 11 Plan and USFI would receive $120,000.00 (assuming only $150,000.00 of net sales proceeds) for its secured claim, as well as receiving some disbursement on its remaining general unsecured claim.

E. In describing the "mistakes" and "omissions" in his prior declaration under penalty of perjury, Mr. Garcia now testifies under penalty of perjury:

1. "My previous declaration dated September 15, 2016, docket number 851, was mistaken in several respects." Declaration ¶ 13; *Id.*

2. "**This sale is not an arm's length transaction**, as I am a member/owner of the buyer Interface Investment Capital, LLC." *Id.* [emphasis added].

3. "There is no personal or family relationship, but **there is a business relationship**." *Id.* [emphasis added].

4. "I entered into this transaction to save the house from foreclosure and to replay [sic] the second mortgage a substantial amount." *Id.* [emphasis added].

In this statement under penalty of perjury, Mark Garcia admits that the transaction was not one to perform the Plan and fulfill the obligations of the Plan Administrators/Debtors, but to personally benefit the Debtors by keeping a house that they were obligated to sell as Plan Administrators/Debtors.

5. "**I did not review the declaration dated September 15, 2016**, before signing it and I apologize to the Court and any parties who relied on those

> portions of my declaration. It was a serious mistake on my part." *Id.* [emphasis added].

The testimony that Mr. Garcia did not read the prior declaration, and therefore should be excused from making a false statement and the Plan Administrators/Debtors excused from their fiduciary duties in performing the Chapter 11 Plan is not credible or persuasive for several reasons.

Implicit in the testimony is that Mr. Garcia is blaming his counsel for making up a declaration without first obtaining the necessary information to prepare the testimony under penalty of perjury for his client. If this were true, then counsel will have not only violated the California Rules of Professional Conduct (State Bar Rules 5-200), but counsel will also have violated Federal Rule of Bankruptcy Procedure 9011, which provides in pertinent part:

> Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers
>
> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, **an attorney** or unrepresented party **is certifying that to the best of the person's knowledge**, information, and belief, **formed after an inquiry reasonable under the circumstances**[,]--
>
> (1) it **is not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> . . .
> (3) the allegations and other **factual contentions have evidentiary support** or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;. . .
> . . .
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

For Mr. Garcia, the court does not find persuasive this testimony that he did not read the declaration. Mr. Garcia is not unfamiliar with the judicial process, the pre-petition business operated by Debtors since 1999, during this bankruptcy case, and now as the Plan Administrators/Debtors is a bail bond business. As described in the approved Amended Disclosure Statement, at one time the business was the "largest such business in the area." Disclosure Statement, p. 5:12–14; Dckt. 739. Mr. Garcia cannot operate in that judicially related business and not understand the significance of making testimony under penalty of perjury.

It appears that the best case scenario for Mr. Garcia is that he gave partial information to his attorney, did not bother to read it, and then only asked the attorney if the testimony in the declaration meant "Mr. Garcia wins." When told yes by his attorney, Mr. Garcia made the conscious decision not to read the

declaration, "just in case there is something in there the attorneys misunderstood," which if corrected might mean that Mr. Garcia might not win.

> 6. "I have been in a rush in the last few months to get my house sold before the first mortgage Deutsche schedules a trustee sale in order that I can pay my creditor USFI from the proceeds. No real estate broker was ever able to do so."

It is clear that the Plan Administrators/Debtors have a sale they can make, recover 20% to be disbursed through the Plan, and do USFI a "great favor" recovering $120,000.00 for it, in addition to whatever may be disbursed on the unsecured portion of its claim from the 20% carve-out. Instead of fulfilling the obligations as Plan Administrators, the Debtors are driven to a plan/scheme/goal to get keep their home, then sell it to their personal advantage, and take the 20% which is obligated under the confirmed Chapter 11 Plan to be paid to creditors holding general unsecured claims.

RULING

At the conclusion of the prior hearing, counsel for USFI posed a question to the court, "would the court consider granting a motion to sell if it was represented by the Plan Administrators/Debtors." While the court does not give advisory opinions, the court noted that the prior motion was denied without prejudice, leaving the door open for another motion to be represented to the court.

The court, now obviously incorrectly, thought that the parties would consider the comments of the court, the breaches of duty, the inaccurate statements under penalty of perjury, and the court's comments throughout this case (and most recently in connection with the efforts to increase its administrative expense), and would present a motion in which the Plan Administrators/Debtors would perform the plan and fulfill their duties to recover the 20% distribution of sales proceeds for the benefit of the creditors through the Chapter 11 Plan—not to put the 20% in the Debtor's own pockets.

Further, it having been disclosed that Mark Garcia (and possibly Angela Garcia) was a member of the Buyer (which may or may not have been news to USFI), the court thought that the Plan Administrators/Debtors, their counsel, USFI, and other parties in interest would be careful to present a motion and proposed sale in which the Plan Administrators/Debtors fulfilled their fiduciary duties under the confirmed Chapter 13 Plan and did not abuse the use of their powers for self-benefit to the detriment of creditors.

Unfortunately, they have not. Instead, they have merely represented the same motion, using the fallback position stated by the Plan Administrators'/Debtors' counsel that the Plan Administrators/Debtors abandoned any ability to recover the 20% for the benefit of creditors and would just give all of the monies to USFI.

That being the case and there being no demonstrated benefit for the creditors or the Plan Administrators/Debtors fulfilling their duties to perform the plan, there is no reason for the court to approve the sale. USFI can exercise its rights to foreclose on the property—advancing the $500,000.00 to pay the senior lien, pay the foreclosure costs and expenses, pay the property taxes and insurance for a year, and pay

the real estate commission for a broker to sell the REO property, and hopefully recover at least $130,000.00 more than eighteen months from now. No good faith, bona fide reason has been shown for the Plan Administrators/Debtors conducting a sale that nets nothing for distribution through the Plan and works to just save USFI from having to exercise its rights in the property.

TERMS OF PROPOSED SALE

The proposed purchaser of the Property is Interface Investment Capital, LLC—of which Movant Mark Garcia is a member and owner—through member and owner Christopher Martin, and the terms of the sale are:

A. Purchase Price of $675,000.00:

1. Estimated payment to Deutsche Bank of $500,000.00,
2. Estimated net proceeds for payment to United States Fire Insurance lien position of $150,000.00, and
3. No Brokerage Fee.

B. Closing date set for December 1, 2016.

C. Seller to pay closing costs for:

1. Preparation of the deed to the Property;
2. Title search, title report, and title insurance policy;
3. Property taxes, fees, and assessments;
4. Any real estate agent's commission;
5. Home loans and other debts on the Property, but not assumed by the Buyer;
6. Judgments, tax liens, or other liens necessary to transfer clean title; and
7. Recording charges for documents necessary to transfer clean title.

D. Buyer to pay closing costs for:

1. Recording documents in Buyer's name,
2. Lenders title insurance premium,
3. New home loan charges or assumption of existing loan charges,
4. Costs associated with financing the purchase of the Property,
5. Notary fees, and
6. All other costs associated with closing unless otherwise stated by the Parties in writing.

E. Each party pays half of escrow fees and half of the Homeowners Association transfer fee.

F. Taxes, assessments, rents, and Homeowners Association dues are to be prorated to Seller up to, but not including, the closing date.

G. Financed entirely by cash.

H. Governed by California law.

Based on the evidence before the court, the court determines that the proposed sale is not in the best interest of the Estate. The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Mark Garcia and Angela Garcia, the Chapter 11 Plan Administrators/Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Sell is denied without prejudice.