UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

January 23, 2014 at 10:30 a.m.

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1. 12-41713-E-11 MARVIN/ARNELLE BROWN
RLC-2 Stephen M. Reynolds

MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. AND/OR OBJECTION TO CLAIM OF WELLS FARGO BANK, N.A., CLAIM NUMBER 9
11-26-13 [110]

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditor, and Office of the United States Trustee on November 26, 2013. By the court's calculation, 58 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion to Value Collateral of Bank of America and/or Objection to Claim of Wells Fargo Bank, N.A. is denied without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors move for an order for order valuing collateral of Wells Fargo, N.A., or in the alternative, an Objection to Claim. This Motion is denied without prejudice for the following reasons: (1.) Debtors seek to improperly join two requests for relief in one pleading; (2.) Debtors are asking that the court issue an advisory opinion conditioned on Debtors' conjectural completion of their Chapter 11 Plan; and (3.) respondent creditor was not served as required by Federal Rule of Bankruptcy Procedure 7004(h).

Improper Joinder of Claims

The Motion seeks two different types of relief:

1) That the court enter an order valuing the claim of Wells Fargo Bank, secured by a deed of trust in the property located at 2000 Daybreak Court, Fairfield, California, in the amount of 0.00.

2) Proof of Claim No. 9 be determined to be a general unsecured claim.

Debtors' combination of two types of relief in one pleading is procedurally incorrect. Federal Rule of Bankruptcy Procedure 7018 makes Federal Rule of Civil Procedure 18 applicable in adversary proceedings. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, however, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014 does not incorporate Rule 7018 for contested matters, which includes motions. Debtors have improperly attempted to join two separate requests for relief in one motion.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate– proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. The Supreme Court and Rules Committee excluded the provision of Fed. R. Bankr. P. Rule 7018 and Fed. R. Civ. P. Rule 18 from the rapid law and motion practice in the bankruptcy court. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice.

The Debtors have improperly attempted to join a motion to value a secured claim pursuant to 11 U.S.C. § 506(a) with an objection to claim pursuant to 11 U.S.C. § 502(a). This is improper. Each motion must assert one claim against the other party. The Motion is denied without prejudice for this independent ground.

Advisory Ruling on Completion of Chapter 11 Plan

Debtors also request that the court provide in the "Order of confirmation a provision that states that upon completion of the Chapter 11 Plan herein and the entering of a Discharge in this case the lien of Wells Fargo Bank, N.A., represented by Proof of Claim No. 9 be considered null..." Debtors have not proposed a new plan and set it for confirmation.

It appears that debtors are requesting that the court approve plan terms outside of an actual confirmation hearing and the plan itself. Debtors request that the court order specific plan terms, describing what should be stated in a prospective order confirming the plan. Debtor

requests that the claim of Wells Fargo Bank, N.A., be deemed as having no further legal effect upon Debtors' discharge.

Debtors are essentially asking that the court issue an advisory opinion on the speculative completion of the Chapter 11 Plan and/or the terms of a newly proposed plan that may or may not materialize, in their combination Motion of Valuation of the Collateral and Objection to Claim. The court cannot issue advisory opinions as to what the effect of some future event--in this instance, the hypothetical completion of Debtors' Chapter 11 Plan--may be. The legal effect of the facts of this case will be determined when an actual case or controversy arises and is presented to the court for decision. In the meantime, the motion seeks an advisory opinion, which the court cannot issue. *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America*, Inc.,508 U.S. 439, 446, 113 S.Ct. 2173, 2178, 124 L.Ed.2d 402 (1993)("a federal court [lacks] the power to render advisory opinions.").

Debtors' request for an advisory plan provides further cause for denial of the Motion.

Service of Process Issues

Service has not been effected as required by Fed. R. Bankr. P. 7004(h). Federal Rule of Bankruptcy Procedure 7004(h) and 9014 require that service be made on federally insured financial institutions by certified mail. Even if certified mail is not required, corporations, partnerships, and other fictitious entities need to be served on officers, partners, managing members, and other designated agents for service of process. Fed. R. Bank. P. 7004(b)(3), 9014; Fed. R. Civ. P. 4(h).

The respondent creditor in this case, Wells Fargo Bank, N.A. is insured by the Federal Deposit Insurance Corporation. Thus, the service requirements of Federal Rule of Bankruptcy Procedure 7004(h) regarding federally insured financial institutions applies. The certificate of service for this motion, Dckt. No. 114, does not indicate that service was made to a specific representative or agent for service, or that it was at least addressed to the entity, "Attn: Officer/Agent for Service of Process." Additionally, the proof of service does not state that the Motion/Objection was sent to Creditor by certified mail.

On this basis and for the reasons detailed above, the Motion to Value Collateral and Objection to the Claim of Wells Fargo, N.A., is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Valuation of Collateral and Objection to Claim filed by Debtors having been presented to the

court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Value Collateral and Objection to Claim is denied without prejudice.

2. 13-28039-E-7 SLC-3 — SOHAIL AZIZ — Richard E. Oriakhi — MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR — 12-16-13 [79]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 16, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Extend the Time to File an Objection to Discharge was properly 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 Motion to Extend the Time to File an Objection to Discharge is granted. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 7 Trustee seeks an extension of time to object to the entry of Debtor's discharge, pursuant to 11 U.S.C. § 727 and 11 U.S.C. § 523. The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b).

The Chapter 7 Trustee explains that when Debtor filed his original schedules on June 13, 2013, none of his business assets were disclosed on Schedule B. Debtor amended his Schedule B on October 23, 2013, only after Trustee had discovered that Debtor had a car rental business and several vehicles that he owned at his business premises.

The Debtor commenced this case under Chapter 13, seeking to restructure his debts and obtain a discharge. The Proposed Chapter 13 Plan provided for $600.00 a month plan payments for a period of 36 months. Plan, Dckt. 26. The Proposed Plan provided for Class 1 Claim treatment for "Wells Fargo," with a monthly contract payment of $487.00 and the cure of a

$17,523.86 arrearage at 0% interest (requiring $487.02 monthly cure payment). Class 4 provides for a secured claim of "Wells Fargo-Residence" to be paid outside the plan, with monthly payments of $1,520.42. It appears that the Debtor improperly provided for this claim as Class 4. (See Class 4 claim definition requiring that there be no arrearage for a Class 4 claim. Id., ¶ 2.11.)

The Proposed Chapter 13 Plan payments appear to be premised on the Schedules filed by the Debtor. Dckt. 1. Schedule B states that the Debtor had: (1) no cash, (2) no checking or savings accounts, (3) No interests in any corporations, partnerships, or other entities, (4) no office or business equipment, or (5) other assets except the following. Schedule discloses on the following personal property assets: (1) household goods with a $2,000 value, (2) clothes with a value of $1,500, (3) 2002 Honda Accord with a value of $1,500.00, and (4) 2006 Toyota Prius with a value of $2,500.

On Schedule I, the Debtor states that he has monthly wages of $3,580.67 a month. There are no payroll taxes, social security, or other normal withholding or deductions from the gross wages. *Id.* at 27. On Schedule J the Debtor lists $3,392.00 in monthly expenses, which yields only $188.67 Net Monthly Income. *Id.* at 28. No provision is made for the payment of income taxes or self employment taxes.

The Statement of Financial Affairs shows income of $17,903 for 2013, $42,968 for 2012, and $36,293 for 2011. Question 1, *Id.* at 29. The income is stated to be "Income from Business." *Id.* In response to Question 18 to the Statement of Financial Affairs the Debtor lists four business, all of which are stated to being operated by the Debtor. *Id.* at 33. This includes California Auto Rental.

The court converted the case to one under Chapter 7. Order filed September 5, 2013, Dckt. 33. At the hearing on the Chapter 13 Trustee's motion to convert or dismiss, the Debtor stated his election on the record to convert the case to one under Chapter 7. The court's findings also state that cause exists to convert or dismiss the case. These include the following. The Debtor failed to attend the First Meeting of Creditors in the Chapter 13 case. Second, the Debtor failed to provide proof of income as required under the Bankruptcy Code. Third, the Debtor failed to provide the Trustee with copies of tax returns as required under the Bankruptcy Code. Fourth, that the Debtor failed to file a motion to confirm the Proposed Plan and had not served the Proposed Plan on creditors. Civil Minutes, Dckt. 31.

First Amended Schedule B listed the Debtor owning 21 vehicles, not the two as shown on Original Schedule B. Dckt. 49.

SECOND AMENDED SCHEDULE B

Debtor again amended his Schedule B on November 12, 2013, to add accounts receivables that he had not previously listed. These accounts are not exempted on Debtor's Schedule C. Trustee has made demands for the turnover of the money that Debtor has continued to collect during the bankruptcy, but has not turned over any funds. Trustee is still investigating Debtor's assets to ensure that Debtor has now listed all of

his personal and business assets. The Chapter 7 Trustee asserts that more time is need to fully examine Debtor's financial affairs, so that the Trustee can make an informed decision as to what action, if any, needs to be taken.

DEBTOR'S OPPOSITION

Debtor states that at the time of the filing of his Chapter 13 petition, Debtor's Schedule B did not list the business assets described in Trustee's Motion because counsel believed that the business was a corporation. When Debtor's counsel discovered that the business was simply a sole proprietorship, Debtor's counsel amended Schedule B to reflect the business assets, which included vehicles the Debtor used to operate a car rental service, as well as those he held for sale on his business premises. Debtor subsequently amended his Schedule B on November 12, 2013, to reflect accounts receivables after counsel learned that Debtor had sole some of the vehicles.

Debtor asserts that he has responded to Trustee's demands to turn over all accounts receivables, and has done so. Trustee continues to demand, however, that Debtor turn over all accounts receivables which Debtor collected after the filing of the Chapter 13 petition on June 13, 2013. Debtor maintains that Trustee is only entitled to collect accounts receivables belonging to the estate as of the date of the conversion to Chapter 7, which occurred on September 5, 2013. Debtor has collected only $100.00 on the accounts receivable since September 5, 2013, and has offered to turn over that sum to the trustee, even though that money was used to pay the administrative expenses of the business while in bankruptcy proceedings.

Debtor maintains that he has fully cooperated with the Trustee by turning over all of his assets, including exempt vehicles and account receivables, including paying rent on the business premises, despite being "locked out" by Trustee for over a month. Debtor also maintained insurance coverage on the vehicles during this time, as well as paying for repairs on some of the vehicles.

While filing an opposition, the Debtor offers no evidence for the various faction contentions in the Opposition. Either the Debtor has inadvertently forgotten to provide evidence or the Debtor cannot testify under penalty of perjury to the alleged "facts."

Trustee has filed a motion abandoning certain property to the Debtor, and has returned the keys to his business premises to Debtor. The Trustee has also removed those vehicles that she intends to sell, which were not exempt, and is currently in the process of selling those vehicles through West Auctions. She has also sold some of the vehicles back to Debtor, and a hearing on the sale is set for January 23, 2014 at 10:30 A.M. before this court.

The Creditors in this case have always received notice of all the meetings and hearings. There were a minimum of two Creditors' Meetings, and not a single creditor appeared. These Creditors are corporations and are fully aware of the deadline for objecting to Debtor's discharge, yet not a single Creditor has filed such an objection. Debtor maintains that

Trustee's proposed investigation of Debtor's assets, both business and personal in order to discover undisclosed assets is "an exercise in futility." Debtor's home has no equity, and his household goods are all exempt. Debtor asserts that there is no cause for the court to extend the time for objecting to Debtor's discharge.

DISCUSSION

Fed. R. Bankr. P. 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs. Fed. R. Bankr. P. 1017.

The court does not find Debtor's response convincing. Debtor states at the time that he filed his Chapter 13 petition, Debtor's counsel did not list the business assets because of their belief that the corporation was a business. A corporation or LLC, however, must still be listed a Debtors' schedules. As a corporation, Debtor's business would not be in the bankruptcy case when Debtor files his personal bankruptcy, but the corporation would still be an asset of Debtor's personal bankruptcy estate. Further, confirmation that a corporation exists may be simply done by checking the California Secretary's of State website (or other state secretary of state or department of corporations websites). Such a check costs nothing, other than having internet access. Additionally, such information is readily available through legal research services such as WestLaw and LEXIS NEXIS.

Debtor's counsel amended the schedule on November 12, 2013, a full four months after Debtor filed his Chapter 13 petitions. Debtor's counsel also claims that he initially did not realize that Debtor's company was a sole proprietorship, and did not list Debtor's business assets, which included the vehicles and accounts receivable until four months later.

It appears that Debtor's counsel has represented Debtor from the start, and that there have been some missteps from the beginning of Debtor's case. On June 25, 2013, the Debtor's case was dismissed when pursuant to 11 U.S.C. § 521(I), an order dismissing case for failure to timely file documents was entered. Debtor's counsel, however, filed a Motion to Reinstate the Petition Dismissed for Insufficient Filing on June 27, 2013. In the Motion, Counsel alleged that after filing the petition, he was sent "several e-mail notices," but that when he attempted to open the documents, a "blank screen opened upon the computer screen." ¶ 1, Debtor's Motion to Reinstate Petition, Dckt. No. 10. Debtor's counsel tried enlisting the assistance of the clerk's office but could not connect with any live help. Debtor's counsel did not receive a hard copy of the notice indicating the deficiency in Debtor's filing until June 24, 2013, and filed some of the documents (the Verification, Master Address List, the Chapter 13 Plan) on June 25, 2013. *Id.* The court granted the Motion, and reinstated the case on July 2, 2013 (Dckt. No. 13).

Additionally, Debtor asserts that Trustee is not entitled to collect Debtor's accounts receivables belonging to the estate after September 5,

2013, the date of the conversion of the case from Chapter 13 to a Chapter 7 case. 11 U.S.C. § 541(a)(6), however, defines proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case, as property of the estate.

The accounts receivable were incurred by Debtor's sole proprietorship; as such, the assets and liabilities of Debtor's business are property of Debtor's personal bankruptcy, even if they were acquired in the postpetition period. These accounts were not exempted in Debtor's Amended Schedule C. It is difficult to determine whether the property falls under the 11 U.S.C. § 546(a)(6) exception, as Debtor has not specified whether the accounts were for services rendered by the individual Debtor himself and as such should be considered earnings from services performed by the debtor after the commencement of the case. As 11 U.S.C. § 348(f) sets forth, the property of the estate in the converted case shall still consist of property of the estate as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion. As 11 U.S.C. § 546(a)(6) makes clear, after-acquired assets of the estate are still considered to be the property of the estate, so conversion would have no bearing on what Debtor is expected to turnover to Trustee.

Lastly, Debtor argues that no creditors have come forward to object to Debtor's discharge. Trustee's Motion, however, was filed in order to extend the deadline that Trustee may have to file an objection to Debtor's discharge on her own. As Trustee has explained in her pleadings, and Debtor seems to acknowledge, Debtor has continued to collect on the accounts receivables but refuses to turn over those funds.

Based on Debtor's less than forthcoming responses to Trustee's requests, and the Trustee's need to perform further investigation of the assets and liabilities of Debtor's business, the court finds cause pursuant to Fed. R. Bankr. P. 4004(b) to extend the deadline for the Chapter 7 Trustee to object to Debtor's discharge to March 17, 2014. The deadline will be extended to March 17, 2014 per Trustee's request.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Extend the Time to File an Objection to Discharge filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to March 17, 2014.

3. 13-28039-E-7 SOHAIL AZIZ — MOTION TO SELL
SLC-4 Richard E. Oriakhi — 12-31-13 [90]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney,, all creditors, parties requesting special notice, and Office of the United States Trustee on December 31, 2013. By the court's calculation, 23 days' notice was provided. 21 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(2). Consequently, the creditors and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Sell Property without prejudice. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, the Trustee proposes to sell the following assets belonging to Debtor's estate:

Vehicle	Sales Price	Debtor's Exemption	Amount Owed
2000 Ford 350	$1,850.00	$1,400.00	$450.00
2003 Chevy Astro Van	$1,500.00	$1,000.00	$500.00
2003 Toyota Camry	$2,300.00	$1,500.00	$800.00
2005 Chevy Express	$3,750.00	$2,500.00	$1,250.00

2005 Toyota Corolla	$2,750.00	$1,800.00	$950.00
2006 Toyota Corolla	$2,400.00	$1,600.00	$800.00
2006 Toyota Prius	$2,500.00	$1,500.00	$1,000.00
		Total	$5,750.00

The sales price is $5,750.00 and Trustee has received an offer from the Debtor for the same sum of $5,750.00. Trustee states that the Debtor has already tendered to the estate $1,000.00 as a down payment on the purchase. There is no Purchase Agreement attached, however, which sets forth the terms of the agreement between Debtor and Trustee for the court's review. Trustee did not file any exhibits in support of the Motion.

It is clear that the Debtor's ability to disclose information has been challenging in this case. Without a copy of the sales agreement, the court has no idea what are the terms of the proposed sale. The Trustee might respond, "oh its simple, the Debtor pays me $5,750.00, everyone knows that." When it the payment due? What if the Debtor fails to make the payment? What representations and warranties has the Trustee made? Possibly simple sale terms of (1) cash sale, (2) date certain, (3) right to purchase terminates on date certain, and (4)property sold "as-is," with no representations and warranties could be stated in a motion and then set forth in the order confirming. These terms were not so stated in the Motion and the court will not, and cannot, construct them post hoc for Movant.

The last paragraph (¶4) of Trustee's motion also casually mentions that Trustee has also agreed to sell back to Debtor, "the miscellaneous shop tools for the sum of $400.00." The sale of Debtor's shop tools seems to be a mere afterthought, with no mention of what the tools actually are and how much they are valued. Debtor also does not describe these tools with much specificity; an adequate description would, for instance, itemize the tools being sold and provide the name of Debtor's business." A review of Debtor's Schedule B shows that Debtor characterizes the tools as:

> Misc. items $400.00
> Location: In debtor's possession

In addition to Trustee's failure to identify the business assets to be sold with particularly, Trustee's Declaration in support of the Motion to Sell Property of the Estate is deficient.

The declaration offered by the Trustee states that it is under penalty of perjury and that the statements are "true and correct to the best of my knowledge and belief." This could be read two ways. The first is that "whatever I have said is true, to the extent that I have any knowledge about what I am talking about." The second interpretation is that "I am telling you the truth to the best of my ability to testify in this proceeding."

The requirements for what constitutes an adequate declaration are set out in 28 U.S.C. § 1746, which provides:

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

This does not provide for any qualification on stating that the information is true and correct, or let the witness provide a declaration based on information and belief. Trustee is advised to update her declaration forms to be in unqualified compliance with § 1746, as the next time this court, or other judges sitting in this District, may well find the declaration to be insufficient and deny the motion without prejudice and without a hearing.

Based on the lack of competent evidence before the court, the failure to properly identify the property sought to be sold, and a contract or clear statement of the terms of the sale, the motion is denied without prejudice.

A minute order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Sell property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Trustee's Motion to Sell Personal Property is denied without prejudice.

4. 13-27771-E-11 CWS-4 | **ANGELA CATARATA** **Pro Se** | **MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7 AND/OR MOTION TO DISMISS CASE 12-26-13 [204]**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 26, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required. That requirement was met.

Final Ruling: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Convert is granted and the case is dismissed. No appearance required.

The United States Trustee ("UST") is moving the court to convert this Chapter 11 Case to a Chapter 7 case or dismiss the case pursuant to 11 U.S.C. § 1112(b)(1). The UST seeks to have the case converted or dismissed for the following reasons:

1. Debtor has failed to file notice of her three previous bankruptcy cases

2. Debtor made false representations in her petition, which include her statement that there are $0.00 in secured claims against the estate; her failure to disclose her interest in an entity named Black Hills Group, LLC; and her failure to disclose transfers of real property to her daughter within two years of her bankruptcy filing

3. Debtor has grossly mismanaged of the estate, including her use of cash collateral without court authorization.

The UST is seeking to have the case converted rather than dismissed because the Debtor's schedules reflected that there may be unencumbered real property that could be administered for the benefit of creditors.

The Bank of New York Mellon ("BNY") filed a memorandum in support of the UST's motion on August 15, 2013, and noted therein that BNY holds a security interest in one of the parcels of real property identified in the Debtor's Schedule A that exceeded the fair market value of the property.

Following a hearing on August 29, 2013, the court found cause to convert or dismiss based on multiple deficiencies in Debtor's petition. Debtor failed to describe the amount of secured claims in her Schedule A and in the amended Schedule A, when such information was clearly known by the Debtor. Debtor did not disclose her interest in an entity named Black Hills Group, LLC, nor did she provide complete information about this group in the amended Statement of Affairs. Debtor did not disclose her transfer of real property to her daughter, Cherise Evangelista, within the two years prior to the commencement of this case.

Debtor also admitted to using cash collateral and made at least one post-petition transfer during the first month of the case, without court approval. Additionally, the Debtor failed to provide information reasonably requested by the UST, when the UST asked that Debtor provide corrected versions of her schedules and Statement of Financial Affairs.

Rather than convert or dismiss, however the court ordered the appointment of a Chapter 11 trustee. The U.S.T. appointed the Trustee on September 16, 2013, and the Court approved the Trustee's appointment the following day. The court appointed the Trustee to evaluate the feasibility of a plan of reorganization; to determine the value of the eight adversary proceedings that the Debtor had filed shortly before the Trustee was appointed; to evaluate the estate; and to offer a knowledgeable opinion as to whether the case should remain a Chapter 11 case or be converted.

The UST maintains now, however, that it is unclear that any Chapter 11 plan that the Debtor or the Trustee might propose would be confirmable. Each secured creditor has refused to cooperate with the Trustee's requests for voluntary disclosure of information necessary to these efforts, indicating to the Trustee that the secured creditors would prefer to pursue their foreclosure remedies rather than confirm a Chapter 11 plan. The sole unsecured creditor who was expected to file a proof of claim has failed to respond to the Trustee's efforts to contact it.

Debtor has not "consistently cooperated" (as phrased by the Chapter 11 Trustee) with the Trustee's efforts and appears to believe that she will be able to work out the secured claims outside of bankruptcy. Debtor has made it clear that she wants the case to be dismissed. Trustee states that the only significant assets of the estate are several parcels of real property whose market value does not exceed their liens and two parcels of real property that the Trustee may recover from the Debtor's daughter. Without the Debtor's cooperation, the Trustee will likely have to file an

adversary proceeding or proceedings to recover the latter property. Those parcels appear at this time to be unencumbered but their value is uncertain. Although the encumbered parcels generate income, they do not do so reliably.

Trustee has weighed the potential benefit of each of the eight adversary proceedings filed to determine the Debtor's rights and claims of the estate in the case, and has determined that allowing them to proceed would not be in the interests of the estate or its creditors, and ultimately had them al dismissed on December 23, 2013.

Creditor's Statement of Non-Opposition and Joinder in Chapter 11 Trustee's Motion for Dismissal or Conversion of the Chapter 11 Case

The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Psas-Through Trust 2004-16, Mortgage Pass Through Certificates, Series 2004-16 ("BNY") filed a statement of non-opposition and submits a request to join the UST's Motion to Dismiss.

BNY holds a Note and Deed of Trust encumbering the Debtor's real property located at 5212 Blossom Ranch Drive, Elk Grove, CA. BNY fully supports the Chapter 11 Trustee's Motion to Dismiss, but requests dismissal of the case rather than conversion to a Chapter 7 to allow the parties to exercise their remedies under applicable state law. The Chapter 11 Trustee's Motion to Dismiss indicates that the Debtor has failed to consistently cooperate with the Trustee's efforts and appears to believe that she will be able to work out the secured claims outside of bankruptcy.

Due to the Debtor's apparent refusal to cooperate with the Chapter 11 Trustee regarding estate assets, BNY anticipates a Chapter 7 Trustee will experience similar restraint from the Debtor in any attempt to liquidate the Debtor's assets. Accordingly, Creditor asserts that dismissal of this case is in the best interests of creditors to prevent further delay.

DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

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

The Bankruptcy Code Provides:

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

Here, the UST believes that the because Debtor and creditors are being uncooperative they will end up "bury[ing] the estate with administrative costs." The court finds sufficient cause for relief to be granted under 11 U.S.C. § 1112, for all of the same reasons that the court found cause in Trustee's First Motion to Dismiss.

As the court pointed out in the first instance of Trustee's request that the court dismiss this case, there are numerous discrepancies and inconsistencies that remain on Debtor's schedules and have not been corrected. Debtor has failed to remedy the deficiencies in her schedules and statement of financial affairs, and failed to disclose the transfers to her daughter and the interest in Black Hills Group, LLC. A debtor's "unexcused failure to satisfy timely any filing or reporting requirement established under this title or by any rule applicable to this case under this chapter …" constitutes "cause" to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(4)(F). Debtor has also grossly mismanaged her estate, impermissibly using cash collateral and paid professional fees to pay counsel without court authorization.

Additionally, this is Debtor's fourth bankruptcy case, but continues to be remiss in her responsibilities as a Debtor. The Debtor's previous bankruptcy cases are: Case Nos. 13-28833 (Chapter 11, dismissed); 12-40475 (Chapter 13, dismissed); and 12-34580 (Chapter 7, dismissed). These cases were filed within the last eight years. Local Rule 1015-1 requires the Debtor to file a Notice of Related Cases. See LBR 1015-1 (Bankr. E.D. Cal., May 1, 2012). The Debtor failed to file a Notice of Related Cases.

Trustee states that because of the lack of cooperation from the Debtor and creditors and the unreliable nature of the income that would be used to make payments under a plan of reorganization, as well as the potential administrative costs associated with a contested case, the plan of reorganization is unlikely to be confirmed or to succeed and that dismissal or conversion of the Chapter 11 case is in the interests of creditors and the estate. A Chapter 11 Debtor's inability to effectuate plan of reorganization and that a prejudicial delay to creditors warranted conversion of the Debtor's case to one under Chapter 7 and even dismissal. Bankr.Code, 11 U.S.C.A. § 1112(b), (b)(1). *In re Johnston*, 149 B.R. 158 (B.A.P. 9th Cir. 1992).

Debtor, through her affirmative representations, and creditors by their lack of cooperation, as well as the creditor of BNY's joinder and statement of non-opposition, have all demonstrated a preference for dismissal as opposed to conversion. Cause exists to dismiss the Chapter 11 case, and appears to be in the best interests of creditors and the estate. The court will dismiss the case.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by the United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the Chapter 11 case is dismissed.

5. 12-36884-E-7 MF-2 — JENNY PETTENGILL — Richard A. Hall — MOTION TO APPROVE STIPULATION TO CONSOLIDATION AND CONDUCT OF PROCEEDINGS RE CLAIMS AGAINST CORRIGAN FINANCE LIMITED, COUNTERCLAIMS AND LEASING AND SALE OF REAL PROPERTY — 12-17-13 [166]

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, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 17, 2013. By the court's calculation, 37 days' notice was provided. 21 days' notice is required. That requirement was met.

No Tentative Ruling: The Motion to Approve Stipulation was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). The Debtor having filed an opposition, the court will address the merits of the motion. 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 court's tentative decision is to ---- the Motion to Approve Stipulation. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

BACKGROUND

Corrigan Finance Limited ("Corrigan") and John Roberts, Chapter 7 Trustee ("Trustee") move for an entry of an order approving the Stipulation to Consolidation of Proceedings re: Claims Against Corrigan Finance Limited,

Counterclaims and Leasing and Sale of Real Property (the "Stipulation"), pursuant to Bankruptcy Code Sections 105(a), 327, 362(d), 363(b), 502(b) and 503(b)(1) and Rules 4001(d), 6004 and 7001 of the Federal Rules of Bankruptcy Procedure.

Jenny Belle Pettengill ("Pettengill") commenced a bankruptcy case by filing a voluntary chapter 13 petition on September 19, 2012 (Case No. 12-36884-E-7). The case was converted to chapter 7 on July 1, 2013. The case is now pending before this court. Stanislav Lazutkine ("Lazutkine") commenced a bankruptcy case by filing a voluntary Chapter 7 petition on February 13, 2013 (Case No. 13-21893-B-7). John Roberts is the Chapter 7 Trustee for both cases, and has filed identical motions to approve the stipulation in both cases.

Corrigan is the record owner of real property located at 1590 North Lake Boulevard in Tahoe City, California. Pettengill disputes Corrigan's ownership of the property, and represents that Corrigan is actually controlled by Lazutkine, and that the stock of Corrigan is community property of the Pettengill.

Pettengill is the separated wife of Lazutkine. Pettengill commenced marital dissolution proceedings in 2011, which are now pending as Marriage of Lazutkine before the Superior Court of the State of California, County of Placer (Case No. SDR-0037138) (the "Family Court"). Corrigan was subsequently joined as a party for the purposes of bringing an action to set aside Corrigan's purchase of the Property as a transfer of community property for less than fair and reasonable consideration pursuant to Family Code Section 1100, et seq.

Corrigan has brought certain counterclaims ("Counterclaims"). Pettengill has brought certain claims against Lazutkine personally, including claims for contempt and domestic support (collectively the "Personal Claims"). Trustee concludes that Pettengill properly exempted these Personal Claims. Corrigan also filed motions for relief from the automatic stay in both of the Cases, requesting a determination that the automatic stay does not apply to the Property, and for relief from the automatic stay to allow the litigation to go forward in Family Court with the Dissolution Proceedings. The Trustee objected. Creditor and the Trustee subsequently stipulated to dismissal of both motions without prejudice based upon their tentative agreement. That agreement is the basis for this Motion to Approve the Stipulation.

The court understands there are four pending or potential legal actions involving the Debtor (Pettengill) and Corrigan, where the matter of ownership and lawful occupation of the Tahoe property is in controversy:

(1.) Marriage of Lazutkine, Superior Court of the State of California, County of Placer, Case No. SDR-0037138.

(2.) In re Jenny Belle Pettengill, United States Bankruptcy Court, Eastern District, Case No. 12-36884-E-7.

(3.) In re Stanislav Lazutkine, United States Bankruptcy Court, Eastern District, Case No. 13-21893-B-7.

(4.) An Unlawful Detainer Action to be filed by Corrigan against Jenny Pettengill, asserting rightful possession of the Tahoe premises.

At the hearing on November 7, 2013, the court suggested that the matters regarding property of both bankruptcy estates could be consolidated such that they will be heard before the court, and that discovery exchanged in connection with the family court proceedings could be used in the bankruptcy case. Trustee and Corrigan now request that all claims reasonably related to property of either of the debtors' estates be heard by this court, and that the discovery propounded and obtained in the Family Court be transferred to claims being heard before this court.

Trustee states that he wishes to evaluate Pettengill's claim against Corrigan and to prosecute it in bankruptcy court if appropriate, along with any other claims regarding property of both estates. Corrigan, on the other hand, wishes to preserve its right to offset any counterclaims it may hold against the estates, and neither the Trustee nor Corrigan wish to interfere with the Personal Claims between Pettengill and Lazutkine pending in Family Court that do not implicate a claim related to property of the estates. Pettengill and Lazutkine executed agreements to keep confidential certain information and documents discovered. Trustee and Creditor want to use the discovery obtained in connection with the Dissolution Proceedings in proceedings before the bankruptcy court.

Trustee and Corrigan state their desire to sell the property hold the net proceeds until it is determined what amount of the proceeds are property of the estates. This plan seems to be in the spirit of the court's comments at the November 7, 2013 hearing, when the court stated that the property can be sold and the proceeds deposited with the Clerk of the United States Bankruptcy Court. This comment was made in response to Corrigan's concerns that if the Lake Tahoe Property is not quickly sold it will suffer from dilapidation and loss of value.

Trustee and Corrigan further state that because Corrigan "can make certain representations and warranties as owner of record, Creditor would be better positioned to solicit and obtain a higher price if it takes the lead in arranging a sale." Pettengill currently occupies the property without paying rent or real property taxes.

Corrigan appears eager to initiate eviction proceedings against the Debtor, Pettengill. Corrigan and Trustee states that Pettengill has been given a reasonable opportunity to informally agree to pay rent or quit the premises, but has been unresponsive to Trustee's requests. Corrigan expresses its intent to bring an action for unlawful detainer against Pettengill, at its own expense. Trustee and Corrigan agree that the Property should be rented pursuant to a short term lease and that rent should be used to pay for repairs, maintenance and real property taxes, as appropriate, but are unclear how a potential lease agreement might affect the sales price when Corrigan sells the property to a third party.

Proposed Stipulation of Trustee and Corrigan

Corrigan and Trustee (referred to as the "Parties" in the provisions of their agreement), describe the terms of their agreement as follows:

a. Within a reasonable time, Corrigan shall list the Property for sale and shall thereafter use its best efforts to sell the Property.

b. All written offers received on account of said listing shall be disclosed to the Trustee within one business day of receipt by Corrigan. Acceptance of any offer and the making and form of any counteroffer shall be subject to the Trustee's advance approval, overbids, and bankruptcy court approval which approval shall not be unreasonably withheld.

c. All net sale proceeds shall be transferred from escrow and held in a joint, interest bearing blocked account with an institution insured by the Federal Deposit Insurance Corporation (the "Account") pending resolution of the matters to be resolved by the Honorable Ronald H. Sargis (the "Bankruptcy Court").

d. The Trustee shall not unreasonably interfere with any unlawful detainer action to be brought by Corrigan against the person or persons now occupying the Property or other efforts to evict said person or persons.

e. Within a reasonable time of obtaining exclusive possession of the Property, Corrigan shall use its best efforts to lease the Property pursuant to a short-term lease.

f. All rents shall be deposited to the aforesaid Account. Corrigan may use said rents to pay the actual, reasonable costs of repairs and maintenance and to pay defaulted and current real property taxes and penalties subject to advance approval by the Trustee, which approval shall not be unreasonably withheld.

g. Pettengill's claim against Corrigan pursuant to Family Code Section 1100, et seq. and any other claim reasonably related to property of either of the debtors' estates (the "Estate Property Claims") shall be heard by the Court except as otherwise agreed by the Parties. Any Estate Property Claims that would otherwise be heard by the Honorable Thomas Holman shall be consolidated with the aforesaid claims such that they shall be heard by the Bankruptcy Court, and orders and judgments entered by the Bankruptcy Court in connection therewith shall have the same force and effect as if entered by the Honorable Thomas Holman.

h. The Parties hereby consent to the Court's authority to conduct a jury trial (if applicable), enter final orders and judgments with respect to the Estate Property Claims.

I. The Parties shall cooperate in good faith in advising the Family Court that the Dissolution Proceedings are stayed as to the Estate Property Claims but not as to the Personal Claims and shall cooperate in good faith with respect to the adjudication of the Estate Property Claims. The Parties shall meet and confer, in good faith, and propose a joint scheduling order to the Court (or separate proposed scheduling orders if there is an irreconcilable dispute).

j. The Parties may use information and documents discovered by Corrigan, Pettengill and/or Lazutkine in connection with the

aforesaid Dissolution Proceedings in prosecuting and defending the Estate Property Claims. The Parties shall be bound by any confidentiality agreements, protective orders and other restrictions upon said information and documents applicable to Corrigan, on the one hand, and the Trustee as successor in interest to Pettengill and/or Lazutkine, on the other hand. In the event that either Party wishes to request additional discovery, the Parties shall meet and confer, in good faith, with regard to exchanging discovery informally and any the application of any existing or proposed confidentiality agreement, protective orders or other restrictions.

k. Corrigan has filed or will file proofs of claim in both of the Cases on account of its Counterclaims against both of the debtors. In the event that the Trustee objects to either or both of said proofs of claim, the aforesaid provisions regarding consolidation of proceedings with the Bankruptcy Court and discovery shall apply to the claim objection proceedings (the "Claim Objections"). The Parties hereby consent to the Bankruptcy Court's authority to conduct a jury trial (if applicable), and enter final orders and judgments with respect to said potential Claim Objections.

l. The Parties agree that the Bankruptcy Court should not hear any Personal Claims pending in Family Court not reasonably related to the Estate Property Claims or the Counterclaims. The Trustee has concluded that Pettengill has exempted all claims she holds against Lazutkine personally. If requested by a party to the Dissolution Proceedings and it appears reasonably likely that the Family Court will not proceed without an order of the Court, the Trustee shall cooperate with the filing of a motion to abandon any Personal Claims not reasonably related to the Estate Property Claims or Counterclaims and/or stipulating to relief from the automatic stay with respect to said Personal Claims.

m. Corrigan's choice of (a) broker, listing price, commission and form of listing agreement in connection with the aforesaid sale of the Property, (b) leasing broker or property manager, proposed rent, form of lease and choice of tenant or tenants, and (c) attorneys or professionals to be engaged to assist in the aforesaid said unlawful detainer action or eviction efforts shall be subject to the Trustee's advance approval, which shall not be unreasonably withheld, and approval of the Court.

n. Within a reasonable time of Corrigan informing the Trustee of – and the Trustee's approval of – each of said choices of professional, the Trustee shall file with the Court an application or motion seeking approval of the professional's engagement. In the event that said application is not granted, the Parties reserve the right to contend that Court approval is not necessary.

o. Within a reasonable time of the completion of the work of each of said professionals, the Trustee shall file with the Court an application or motion seeking approval of any compensation, commissions, reimbursement of expenses and other amounts reasonably requested by said professionals. The order shall not be construed to require Court approval to pay liens, real property taxes, security deposits and other amounts for which Court authority is not

required. If said application is not granted, the Parties reserve the right to contend that Court approval is not necessary.

p. In the event that the Property or the proceeds of the sale thereof are determined to be property of the estate of either of the debtors, Corrigan shall hold an administrative priority claim against said estate for the reimbursement of the reasonable attorney's fees, professional fees and costs of the aforesaid said unlawful detainer action and eviction efforts.

q. In the event of a dispute in connection with this Stipulation, the Court shall hear the dispute upon ten (10) calendar days' written notice to the other party, subject to the Court's availability.

Debtor's Opposition

Debtor opposes the stipulation based on her belief that the agreement is tantamount to "letting the fox into the hen house." Opposition, Dckt. 170. Debtor states that she has scheduled a community property interest of unknown value in Corrigan because Lazutkine told her that he owns corrigan. Debtor asserts that appointing Corrigan is not in the best interests of her bankruptcy estate because Corrigan "is patently incented to do its master's bidding." *Id.*

Additionally, Debtor asserts that there is no basis for so urgently pursuing the sale of the Tahoe property at this time. Liquidating the assets would only serve to lock the proceeds in an account partially controlled by Corrigan, which Debtor asserts Is owned by Debtor. Furthermore, Debtor's scheduled claim of ownership has not yet been resolved. Debtor's counsel has also not been contacted regarding the renting of or vacating the Tahoe Property.

Trustee and Corrigan's Reply to Debtor's Opposition

Trustee and Corrigan maintain that Pettengill appears not to understand that any claims she may hold against Corrigan belong to the estate, and that Pettengill has no legitimate interest in the subject matter of the Stipulation. Trustee and Corrigan state that she has no principled objection to the stipulation other than a "generalized, vague and unsupported suspicion." Reply, Dckt. 173.

Trustee and Corrigan state that it is "undisputed" Corrigan holds record title to the real property at issue. The sale proceeds will be held pending resolution of whether the funds are property of the estate. Trustee and Corrigan assure Debtor and the court that the sale will be subject to the Trustee's approval, and the parties will seek Court approval of any brokers and other professionals to be employed and compensated.

The stipulation additionally provides for the Trustee to litigate issues regarding property of the estate in this court. Trustee and Corrigan state that Pettengill has not brought a motion requesting the Court to abstain in favor of the family court, and she has not provided any support therefor. It is necessary and customary for the Trustee to promptly reduce assets of the estate to cash. Both the Trustee and Corrigan are motivated to maximize the value of the property. Both Corrigan, as owner of the property, and the Trustee, as holder of any claims asserted by the estate,

have "every incentive to maximize the sale proceeds as one of them will eventually receive the proceeds depending on the outcome of the potential litigation." *Id.*

DISCUSSION

At the core of the proposed stipulation is Trustee's and Corrigan's desire to sell the property at 1590 North Lake Boulevard, Tahoe City, California and reduce its value to cash. There are several issues arising from the disputed ownership of the property which complicates the court's analysis of the proposed agreement. The court is mindful that this is an arrangement that will imbue Corrigan with an enormous degree of control over the sale, and enable Corrigan to move forward in its unlawful detainer suit against Pettengill without interference from the Trustee.

Pettengill, Lazutkine, and Corrigan are embroiled in proceedings in the Family Court, where Pettengill is seeking to set aside a transfer of the property. Pettengill occupies the property, and asserts that Corrigan is a community business in which Lazutkine is the controlling owner. Pettengill alleges that Lazutkine established the business to avoid taxation of funds being brought into the U.S. from Swiss Bank accounts, and that it was a legal tax-sheltering tool (Dckt. No. 138, at pages 37-46).

As evidenced by Exhibit G in Support of Roman Rykounov's Declaration (filed in support of Corrigan's previous Motion for Relief from the Automatic Stay), titled "Pettengill Motion to Join Corrigan Finance Limited" in the state court action, Pettengill alleges that Lazutkine exercises unilateral control over Corrigan's money transfers, investments, executive decisions, and all other primary roles associated with being a controlling owner. Pleading on Joinder, Dckt. No. 138 at 38.

Pettengill argues that Corrigan is the sham company of Lazutkine, and designed to shield Lazutkine and other "officers" of the company from personal liability that may result from the self-dealing transactions in which company personnel were engaged. Pettengill alleges that Corrigan was structured as a vehicle for the transfer of funds from Lazutkine's foreign businesses to the U.S. for lifestyle acquisitions, and that the company was used to conceal Lazutkine's true net worth. Pleading on Joinder, Dckt. No. 138 at 38. It is alleged that Lazutkine himself orchestrated and finalized the purchase of the Tahoe residence, under his authority as a controlling owner, and that the property was actually a personal purchase of Lazutkine. ¶ 18, Pleading on Joinder, Dckt. No. 138 at 39.

Moreover, Pettengill asserts a community interest in the property, stating that the residence was a community purchase undertaken by both Pettengill and Lazutkine.

> 20. The Tahoe Home Was a Community Purchase. In April 2009, Respondent and Petitioner began shopping for a townhome for themselves in New York City. Respondent put an offer on an 82nd Street townhouse that ultimately fell through. At that time, they decided to look "closer to home," and ultimately settled on the Tahoe Home. They purchased it for $2.5 million in cash in June 2009.
>
> 21. The Parties together chose the property, negotiated the price, proceeded with the acquisition, and worked with an

> engineering company in Tahoe City to receive all the necessary permits. They even discussed primarily living in Tahoe City and switching high schools for Petitioner's son. After they purchased the Tahoe Home, Petitioner bought all furniture and fine art on behalf of the community or herself. Respondent continues to pay bills (including utilities) for the Tahoe Home (allegedly on behalf of MetProm, although he has not yet been reimbursed). Respondent told friends that the Tahoe Home was for the Parties' retirement and for their children, and he referred to the residence as the "Lazutkine family home." Respondent also purchased a boat for personal use at the Tahoe Home. And on September 11, 2010, the Parties personally donated use of the Tahoe Home to a benefit auction for the American Cancer Society. The two-night stay was auctioned in their names, and bought by an individual for $1,800.
>
> 22. Despite these facts, Respondent now claims no interest in the Tahoe Home because it is owned by Corrigan. This is contrary to all of his prior actions and statements that the Tahoe Home was a community purchase.

Id.

The court understands Lazutkine's argument to be that the property was not purchased by the Debtor and Lazutkine as their community property, but solely as an investment by Corrigan.

Tahoe Property is Asserted by Pettengill to be Property of the Estate

First, the court is questions why Trustee and Corrigan believe that further state court eviction proceedings are necessary for the Trustee and Corrigan to obtain possession of the Tahoe Property to proceed with a sale. Pettengill is asserting that the property is community property, which then renders the Tahoe residence, if it is community property, to be property of the bankruptcy estate in this case.

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Characterization of property as separate or community as of date of one spouse's bankruptcy filing is determined by applicable state law. *In re McCoy*, 9th Cir. BAP (Cal.) 1990, 111 B.R. 276. For purposes of § 541(a)(2), all community property in California that is not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. *In re Mantle,* 153 F.3d 1082, 1085 (9th Cir. 1998). Under California law, division of property is the event that will sever the liability of community property for community debts, and, until division, all community property of the divorcing couple is property of one spouse's bankruptcy estate. 11 U.S.C. § 541(a)(2). *Id.* at 1083.

Here, Pettengill argues that the property, the division of which is still being litigated in the state court dissolution proceedings, was a community acquisition. The proceeds generated would be property of Pettengill's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(2). In the case of *In re Mantle,* 153 F.3d 1082 (9th Cir. 1998), the Ninth Circuit Court

held that since the state court adjudicating Chapter 7 debtor-husband's divorce had not entered any order dividing couple's property when the bankruptcy petition was filed, the proceeds from the sale of the community property house remained community property, and constituted property of the bankruptcy estate. 11 U.S.C. § 541(a)(2). *Id.* at 1085.

Because the property (as argued by Pettengill) remains property of Pettengill's bankruptcy estate, the court may order that Pettengill turn over possession to Trustee pursuant to 11 U.S.C. § 542. The Trustee's ability to request a turnover the nonexempt Tahoe property would render an unlawful detainer suit unnecessary and irrelevant. Rather than file an action to terminate Pettengill's possession of the premises in state court, court can easily order Pettengill turn over the possession of the property to Trustee. The court is uncertain as to why it is necessary for Corrigan to file an unlawful detainer complaint against Pettengill to remove her from property that can be turned over to Trustee.

Merely because Pettengill has stated under penalty of perjury in Schedules filed in this case and has filed pleadings in state court asserting claims in the various personal and real property, the court does not accept these statements as gospel. Though, it does cause heightened concern and demonstrates the need for all parties to sharply turn each corner, not procedurally and substantively taking shortcuts. For Pettengill, it is difficult to argue that the Chapter 7 Trustee should not have control of property which Pettengill argues is property of the bankruptcy estate.

AREAS OF CONCERN FOR THE COURT

Court Approval of the Terms of Sale

The court is troubled by the nature of Corrigan's control over the proposed sale and the language in the Stipulation restructuring the court's power concerning property of the estate. Trustee and Corrigan have agreed that Corrigan will list for sale and market the property. Trustee vaguely agrees to not "unreasonably interfere" with any unlawful detainer action to be brought by Corrigan against the occupants of the property, and to not "unreasonably" withhold approval of Corrigan's choice of broker, listing price, commission, and form of listing agreement in connection with the sale of the property. ¶ 12 of the Stipulation. Trustee also agrees not to unreasonably withhold approval of Corrigan's proposed leasing broker or property manger, proposed rent, form of lease, choice of tenants, and attorneys or professionals engaged to assist in the unlawful detainer action of eviction efforts against tenants.

Much of the power to direct the sale and the manner in which the property will be sold lies with Corrigan. In accordance with the stipulation, Corrigan will locate the brokers and agents who will effectuate the sale. These efforts include the eviction of Pettengill, and the stipulation provides accommodation for the professional fees and costs of any attorneys who may be employed to file an unlawful detainer action against Pettengill.

It is only after Corrigan has completed the legwork on the sale, that the ball bounces back to the Trustee, whose role is limited to giving his blessing to the sale. As the stipulation makes clear, Trustee's blessing shall not be "unreasonably withheld" in approving the brokers and

other professionals employed in the sale. The Trustee shall also not unreasonably withhold approval of bids, overbids, offers, and counteroffers fielded by Corrigan when the property is listed for sale.

The parties then provide that any sale is to be approved by the Bankruptcy Court, but the "not unreasonably withhold approval" standard for approval by the court is imposed by the parties.

The commands regarding the court and Trustee's consent are troubling in their lack of clarity, and restricts the authority of Trustee to fulfill his fiduciary duties to the estate and the power of this court to ensure that any sale is a bona fide, arms-length transaction.

Corrigan and Trustee agree that Corrigan, as the owner of record, is in a better position to solicit and obtain a higher price and should take the "lead in arranging a sale." Someone who asserts an interest in the property has to take the lead, and the decision to allow the party who appears as of title in the California real estate records does not unduly concern the court. However, the Trustee and Corrigan make short shrift of the contentions of misdealing and secret control of Corrigan by Lazutkine. While the court does not tar Corrigan with this contention, the procedures to be imposed on this court lend themselves to abuse by someone who might be trying to secretly operate Corrigan and improperly transfer assets.

The court begins with the engaging of a real estate broker to sell the property. It is not clear that such a broker will be approved by this court, that the broker be an independent third-party, and that the broker understand and accept his or her fiduciary duties to the bankruptcy Trustee and the estate. Second, the process does not appear to be a transparent one in which the court will be confident that the property was fully marketed in a manner to allow for independent third-party bona fide purchasers to be aware of the sale, have the ability to bid on the property, and ultimately be presented to the court. The Trustee is insulated from communicating with the broker, and only "written offers received" will be transmitted to the Trustee. From the face of the Stipulation, the Trustee will have no knowledge, input, or ability to communicate to the court and parties in interest that the marketing process was reasonable and a proposed sale is one generated from the proper marketing of the property.

Third, the Trustee and Corrigan have decided that the property should be rented for some indeterminate amount of time. There has been no knowledgeable, independent, third-party broker advice presented to the court. It may well be that to a real estate professional attempting to sell the Tahoe Property in a reasonable amount of time, a lease of the property only works to reduce the value and limit the marketability.

Fourth, the court is not sure what claims the parties have agreed to be determined in the state court. The recitals state that the Pettengill has exempted all claims which she hold against "Lazutkine personally." If the parties are limiting these claims to be litigated in the state court to the exempted claims, then they should be expressly identified and cross referenced to the Amended Schedule C. Pettengill listed an asset with a value of $929,898.00 for "Alimony, Maintenance, Support, and Property Settlements and being exempt pursuant to California Code of Civil Procedure § 703.140(b)(10)(D). That section provides that an exemption exists for,

"(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

The parties need to clearly state that it is the state law claim for alimony, support, or separate maintenance are the "personal claims" that will be litigated in state court. Dckt. 112 at 14. Also, the Trustee should make clear whether he has determined, and if the Trustee and Pettengill are going to notice creditors and seek a judicial pre-determination that whatever Pettengill is awarded is "reasonably necessary for support" or that issue remains to be determined by this court.

Amended Schedule C also lists an exemption in the claim that an exemption is also claimed in a 401(k) account pursuant to this same section. The amount claimed as exempt is $10.00. The same issue exists.

The parties are reminded that the employment of professionals and the planned sale of the property cannot be completed without the approval of this court. 11 U.S.C. § 363(b) requires that the court review of the terms of the sale to make sure that the sale is fair and equitable, is of benefit the Debtor's bankruptcy estate, and does not violate any applicable nonbankruptcy laws. The court is responsible for examining the terms of any proposed sale to certify that Corrigan is not, for instance, selling the property to an insider, or manipulating the price in a way which would disadvantage Pettengill's estate.

ADDRESSING THE COURT'S CONCERNS

The court's concerns do not appear to be significant impediments to the parties consummating this stipulation and moving promptly to sell the Tahoe Property. Some possible adjustments to the Stipulation include:

A. The real estate broker is jointly hired by Corrigan and the Trustee. The employment is approved by the court, with the broker demonstrating his or her understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee, and the bankruptcy estate.

B. Corrigan be given the authority to have lead responsibility to give direction and instructions to the broker. The Chapter 7 Trustee could communicate directly with the broker, be copied on all correspondence, inquiries, and marketing data; have personal knowledge of the marketing efforts; and provide input and direction on the marketing of this property to Corrigan (which would not unreasonably object to such input and direction).

C. As part of the application to be employed, the broker shall provide to Corrigan, the Chapter 7 Trustee, and the court his or her professional opinion as to whether rental of the property helps, hinders, or is of no impact to the business reasonable marketing and sale of the Tahoe property.

D. The marketing of the property be done independently by the broker and in a manner to provide reasonable assurances that any potential purchaser is a good faith, arms length buyer.

E. Upon the sale of the Tahoe property, all sales proceeds are placed in a blocked, interest bearing account from which no disbursements may be made except upon order of this bankruptcy court.

F. Court approval of any proposed sale shall be subject to the standards of 11 U.S.C. § 363 and not a lesser standard created by the parties.

G. The Chapter 7 Trustee be primarily responsible, with the assistance of Corrigan and its counsel as appropriate, for obtaining possession of the Tahoe property so that it can be marketed and sold. Corrigan and the Trustee can document as part of the Stipulation allowing Corrigan to have possession of the Tahoe property for purposes of the broker marketing it.

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

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve the Stipulation is XXXX.

6. 13-21893-E-7 STANISLAV LAZUTKINE
MF-2 Andrew B. Reisinger

CONTINUED MOTION TO APPROVE STIPULATION TO CONSOLIDATION AND CONDUCT OF PROCEEDINGS RE: CLAIMS AGAINST CORRIGAN FINANCE LIMITED, COUNTERCLAIMS AND LEASING AND SALE OF REAL PROPERTY
12-17-13 [92]

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, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 17, 2013. By the court's calculation, 37 days' notice was provided. 21 days' notice is required. That requirement was met.

No Tentative Ruling: The Motion to Approve Stipulation was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3). The Debtor having filed an opposition, the court will address the merits of the motion. 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 court's tentative decision is to ---- the Motion to Approve Stipulation. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

This motion was originally scheduled to be heard by the Honorable Thomas Holman on January 14, 2014. On January 13, 2014, the court signed an ordering transferring the bankruptcy case to Dept. E, with the Honorable Ronald H. Sargis presiding (Dckt. No. 93). The Motion was continued to this hearing date so that it could be heard in conjunction with an identical Motion filed by the Trustee and Corrigan Finance Limited, in the related case of *In re Jenny Belle Pettengill*, United States Bankruptcy Court, Eastern District, Case No. 12-36884.

The issues to be addressed are the same as discussed in the tentative ruling in item 5 on this calendar.