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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8
9 In re) Case No. 12-34470-E-13
10 LAMAR R. SMITH,) Docket Control No. JLW-1
11 Debtor.) Date: *Ex Parte*
12) Time: *Ex Parte*
_____)

13 This memorandum decision is not approved for publication and may
14 not be cited except when relevant under the doctrine of law of the
case or the rules of claim preclusion or issue preclusion.

15
16 MEMORANDUM OPINION AND DECISION
Ex Parte Motion to Extend Automatic Stay

17 The Chapter 13 Debtor commenced the present Chapter 13 case on
18 August 7, 2012. He lists one asset on Schedule A, real property
19 commonly known as 9434 Cross Fox Way, Elk Grove, California ("Cross
20 Fox Way Property"). The Debtor states that this property has a
21 value of \$150,000.00 and is subject to liens totaling \$389,251.58.
22 Dckt. 1, Petition, Schedules, and Statement of Financial Affairs.
23 This is the same address identified as the Debtor's residence on
24 the Petition and Statement of Financial Affairs. Schedule B lists
25 personal property assets and assets one expects of an average
26 consumer debtor seeking relief under Chapter 13, and do not
27 disclose any business interests or investments.

28 ///

1 On Schedule D the Debtor lists two creditors - America's
2 Servicing Company¹ as having a claim in the amount of \$310,510.58
3 secured by a first deed of trust against the Cross Fox Way Property
4 and Wells Fargo Home Mortgage/ASC having a claim in the amount of
5 \$78,741.00 secured by a second deed of trust against the Cross Fox
6 Way Property. The Debtor lists a \$10,750.00 federal tax claim on
7 Schedule E (of which \$6,000.00 is a priority claim) and \$38,238.12
8 in general unsecured claims (of which \$12,315.12 is a student loan
9 and \$16,000.00 is a credit card debt) on Schedule F.

10 For Income, the Debtor (a family unit of 1) discloses gross
11 income of \$8,244.97 a month from his employer of 12 years. In
12 addition to the normal taxes and insurance deductions, the Debtor
13 also has \$1,263.86 a month in pension and 457 Plan deductions.
14 Schedule I.

15 The proposed Chapter 13 Plan requires monthly payments of
16 \$3,380.00 for a period of 60 months. Of this, \$3,016.92 is
17 earmarked to make payments on the claim secured by the first deed
18 of trust. The balance of the monthly plan payment, \$363.08 x 60 =
19 \$21,784.80, are to pay administrative expenses (Debtor's counsel
20 and Chapter 13 Trustee), the priority tax claim, and then general
21 unsecured claim. After allowing for Counsel's fees to be paid
22 through the plan (\$2,519.00), the Chapter 13 Trustee fees
23 (\$16,224.00, estimated at 8%) and the priority tax claim
24

25
26 ¹ Interestingly, on Schedule D the Debtor appears to incorrectly
27 list the creditor having a claim secured by a first deed of trust
28 against the real property as "America's Servicing Co." Nothing in the
multiple filings by the Debtor indicate that a servicing company is a
creditor in this case. Wells Fargo Home Mortgage/ASC (which as
discussed below in Wells Fargo Bank, N.A.) is listed as the creditor
having a claim secured by a second deed of trust.

1 (\$4,750.00), there is nothing to distribute to creditors holding
2 general unsecured claims (the Plan proposing a 0.00% dividend).
3 Dckt. 5.

4 As disclosed in the Petition and *Ex Parte* Motion, this is not
5 the Debtor's first bankruptcy case. In each of his prior two cases
6 the Debtor was represented by the same counsel who is representing
7 him in this case. The prior cases are summarized as follows:

8 A. EDC Bankr. Case No. 12-31242

9 1. Counsel for Debtor: Jamil L. White

10 2. Attorneys' Fees Paid Counsel Pre-Petition:
11 \$0.00 of \$3,500.00. Dckt. 7

12 3. Filed: June 14, 2012

13 4. Dismissed: July 2, 2012

14 5. Reason For Dismissal: Failure to file Chapter
15 13 Plan, Schedules A-J, Statement of Financial
16 Affairs, Form 22C. Dckts. 3, 12

17 B. EDC Bankr. Case No. 12-29109

18 1. Counsel for Debtor: Jamil L. White

19 2. Attorneys' Fees Paid Counsel Pre-Petition: Not
20 Disclosed

21 3. Filed: May 10, 2012

22 4. Dismissed: May 29, 2012

23 5. Reason For Dismissal: Failure to file Chapter
24 13 Plan, Schedules A-J, Statement of Financial
25 Affairs, Form 22C. Dckts. 3, 10

26 **DISCUSSION OF *EX PARTE* MOTION**

27 The Debtor filed an *ex parte* motion for an order extending the
28 automatic stay on August 8, 2012, the day after commencing this
29 bankruptcy case.² No basis for seeking this relief by an *ex parte*

² The *Ex Parte* Motion incorrectly states that the present
bankruptcy case was commenced on July 16, 2012.

1 motion is stated by the Debtor or why impacted parties, now with
2 the third filing of a bankruptcy case by this Debtor, should not be
3 afforded a hearing on this Motion.

4 Pursuant to Federal Rule of Bankruptcy Procedure 9013, the
5 Debtor states in the *Ex Parte* Motion, Dckt. 8, with particularity,
6 the following grounds in support of the requested *ex parte* relief,

7 A. The motion seeks to extend the automatic stay,
8 citing to and including in a footnote 11 U.S.C. § 362(c)(3).

9 B. Prior bankruptcy case no. 12-29109 was closed by the
10 court on May 29, 2012, without the entry of a discharge.

11 C. Prior bankruptcy case no. 12-31242 was closed by
12 the court on July 3, 2012, without the entry of a discharge.

13 D. Pursuant to 11 U.S.C. § 362(c)(3)(a), because of a
14 prior bankruptcy filing within in a 12-month period preceding
15 the filing of the present bankruptcy case, the automatic stay
16 terminates after 30 days, and two prior filings within one
17 year prior to the third case precludes the automatic stay
18 going into effect.

19 E. Pursuant to 11 U.S.C. § 362(c)(3)(B) the Debtor has
20 standing to seek an order of the court extending the automatic
21 stay.

22 F. If the Debtor can convince the court by clear and
23 convincing evidence that the dismissal of the prior case was
24 not due to the willful inadvertence or negligence on the part
25 of the Debtor, the court may extend the automatic stay.

26 G. Debtor's counsel "avers" that the third bankruptcy
27 case was filed in good faith and the prior case was dismissed
28 not due to the willful inadvertence or negligence of the

1 Debtor.

2 H. The court is instructed by the Debtor to read his
3 declaration and select what grounds exist for the relief
4 requested in the Motion.

5 I. Debtor's counsel (who represented the Debtor in the
6 prior two cases and the third case) asserts that the Debtor
7 may have been "less than adequately advised as to the Debtor's
8 rights and responsibilities. This may have led to the
9 Debtor's unintentional failure to comply with his obligations
10 and duties."

11 J. Debtor's counsel asserts that if the stay is not
12 extended that it will terminate prior to the first meeting of
13 creditors. It is suggested that this will result in creditors
14 engaging in "last minute 'self-help' efforts to collect as
15 much as possible during the 60 days before the Order of
16 Discharge."

17 K. A Chapter 13 Plan, announcing the Debtor's plans to
18 pay certain secured and priority debts, should be completed
19 while the automatic stay protects the Debtor.

20 As filed, the Motion fails to state with particularity grounds
21 upon which the court may grant the requested relief. First, it
22 merely contains some general conclusions and provides no concrete
23 grounds as to why and how the Debtor has twice, in the three months
24 prior to the third bankruptcy case, failed to file the minimal
25 documents required to initiate a Chapter 13 bankruptcy case. A
26 vague general reference is stated in the Motion that Debtor's
27 counsel, in the prior cases "may" not have adequately advised his
28 client. This theoretical, abstract, nonspecific statement does not

1 constitute grounds stated with particularity. Also, no contention
2 is made as to why or how the prior and now current counsel failed
3 to adequately advise the Debtor previously but will now adequately
4 advise the Debtor.

5 The Declaration of the Debtor, Dckt. 10, provides testimony
6 under penalty of perjury for the following:

7 A. The Debtor has filed two prior bankruptcy cases
8 within the one-year period preceding the commencement of the
9 third case.

10 B. The Debtor provides his opinion as to the effect of
11 11 U.S.C. § 362(c)(3)(A), that the automatic stay is effective
12 for only 30 days when one prior case was filed in the one-
13 period preceding the third case and the stay does not commence
14 when there are two prior cases filed within one-year of the
15 third case.³

16 C. The Debtor "candidly and honestly" states that the
17 present case was commenced in "good faith." The Debtor does
18 not testify as to facts and circumstances for the court to
19 understand how the Debtor reaches this conclusion.

20 D. The Debtor testifies that the prior dismissals were
21 "NOT due to the willful inadvertence or negligence on my
22 part." ¶ 4. He does not affirmatively testify as to the
23 reason why he failed to comply in the prior cases or why they
24

25 ³ 11 U.S.C. § 362(c)(3)(A), for one case filed within the
26 preceding year, and §362(c)(4)(A), for two or more cases filed within
27 the preceding year, provides that the termination or no automatic stay
28 going into effect is based on cases "pending" within the prior year,
not filed. Under the facts of the present case, this distinction does
not render a different result, as the Debtor's prior two cases were
filed and dismissed within the one-year period preceding the
commencement of the third Chapter 13 case.

1 were dismissed.

2 E. The Debtor's testimony continues to state that,
3 since he is not an attorney, he cannot determine if he was
4 properly advised by his attorney in those cases (who was his
5 attorney in the prior two dismissed cases). This possible
6 failure to provide proper advice may have led to the Debtor
7 unknowingly and unintentionally failing to comply with his
8 (unspecified) duties in the prior bankruptcy cases.

9 F. Further, the Debtor testifies that after the
10 dismissal of the two prior cases, he believed in good faith
11 that his lender was reconsidering the possibility of a loan
12 modification (which indicates that a loan modification was
13 denied) to cure the arrearage on the loan. After the
14 dismissal of the second bankruptcy case the Debtor states he
15 paid his lender \$13,000.00 "in reliance on their indication
16 that they were willing to approve a loan modification . . . "

17 ¶ 6.⁴

18 G. The Debtor provides his conclusion that if the court
19 does not extend the stay, creditors will be able to enforce
20 their rights until the Debtor obtains a discharge.
21 Specifically, his "mortgagor" will foreclose on his house,
22 which the Debtor concludes will not be in the best interest of
23 his creditors. Notwithstanding his proposed Chapter 13 Plan
24 providing for a 0.00% dividend to creditors holding general

26 ⁴ As discussed below, the Debtor fails to disclose in the
27 Statement of Financial Affairs such a payment. The Debtor does
28 disclose having chosen to pay another creditor \$10,000.00 shortly
 before filing this bankruptcy case. The amounts of cash this Debtor
 appears to have held and disburse to his preferred creditors concerns
 the court.

1 unsecured claims, he states under penalty of perjury, "[i]f I
2 am allowed to keep my house and stay in Chapter 13, they [all
3 the Debtor's creditors] will receive all of the money owed to
4 them." ¶ 7.

5 DISCUSSION

6 While the Debtor seeks to "extend" the automatic stay,
7 Congress has provided that no automatic stay has gone into effect
8 in this case. 11 U.S.C. § 362(c)(4) provides (emphasis added),

9 (4) (A) (i) if a single or joint case is filed by or
10 against a debtor who is an individual under this title,
11 and **if 2 or more single or joint cases of the debtor were**
12 **pending within the previous year but were dismissed,**
13 other than a case refiled under a chapter other than
chapter 7 after dismissal under section 707(b), **the stay**
under subsection (a) shall not go into effect upon the
filing of the later case; and

14 (ii) on request of a party in interest, the
15 court shall promptly enter an order confirming that
no stay is in effect;

16 (B) if, within 30 days after the filing of the
17 later case, a party in interest requests the court may
18 order the stay to take effect in the case as to any or
19 all creditors (subject to such conditions or limitations
as the court may impose), **after notice and a hearing,**
only if the party in interest demonstrates that the
filing of the later case is in good faith as to the
creditors to be stayed;

20 (C) a stay imposed under subparagraph (B) shall be
21 effective on the date of the entry of the order allowing
the stay to go into effect; and

22 (D) for purposes of subparagraph (B), a **case is**
23 **presumptively filed not in good faith** (but such
presumption may be **rebutted by clear and convincing**
24 **evidence** to the contrary)--

25 (i) as to all creditors if--

26 (I) 2 or more previous cases under this title
27 in which the individual was a debtor were
pending within the 1-year period;

28 (II) a previous case under this title in which
the individual was a debtor was **dismissed**

1 within the time period stated in this
2 paragraph **after the debtor failed to file or**
3 **amend the petition or other documents** as
4 required by this title or the court **without**
5 **substantial excuse** (but mere inadvertence or
6 negligence shall not be substantial excuse
unless the dismissal was caused by the
negligence of the debtor's attorney), failed
to provide adequate protection as ordered by
the court, or failed to perform the terms of a
plan confirmed by the court; or

7 (III) **there has not been a substantial change**
8 **in the financial or personal affairs of the**
9 **debtor since the dismissal of the next most**
10 **previous case under this title**, or any other
reason to conclude that the later case will
not be concluded, if a case under chapter 7,
with a discharge, and if a case under chapter
11 or 13, with a confirmed plan that will be
fully performed; or

12 (ii) as to any creditor that commenced an action
13 under subsection (d) in a previous case in which
14 the individual was a debtor if, as of the date of
15 dismissal of such case, such action was still
pending or had been resolved by terminating,
conditioning, or limiting the stay as to such
action of such creditor.

16 First, the Debtor presumes that "after notice and hearing" for
17 the court to consider the motion means an *ex parte* motion in this
18 case. 11 U.S.C. § 102(1) provides that the phrase "after notice
19 and hearing" means such notice and hearing as is appropriate under
20 the circumstances as appropriate under the particular
21 circumstances. Under the Local Bankruptcy Rules in this District,
22 a person may seek an order shortening time for a hearing, set a
23 hearing on either a 28-day or 14-day notice. EDC Local Bankruptcy
24 Rule 9014-1. The term "*ex parte*" is defined by the Local
25 Bankruptcy Rules to mean "without prior notice." L.B.R. 9001-1(h).
26 The Debtor has not provided the court with good cause for
27 shortening the notice period from the minimum 14 days or to not
28 require any hearing. L.B.R. 9014-1(f)(3). Rather, the Debtor

1 merely presumes that he is entitled to an order pursuant to an ex
2 parte motion as a matter of right. That presumption is incorrect.

3 The Certificate of Service filed by the Debtor also fails to
4 document that Wells Fargo Bank, N.A.⁵, the creditor with the claims
5 secured by the Debtor's property, has been served pursuant to
6 Federal Rules of Bankruptcy Procedure 7004(h) and 9014. As a
7 federally insured financial institution, the Debtor must serve
8 Wells Fargo Bank, N.A. by certified mail addressed to an officer of
9 the bank. The Debtor has only mailed the pleadings to "Wells Fargo
10 Home Mortgage/ACS" by First Class Mail, not addressed to the
11 attention of an officer, and sent to a Post Office Box in
12 Des Moines, Iowa. The FDIC does not list an Iowa address for Wells
13 Fargo Bank, N.A. and the court has no idea of who or what is at
14 this post office box, as well as attempted service on a post office
15 box being insufficient. *Beneficial Cal., Inc. v. Villar (In re*
16 *Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that
17 service upon a post office box does not comply with the requirement
18 to serve a pleading to the attention of an officer or other agent
19 authorized as provided in Federal Rule of Bankruptcy Procedure
20 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re*
21 *Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr.
22 E.D. Va. 1995) ("Strict compliance with this notice provision in
23 turn serves to protect due process rights as well as assure that
24 bankruptcy matters proceed expeditiously.").

25
26 ⁵ In other cases before this court, Wells Fargo Bank, N.A. has
27 identified the operation known as Wells Fargo Mortgage as a division
28 within the Bank itself. This is also represented by Wells Fargo Bank,
N.A. on its web page for home mortgages, stating "Wells Fargo Home
Mortgage is a division of Wells Fargo Bank, N.A."
<https://www.wellsfargo.com/mortgage/>

1 Secondly, the Debtor has failed to provide the court with
2 clear and convincing evidence that this third bankruptcy case has
3 been filed in good faith and the presumption has been rebutted. It
4 appears that the *Ex Parte* Motion fails to state grounds with
5 particularity and sufficient evidence has not been presented
6 because no such grounds exist.

7 From the three filings, it appears that the Debtor is
8 attempting to forestall a foreclosure on a home worth (in the
9 Debtor's opinion) \$150,000.00 which secures a \$310,510.56 claim
10 secured by a first deed of trust. The terms of this claim cannot
11 be modified without the consent of the creditor. 11 U.S.C. § 1322.
12 The proposed Chapter 13 Plan filed in this third bankruptcy case
13 provides for curing the default and fund payment of a (\$160,510.00)
14 negative equity to keep the house rather than making dividends to
15 creditors holding general unsecured claims. In substance, the
16 creditors are requested to forgo a dividend to allow the Debtor to
17 retain a property with a negative (\$160,510.00) equity.⁶ No
18 explanation is provided as to how the multiple filings and the
19 attempt to retain this property has a reasonable, rational,
20 economic basis consistent with the provisions of Chapter 13.

21 In attempting to justify the imposition of a stay in this
22 case, the Debtor testifies that he has paid \$13,000.00 to his
23

24
25 ⁶ If instead of paying \$3,016.92 monthly to preserve the
26 property with a negative (\$160,510.00) equity the Debtor obtained a
27 replacement property with a monthly cost of \$2,000.00 (which
28 represents a reasonable significant rent or mortgage), the Debtor
would generate more than \$60,000.00 for disbursement to creditors
holding general unsecured claims a 100% dividend. This proposed
treatment under the plan and terms for the property will call into
plan the issue of good faith in attempting to confirm the plan. 11
U.S.C. § 1325(a)(3).

1 mortgage lender. This is not disclosed in the Statement of
2 Financial Affairs. The Debtor also states in the Statement of
3 Financial Affairs, but omits from his declaration, that he has paid
4 an additional Santander \$10,000.00. In the brief hiatus between
5 the second and this third bankruptcy case the Debtor has
6 distributed at least \$23,000.00 to creditors holding prepetition
7 claims rather than disbursing that money through a confirmed
8 Chapter 13 plan.

9 In his Statement of Financial Affairs the Debtor discloses in
10 response to question No. 3 that he paid \$10,000.00 to "Santander"
11 in July 2012. Dckt. 1. This statement does not disclose why this
12 payment was made and whether Santander had any interest in any
13 property of the estate. Santander is not listed as a creditor in
14 this third bankruptcy case. In the second bankruptcy case no. 12-
15 31242, no Schedules have been filed and the court cannot determine
16 how or why Santander was a creditor as of that filing based on the
17 pleadings filed by the Debtor in that case or this third bankruptcy
18 case.

19 In the second bankruptcy case, the Debtor did file a
20 Verification of Master Mailing List on which he states under
21 penalty of perjury the names and addresses of his creditors so that
22 they may properly receive notice in that case. Santander is not
23 listed on the Master Mailing List in the second bankruptcy case,
24 but only "Car Loan....."[which likely was Santander, commonly a
25 creditor holding claims secured by vehicles in consumer cases, and
26 there was an error in printing the attachment to the Master Mailing
27 List], the Internal Revenue Service, and Wells Fargo Home
28 Mortgage/ASC. Case No. 12-31242 Dckt. 4. Santander Consumer USA

1 filed a proof of claim in the prior case in the amount of
2 \$11,458.99 (at 14.99% interest), which was secured by a 07 Dodge TR
3 Dakota.⁷

4 Proofs of claim in the second bankruptcy case were also filed
5 by FIA Card Services, N.A., and the California Franchise Tax Board.
6 The Debtor has not included these creditors in the third bankruptcy
7 case or disclosed payments made to them in the 90-days prior to the
8 commencement of the third bankruptcy case.

9 In the Debtor's first bankruptcy case no. 12-29109, Dckt. 4,
10 the Verification of Master Mailing list does not include Santander
11 as a creditor or party to receive notice. Only Wells Fargo Home
12 Mortgage/ACS is listed on the Mailing list in that prior case.
13 Santander did not file a proof of claim in the first bankruptcy
14 case, however Dell Financial Services, LLC, FIA Card Services,
15 N.A., and Midland Funding, LLC filed proofs of claim in the first
16 case. The Debtor has not included these creditors in the second
17 and third bankruptcy cases filed.

18 Congress did not define what constitutes "good faith" in the
19 context of 11 U.S.C. § 362(c)(3)(B) and (4)(B). It is well
20 established in the Ninth Circuit that the consideration of good
21 faith in bankruptcy cases is one based on the totality of the
22 circumstances. The Bankruptcy Appellate Panel restated the
23 nonexclusive list of good faith factors in this circuit in
24 connection with the dismissal or conversion of a case.

25 ///

27
28 ⁷ Though stating that he paid Santander \$10,000.00 for the Dodge
Dakota shortly before the bankruptcy case, he now lists it on
Schedule B as having a value of only \$9,000.00.

1 Factors to be considered in determining good faith include,
2 but are not limited to:

3 1) The amount of the proposed payments and the amounts of
4 the debtor's surplus;

5 2) The debtor's employment history, ability to earn, and
6 likelihood of future increases in income;

7 3) The probable or expected duration of the plan;

8 4) The accuracy of the plan's statements of the debts,
9 expenses and percentage of repayment of unsecured debt,
10 and whether any inaccuracies are an attempt to mislead
11 the court;

12 5) The extent of preferential treatment between classes
13 of creditors;

14 6) The extent to which secured claims are modified;

15 7) The type of debt sought to be discharged, and whether
16 any such debt is dischargeable in Chapter 7;

17 8) The existence of special circumstances such as
18 inordinate medical expenses;

19 9) The frequency with which the debtor has sought relief
20 under the Bankruptcy [Code];

21 10) The motivation and sincerity of the debtor in seeking
22 Chapter 13 relief; and

23 11) The burden which the plan's administration would
24 place upon the trustee.

25 *Villanueva v. Dowell (In re Villanueva)*, 274 B.R. 836, 841 (B.A.P.
26 9th Cir. 2002).

27 The court is troubled by the Debtor's conduct through this
28 series of bankruptcy cases and the preferential treatment he has
given to creditors between bankruptcy filings and in this case
(payments on substantially undersecured claim to holder of first
deed of trust). The Debtor has failed to disclose in the statement
of financial affairs payments made to the holder of the first deed
of trust, which he then uses as a justification to impose the

1 automatic stay. The sincerity of the Debtor in advancing a
2 confirmable Chapter 13 plan is questionable, as the only plan
3 presented is to fund a substantially overencumbered home
4 (considering only the first deed of trust) by not paying anything
5 to the Debtor's creditors holding general unsecured claims.

6 It is also clear that there are, and have been, significant
7 inaccuracies in the Master Mailing Lists filed in the prior and
8 current case, and the Debtor is choosing to either selectively omit
9 persons who have asserted they are creditors of the Debtor (having
10 filed proofs of claim in prior cases) or secretly pay these
11 creditors and not disclose those payments in the Statement of
12 Financial Affairs. The bankruptcy process and the Debtor
13 prosecuting his bankruptcy cases in good faith are dependent on him
14 truthfully, candidly, and accurately disclosing both assets,
15 liabilities, and creditors.

16 Clearly, there has been substantial planning, preferential
17 payments, and actions taken by the Debtor with respect to claims
18 and creditors during the down periods between the multiple
19 bankruptcy cases he has allowed to be dismissed for failure to file
20 the schedules, statement of financial affairs, plan and Form 22C.
21 Only now, after having diverted at least \$23,000.00 to preferred
22 creditors and omitting other persons who have filed claims from the
23 Master Mailing Lists is the Debtor attempting to gain a third
24 automatic stay. The Debtor has not rebutted by clear and
25 convincing evidence the presumption of that this third bankruptcy
26 case was not filed in good faith.

27 ///

28 ///

This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 9014. The court shall issue a separate order consistent with the Decision.

Dated: August 17, 2012

/s/

RONALD H. SARGIS, Judge
United States Bankruptcy Court