

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 28, 2016 at 1:30 p.m.

1.	09-32061 -E-13	ROBERT/KATHLEEN ASH	CONTINUED MOTION FOR CONTEMPT
	PLC-1	Peter L. Cianchetta	8-20-15 [130]

Final Ruling: No appearance at the January 28, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on August 19, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Contempt is dismissed without prejudice.
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Robert and Kathleen Ash ("Debtor") filed the instant Motion for Civil Contempt as to Ocwen Loan Servicing, LLC on August 20, 2015. Dckt. 130. The Debtor requests to the court to find Ocwen Loan Servicing, LLC ("Creditor") in civil contempt under 11 U.S.C. § 105 and Fed. R. Bankr. P. 3002.1, 9014 and 9020 for violations of the discharge injunction.

The Debtor filed the instant bankruptcy case on June 13, 2009. On April 12, 2010, the Debtor's plan was confirmed. On July 15, 2015, the Chapter 13 Trustee filed a Notice of final Cure Payment. Dckt. 109.

On August 4, 2014, Creditor filed a Response to Notice of Final Cure indicating that the arrears were paid and the next payment dues was for July 1, 2014. Dckt. 112.

The Debtor states that since the final payment made by the Trustee, the Debtor has made all payments to Creditor, as required by the loan, except for one due to the confusion caused by the demands of Creditor and payments were made, but Creditor has returned them demanding back payments that were cured

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in the Chapter 13 plan.

The Debtor states that they made a Qualified Written Request and was provided a full accounting was provided on July 13, 2015. Dckt. 133, Exhibit 14. The Debtor alleges that the accounting reveals that post-petition payments were applied to amounts claimed during the cure of the bankruptcy case.

The Debtor argues that attempts to collect payments cured by the Chapter 13 Plan, as found to have been paid in full as of August 4, 2014 based on the Creditor's response to the Trustee's Notice of Final Cure Mortgage Payment are in violation of the discharge.

Debtor asserts that he made all necessary payment to Creditor and any delinquency is based on the return of payments . Dckt. 133, Exhibit 16.

The Debtor alleges is that since the response to the Notice of Final Cure of Mortgage Payment, Creditor has told Debtor that they are more than \$15,000.00 in arrears and that they must pay the entire amount. The Debtor further alleges that the Creditor threatened to filed foreclosure on August 20, 2015 and the Debtor has received phone calls to collect the arrears.

The Debtor argues that they have also suffered emotional stress.

Additionally, the Debtor argues that the Creditor violated Fed. R. Bankr. P. 3002.1 because Creditor did not file any notice of post petition fees and, therefore, should not be charging Debtor for Bankruptcy related fees.

The Debtor notes that the breach of the contract between Debtor and Creditor post petition is a matter for the state courts to resolve but the Debtor is seeking resolution as to the alleged violation of the discharge injunction and violation of Fed. R. Bankr. P. 3002.1 for the res judicata effect it may have on state court.

The Debtor is requesting that:

1. Creditor be found in civil contempt for violating the "automatic stay" and Rule 3002.1 and sanctioned
2. A further hearing to determine emotional damages
3. Pay the Debtor's reasonable attorneys' fees

APPLICABLE LAW

Civil Contempt

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both

attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058.

Federal Rule of Bankruptcy Procedure 3002.1

Pursuant to Fed. R. Bankr. P. 3002.1(c), a creditor holding a claim must do the following:

(c) Notice of fees, expenses, and charges

The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

Furthermore, if the holder of a claim fails to properly notice, the Rule provides the following:

(I) Failure to notify

If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

VIOLATION OF ORDER CONFIRMING PLAN

As Debtor addresses in the Points and Authorities, 11 U.S.C. § 524(I) provides that the failure of a creditor to properly apply payments received through a bankruptcy plan shall also constitute a violation of the discharge injunction. Such a violation is addressed by holding the violating party in contempt, subjecting the violator to civil sanctions. *Espinosa v. United Student Aid Funds*, 553 F.3d 1193, 1205 (9th Cir. 2008); *affrm.* 440 U.S. 260 (2010). The Ninth Circuit cases addressing the bankruptcy court imposing the civil sanctions for violating the discharge injunction include: *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 10-52 (9th Cir. 2009); *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, (9th Cir. 2002). In *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2006), the Ninth Circuit Court of Appeals states,

"Section 524 of the bankruptcy code provides that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. See *In re Bennett*, 298 F.3d at 1069; *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002) (holding that civil contempt is an appropriate remedy for a willful violation of section 524's discharge injunction). In *Bennett*, we noted that the party seeking contempt sanctions has the burden of proving, by clear and convincing evidence, that the sanctions are justified. We cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069 (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

As the Ninth Circuit Court of Appeals noted in Footnote 11 in *ZiLog*, "Of course, where the facts are not in dispute, no hearing need be held. See, e.g., *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003) (contempt sanctions upheld where creditor admitted having notice of the automatic bankruptcy stay, yet took no steps to remedy his violation of the stay)." *Id.* at 1008, FN.11.

SEPTEMBER 22, 2015 HEARING

At the hearing, based on the stipulation filed by the parties the day of the hearing, the court continued the hearing to 1:30 p.m. on October 29, 2015. Dckt. 146. The court ordered that any opposition shall be filed and served on or before October 22, 2015. The court also ordered that no telephonic appearances would be permitted. Lastly, the court required that Bryan Cave LLP, attorneys for Ocwen Loan Servicing LLC, shall file and serve on the U.S.

Trustee and the Chapter 13 Trustee copies of the engagement letter (redacted as appropriate) by which said law firm was engaged as counsel for Ocwen Loan Servicing LLC in this contested matter.

OCTOBER 20, 2015 ORDER

On October 21, 2015, the court issued an order continuing the hearing to 1:30 p.m. on November 19, 2015 based on the stipulation of the parties. Dckt. 148. The court ordered that Ocwen Loan Servicing LLC shall file any opposition by November 5, 2015 and any responses shall be filed by November 12, 2015.

DECLARATION OF CHRISTOPHER SCHMIDT

Christopher Schmidt, a partner at Bryan Cave LLP, filed a declaration on October 22, 2015. Dckt. 149. Mr. Schmidt states that in his capacity as the relationship partner for Ocwen Loan Servicing, LLC, he has "access to [his] law firm's business records, including the business records for and relating to Ocwen's retention of Bryan Cave in this contested matter."

Mr. Schmidt states that Ocwen Loan Servicing, LLC is the servicer of the loan, without providing the basis for such knowledge. Mr. Schmidt continues and states that "Ocwen" utilizes a "certain group of law firms to handle litigated matter throughout the country" and that Bryan Cave is one of those firms. Mr. Schmidt states that when Ocwen retains the firm, the matter is opened on CounselLink, in which Bryan Cave is sent an email notifying the firm that a case has been referred. Upon notification, Bryan Cave accepts the referral via the CounselLink website.

Mr. Schmidt states that on September 1, 2015, the firm was retained as counsel for Ocwen to defend the instant Motion. On September 2, 2015, Mr. Schmidt states that the firm received an email notice indicating the instant matter had been opened and referred to Bryan Cave in CounselLink. Once accepted, the matter is referred to the office closest geographically to the court where the matter is being heard, here the Bryan Cave San Francisco Office.

Mr. Schmidt attached the redacted email that notified the firm of the referral. Dckt. 149, Exhibit A. The email indicates that "Ocwen Financial" referred "In Re: Robert C. Ash" on September 1, 2015.

The court notes that the "Email" provided is so redacted that it fails to provide any useful information for the court. The best the court can tell from it is:

- A. It was sent from someone at ask@lexisnexis.com.
- B. It was sent to some unidentified person at an unidentified email address. (That information having been redacted.)
- C. It relates to a matter relating to "Ocwen Financial," not Ocwen Loan Servicing, LLC.
- D. Under matter title it states "In Re: Robert C. Ash."

Exhibit A. Everything else is redacted out. From this, it appears that some entity named "Ocwen Financial" was involved, not Ocwen Loan Servicing, LLC. It appears to be evidence that either no counsel was retained for Ocwen Loan Servicing, LLC or that Ocwen Loan Servicing, LLC is part of and the alter-ego of "Ocwen Financial." This email conflicts with the testimony under penalty of perjury provided by Christopher Schmidt, who states that his law firm was retained to represent "Ocwen Loan Servicing, LLC." Declaration, p. 2:2-3, 22-23.

The court is concerned that this highly redacted document has not been provided in good faith or to substantiate the contention that the law firm has actually be engaged to represent Ocwen Loan Servicing, LLC. The court has, and is, addressing the "Ocwen Entities" and other counsel they have hired filing redacted documents which fail to provide any meaningful information in support of what an attorney tells the court the document would say if it was not redacted.

NOVEMBER 5, 2015 ORDER

On November 5, 2015, the court issued an order pursuant to the stipulation of the parties to continue the instant hearing to 1:30 p.m. on December 15, 2015, with opposition due on December 1, 2015 and response by December 8, 2015. Dckt. 157.

NOTICE OF SETTLEMENT

On December 1, 2015, Debtor's counsel filed a Notice of Settlement which stated that the parties have resolved their disputes and are in the process of preparing an agreement. Dckt. 159. The Notice states that it is anticipated that the Motion for Contempt will be withdrawn by December 20, 2015.

DECEMBER 15, 2015 HEARING

At the hearing and in light of the Notice of Settlement, which indicated that the parties are currently drafting a settlement agreement, the hearing on the instant Motion was continued to 1:30 p.m. on January 28, 2016, no telephonic appearances permitted. Dckt. 165

DECEMBER 12, 2015 ORDER

On December 12, 2015, the court issued an order that withdrew the Motion for Contempt and removing the Motion from Calendar. Dckt. 162.

DISCUSSION

The court having issued an order withdrawing the instant Motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 (Dckt. 162), the "Withdrawal" being consistent with the opposition filed to the Motion, and good cause appearing, **the court dismisses without prejudice the Debtor's Motion for Contempt.**

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 Contempt filed by Robert C. Ash and Kathleen H. Ash, Debtors, the court having continued the hearing pursuant to the stipulation of the parties, the court having reviewed the highly redacted exhibits filed by the Bryan Cave, LLP law firm, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed without prejudice

2. [13-32494-E-13](#) THEODORE/MOLLY MCQUEEN
[14-2004](#) CAH-9
G & K HEAVEN'S BEST, INC. V.
MCQUEEN ET AL

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH G & K HEAVEN'S
BEST, INC.
12-23-15 [[80](#)]

Final Ruling: No appearance at the January 28, 2016 hearing is required.

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 36 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Motion For Approval of Compromise is continued to 1:30 p.m. on February 2, 2016. (Specially set for the court's relief from stay calendar.) The Parties shall address for the court the proposed language for the order stating the terms of the compromise and confirm that there is no other written settlement agreement.

Theodore and Molly McQueen, the Defendant/Cross-Plaintiff's, requests that the court approve a compromise and settle competing claims and defenses with G & K Heaven's Best, Inc. The claims and disputes to be resolved by the proposed settlement are those arising in Adversary Proceedings Nos. 14-02004 and 14-02027.

Theodore and Molly McQueen and G & K Heaven's Best, Inc. has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the parties failed to provide a copy of the Settlement Agreement as an exhibit in support of the Motion):

- A. As to Adversary Proceeding No. 14-02004: Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the unsecured balance of Creditor's Claim #4 in the amount of \$240,044.53 of which the Parties agreed \$105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice. In the event Debtors are not able to complete the Third Amended Chapter 13 Payment Plan, Claim #4 in the amount of \$240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6)."

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- B. As to Theodore and Molly McQueen's cross complaint against G & K Heaven's Best, Inc.: "Debtor reserves the right to pursue claims against Creditor. Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee."
- C. "Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the UCC Financial Statement #39225120002 filed with the Secretary of State on August 29, 2013 is void and therefore this adversary proceeding pursuant FRBP 7001(2) and §547 shall be dismissed with prejudice."

G & K Heaven's Best, Inc.'S NON-OPPOSITION

The G & K Heaven's Best, Inc. filed a non-opposition on January 13, 2016. Dckt. 89. The G & K Heaven's Best, Inc. state that the do not oppose the Motion.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the G & K Heaven's Best, Inc., following the completion of Theodore and Molly McQueen's plan, are fully and completely settled, with all such claims released. G & K Heaven's Best, Inc. has granted a corresponding release for Theodore and Molly McQueen and the Estate.

Probability of Success

Theodore and Molly McQueen states that this factor weighs in favor of settlement because the settlement is reasonable in light of the merits of the case. The G & K Heaven's Best, Inc.'s Claim No. 4 is in the amount of \$240,044.53 to which the parties have agreed to pay and accept \$105,000.00. Theodore and Molly McQueen further understand that any settlement would be subject to the discretion of the court. Theodore and Molly McQueen asserts that

they would rather move forward with completing the Chapter 13 plan, rather than litigating the Adversary Proceeding any further.

Difficulties in Collection

Theodore and Molly McQueen assert that they are making necessary plan payments to the Trustee and plan to finish the plan.

Expense, Inconvenience and Delay of Continued Litigation

Theodore and Molly McQueen argues that litigation would result in significant costs which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Theodore and Molly McQueen estimate that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Theodore and Molly McQueen projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation. Additionally, Theodore and Molly McQueen assert there may be no monetary benefit to the estate and that there is the potential that Theodore and Molly McQueen may lose.

Paramount Interest of Creditors

Theodore and Molly McQueen argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Absence of Written Settlement Agreement

The Parties to this Settlement have been warring since before Theodore and Molly Ann McQueen filed their Chapter 13 bankruptcy case on September 25, 2013. Competing adversary proceedings have been filed by one against the other. Contested matter battles have been fought.

Slowly, the Parties found common ground and worked toward settlement of their disputes. In the Chapter 13 case a bankruptcy plan has been confirmed. 13-32494; Order, Dckt. 238. A companion proposed settlement has been advanced in Theodore and Molly McQueen's Adversary Proceeding against G & K Heaven's Best, Inc.

Rather than having a fully executed settlement agreement, the Parties have placed the three terms of their settlement in the present Motion. The Parties seek court approval, by which the Order approving the settlement becomes the physical embodiment of the settlement.

The court grants the Motion, and states the terms of the Settlement as follows:

- A. For Adversary Proceeding No. 14-02004; Complaint *G & K Heaven's Best, Inc.* ("Creditor") v. *Theodore McQueen and Molly McQueen* ("Debtors"):

- 1. "Only upon successful completion of Debtors' Third

Amended Chapter 13 Plan, the unsecured balance of Creditor's Claim #4 in the amount of \$240,044.53 of which the Parties agreed \$105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice."

2. "In the event Debtors are not able to complete the Third Amended Chapter 13 Payment Plan, Claim #4 in the amount of \$240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6)."

B. For Adversary Proceeding No. 14-02004; *Cross Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:

1. "Debtor [McQueens] reserves the right to pursue claims against Creditor [G & K Heaven's Best, Inc.]. Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee."

C. As to Adversary Proceeding No. 14-02027, *Complaint G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. "Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the UCC Financial Statement #39225120002 filed with the Secretary of State on August 29, 2013 is void and therefore this adversary proceeding pursuant FRBP 7001(2) and §547 shall be dismissed with prejudice."

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate.

However, Theodore and Molly McQueen fail to provide a copy of the actual settlement agreement, with the signatures of the parties. Instead, Theodore and Molly McQueen merely provides the bare-bones terms of the settlement.

While Theodore and Molly McQueen do provide evidence that the settlement would be in the benefit of all parties and the G & K Heaven's Best, Inc. filed a non-opposition, the Parties have left the "drafting" of the "Settlement Agreement" to the court to place in the order.

Upon review of the terms stated in the Motion, the court understands the terms of the settlement to be as follows (which are stated in manner in which the court would state in the order):

IT IS ORDERED that the Complaint and Cross Complaint in Adversary Proceeding are stated by the Parties as set forth in the Motion to Approve Compromise (Dckt. 80) and Non-Opposition (Dckt. 89) are settled on the following terms and conditions:

A. For the Complaint in Adversary Proceeding 14-

02004, *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Debtors' Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), the unpaid balance of Creditor's unsecured claim, Amended Proof of Claim #4 (which was filed for a total claim of \$240,044.53), for which the Parties agreed to pay the secured portion of the claim in the amount of \$105,000.00 thorough the confirmed Third Amended Plan, shall be discharged and this adversary proceeding shall be dismissed with prejudice by G & K Heaven's Best, Inc.
2. In the event Theodore and Molly McQueen Debtors fail to complete the Third Amended Chapter 13 Plan as confirmed, the debtor set forth in Amended Proof of Claim No. 4, in the amount of \$240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6). Judgment shall be entered on the Complaint upon noticed motion filed by G & K Heaven's Best, Inc.

B. For the Counter Claim in Adversary Proceeding No. 14-02004; *Cross Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:

1. Theodore and Molly McQueen reserve the right to pursue claims against G & K Heaven's Best, Inc. and Gregory Miller if Theodore and Molly McQueen fail to complete the Third Amended Chapter 13 Plan and the claim set forth in Amended Proof of Claim No. 4 is determined non-dischargeable.
The election to pursue such claims shall be made within ninety-days of entry of the default judgment of non-dischargeability for G & K Heaven's Best, Inc., and such election shall be documented by Theodore McQueen or Molly McQueen, or both of them, filing a motion for the bankruptcy court to set a

scheduling conference for the Cross Complaint. Any monetary damages from the Cross Complaint, less any court allowed fees and expenses, shall be turned over to the Chapter 13 Bankruptcy Trustee for disbursement through the Chapter 13 Plan.

2. If the Chapter 13 Plan is completed and Theodore and Molly McQueen discharge the unsecured portion of the G & K Heaven's Best, Inc. claim in their Chapter 13 bankruptcy case (Amended Proof of Claim No. 4), Theodore and Molly McQueen shall dismiss the Adversary Proceeding as it relates to their Cross Complaint."

C. For Adversary Proceeding No. 14-02027; Complaint *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Debtors' Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), UCC Financing Statement naming "GandK Heaven's Best" as the Secured Party, Document #39225120002, filed with the Secretary of State on August 29, 2013, is deemed void and G & K Heaven's Best, Inc. shall file a termination statement. Upon the filing of the termination statement, Theodore and Molly McQueen, and each of them, shall dismiss this adversary proceeding with prejudice.

IT IS FURTHER ORDERED that the terms of the Settlement of the two Adversary Proceedings are stated in this Order, the Parties agreed and confirmed for the court that there are no further or other terms which either parties asserts exists, and any modifications of the terms of the settlement must be in writing and approved by this bankruptcy court.

The court posted the above language for an order granting the Motion and stating the terms of the settlement on January 27, 2016. To afford the Parties the opportunity to consider how the court has phrased the stated agreement of the Parties, the court continues the hearing to 1:30 p.m. on February 2, 2016 (specially set to the court's relief from stay calendar).

3. [13-32494-E-13](#) THEODORE/MOLLY MCQUEEN
[14-2027](#) CAH-9
MCQUEEN ET AL V. G & K
HEAVEN'S BEST, INC.

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH G & K HEAVEN'S
BEST, INC.
12-23-15 [[81](#)]

Final Ruling: No appearance at the January 28, 2016 hearing is required.

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 36 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

The Motion For Approval of Compromise is continued to 1:30 p.m. on February 2, 2016. (Specially set for the court's relief from stay calendar.) The Parties shall address for the court the proposed language for the order stating the terms of the compromise and confirm that there is no other written settlement agreement.

Theodore McQueen and Molly McQueen, the Plaintiff-Debtor, requests that the court approve a compromise and settle competing claims and defenses with G & K Heaven's Best, Inc. The claims and disputes to be resolved by the proposed settlement are those arising in Adversary Proceedings Nos. 14-02004 and 14-02027.

Theodore and Molly McQueen and G & K Heaven's Best, Inc. has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the parties failed to provide a copy of the Settlement Agreement as an exhibit in support of the Motion):

- A. As to Adversary Proceeding No. 14-02004: Only upon successful completion of Theodore and Molly McQueen's Third Amended Chapter 13 Plan, the unsecured balance of G & K Heaven's Best, Inc. 's Claim No. 4 in the amount of \$240,044.53 of which the parties agreed \$105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice. In the event Theodore and Molly McQueen are not able to complete the Third Amended Chapter 13 Payment Plan, Claim No. 4 in the amount of \$240,044.53 less payments received shall

be non-dischargeable pursuant to § 523(a)(6)

- B. As to Theodore and Molly McQueen' cross complaint against G & K Heaven's Best, Inc. : Theodore and Molly McQueen reserve the right to pursue claims against G & K Heaven's Best, Inc. . Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee.
- C. As to Adversary Proceeding No. 14-02027: Only upon successful completion of Theodore and Molly McQueen' Third Amended Chapter 13 Plan, the UCC Financial Statement No. 39225120002 filed with the Secretary of State will be void.

G & K Heaven's Best, Inc. 'S NON-OPPOSITION

The G & K Heaven's Best, Inc. filed a non-opposition on January 13, 2016. Dckt. 89. The G & K Heaven's Best, Inc. state that they do not oppose the Motion.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Under the terms the Settlement all claims of the G & K Heaven's Best, Inc. , following the completion of Theodore and Molly McQueen's plan, are fully and completely settled, with all such claims released. G & K Heaven's Best, Inc. has granted a corresponding release for Theodore and Molly McQueen and the Estate.

Probability of Success

Theodore and Molly McQueen states that this factor weighs in favor of settlement because the settlement is reasonable in light of the merits of the case. The G & K Heaven's Best, Inc. 's Claim No. 4 is in the amount of \$240,044.53 to which the parties have agreed to pay and accept \$105,000.00.

January 28, 2016 at 1:30 p.m.

Theodore and Molly McQueen further understand that any settlement would be subject to the discretion of the court. Theodore and Molly McQueen asserts that they would rather move forward with completing the Chapter 13 plan, rather than litigating the Adversary Proceeding any further.

Difficulties in Collection

Theodore and Molly McQueen assert that they are making necessary plan payments to the Trustee and plan to finish the plan.

Expense, Inconvenience and Delay of Continued Litigation

Theodore and Molly McQueen argues that litigation would result in significant costs which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Theodore and Molly McQueen estimate that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Theodore and Molly McQueen projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation. Additionally, Theodore and Molly McQueen assert there may be no monetary benefit to the estate and that there is the potential that Theodore and Molly McQueen may lose.

Paramount Interest of Creditors

Theodore and Molly McQueen argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Absence of Written Settlement Agreement

The Parties to this Settlement have been warring since before Theodore and Molly Ann McQueen filed their Chapter 13 bankruptcy case on September 25, 2013. Competing adversary proceedings have been filed by one against the other. Contested matter battles have been fought.

Slowly, the Parties found common ground and worked toward settlement of their disputes. In the Chapter 13 case a bankruptcy plan has been confirmed. 13-32494; Order, Dckt. 238. A companion proposed settlement has been advanced in the McQueens's Adversary Proceeding against G & K Heaven's Best, Inc.

Rather than having a fully executed settlement agreement, the Parties have placed the three terms of their settlement in the present Motion. The Parties seek court approval, by which the Order approving the settlement becomes the physical embodiment of the settlement.

The court grants the Motion, and states the terms of the Settlement as follows:

- A. For Adversary Proceeding No. 14-02004; Complaint *G & K Heaven's Best, Inc.* ("Creditor") v. *Theodore McQueen and Molly McQueen* ("Debtors"):

1. "Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the unsecured balance of Creditor's Claim #4 in the amount of \$240,044.53 of which the Parties agreed \$105,000.00 to be secured shall be discharged and this adversary proceeding shall be dismissed with prejudice."
 2. "In the event Debtors are not able to complete the Third Amended Chapter 13 Payment Plan, Claim #4 in the amount of \$240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6)."
- B. For Adversary Proceeding No. 14-02004; *Cross Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:
1. "Debtor [McQueens] reserves the right to pursue claims against Creditor [G & K Heaven's Best, Inc.]. Any monetary damages from the cross complaint, less any court allowed fees and expenses, shall be submitted to the Chapter 13 Bankruptcy Trustee."
- C. As to Adversary Proceeding No. 14-02027, Complaint G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen;:
1. "Only upon successful completion of Debtors' Third Amended Chapter 13 Plan, the UCC Financial Statement #39225120002 filed with the Secretary of State on August 29, 2013 is void and therefore this adversary proceeding pursuant FRBP 7001(2) and §547 shall be dismissed with prejudice."

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate.

However, the McQueens fail to provide a copy of the actual settlement agreement, with the signatures of the parties. Instead, McQueens merely provides the bare-bones terms of the settlement.

While the McQueens do provide evidence that the settlement would be in the benefit of all parties and the G & K Heaven's Best, Inc. filed a non-opposition, the Parties have left the "drafting" of the "Settlement Agreement" to the court to place in the order.

Upon review of the terms stated in the Motion, the court understands the terms of the settlement to be as follows (which are stated in manner in which the court would state in the order):

IT IS ORDERED that the Complaint and Cross Complaint in Adversary Proceeding are stated by the Parties as set forth in the Motion to Approve Compromise (Dckt. 80) and Non-Opposition (Dckt. 89) are settled on the following terms and conditions:

A. For the Complaint in Adversary Proceeding 14-02004, *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Theodore and Molly McQueen' Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), the unpaid balance of Creditor's unsecured claim, Amended Proof of Claim #4 (which was filed for a total claim of \$240,044.53), for which the Parties agreed to pay the secured portion of the claim in the amount of \$105,000.00 thorough the confirmed Third Amended Plan, shall be discharged and this adversary proceeding shall be dismissed with prejudice by G & K Heaven's Best, Inc.
2. In the event Theodore and Molly McQueen, the Debtors, fail to complete the Third Amended Chapter 13 Plan as confirmed, the debt set forth in Amended Proof of Claim No. 4, in the amount of \$240,044.53 less payments received shall be non-dischargeable pursuant to § 523(a)(6). Judgment shall be entered on the Complaint upon noticed motion filed by G & K Heaven's Best, Inc.

B. For the Counter Claim in Adversary Proceeding No. 14-02004; *Cross Complaint Theodore McQueen and Molly McQueen v. against G & K Heaven's Best, Inc. and Gregory Miller*:

1. Theodore and Molly McQueen reserve the right to pursue claims against G & K Heaven's Best, Inc. and Gregory Miller if Theodore and Molly McQueen fail to complete the Third Amended Chapter 13 Plan and the claim set forth in Amended Proof of Claim No. 4 is determined non-dischargeable. The election to pursue such claims shall be made within ninety-days of entry of the default judgment of non-dischargeability for G & K Heaven's Best, Inc., and such

election shall be documented by Theodore McQueen or Molly McQueen, or both of them, filing a motion for the bankruptcy court to set a scheduling conference for the Cross Complaint. Any monetary damages from the Cross Complaint, less any court allowed fees and expenses, shall be turned over to the Chapter 13 Bankruptcy Trustee for disbursement through the Chapter 13 Plan.

2. If the Chapter 13 Plan is completed and Theodore and Molly McQueen discharge the unsecured portion of the G & K Heaven's Best, Inc. claim in their Chapter 13 bankruptcy case (Amended Proof of Claim No. 4), Theodore and Molly McQueen shall dismiss the Adversary Proceeding as it relates to their Cross Complaint."

C. For Adversary Proceeding No. 14-02027; Complaint *G & K Heaven's Best, Inc. v. Theodore McQueen and Molly McQueen*:

1. Upon successful completion of Theodore and Molly McQueen's Third Amended Chapter 13 Plan, as confirmed by the court (13-32494; Third Amended Plan, Dckt. 220, and Order, Dckt. 238), UCC Financing Statement naming "GandK Heaven's Best" as the Secured Party, Document #39225120002, filed with the Secretary of State on August 29, 2013, is deemed void and G & K Heaven's Best, Inc. shall file a termination statement. Upon the filing of the termination statement, Theodore and Molly McQueen, and each of them, shall dismiss this adversary proceeding with prejudice.

IT IS FURTHER ORDERED that the terms of the Settlement of the two Adversary Proceedings are stated in this Order, the Parties agreed and confirmed for the court that there are no further or other terms which either parties asserts exists, and any modifications of the terms of the settlement must be in writing and approved by this bankruptcy court.

The court posted the above language for an order granting the Motion and stating the terms of the settlement on January 27, 2016. To afford the Parties

the opportunity to consider how the court has phrased the stated agreement of the Parties, the court continues the hearing to 1:30 p.m. on February 2, 2016 (specially set to the court's relief from stay calendar).

4. [13-32494](#)-E-13 THEODORE/MOLLY MCQUEEN CONTINUED STATUS CONFERENCE RE:
[14-2004](#) COMPLAINT
G & K HEAVEN'S BEST, INC. V. 1-4-14 [[1](#)]
MCQUEEN ET AL

Final Ruling: No appearance at the January 28, 2016 Status Conference is required.

The Motion For Status Conference is continued to 1:30 p.m. on February 2, 2016. (Specially set for the court's relief from stay calendar.)

5. [13-32494](#)-E-13 THEODORE/MOLLY MCQUEEN CONTINUED STATUS CONFERENCE RE:
[14-2027](#)
 MCQUEEN ET AL V. G & K COMPLAINT
 HEAVEN'S BEST, INC. 1-21-14 [[1](#)]

Final Ruling: No appearance at the January 28, 2016 Status Conference is required.

The Motion For Status Conference is continued to 1:30 p.m. on February 2, 2016. (Specially set for the court's relief from stay calendar.)