UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

November 20, 2014 at 3:30 p.m.

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1. 13-90901-E-12 ANDREW NAPIER — **STATUS CONFERENCE CONTINUED RE: CHAPTER 12 VOLUNTARY PETITION 5-9-13 [1]**

Debtor's Atty: Scott A. CoBen

Notes:

Continued from 9/4/14 to be heard in conjunction with other matters on calendar.

First Modified Chapter 12 Plan filed 9/18/14 [Dckt 268]

[SAC-10] Motion to Confirm First Modified Chapter 12 Plan filed 9/18/14 [Dckt 257]; heard 10/30/14 and continued to 11/20/14

[SAC-11] Motion to Employ John Bell as Receiver, or in the Alternative, As a Post Confirmation Manager filed 9/18/14 [Dckt 262]; heard 10/30/14 and continued to 11/20/14

2. 13-90901-E-12 ANDREW NAPIER JPJ-1 — **CONTINUED MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS 4-8-14 [206]**

No Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and

supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 8, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Dismiss is XXXXXXX.

AUGUST 21, 2014 HEARING

At the hearing the Debtor conceded that the appointment of a receiver or a trustee to replace the Debtor under the Plan was appropriate and consented thereto. The Chapter 12 Trustee is to meet with the U.S. Trustee, confer with creditors and the Debtor, and determine whether he recommends amending the Plan to provide for a receiver, the court order the appointment of a trustee to replace the debtor, and whether the Chapter 12 Trustee believes that he should fill that roll.

DISCUSSION

The Chapter 12 Trustee seeks dismissal of the case on the basis that the Debtor is $23,320.79 delinquent in plan payments, which represents three (3) months of the plan payment. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6).

Counsel for Debtor responded, stating that Debtor will be current by the date of this hearing. Debtor did not offer any evidence concerning his default or how he would be able to cure such a substantial default.

The Debtor has failed, or refused, to provide any testimony under penalty of perjury with his original opposition to the Motion to Dismiss. Rather, the court is provided only with a short, one-line response. Dckt. 216.

Further, no explanation is provided as to why the Debtor has defaulted under the confirmed plan, why such default should not likely reoccur, and how the Debtor could come up with the "extra" money to cure the defaults.

OVERVIEW OF CURRENT BANKRUPTCY CASE

This not being the Debtor's first bankruptcy case, and not first Chapter 12 bankruptcy case in which he confirmed and then default on the plan, the court continued the hearing for further briefing and presentation of evidence. Additionally, the Debtor's ex-wife brought to light allegations that the Debtor has not truthfully and accurately disclosed his assets, has made multiple misrepresentations to the court and creditors, and has not filed or prosecuted his bankruptcy cases in good faith. FN.1.

FN.1. As with all "ex-'s (ex-spouse, ex-partner, ex-director, ex-client), the court does not assume that the allegations are true. However, it is usually one of the "ex-'s" who has knowledge of a debtor's misdealings. The

Chapter 12 Trustee, creditors, and U.S. Trustee (with an occasionally referral to the U.S. Attorney) are usually up to the task of addressing such allegations and misconduct, if it occurs and comes to light. However, in some situations the "interests" of such parties may not align with how the misconduct is a substantial abuse of the federal judicial process and federal courts.

This court has previously conducted a general review of the Debtor's multiple prior bankruptcy cases and multiple defaults. This is Debtor's third case since March 2010. The Debtor has already been "challenged" in this case with complying with the Bankruptcy Code, fulfilling his fiduciary obligations, and being forthright with the court. As stated by the court in the Civil Minutes from the confirmation hearing,

> "In his declaration, the Debtor states that Exhibit A is his budget showing $5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes $75,000.00 a month in gross income and the $67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement.
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> [FN.1.]
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> Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.
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> In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of $28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of $83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were $55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was $43,057 delinquent in plan payments, with another monthly payment of $19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.
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> Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013.
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> In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make $7,050 a month

payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt. 75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of $66,000 and monthly non-personal expenses of $56,880. This resulted in his testimony that his average monthly net income was $9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was $34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

...

(6) The debtor will be able to make all payments under the plan and to comply with the plan;

Court Finding: This element is the most problematic for the Debtor in Possession. For two prior cases the Debtor's in Possession testimony under penalty of perjury as to the financial operation of his business and assurances that the two prior confirmed plan were feasible have turned out to be inaccurate. The declaration in the present case is devoid of any evidence from which the court can determine whether the Debtor's in Possession conclusions that the current Plan is feasible are realistic.

The Debtor in Possession argues that he has so significantly changed his business in the last several months that no historic data is relevant. He further argues that he has paid a significant amount to creditors under the prior two plan. As the court noted at the hearing, when a person has a business which generates substantial cash flow and has substantial debt to be paid, making partial payment two prior times and defaulting is not a significant victory. Though significant payments were made, significant defaults occurred and significant claims went unpaid.

The creditor support the Plan, from which the court infers that they believe the Plan is feasible. The court will rely on this inference as "evidence" presented by the creditors their withdrawal of oppositions and affirmative support at the confirmation hearing.

Though sketchy at best, the court will find that this plan is "feasible as any possible plan could be in this case" and give the Debtor in Possession and creditors what they want confirmation of the Plan. As the court admonished the Debtor in Possession at the confirmation hearing, if he defaults under this Plan, the court expects him to immediately address the default with his counsel. In the past, it appears that the Debtor ignored the defaults and left it to the Chapter 12 Trustee to file and obtained orders dismissing the case.

Civil Minutes, Dckt. 186.

In confirming the Plan, the court noted that the Debtor was getting a second second-chance, and should not squander it. It appears that he has, spending monies for purposes other than performing his confirmed Chapter 12 Plan. His ex-wife, has raised significant issues concerning the information provided to this court under penalty of perjury by Mr. Napier. While the court acknowledges that an ex-spouse may not be the most unbiased, often times an "ex-" (spouse, partner, business associate) may provide accurate information.

The Chapter 12 Trustee reported that the Debtor appeared at the Trustee office today (May 22, 2014) to make a payment of over $30,000.00. Debtor's counsel that $25,000.00 of these monies represent an advance payment of future work to be done by the Debtor for a customer. No explanation is provided as to how the Debtor, in the ordinary course of business, without having to "borrow" against future work which has not been done, can make the payments promised under the confirmed Plan.

UNITED STATES TRUSTEE'S RESPONSE

On July 23, 2014, the United States Trustee filed a response in support for the motion to dismiss. After laying out the background of the case, notably the multiple bankruptcy filings of the Debtor, the United States Trustee reviews subsequent developments since the May 22 continuance.

Following the May 22nd continuance, the United States Trustee performed a Bankruptcy Rule 2004 Examination of the Debtor, pursuant to the June 3, 2014 order authorizing the examination. Dckt. 226. On July 9, 2014, the Debtor produced a number of documents including Debtor's bank statements for the period covering January 1, 2013 through May 31, 2014 ("Applicable Period"). On July 16, 2014, the Bankruptcy Rule 2004 Examination of the Debtor took place.

In the response, the United States Trustee notes all of the serious concerns that arose from the Bankruptcy Rule 2004 Examination. These include:

1. During the Applicable Period, the Debtor spent more than $50,000 on airline tickets, hotels and other travel expenses. See Exhibit 8, Dckt. 232; see also Spyksma Declaration, at ¶ 8.3, Dckt. 233;

2. During the Applicable Period, the Debtor spent more than $12,000 at restaurants. See Exhibit 9, Dckt. 232; see also Spyksma Declaration, at ¶ 9, Dckt. 233;

4. During the Applicable Period, the Debtor spent more than $18,000 on goods and services that could be considered luxuries (or, at least, do not appear to have been reasonably necessary for the Debtor's maintenance or support). Exhibit 10, Dckt. 232; see also Spyksma Declaration, at ¶ 10, Dckt. 233;

5. The Debtor failed to disclose his interest in the Tri Counties 6036 bank account on Schedule B. This account was open on the Petition Date. Compare Schedule B, at item 2, Dckt. 1 with Exhibit 4 at p.58, Dckt. 232;

6. The Debtor failed to disclose his rental of a storage space (at StorKwik SelfStorage) on his Schedules and Statements

(including on Schedule G). Compare Dckt. 1 with Exhibit 20 at pp. 247-48, Dckt. 232;

7. During the Applicable Period, the Debtor's deposits into his bank accounts totaled only $622,194.16. See Exhibit 1, Dckt. 232; Spyksma Declaration, at ¶11, Dckt. 233. On average, that is less than $37,000 per month ($622,194.16 / 17 months). This is substantially less than what the Debtor reported on his Schedule I($75,000), or what he projected in his Plan Declaration (at least $65,000). In fact, the Debtor's monthly income never once reached $75,000 during the four full months preceding the filing of this case. See Exhibit 11 to the Response. The discrepancy calls into question the accuracy of Schedule I and the Plan Declaration at the time that they were prepared;

8. The $25,000 payment mentioned in the Civil Minutes for the hearing on the Motion to Dismiss was funded by Roy Reeves. According to the Debtor, Mr. Reeves buys and sells dirt. The $25,000 represents an advance for future work. However, even as of July 16, 2014, the Debtor still had not started the work. There is no contract between the parties. Exhibit 20 at pp. 258-62, Dckt. 232;

9. As noted above, in his Plan Declaration, the Debtor testified that he had no domestic support obligations. See ¶ 13, supra. While this statement was true, it was arguably misleading. That is because Ms. Leysa Napier had filed an application for spousal support in June 2013. The Debtor filed a responsive declaration on July 12, 2013 (i.e., only 10 days before the Plan Declaration was filed). See Exhibits 14 and 15, Dckt. 232. Unquestionably, the request for spousal support was relevant to the whether the Debtor's plan was feasible.

After laying out the concerns, the United States Trustee argues that under 11 U.S.C. § 109(g), the debtor may be ineligible from filing a new bankruptcy case for 180 days because of a willful failure to appear before the Court in proper prosecution of the case. Under Section 109(g), there are two elements that must be satisfied: 1) the debtor must have filed to appear before the Court in proper prosecution of the case (leading to the dismissal of the debtor's case) and 2) the failure must have been "willful."

Applying these factors, the United State Trustee argues that both are satisfied as to the Debtor. As to the first element, the United States Trustee first reviews applicable law. The United States Trustee argues that a debtor's failure to make plan payments can constitute "a failure. . .to appear before the court in proper prosecution of the case." *See In re King*, 126 B.R. 777, 780-81 (Bankr. N.D. Ill. 1991) ("Section 109(g) does not merely require a debtor to come physically before the bankruptcy judge when the case is set. Willful failure to 'appear before the court in the proper prosecution of the case' can also include a Chapter 13 debtor's willful failure to pay under his plan."); *In re Wen Hua Xu*, 386 B.R. 451, 457 (Bankr. S.D. N.Y. 2008) ("[C]ourts have held that this section can apply to a debtor's willful failure to pay under a chapter 13 plan…. 'Proper prosecution,' in this context must necessarily encompass, at the least, compliance with the statutory duties of a debtor."). Applying the law, the United States Trustee asserts that the element is satisfied because the Debtor has failed to make substantial payments in the instant case as well

as in Debtor's two prior cases.

As to the second element, the United States Trustee argues that willful" means "deliberate or intentional, rather than accidental or that which is beyond the debtor's control." *See In re Wen Hua Xu*, 386 B.R. at 455. But repeated failures to abide statutory or judicial directives do support an inference of willful conduct. *See id.* at 456. Applying the law, the United States Trustee argues that the Debtor had the clear financial ability to make the plan payments but instead chose to superfluously spend an exorbitant amount of money on hotels, airline tickets, and other luxuries. The United States Trustee argues that this strongly suggests an inference of willfulness. *See, e.g.*, *In re King*, 126 B.R. at 779 ("The Debtors are therefore well able to make payments due to the Trustee under their Plan …. They have willfully failed to do so despite knowing of their obligation to do so and having the financial ability to do so.") (emphasis added); *In re Patel*, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985) (failure to make plan payments was willful where "[c]reditors have been forced to wait for payments that were never made, while petitioner has prospered.") (emphasis added).

The United States Trustee asks for the court to enter an order (1) dismissing the case under Section 1208©) and (2) bar the Debtor from filing a new case for 180 days pursuant to Section 109(g).

CHAPTER 12 TRUSTEE SUPPLEMENTAL PLEADINGS

On August 6, 2014, the Chapter 12 Trustee filed a supplemental brief to the motion to dismiss in support of having the motion denied.

In his support, the Chapter 12 Trustee argues that after review of the case, it would be in the best interest of the creditors to keep the case open. While the Chapter 12 Trustee does note that the Debtor remains to be delinquent of one plan payment in the amount of $8,500.79, he argues that keeping the case going is best for the creditors.

The Chapter 12 Trustee states that he has reviewed the Bankruptcy Rule 2004 Examination transcript and reviewed the financial statements to conclude that the Debtor makes enough money to support the remainder of the plan as well as the business.

The Chapter 12 Trustee suggests and argues that the court should appoint an accountant to act as the Debtor's accountant and bookkeeper in order to ensure that the Debtor makes the remaining plan payments. Furthermore, the Chapter 12 Trustee argues that the Debtor should be ordered to file Monthly Operating Reports and be required to attend status conferences at least quarterly to ensure compliance with the plan.

The court knows nothing about the person identified as "Ralph Juarez" by the Trustee as a possible accountant and bookkeeper for the Debtor. The Trustee states that if the court does not dismiss the case then the Chapter 12 Trustee shall filed a motion for Mr. Juarez to be employed.

Interestingly, the Chapter 12 Trustee's supplemental response is devoid of any legal authority for appointing an "accountant" or a "bookkeeper" to take over the fiduciary and other Plan duties of a Chapter 12 Debtor in a Chapter 12 case. The Chapter 12 Trustee does not provide the court with any authorities for the Chapter 12 Trustee to select and have appointed an "accountant" or a "bookkeeper" for the Debtor in a Chapter 12

case. FN.2.

FN.2. In connection with this case, it has been made clear to the court that this Chapter 12 case can be converted to one under Chapter 7, with the Chapter 7 trustee authorized to continue in the operation of the business as the independent fiduciary. 11 U.S.C. § 1208(d). Additionally, pursuant to 11 U.S.C. § 105(a) and applicable state law, the court can appoint a receiver under the Chapter 12 Plan to take control of the assets, perform the plan, and then turn the business and assets back over to the Debtor upon completion of the plan.

The Chapter 12 Trustee has provided as an exhibit correspondence from the proposed "accountant" and "bookkeeper" as to his understanding of his duties. Clearly, he does not see it as a task other than inputting the information from the Debtor and then doing with it what the Debtor says. "I believe that the majority of the work would be done by my general staff with my oversight." Exhibit A, Dckt. 237. The court is at somewhat of a loss, based on the pleadings filed, how the Chapter 12 Trustee is suggesting that having bookkeeping staff do the work remedies the substantial breaches, misrepresentations, and diversions of monies by Debtor.

DEBTOR'S RESPONSE

On August 7, 2014, Debtor filed a response. Debtor argues that the motion to dismiss should be denied.

In his response, the Debtor admits to not be current on his plan payments but that "it is anticipated that [Debtor] will be current on his plan payments by the time of the [August 21st hearing]." Dckt. 240.

In support for denying the motion to dismiss, the Debtor argues that: 1) all of the creditors receiving payments under the plan oppose the dismissal of the case; 2) the Chapter 12 Trustee opposes the dismissal of the case subject to the appointment of an accountant; and 3) Debtor has paid all domestic support obligations and has no further domestic support obligations.

The Debtor concludes by arguing that it is not in the best interest of the creditors to dismiss the case. Furthermore, while admitting that the Debtor "has spent money that should have been devoted to plan payment," Debtor asserts that "the remedy for this behavior is the appointment of [an accountant] to take control of [Debtor's] finances leaving [Debtor] to drive the tractors." Dckt. 240.

The Debtor provides his testimony in opposition to the Motion. In his declaration he states,

a. Debtor supports Trustee's recommendation for the Debtor to have an accountant;

b. Debtor supports Trustee's recommendation that monthly operating reports be filed timely;

c. Debtor supports Trustee's recommendation that quarterly status conferences be held;

d. Debtor wants the accountant to be the disbursing agent to

receive payments from Debtor's customers, make payments to the Chapter 12 Trustee, and then release funds to Debtor for his business expenses.

Declaration, Dckt. 241. As discussed below, the Debtor provides scant evidence of what monies were misspent, how that occurred, or why he would not be working to continue improperly diverting monies notwithstanding having a bookkeeper. The Declaration is pregnant with foreshadowed future diversions.

Though professing to have the bookkeeper handle all of the monies, Debtor says that while the bookkeeper will receive "all" payments from clients and make disbursements to the Chapter 12 Trustee, the only disbursements to be made to the Debtor will be "to pay business expenses." Debtor has previously stated that his only income is from this business. Schedule I, Dckt. 1 at 32; Statement of Financial Affairs Responses to Questions 1 and 2, *Id.* at 35; Declaration in Support of Confirmation, ¶ 6, incorporating Exhibit A, Dckts. 10, 11; and Declaration in Support of Confirmation, ¶ 12, incorporating Exhibit A, Dckts. 152, 153.

This testimony under penalty of perjury taken as true, then the Debtor would have no money for paying any personal expenses. The Debtor's ability to pay his personal expenses is dependent (based on the evidence to date) on using monies earned from the operation of his business. Thus, in saying that the bookkeeper will disburse monies to him only for business expenses, Debtor is also stating that he has additional monies or will be secretly collecting monies from his business, diverting them around the bookkeeper.

The above testimony relating, to the extent it does, to misrepresentation to the court and creditors, and the diversion of monies, covers a total of five lines in the declaration. Debtor then spends fourteen lines testifying as to what a bad person his ex-spouse is and how he has determined that his ex-spouse routinely makes false statements to the court. (The irony of the Debtor reaching such a determination as to another is not lost on the court, and presumably on the Chapter 12 Trustee and the U.S. Trustee.)

CREDITOR STATEMENTS SUPPORTING DEBTOR'S CONTINUED POSSESSION AND CONTROL UNDER PLAN NOTWITHSTANDING MISREPRESENTATIONS, BREACHES OF FIDUCIARY DUTY, AND DIVERSION OF PLAN MONIES

Bankruptcy cases can make for strange bedfellows, and a good Chapter 11 or 12 attorney can find the common ground by which plans can be confirmed with broad creditor support. These compromises relate to issues concerning creditor liens, priority of payment, why some dividend is better than no dividend, and the like. However, a "deal" between a debtor and creditors does not work for the creditors to "sanctify and absolve" parties for conduct to corrupt the federal judicial process and commit fraud upon the court.

Four creditors have provided the court with their claim specific response to the Trustee's Motion. These statements are as follows:

A. CNH Capital America, LLC Response, Dckt. 244, states in its entirety,

"Creditor, CNH CAPITAL AMERICA, LLC, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.

Creditor, CNH CAPITAL AMERICA, LLC, opposes the dismissal of the case."

B. NAEDA Financial Ltd., L.P., Response, Dckt. 245, states in its entirety,

"Creditor, NAEDA Financial Ltd,. L.P., submits the following in response to the motion to dismiss case filed by the Chapter l2 Trustee.

Creditor, NAEDA Financial Ltd., L.P., opposes the dismissal of the case. Creditor, NAEDA Financial Ltd., L.P., is satisfied with the confirmed plan and opposes the dismissal of the case."

C. Mesa Leasing, Inc. Response, Dckt. 246, states in its entirety,

"Creditor, MESA LEASING, INC., submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.

Creditor, MESA LEASING, INC., opposes the dismissal of the case. Creditor, MESA LEASING, INC., is satisfied with the confirmed plan and opposes the dismissal of the case."

D. Deere & Company Response, Dckt. 247, states in its entirety,

"Creditor, DEERE & COMPANY, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.

So long as the Debtor remains current on his plan payments, DEERE & COMPANY opposes the dismissal of the case."

These "Responses" by the Creditors raise several questions. First, none of them address, or appear to reflect any knowledge of the Debtor having diverted substantial amounts of money ($80,000.00) to his personal use (travel, lodging, and luxuries), leading to the defaulted plan payments.

Second, The Deere & Company response can be read (less charitably then as phrased by the Debtor) as stating, "so long as the Debtor pays us on the deal we made, he can misrepresent to and defraud the court – just as long as we get ours."

At the hearing, the court will afford sufficient time for the attorneys for each of these creditors to provide the court with their client's respective analyses and position as it relates not merely to a default in plan payment, but the diversion of the monies and misrepresentations to the court.

DEBTOR'S CONDUCT WARRANTS CONVERSION, DISMISSAL, OR REPLACEMENT OF DEBTOR UNDER THE PLAN BY A TRUSTEE OR RECEIVER.

The United States Trustee's response provides succinctly all of the problems with Debtor's case. Ranging from excessive and unjustifiable spending on luxury goods to failure to disclose bank accounts and support obligations, the Debtor has not been forthright in this case. As discussed below, the court finds multiple grounds to grant the motion to dismiss.

11 U.S.C. § 1208(C) authorizes the bankruptcy court to dismiss a case for cause. In relevant part, such causes that constitute for cause are:

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;. . .
>
> (4) failure to commence making timely payments required by a confirmed plan;. . .
>
> (6) material default by the debtor with respect to a term of a confirmed plan;. . .
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> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
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> (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. 1208©).

While "bad faith" is not specifically listed as one of the enumerated causes to justify dismissal under § 1208©), bad faith may constitute cause for dismissal. *Leavitt v. Soto* (*In re Leavitt*), 171 F. 3d 1219, 1224 (9th Cir. 1999) (bad faith held to be cause for dismissal under chapter 13's mirrored statute, § 1307©)). When determining whether a debtor filed his petition in bad faith, a court must apply a totality of the circumstances, considering the following factors:

> (1) Whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;
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> (2) The debtor's history only intended to defeat state court litigation;
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> (3) Whether the debtor only intended to defeat state court litigation; and
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> (4) Whether egregious behavior is present.

In re Pandol, No. 10-19733-B-12, 2010 Bankr. LEXIS 6495, at *2 (Bankr. E.D. Cal. Sept. 29, 2010) (citations omitted).

It is painfully obvious that the Debtor has not followed the terms of the confirmed Plan. The Debtor has been spending an exorbitant amount of money outside of the confirmed Plan. $50,000 for travel expense, $12,000 at restaurants, and $18,000 on luxury goods and services are most certainly not

terms of any Chapter 12 confirmed plan. Debtor here took it upon himself to act outside the terms of the Plan and spend money (a large amount of it) on items and services that were not for the betterment of the estate or creditors. FN.3.

FN.3. It is equally curious that the Debtor, so strapped for cash and ability to generate a profit, justified confirming a Chapter 12 Plan with a 0.00% dividend to creditors holding general unsecured claims, but during the first year of the Plan has been able to spend $80,000.00 for travel, lodging, and luxuries. This further impugns the Debtor's credibility and ability to serve as a plan administrator in a bankruptcy case.

Applying the causes under § 1208©) to the instant case, there are multiple grounds in which dismissal is proper. The Debtor has grossly mismanaged funds by spending superfluous and unnecessary monies on travel, restaurants, and hotels instead of putting that money towards fulfilling the Plan obligations. Through this gross mismanagement, there has been a substantial diminution of the estate (upwards of $80,000 in the past year and a half alone). The multiple filings of the Debtor which all led to dismissal and the inability for the Debtor to follow the terms of the Plan make rehabilitation highly unlikely. Lastly, the Debtor did not disclose the domestic support obligations (or the potential of such, assuming that the Debtor acted in some form of good faith) and failed to timely pay such obligations after confirmation of the plan.

Most notably, the Debtor remains to be delinquent on payments. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6). On this ground alone, there is sufficient basis to dismiss the case. The evidence concerning the superfluous and unjustifiable spending on non-essential goods suggests that the Debtor willfully ignored the terms of the plan and chose not to make the plan payments in order to take vacations to Las Vegas. Lavish vacations were not part of the Debtor's plan.

Furthermore, the Debtor has not been forthright with the court from the start of this case. In short, the Debtor has **only** acted in bad faith. Debtor did not disclose an interest in a bank account at the time of filing the petition. Debtor failed to disclose the existence of domestic support obligations. Debtor has provided little to no explanation concerning the discrepancies in Schedules I and J of Debtor's petition and his sworn declarations for the instant motion. Debtor failed to sufficiently explain where large sums of money, such as the $25,00.00 advance for future work in which the Debtor has not provided any contract of the future work nor explanation of the terms of such advance, "magically" appear from to satisfy Debtor's obligations.

Debtor is constantly hiding the ball, hoping that satisfying any deficiencies will cure any and all problems (fraud, misrepresentation, and breach of fiduciary duties) that have run rampant in this case from the get go. Debtor has acted on his own accord in spending estate funds without providing any authorization, justification, or permission. For example, Debtor has not provided any explanation on where he got the past due domestic support obligation payment nor under what authority he was acting under to pay such past due payments. Overall, Debtor has acted egregiously, whether it be through the gross spending of estate funds outside the Plan's terms or acting without any authority and diminishing the value of his

Chapter 12 estate.

The Chapter 12 Trustee and Debtor's suggestion that hiring an accountant will cure the deficiencies and problems that the case has experienced so far is unpersuasive. The plan nor the court should provide for professional "babysitters" so that the Debtor may be left "to drive the tractors off the cliff a fifth time." Such a bookkeeper (or in this situation the non-professional staff of the bookkeeper actually doing the work) would not be able to cure the breaches or prevent them in the future.

The Debtor, first as the Debtor in Possession and then as the Plan Administrator is a fiduciary to the bankruptcy estate and plan estate. The Chapter 12 Plan provides that the property of the estate shall revest in the Debtor upon confirmation. Order, First Amended Chapter 12 Plan attached, ¶ 5.01, Dckt. 193. Even though revested in the Debtor, the property remains subject to the Bankruptcy Code, including 11 U.S.C. § 363. Collier on Bankruptcy, Sixteenth Edition, ¶ 1227.02. The Debtor has chosen to take on the responsibility to serve as the plan administrator, and handle the plan estate monies in the same manner as an independent fiduciary could (and is now proposed) to hold and control those assets. The court would well anticipate the Debtor being the first to the courthouse if the accountant/bookkeeper had used $80,000.00 of the monies for the purposes used by the Debtor through this confirmed Plan.

A trust (fiduciary relationship) is created as a matter of California law when there is a transfer of assets by which one obtains control and another is to share in the profits. *Schaake v. Eagle Automatic Can. Co.*, 135 Cal. 472 (Cal. 1902). A fiduciary owes a duty "to act with the utmost good faith for the benefit of the other party." *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1160 (2005) (citing *Bacon v. Soule*, 19 Cal. App. 428, 434 (1912))(internal quotations omitted).

Therefore, because of the delinquent payments and the apparent willfulness in not abiding by the terms of the Plan and the failure to provide any explanation or justification for spending outside the terms of the Plan, the relief is proper pursuant to 11 U.S.C. § 1208. However, it remains to be determined if the relief should be dismissal with only an six month prohibition on filing yet a fourth bankruptcy case in four years, dismissal of the bankruptcy case with prejudice, or conversion to a case under Chapter 7. Alternatively, if the Debtor were to prosecute a plan amendment which provided for an appointment of a receiver to take control of the business and assets for the term of the Plan and the diverted $80,000.00 and additional monies paid to the ex-spouse were accounted for, the court would have yet another option.

3. 13-90901-E-12 ANDREW NAPIER — **CONTINUED MOTION TO MODIFY CHAPTER 12 PLAN**
SAC-10 — **9-18-14 [257]**

Tentative Ruling: The Motion to Confirm Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local

Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion to Confirm has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Confirm is xxxxxxxxxxxxxxxxxxxxxxxxx.

Andrew Napier ("Debtor") filed the instant Motion seeking confirmation of his Modified Chapter 12 Plan on September 18, 2014. Dckt. 257.

Debtors propose a 36 month plan with total monthly payments of $110,500.00 by September 3, 2014 and then monthly payments of $12,000.00 from September 25, 2014 through August 25, 2016. Debtors propose to pay the following debt through the plan:

1. All attorney fees shall be paid in full prior to any distribution to creditors other than Chapter 12 Trustee Administrative Expenses pursuant to statute;

2. Upon confirmation of the plan, the loan of Ally financial secured by a 2006 Chevy Silverado 2500 shall be reduced to $500.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or $10.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;

3. Upon confirmation of the plan, the loan of Bank of the West secured by Top Con GPS system shall be reduced to $3,000.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or $57.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month

following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;

4. Upon confirmation of the plan, the loan of CNH Capital America, LLC secured by the 2008 Ford TJ380 Tractor, Port laser tower and Prot Scraper shall be reduced to $160,804.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 6 years or $2,572.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;

5. Upon confirmation of the plan, the loan of Ervin Leasing secured by a JD 9500 Laser System shall be reduced to $1,000.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or $19.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;

6. Upon confirmation of the plan, the secured claim of the Internal Revenue Service secured by the equity in all of Debtor's assets shall be paid in full without interest amortized over 5 years or $359.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by Debtor directly until the debt is satisfied;

7. Upon confirmation of the plan, the secured claim of Deere & Company secured by a 2007 John Deere 9520 Tractor shall be $91,026.92 paid with interest at the rate of 4.75% per annum, amortized over 5 years or $938.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied. In addition to these payments, Debtor shall pay $5,628.00 directly to Deere & Company by August 15, 2013 which shall be applied to the secured claim of Deere & Company. Debtor shall at all times maintain insurance on all of the equipment;

8. The claim of Mesa Leasing in the amount of $72,661.00 secured by multiple pieces of equipment shall be paid in full as follows:

   a. $10,000.00 paid by August 1, 2013 directly by Debtor;

   b. $10,000.00 paid by September 1, 2013 directly by Debtor and the balance of the claim paid with interest at the rate of 4.75% per annum, amortized over 3 years or $1,659.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan;

9. Debtor shall pay the sum of $10,000.00 directly to NEADA. One payment of $5,000.00 shall be received no later than July 24, 2013. The second payment of $5,000.00 shall be received no later than August 7, 2013. This is no grace period for the receipt of these

payments; (B) The balance of NEADA's claim in the amount of $37,611.86 shall be paid in full within 36 months, at 4.75% interest, by monthly plan payments in the amount of $1,139.70, commencing September 10, 2013 and continuing monthly thereafter until August 10, 2016; (C) NEADA shall have the right to inspect the Equipment (i.e. Used Model 1814 E John Deere Scrapper S/N T81814E050108, and a Used Model 1814E John Deere Scraper S/N T81814E050109) at 90 day intervals. NEADA may contact the Debtor directly to arrange for the inspection; (D) Debtor shall maintain adequate insurance on the Equipment at all times, naming NEADA as a loss payee in the amount of $50,000.00; (E) NEADA has also filed a motion from relief from stay or, in the alternative, for adequate protection. Debtor agrees that the motion may be granted, but the relief stayed so long as Debtor remains in compliance with the terms of this Stipulation. If the Debtor defaults under any provision of this Stipulation, then NEADA shall send written notice of the default to Debtor and Debtor's counsel. If the default is not cured within 10 days of the date of the written notice, then NEADA may immediately exercise its rights under state law to repossess and sell the Equipment;

10. Unless the court orders otherwise, attorney fees for Debtor's counsel in the amount of $10,000.00 are approved. $5,000.00 was paid by the Debtor directly and the balance shall be paid by the Trustee as funds become available. Attorney fees shall be governed by the terms and conditions set forth in the "Rights and Responsibilities" form used by this court in Chapter 13 cases;

11. To the extent any preprinted section of the plan conflicts with the Additional Provisions set forth in Section 6.02, the Additional Provisions shall control the plan and the preprinted sections shall be of no force or effect;

12. John Bell shall act as a receiver with the following obligations:

    a. Collect payments from Debtor's customers;

    b. Verify and ensure payment of Debtor's business expenses;

    c. Pay plan payments to the Chapter 12 Trustee;

    d. Pay Debtor any amounts remaining after payment of business expenses and plan payments;

    e. Prepare and file any reports requested by the court of Chapter 12 Trustee;

    f. Assume control and monitor all of Debtor's business activities;

13. There shall be no distributions to unsecured creditors until the end of the plan to ensure there is sufficient funds on hand to pay administrative expenses;

14. In the event there is a default in plan payments, the Chapter 12 Trustee may send a letter advising Debtor and Debtor's counsel of a default. Should Debtor fail to cure this default within 10 calendar days, the Chapter 12 Trustee may file with the court a declaration

describing the default and failure to cure and the court shall dismiss the case with a one year bar on future bankruptcy filings without any further notice or hearing.

UNITED STATES TRUSTEE'S RESPONSE

The United States Trustee ("UST") filed a response to the instant Motion on October 16, 2014. Dckt. 283. The UST first frames the proposed plan as (1) increasing the monthly payments to $12,000.00 and (2) appointing John Bell as a "receiver." To these points, the UST states:

1. The appointment of a receiver may be contrary to 11 U.S.C. § 105(b), which prohibits the appointment of a receiver "in a case under this title." Therefore, the Modified Plan should be amended to provide for the appointment of Mr. Bell as a "financial manager" (albeit with the same duties currently specified in Additional Plan Provision No. 13).

2. In order to address the Modified Plan's compliance with 11 U.S.C. § 1229(a)(1), the Modified Plan should expressly state that the purpose of the modification is to increase the plan payments in order to repay the money spent by the Debtor on luxury items. The Modified Plan should also expressly state that the "financial manager" (Mr. Bell) is being appointed to ensure the feasibility of the Plan.

3. The Modified Plan should require the "financial manager" (Mr. Bell) to be bonded in the amount of $20,000.00.

The UST requests that the court condition confirmation of the plan upon the Debtor making amendments to the Plan that address the above concerns.

STIPULATION REGARDING FIRST MODIFIED CHAPTER 12 PLAN

The UST and Debtor filed a stipulation concerning the proposed modified plan on October 17, 2014. Dckt. 287. The parties stipulated and agreed to the following:

1. John Bell shall be appointed to act as financial manager pursuant to the terms of the Modified Plan;

2. Additional Provision Number 13 to Section 6.02 of the Modified Plan shall be amended to read as follows:

    a. "John Bell shall act as financial manager with the following obligations:

        i. Collection payments from Debtor's customers;

        ii. Verify and ensure payment of Debtor's business expenses;

        iii. Pay plan payments to the Chapter 12 Trustee;

        iv. Pay Debtor any amounts remaining after payment of business expenses and plan payments;

v. Prepare and file any reports requested by the court of Chapter 12 Trustee

vi. Assume control and monitor all of Debtor's business activities; and

vii. Obtain a bond in the amount of $20,000.00 in favor of the United States, conditioned on the faithful performance of his duties under this Provision

3. An Additional Provision Number 16 shall be added to Section 6.02 of the Modified Plan, which provision shall read as follows:

4.

a. "The purpose of this First Modified Chapter 12 Plan is to increase monthly payments in order to repay the money spent by the Debtor on luxury items. Mr. Bell, the financial manger, is being appointed as such to facilitate the feasibility of the First Modified Chapter 12 Plan."

5. Facsimile or scanned copies of signatures on this Stipulation are acceptable, and facsimile or scanned copy of a signature on this Stipulation is deemed an original.

6. This Stipulation may be changed, modified or otherwise altered only by a writing executed by all parties hereto. Oral modifications are not permitted.

7. This Stipulation may be executed in counterparts, each of which is deemed an original, but when taken together shall constitute one and the same document.

DISCUSSION

Upon review of the proposed Chapter 12 Plan, as amended, the evidence in the form of the declaration of Debtor, the response of the UST, the stipulation between the UST and Debtor, and arguments of counsel, the court makes the following findings of fact and conclusions of law with respect to the motion to confirm the Chapter 12 Plan pursuant to 11 U.S.C. § 1225, analyzing each requirement individually.

(1) the plan complies with the provisions of Chapter 12 of the Bankruptcy Code and with the other applicable provisions of this title, with the amendments proposed in the Stipulation, except as expressly stated below;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law in order to address Debtor's spending on luxury goods and to remedy that superfluous spending;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date;

The Debtor states in the Motion that all of Debtor's assets are fully encumbered. Absent a Federal Tax Lien, Debtor would have $21,522 in unencumbered assets. Noting this, the Internal Revenue Service filed a secured claim in this amount. According to the Debtor, if the Debtor were to liquidate in Chapter 7, there would be nothing for the unsecured creditors because the assets are exempt, subject to a tax lien and unsecured creditors would be junior to a $54,743.00 priority claim by the Internal Revenue Service.

(5) with respect to each allowed secured claim provided for by the plan–

(A) the holder of such claim has accepted the plan;

(B) (I) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor has not provided the court with evidence that he will be able to make all payments under the plan and to comply with the plan.

This court learned early on that "budgets" presented by plan proponents in Chapter 11, 12, and 13 cases were often comprised of the "necessary numbers" to generate the required plan payment. After several cases in which the "budgets" testified to under penalty of perjury by debtors and put forward by they attorneys (subject to Fed. R. Bankr. P. 9011) turned out to be mere "make believe," the court has required plan proponents to provide evidence of how the numbers are generated and why they are credible. Generally this is shown through historical information concerning the operation of the business (which in Chapter 11 cases may include the monthly operating reports), with explanations as to what has changed to decrease expenses or increase income.

When this bankruptcy case was filed on May 9,2013 the Debtor stated on Schedule I that the monthly income from the business was $75,000.00 a month. Dckt. 1 at 32. On Schedule J the Debtors list business expenses of ($69.900.00) to generate the $5,100.00 of business income. *Id.* at 33. The Statement of Financial Affairs lists income from the business of $916,476.00 ($76,373 a month) in 2011, $900,000.00 ($75,000 a month) in 2012, and $300,000.00 YTD as of petition date in 2013.

Now, in support of confirmation a year and a half later, Debtor state that the monthly business income is $14,620.00 and business expenses are $2,620.00 without providing how these new numbers have been reached. Dckt. 260, Exhibit A.

(7) the debtor has paid all amounts that are required to be paid under domestic support obligation an that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation.

While the Debtor notes that there may be future support obligations due for Debtor's former spouse, at the time there is no award for domestic support obligations that is due.

CONSIDERATION OF ORIGINAL MODIFIED PLAN TERMS

After review of the plan and analyzing each requirement under 11 U.S.C. § 1225(a), the court finds that the plan, after the amendments stipulated to by the UST and Debtor are made, does not comply with § 1225. The court is concerned with the new budget numbers presented to the court through the supplemental Schedules I and J, the new budget diverges from the original budget filed with the petition. As discussed in more detail, the "financial honesty" of this Debtor has been compromised by his diversion of monies.

The terms concerning Mr. Bell appears to have not been rectified through the stipulated amendment proposed by the UST and Debtor to ensure that the past bad acts of the Debtor concerning superfluous spending no longer takes place. The court agrees that the modified plan needed to state the purpose of the plan and step up in plan payments was to rectify Debtor's prior spending on luxury goods.

The proposed Plan merely provides that the "receiver" or "financial manager" shall have some limited powers to oversee the finances of the Debtor's business. However, the Debtor has demonstrated that he is incapable of handing such finances or being honest with the Chapter 12 Trustee, creditors, and the court. Merely changing the name of the fiduciary of the estate from "receiver" to "financial manager" does not change what that person needs to do on behalf of the bankruptcy estate – take over complete operation and control of the estate's business and finances.

The Debtor proposes a watered down, unreasonable "financial manager" which would in effect leave the Debtor with free reign to engage in further financial abuses, diversion of monies, and being free to go on gambling junkets to Las Vegas. In substance, the "financial manager" would be fed the information which the Debtor deemed appropriate about the business, be told about contracts entered into by the Debtor which the Debtor wanted to disclose, responsible for collecting the accounts receivable that the Debtor disclosed, "verify" that the Debtor was paying whatever expenses the Debtor disclosed he was paying, and paying the Debtor an undetermined amount left over each month after accounting for the income that the Debtor chose to disclose to the Trustee, after verifying that the Debtor paid the expenses which the Debtor chose to disclose to the "financial manager."

The proposed plan provides that the "financial manager" has the obligation to "assume control and monitor all of Debtor's business activities." The court does not know what this means, and how, if it is intended to mean that the "financial manager" shall take over control of and operate the business, how that differs from a "receiver" appointed pursuant to a confirmed plan.

The court also finds the Debtor's current financial information not to be credible. Since filing this case on May 9, 2013, Debtor has repeated stated under penalty of perjury that the true and accurate gross income each month is $75,000.00. In his multiple statements this amount never varies. Debtor has now reduced the "necessary" expenses for the business from the prior stated $67,280.00 a month (Schedule J, Dckt. 1) to the current

$60,380.00 (Supplemental Schedule J, Dckt. 267). These "necessary expenses" have now been "reduced" to allow the Debtor to make the higher plan payment which is required because of the monies he previously diverted. No explanation is provided as to how the Debtor could "reduce" such "necessary expenses," and it appears that these are made up numbers to generate the result the Debtor desires.

The Debtor also purports to have personal expenses of only $2,620.00 a month. This includes payment of $1,345.00 for his mortgage or insurance. There is no showing that the expenses which he chooses to list on Supplemental Schedule J are true and accurate. The Debtor lists monthly expenses f only,

a. $100 for electricity and heating;

b. $300 for food and housekeeping;

c. $100 for medical and dental expenses;

d. $300 for self employment taxes;

and the Debtor shows no expenses for the following:

e. $0.00 for home maintenance;

f. $0.00 for health insurance;

g. $0.00 for personal vehicle insurance;

h. $0.00 for health insurance;

i. $0.00 for income taxes

Supplemental Schedule J, Dckt. 267.

These expenses do not appear to be reasonable, but appear to document that the Debtor is not being truthful or accurate with this information.

The Business expenses include $11,500.00 for "payroll," which the court interprets as necessary payments to persons other than the Debtor. No health insurance payments are made by the "business." There is a "business expense" of $1,500 a month for "auto insurance."

Quite possibly the Debtor's actual personal expenses are hidden in the "business expenses." That is not proper.

Debtor has demonstrated that he is not capable of running the finances of the business, be responsible for the finances, handling any money of the business, and being responsible for the contracts and accounts receivable. The proposed "financial manager" appears to be little more than a "beard" by which the Debtor maintains all of the real financial information and the "financial manager" gets only what the Debtor chooses to disclose.

If the Debtor is not able to obtain a receiver under a confirmed plan who can take control of the business upon which the plan depends, he may want to convert the case to one under Chapter 11, have a Chapter 11

Trustee appointed, and have the Chapter 11 Trustee continue in that capacity under a confirmed plan until the plan is completed.

AMENDMENTS TO THE PROPOSED MODIFIED PLAN

Following the October 30, 2014 hearing the Plan Administrator-Debtor and other parties in interest engaged in good faith discussions to fashion a Chapter 12 Plan which properly provides for creditors' claims, the obligations of the Chapter 12 Trustee, the Debtor's efforts to engage in a bona fide, good faith reorganization, and, for the court, the demonstrated inability of the Debtor to serve as the Plan Administrator and perform the plan. The Debtor proposes the following amendments to the Modified Plan:

I. Paragraph 13 of the Proposed Modified Plan is deleted in its entirety.

II. A new Paragraph 13 is inserted in its place which provides as follows (to which the court has added interliniation s for the posted tentative ruling to afford the parties in interest the opportunity to consider and respond to concerns of the court_:

"13. John Bell shall ~~act as a~~ be appointed as the receiver under the terms of this confirmed Modified Plan with the obligation to take over complete operation and control of the estate's business and finances, including, but not limited to the following obligations:

A. Collect payments from Debtor's customers;

B. Verify and ensure payment of Debtor's business expenses;

C. Pay plan payments to the Chapter 12 Trustee;

D. Pay Debtor a stipend of $2,620 per month for Debtor's personal expenses. John Bell shall have the discretion to pay Debtor additional amounts, not to exceed $1,000 per month, to cover additional unforeseen expenses. Should Debtor require any amounts exceeding $1,000 per month, Debtor shall seek court permission by way of a notice motion.

E. Any amounts remaining after payments set forth in paragraphs C and D shall be retained by John Bell as a reserve in a separate blocked account to ensure plan payments can be paid during business slow downs. John Bell may use these funds to pay plan payments with court approval which may be obtained by way of an ex parte application.

F. Prepare and file any reports requested by the court or Chapter 12 Trustee;

G. Assume control and monitor all of Debtor's business activities; and

H. Obtain a bond in the amount of $20,000 in favor of the United States, conditioned on the faithful performance of his duties under this Provision."

III. A new paragraph number 16 shall be added to provide,

"16. The purpose of this First Modified Chapter 12 Plan is to increase monthly plan payment in order to repay the monthly plan payment in order to repay the money spent by the Debtor on luxury items. Mr. Bell, the receiver, is being appointed as such to facilitate the feasibility of the First Modified Chapter 12 Plan."

AMENDED MODIFIED PLAN TERMS REPRESENT A REASONABLE CONTRACTUAL ACCOMMODATION UNDER UNIQUE CIRCUMSTANCES OF THIS CASE

Congress created the Bankruptcy Code and the 21st Century bankruptcy process to operate with four main groups of players: the debtor, debtor in possession, creditors, and trustee. In 11 U.S.C. § 105(b) Congress expressed its desire that the bankruptcy process be built around these players by not permitting a court to appoint a receiver in a case under Title 11 pursuant to the provisions of 11 U.S.C. § 105(a). These 105(a) powers can be referred to as the "make any order necessary to carry out the bankruptcy code" authority.

As this court discussed in *In re Saras*, 2013 Bankr. LEXIS 3392 *6-*9 (Bankr. E.D. Cal. 2013),

> In enacting the Bankruptcy Code, Congress restricted the appointment of receivers by the federal courts in bankruptcy cases. In 11 U.S.C. § 105(b), Congress provided, "(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title." However, this restriction has been interpreted to limit the federal court's power to use a receiver in lieu of appointing a trustee or examiner, and does not limit the appointment of a receiver as permitted by applicable law. Cases which are instructive on the proper exercise of the equitable powers by a federal judge to appoint a receiver include the following.
>
> *In re Memorial Estates, Inc.*, 797 F2d 516 (7th Cir. 1986),
>
> > (The appointment of a receiver for the mortgaged property -- not for the bankrupt's estate as such -- is the appointment of a regular equity receiver and is therefore subject to section 1292(a) (2). Compare our discussion of the possible applicability of section 1292(b) to bankruptcy cases in *In re Riggsby*, supra, 745 F.2d at 1156-57. . .
> >
> > The power cut off by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the bankrupt estate, that is, a receiver in lieu of a trustee. Thus in *In re Cash Currency Exchange*, *supra*, where we held that U.S.C. § 1292(a) (2) is limited to equity receivers, the order sought to be appealed was the order appointing the trustee in bankruptcy, and the appellant wanted us to deem the trustee a receiver for purposes of that section. Section 105(b) is not addressed to the power of the bankruptcy court to

> appoint a receiver in a separate controversy between a creditor and the debtor or another creditor.

Craig v. McCarty Ranch Trust (In re Cassidy Land and Cattle), 836 F.2d 1130, 1133 (8th Cir. 1988), cert, denied 486 U.S. 1033, 108 S. Ct. 2016, 100 L. Ed. 2d 603 (1988).

> The power of the bankruptcy judge precluded by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the estate in lieu of a trustee. *In re Memorial Estates, Inc.*, 797 F.2d 516, 520 (7th Cir. 1986). Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver at the request of the trustee [exercising lien rights of the estate] for the limited purpose of administering the mortgaged property pending disposition of the foreclosure proceeding.

Balakian v. Balakian, 2008 U.S. Dist. LEXIS 121067, at *49, (E.D. Cal. 2008). ("Although 11 U.S.C. § 105(b) precludes appointment of a receiver 'in a case under this title,' Section 105(b) does not preclude appointment of a receiver in an adversary proceeding to foreclose a lien, see *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1133 (8th Cir.1998).")

> The appointment of a receiver to take possession of and compete a required transaction under the confirmed Chapter 11 Plan, would not appear to run afoul of 11 U.S.C. § 105(b). This is not being done in lieu of the appointment of a trustee to take of all the property of the estate, but merely to enforce the contractual terms (Chapter 11 Plan) for the marketing and sale of the Costner Property. The Debtors have agreed, as set forth in the Stipulation, that the court shall "require" that the Costner Property be sold. The Debtors and Nora Torres have left it to this court to determine how the court will enforce the plan and have the sale be completed as required in the Chapter 11 Plan and Stipulation. While the court cannot, and will not, serve as the plan administrator, a receiver may fulfill those fiduciary duties under the Chapter 11 Plan.”

The Parties decision to have a receiver appointed to perform the Plan has been made to address a significant, practical, business reality – the Debtor has demonstrated through multiple bankruptcy cases that he is not up to fulfilling the obligations of a plan administrator. In multiple cases the Debtor has confirmed Chapter 12 Plans and in multiple cases he has defaulted on those plans – notwithstanding the business generating substantial revenues.

The appointment of a contractually agreed, Chapter 12 Plan administrator does not do violence to the letter or spirit of 11 U.S.C. § 105(b). The court is not appointing a receiver to take the place of a debtor in possession, Chapter 13 debtor, or a trustee. The receiver is serving in the same function as a “plan administrator” or as a post-

confirmation, non-bankruptcy Chapter 11 plan trustee over a trust rather than having property of the estate revested in the debtor.

While it would be possible for the Debtor to convert this case to one under Chapter 11 and all of the parties expend more money in confirming a Chapter 11 plan creating such a trust, though the coordination of efforts they have agreed to use a receiver. This has an added benefit for Mr. Bell, as opposed to create some unique position through the Chapter 12 Plan. He knows, through a well established body of California law, the duties of a Receiver. Additionally, he is appointed by this court, and any disputes, issues, or litigation concerning the performance of his duties are in this court, unless ordered otherwise.

The court cannot stress enough that this is a unique situation, with large dollar amounts at stake, and the cooperation of all parties in achieving these amendments. If these parties could not reach such a conclusion, the court would have been left with little option but to convert the case to one under Chapter 7 pursuant to 11 U.S.C. § 1208(d).

4. 13-90901-E-12 ANDREW NAPIER **CONTINUED MOTION TO EMPLOY JOHN**
SAC-11 **BELL AS RECEIVER**
9-18-14 [262]

No Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

Local Rule 9014-1(f)(1) 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 12 Trustee, parties requesting special notice, and Office of the United States Trustee on September 18, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Employ is xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Andrew Napier ("Debtor"), seeks to employ John Bell as financial manager and/or receiver. Debtor seeks the employment of counsel to assist the Debtor in:

i. Collection payments from Debtor's customers;

ii. Verify and ensure payment of Debtor's business expenses;

iii. Pay plan payments to the Chapter 12 Trustee;

iv. Pay Debtor any amounts remaining after payment of business expenses and plan payments;

v. Prepare and file any reports requested by the court of Chapter 12 Trustee

vi. Assume control and monitor all of Debtor's business activities; and

vii. Obtain a bond in the amount of $20,000.00 in favor of the United States, conditioned on the faithful performance of his duties under this Provision.

The Debtor argues that financial manager/receiver's appointment is necessary to ensure that luxury spending by the Debtor no longer takes place to the detriment of the estate and the creditors.

John Bell, a panel Chapter 7 Trustee, a Chapter 11 Trustee and financial manager, testifies that he will have oversight on Debtor's business and estate to ensure timely payment and compliance with the plan. Mr. Bell testifies he does not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Motion states that the Debtor, Mr. Bell, and the Chapter 12 Trustee have agreed that Mr. Bell should be compensated for his services by way of a direct payment form the Chapter 12 Trustee at the rate of $2,000.00 per month for six months. Mr. Bell, Debtor, or the Trustee may move the court to modify this compensation should it be determined that it is inadequate or excessive in light of the amount of work required of Mr. Bell. At the conclusion of the six months, Mr. Bell shall move the court for additional compensation in a manner to reasonably compensate him for the services he will be rendering after these six months. The Debtor asserts that due to the uncertain nature of the amount of work that will be required of Mr. Bell, the Debtor, Mr. Bell and the Trustee have agreed that this approach would be appropriate under the circumstances.

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

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

After review of the Motion and accompanying pleadings, the Motion lists Mr. Bell's position as a receiver. While the stipulation made by the United States Trustee and Debtor re-title the position to "financial manager" in order to avoid any potential 11 U.S.C. § 105(b) concerns that precludes the court from appointing a receiver in lieu of a trustee, the mantra "a rose by any other name would smell as sweet" is appropriate.

In enacting the Bankruptcy Code, Congress restricted the appointment of receivers by the federal courts in bankruptcy cases. In 11 U.S.C. § 105(b), Congress provided, "(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title."

However, this restriction has been interpreted to limit the federal court's power to use a receiver in lieu of appointing a trustee or examiner, and does not limit the appointment of a receiver as permitted by applicable law. Cases which are instructive on the proper exercise of the equitable powers by a federal judge to appoint a receiver include the following.

In re Memorial Estates, Inc., 797 F2d 516 (7th Cir. 1986),

> The appointment of a receiver for the mortgaged property -- not for the bankrupt's estate as such -- is the appointment of a regular equity receiver and is therefore subject to section 1292(a)(2). Compare our discussion of the possible applicability of section 1292(b) to bankruptcy cases in *In re Riggsby*, supra, 745 F.2d at 1156-57...
>
> The power cut off by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the bankrupt estate, that is, a receiver in lieu of a trustee. Thus in *In re Cash Currency Exchange*, supra, where we held that U.S.C. § 1292(a)(2) is limited to equity receivers, the order sought to be appealed was the order appointing the trustee in bankruptcy, and the appellant wanted us to deem the trustee a receiver for purposes of that section. Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver in a separate controversy between a creditor and the debtor or another creditor.

Balakian v. Balakian, 2008 U.S. Dist. LEXIS 121067, at *49, (E.D. Cal. 2008)

> Although 11 U.S.C. § 105(b) precludes appointment of a receiver 'in a case under this title,' Section 105(b) does not preclude appointment of a receiver in an adversary proceeding to foreclose a lien, see *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1133 (8th Cir.1998).

The appointment of a receiver to take possession of and compete a required transaction under the confirmed Chapter 12 Plan, would not appear to run afoul of 11 U.S.C. § 105(b). The plain language states that the court "may not appoint a receiver in a case under this title [Title 11]." 11 U.S.C. § 105(b). However, it does not state that the parties cannot provide for a receiver as terms of a Chapter 11 or Chapter 12 Plan.

However, there is no confirmed plan in this case. The court having dismissed the proposed plan on the October 30, 2014 hearing, the court cannot grant the appointment of a receiver. The fact that the terms of the alleged receivership seem to give the receiver only as much control and knowledge over the estate as what is offered by the Debtor, even if there was a confirmed plan that would avoid the § 105(b) issues, the receivership as contemplated by the Motion and plan are flatly unacceptable and non-confirmable. The court will not authorize the extra-ordinary appointment of a receiver, after a plan is confirmed, who will be at the mercy of disclosures from the Debtor. The reason the case is in its current posture is due to the negligence and bad faith of the Debtor so giving the Debtor any say or authority in the maintenance of the estate is not in the best interest of the estate, the creditors, or even the Debtor himself.

Furthermore, there is no employment agreement outlining the terms of

the representation and compensation for the court to review. Without documentation of the agreement, the court cannot determine the reasonableness of the fee arrangement. Furthermore, while the Debtor states there was an agreement that Mr. Bell would be paid from the chapter 12 Trustee, there does not appear to be any provision in the Plan about the compensation of Mr. Bell.

5. 11-94146-E-11 DOMINIC/MARIA DEPALMA **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 12-2-11 [1]**

Debtors' Atty: Naresh Channaveerappa

Notes:

Continued from 10/2/14

Quarterly Post Confirmation Report filed 10/23/14

NOVEMBER 20, 2014 STATUS CONFERENCE

The Trustee filed a Quarterly Post-Confirmation Status Report on October 23, 2014. In it he reports that some Post-Confirmation Administrative Expenses have not been paid by the Debtors.

OCTOBER 2, 2014 STATUS CONFERENCE

The Chapter 11 Trustee filed a Status Conference Report on September 29, 2014. Dckt. 515. He reports that he is still addressing issues with the California Franchise Tax Board over monies which were withheld and disbursed by the Title Company to the Franchise Tax Board for the sale of properties by the Estate. He reports that part of the confusion arises from the two Debtors having two separate tax identification numbers for the bankruptcy estate, and then one for each Debtor.

The Chapter 11 Plan was confirmed in this case by order filed on March 13, 2014. Dckt. 472.

6. 12-92570-E-12 COELHO DAIRY

CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 9-28-12 [1]

Debtor's Atty: Thomas O. Gillis

Notes:

Continued from 11/5/14 to be heard in conjunction with the evidentiary hearing re objection to claim of Black Rock Milling, Claim Number 24

7. 12-92570-E-12 COELHO DAIRY
TOG-23

CONTINUED EVIDENTIARY HEARING RE: OBJECTION TO CLAIM OF BLACK ROCK MILLING, CLAIM NUMBER 24 2-11-14 [398]