UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 10, 2022 at 11:00 a.m.

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1. **14-24616-E-13** **NICOLE GOLDEN/STEPHEN** **CONTINUED MOTION FOR SUMMARY**
21-2012 **ALTER** **John Downing** **JUDGMENT**
GOLDEN ET AL V. UNITED STATES **12-3-21 [17]**
OF AMERICA (INTERNAL REVENUE

1 thru 3

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all parties appearing in this action on December 3, 2021. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 for Summary Judgment is denied.

Nicole Golden and Stephen Alter ("Plaintiff-Debtor") filed the instant adversary proceeding on February 8, 2021, against the Internal Revenue Service (" Defendant").

Before the court is Defendant's Motion for Summary Judgment requesting a determination that Plaintiff-Debtor's claim is nondischargeable pursuant to 11 U.S.C. §523(a). Dckt. 17. [Fn.1.]

FN. 1. For its Motion for Summary Judgment, Defendant has not designated a docket control number for this motion and all related pleadings as required by Local Bankruptcy Rule 9014-1(c).

The court begins with a review of the Complaint and the Answer.

REVIEW OF COMPLAINT AND ANSWER

The Complaint begins with a statement that the Adversary Proceeding is brought as provided in Federal Rule of Bankruptcy Procedure 7001(2), requiring an adversary proceeding to determine the extent, validity, and priority of a lien or interest in property (with stated exceptions not applicable here), and 7001(6), requiring an adversary proceeding to determine the dischargeability of a debt. Complaint, ¶ 1; Dckt. 1.

The Complaint then lays out the following short and plain statement of the claim showing that Plaintiff-Debtor is entitled to the relief requested (*Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)):

A. On or about April 30, 2014, Plaintiff-Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code and was assigned Case Number 14-24616. Complaint, ¶ 2; Dckt. 1.

B. Defendant filed Proof of Claim 2-1 in Plaintiff-Debtor's bankruptcy case which was an asserted tax obligation in the amount of $88,515.94, which was stated to be comprised of a:

   1. $7,979.51 secured claim, $49,871.18 priority unsecured claim, and $30,665.25 general unsecured claim. *Id*., ¶3.

C. For the tax year 2008 tax obligation included in Proof of Claim 2-1, it asserts the following is owed based on a July 8, 2011 assessment:

   1. $21,572 was owed for back taxes, and
   2. $4,085.50 was owed in interest. *Id*.

D. Plaintiff-Debtor's Chapter 13 plan was confirmed on December 29, 2014. *Id*., ¶ 4.

E. Plaintiff-Debtor was granted a discharge in the Chapter 13 case on February 18, 2020. *Id*.

F. Though the Chapter 13 Plan Plaintiff-Debtor paid off all secured and priority taxes identified in Claim 2-1. *Id*.

G. On June 29, 2020, Plaintiff-Debtor received from Defendant a notice that Defendant asserted a tax lien for the 2008 asserted tax obligation. *Id*. ¶ 6.

H. With respect to the asserted 2008 asserted tax obligation, Plaintiff-Debtor states the following time line, *Id*. ¶ 7:

1.	4/15/2009	Request for extension of time filed seeking an extension date of 10/15/2009. (The Complaint contains a clerical error identifying the year of the extension as being 2010.)
2.	8/16/2010	Substitute Return filed by Defendant.
3.	3/10/2011	2008 Tax Return filed (as the undisputed facts show, this is the date signed by Plaintiff-Debtor, not necessarily filed) filed by Plaintiff-Debtor..
4.	3/14/2011	IRS Letter to Alter re: 2008 Tax Deficiency of $276,506.
5.	7/18/2011	Tax Assessed of $21,572.

I. Plaintiff-Debtor states that Defendant asserts that the 2008 Tax obligation is not dischargeable based on 11 U.S.C. § 1328(a) and 11 U.S.C. § 523(a). Plaintiff-Debtor cites to 11 U.S.C. § 1328(a)(1)(B)(ii). *Id*. ¶ 8.

J. Plaintiff-Debtor asserts that the 2008 Tax Return filed on March 10, 2011 was more than two years prior to the April 30, 2014 filing of the Chapter 13 Bankruptcy Case, and therefore the nondischargeability provisions of 11 U.S.C. § 523(a)(1)(B)(ii) do not apply. *Id*. ¶ 9.

The relief requested in the prayer of the Complaint is stated as:

(1) A Judgment that Plaintiff-Debtor does not owe any taxes for the year 2008, and

(2) Any lien asserted with respect to a tax obligation for the year 2008 is void.

Id., p. 3:13-14.

Review of the Answer

In response, Defendant filed its answer (Dckt. 7) on March 15, 2021, admitting and denying specific allegations in the Complaint. These admissions and denials include that the Defendant is without sufficient knowledge to admit or deny some of the factual allegations.

With respect to the 2008 taxes, the admissions and denials include the following:

1. Defendant admits including in Proof of Claim 2-1 $21,572 for 2008 taxes and $4,083.50 for interest thereon. Answer, p. 2:9-14.

2. Defendant admits that Plaintiff-Debtor received a discharge on February 18, 2020, but -

    a. Defendant lacks knowledge of whether it was paid for all of its secured and priority taxes stated in Proof of Claim 2-1. *Id*., p. 2:24.

3. Defendant lacks sufficient knowledge to admit or deny that it sent a notice that Defendant (through the IRS) asserted a tax lien. *Id*., p. 3:1-3.

4. Defendant denies that Plaintiff-Debtor was granted an extension to October 15, 2010, and that the 2008 Tax Return was filed on March 10, 2011. *Id*., p. 3:14-15. Defendant admits:

    a. The Request for Extension was filed on April 15, 2009;

    b. The Substitute Return was prepare don August 16, 2010; and

    c. The $21,572 was assessed on July 18, 2011. *Id*., p. 3:15-18.

5. Defendant asserts that the 2008 tax obligation is nondischargeable based on the provisions of 11 U.S.C. § 523 (it appears there is a clerical error in the Complaint that references 11 U.S.C. § 1328). *Id*., p. 4:5-7.

6. Defendant asserts that the 2008 Tax Return was:

    a. Filed "before two years before the date of the filing of the [bankruptcy] petition" in the Chapter 13 case, and therefore are nondischargeable.

REVIEW OF THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The grounds stated with particularity, as required by Federal Rule of Civil Procedure 7(b), which is incorporated into Federal Rule of Bankruptcy Procedure 7007, consist of:

A. Defendant moves for summary judgment. MSJ, p. 1:23-25; Dckt. 17.

B. Defendant states the legal conclusion that it is entitled to a judgment as a matter of law that the 2008 income tax assessment is "exempt" from discharge under 11 U.S.C. § 523(a)(1)(B)(I). *Id*., p. 1:26-27, 2:1.

11 U.S.C. § 523(a)(1)(B)(I) provides for a tax obligation to be nondischargeable in which a return, or equivalent report or notice, if required, was not filed or given.

C. Defendant asserts that since the 2008 taxes were assessed prior to a return being filed, and therefore it is exempt from discharge because it is not a debt relating to a

return filed, but an assessed tax obligation. *Id*., p. 2:1-3.

Response of Plaintiff-Debtor

No opposition to Defendant's Motion for Summary Judgment has been filed by Plaintiff-Debtor. *See* L.B.R. 7056-1(b). However, a Counter Motion for Summary Judgement has been filed by Plaintiff-Debtor, using a separate docket control number (DCN: JDG-10) as required by Local Bankruptcy Rule 9014-1(c)(4).

The court provides for countermotions in Local Bankruptcy Rule 9014-1(I), which provides:

> (I) Related Motions and Countermotions. Any countermotion or other motion related to the general subject matter of the original motion set for hearing pursuant to this Local Rule may be filed and served no later than the time opposition to the original motion is required to be filed. In the event a counter or related motion is filed by the responding party, the judge may continue the hearing on the original and all related motions so as to give the responding and moving parties reasonable opportunity to serve and file oppositions and replies to all pending motions. No written opposition need be filed to any related matter unless the matter is continued by the Court. Nothing herein shall be construed to require the filing of a counter or related motion.

Under this rule, if there is a countermotion desired to be filed, which it is a separate motion, it is to be set for hearing at the same time at the original motion so that the parties and court can address them in tandem.

For the Motion for Summary Judgment and the Countermotion for Summary Judgment, it appears that they are arguing the different sides of the same coin, each motion effectively serving as an opposition to the other.

REVIEW OF THE MOTION FOR PLAINTIFF-DEBTOR'S COUNTER MOTION FOR SUMMARY JUDGMENT

In the Motion for Summary Judgment filed by Plaintiff-Debtor, the grounds stated with particularity, as required by Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, are:

A. Debtors contend that the amounts alleged to be owed for 2008, which was listed by the IRS as general unsecured, were discharged as a result of their completion of their Chapter 13 Plan. Plaintiff-Debtor Motion, p. 1:24-26; Dckt. 28.

B. The Motion is and shall be based on this Motion, and the Notice of Motion, Memorandum of Points & Authorities, Separate Statement of Undisputed, Declaration of Stephen Michael Alter, each concurrently filed in support of this Motion, and such other matters as may be presented at or before the hearing of this matter. *Id*., p. 2:3-6.

Thus, in substance, there are no grounds stated in the Countermotion for summary judgment. Rather, the court is instructed to read the Motion, read the Notice of Motion, read the Memorandum of Points and Authorities, read the Separate Statement of Undisputed Facts, read the Declaration of Stephen Alter, and read whatever else Plaintiff-Debtor chooses to file up to the date of the hearing (though such is not permitted under the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules) and then assemble whatever grounds the court thinks that are best for Plaintiff-Debtor.

Though the court generally denies such work assignments from parties, in light of the Parties having reached an agreed statement of undisputed facts and this appearing to be substantially a legal issue, for this Countermotion, and this Countermotion only, the court will wade through the various pleadings and state what it believes the grounds to be.

Grounds From the Memorandum of Points and Authorities

In the Points and Authorities filed by Plaintiff-Debtor there is a section titled "Relevant Facts" which appears to state the factual grounds (not legal authorities and points/arguments) that are suppose to be stated with particularity in the Motion. Using this portion of the Points and Authorities, the grounds stated by Plaintiff-Debtor are:

> 1. In 2008, Plaintiffs began experiencing financial difficulties. A rental property they owned was foreclosed on. The financial difficulties adversely affected their jointly owned and operated business, All Seasons Concierge. The financial difficulties adversely affected their marriage.
>
> 2. On April 15, 2009, Plaintiffs filed a Request for Extension of Time, extending the date for filing the 2008 Tax Return to October 15, 2009.
>
> 3. In February 2010, Plaintiffs, whose daughters at the time were 4 and 6, permanently separated. Nicole Golden alone began operating the Business as a sole proprietorship. It took time for Ms. Golden to take over the tax responsibilities, which had previously been Mr. Alter's responsibility. This was another extremely difficult year for Plaintiffs, personally and financially.
>
> 4. On March 8, 2011, Plaintiffs filed their 2009 Tax Return.
>
> 5. On March 10, 2011, Plaintiffs tax preparer Jean Barnett completed Plaintiffs' 2008 Individual Income Tax Return (the "Return"), showing a total tax of $23,377 and a Balance Due of $23,040. Barnett and Plaintiffs signed the Return on March 10, 2011.
>
> 6. On March 14, 2011, the IRS sent a letter to Plaintiffs asserting that there was a tax deficiency of $276,506, which was based primarily on Self-Employment Income of $760,199.00.
>
> 7. Although the 2008 Return had been completed prior to receiving the March 14, 2011 Letter from the IRS, they held off on filing the return in an effort to put together the money to pay off the taxes and to understand the basis for the IRS

position.

8. On August 10, 2011, the IRS received the 2008 Return. This return showed Gross Income of $760,200 for Plaintiffs' vacation rental business, but a Net Profit of $132,123 after accounting for expenses, including $460,426 to housekeeping contractors.

9. The 2008 return: (1) was a return; 2) was executed under penalty of perjury; 3) contained sufficient data to allow calculation of tax; and 4) represents an honest and reasonable attempt to satisfy the requirements of the tax law.

10. For nineteen (19) months, Plaintiffs attempted to get the IRS to correct the balance owed on 2008.

11. On February 11, 2013, the IRS confirmed that the IRS has made mistakes on the 2008 Return and reduced the balance from $417,000 to $23,040.

12. Debtors attempted to work with the IRS on the back taxes that remained owed.

13. On or about April 30, 2014, Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of California and were assigned Case Number 14-24616.

14. On or about June 11, 2014, the Internal Revenue Service filed Claim 2-1 (the "IRS Claim") for a total of $88,515.94, of which $7,979.51 was identified as secured and $49,871.18 was listed as priority and the balance of $30,665.25 was listed as general unsecured.

15. The IRS Claim listed the 2008 taxes as general unsecured, showing an assessment date of July 28, 2011.

16. On July 18, 2014, Debtors filed a First Amended Chapter 13 Plan (the "Plan"), which was confirmed on December 29, 2014.

17. The IRS did not object to the Plan, nor did the IRS file an objection to discharge before the deadline of August 11, 2014.

18. Debtors completed their plan, paying a total of $51,093.03 to the IRS.

19. On February 18, 2020, Debtors obtained their discharge.

20. On June 29, 2020, Debtors received notice that the IRS had a lien based on taxes claimed to be owed for 2008.

21. The IRS did not object to the 1st Amended Plan or file an objection to the discharge

Plaintiff-Debtor Points and Authorities, p. 2-4; Dckt. 33.

MATERIAL FACTS NOT IN DISPUTE

The Parties and their counsel have each provided detailed statements of material facts not in dispute, and confirmed that they do not dispute, with one exception, the facts asserted not to be in dispute by the other. The following chart lists the facts asserted, and not disputed, to not be in *bona fide* dispute:

Table of Undisputed Facts

Plaintiff-Debtor	Defendant
Plaintiff-Debtor experienced financial difficulties which adversely affected their business and marriage. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
	Income tax returns for tax year 2008 were due on April 15, 2009. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
On April 15, 2009, Plaintiff-Debtor filed a Request for Extension of Time and extended the date for filing their 2008 Tax Return to October 15, 2009. Dckt. 29.	Plaintiff-Debtor sought and received a 6-month extension of their 2008 Tax Return deadline to October 15, 2009. Dckt. 19.
Plaintiff-Debtor permanently separated in 2010. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
	On April 12, 2010, Defendant sent an inquiry regarding Plaintiff-Debtor's failure to file their 2008 Return. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	In August 2010, Plaintiff-Debtor's accounts were referred for an income tax examination. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	Defendant prepared a substitute tax return for the Plaintiff-Debtor. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.

On March 8, 2011, Plaintiff-Debtor filed their 2009 Tax Return. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
At the end of 2010, Plaintiff-Debtor began working with tax preparer Jean Barnett to prepare their back taxes. Dckt. 29. On March 10, 2011, Barnett completed Plaintiff-Debtor's 2008 Tax Return. *Id.* This return showed a total tax of $23,377.00 and a balance due of $23,040.00. *Id.* Plaintiff-Debtor signed the Return on the same day. *Id.*	Plaintiff-Debtor retained Jean Barnett to prepare their 2008 Tax Return. Dckt. 19. The Return was signed by Plaintiff-Debtor and Barnett on the same day. *Id.*
On March 14, 2011, Plaintiff-Debtor received a letter from Defendant asserting a tax deficiency of $276,506.00 which was based primarily on self-employment income of $760,199.00. Dckt. 29.	On March 14, 2011, Defendant issued a Notice of Deficiency to Plaintiff-Debtor, which identified a deficiency of $276,506.00 and multiple statutory additions. Dckt. 19.
	The Notice informed Plaintiff-Debtor that if they wanted to contest Defendant's determination before making any payment, they had 90 days to file a petition in the U.S. Tax Court. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	Plaintiff-Debtor did not file any petition in the Tax Court. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
Plaintiff-Debtor mailed their 2008 Return to Defendant, which Defendant received on August 10, 2011. Dckt. 29. Plaintiff-Debtor's Return showed a gross income of $760,200 from Plaintiff-Debtor's business, but a net profit of $132,123 after accounting for expenses. *Id.*	Defendant received Plaintiff-Debtor's 2008 Return on August 10, 2011. Dckt. 19. Defendant notes that the 2008 return was postmarked on August 8, 2011. *Id.*
	Defendant noted Plaintiff-Debtor's mailed return as a "Duplicate" and "Amended" since Defendant already prepared a substitute return for Plaintiff-Debtor. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.

For nineteen (19) months, Plaintiff-Debtor attempted to get Defendant to correct the balance owed on the 2008 Return. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
On February 11, 2013, Defendant confirmed they made mistakes on Plaintiff-Debtor's 2008 Return and reduced the balance from $417,000.00 to $23,040.00. Dckt. 29.	At various points in 2012 and 2013, large portions of the deficiencies identifies in Defendant's Notice were removed from Plaintiff-Debtor's accounts. Dckt. 19.
Plaintiff-Debtor attempted to "work with" Defendant regarding the back taxes owed. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
On April 30, 2014, Plaintiff-Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code in this court. Dckt. 29.	On April 30, 2014, Plaintiff-Debtor filed a voluntary Chapter 13 petition in this court. Dckt. 19.
On June 11, 2014, the IRS filed Claim 2-1 for a total of $88,515.94, of which $7,979.51 was identified as secured, $49,871.18 was identified as priority, and $30,665.25 was identified as general unsecured. Dckt. 29.	On June 11, 2014, the IRS filed Claim 2-1 for a total of $88,515.94, of which $7,979.51 was identified as secured, $49,871.18 was identified as priority, and $30,665.25 was identified as general unsecured. Dckt. 19.
Claim 2-1 listed the 2008 taxes as general unsecured and showed an assessment date of July 8, 2011. Dckt. 29.	Claim 2-1 listed $21,572 for tax year 2008 based on a July 8, 2011 assessment. Dckt. 19. Claim 2-1 included $4,083.50 in interest on the 2008 outstanding balance. *Id.*
On July 18, 2014, Plaintiff-Debtor filed a First Amended Chapter 13 Plan ("Plan"). Dckt. 29.	On July 18, 2014, Plaintiff-Debtor filed a First Amended Chapter 13 Plan ("Plan"). Dckt. 19.
On December 29, 2014, Plaintiff-Debtor's Plan was confirmed. Dckt. 29.	On December 29, 2014, Plaintiff-Debtor's Plan was confirmed. Dckt. 19.
Defendant did not object to Plaintiff-Debtor's Plan and did not file an objection to discharge before the deadline of August 11, 2014. Dckt. 29. Defendant does not specifically dispute this fact in its response. Dckt. 41.	
Plaintiff-Debtor completed their Plan, paying a total of $51,093.03 to Defendant. Dckt. 29.	Plaintiff-Debtor paid of all secured and priority taxes identified in Claim 2-1. Dckt. 19.
On February 18, 2020, Plaintiff-Debtor obtained their discharge. Dckt. 29.	On February 18, 2020, Plaintiff-Debtor obtained their discharge. Dckt. 19.

On June 29, 2020, Plaintiff-Debtor received notice that Defendant had a lien based on owed taxes from 2008. Dckt. 29.	On June 29, 2020, Plaintiff-Debtor received notice that Defendant recorded notice of a federal tax lien based on the 2008 tax year. Dckt. 19.
	On February 8, 2021, Plaintiff-Debtor initiated the present adversary proceeding. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.
	On April 15, 2020, Defendant transferred a credit of $3,628.00 from at least one of Plaintiff-Debtor's 2019 accounts to the 2008 account. Dckt. 19. Plaintiff-Debtor does not specifically dispute this fact in its response. Dckt. 48.

APPLICABLE LAW FOR A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S.

748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DENIAL OF DISCHARGE LAW

For the Crossmotions for Summary Judgment, the Parties cite to two subparagraphs of 11 U.S.C. § 523(a)(1)(B), which provides (emphasis added):

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
>
> (B) with respect to which a **return**, or equivalent report or notice, if required—
>
> > (I) **was not filed or given**; or
> >
> > (ii) was **filed** [August 10, 2011, postmarked August 8, 2011] **or given after the date** on which such return, report, or notice **was last due, under applicable law or under any extension** [October 15, 2009], and **after two years before the date of the filing of the petition** [April 30, 2014]; or . . . .

Prior to 2005, Congress did not provide a statutory definition of "return," so "the Tax Court developed a widely-accepted interpretation of that term" commonly known as the *Beard* test. *United States v. Hatton* (*In re Hatton*), 220 F.3d 1057, 1070 (9th Cir. 2000) (citing *Beard v. Comm'r*, 82 T.C. 766, 767 (1984)). In order for a document to qualify as a return under this interpretation, the document must:

> (1) purport to be a return;
>
> (2) be executed under penalty of perjury;
>
> (3) contain sufficient data to allow calculation of tax; and
>
> (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

(*Id.* at 1060-61.)

Though Congress amended § 523 to include a definition of "return" ("[f]or purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." 11 U.S.C. § 523(a)), the Ninth Circuit continues to use the four-factor test in *Hatton* to determine what constitutes a tax return. *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094, 1096 (9th Cir. 2016).

DISCUSSION

In the present case, there are no issues of material facts in dispute. Plaintiff-Debtor filed a

Response (Dckt. 48) indicating they do not dispute Defendant's Statement of Undisputed Facts (Dckt. 19). The Statement of Undisputed Facts states:

A. Income tax returns for tax year 2008 were due on April 15, 2009. (Statement of Undisputed Facts, Dckt. 19, 1:25-26)

B. Plaintiff-Debtors received an automatic six-month extension, making their new due date October 15, 2009. (Statement of Undisputed Facts, Dckt. 19, 2:1-3; Complaint, Dckt. 1, 2:16-22; and Exhibit 1, Dckt. 20 at US000002).

C. On April 12, 2010, Defendant sent an inquiry regarding Plaintiff-Debtors failure to file the tax return. (Statement of Undisputed Facts, Dckt. 19, 2:4-5; and Exhibit 1, Dckt. 20 at US000002).

D. August 2010, Plaintiff-Debtors' accounts were referred for an income tax examination. (Statement of Undisputed Facts, Dckt. 19, 2:6-7; and Exhibit 1, Dckt. 20 at US000002)

E. Defendant prepared a substitute tax return for the Plaintiff-Debtors. (Statement of Undisputed Facts, Dckt. 19, 2:8-9; and Exhibit 2, Dckt. 20 at US000002)

F. On March 14, 2011, Defendants issued a Notice of Deficiency to Plaintiff-Debtor, which identified a deficiency of $276,506 and multiple statutory additions. (Statement of Undisputed Facts, Dckt. 19, 2:12-17; and Exhibit 2, Dckt. 21 at US000006)

G. The Notice informed Plaintiff-Debtors that if they wanted to contest Defendant's determination before making any payment, they had 90 days to file a petition in the United States Tax Court. (Statement of Undisputed Facts, Dckt. 19, 2:18-20; and Exhibit 2, Dckt. 21 at US000006)

H. No petition was filed.(Statement of Undisputed Facts, Dckt. 19, 3:1-2 and Exhibit 3, Dckt. 22 at 2:3-2:15-16)

I. On July 18, 2011, Defendant assessed the deficiencies and issued a notice. (Statement of Undisputed Facts, Dckt. 19, 3:3-4 and Exhibit 1, Dckt. 20 at US000002)

J. Plaintiff-Debtor retained Ms. Barnett to prepare and complete Plaintiff-Debtor's 2008 Return. (Statement of Undisputed Facts, Dckt. 19, 3:7-8 and Exhibit 4, Dckt. 23 at 1)

K. August 8, 2011, Plaintiff-Debtor's 2008 tax return was postmarked to Defendant. (Statement of Undisputed Facts, Dckt. 19, 3:11-12 and Exhibit 5, Dckt. 24 at US000059)

L. August 10, 2011, Plaintiff-Debtor's 2008 tax return was received by Defendant. Defendant notes the 2008 tax return was signed on on March 10, 2011. (Statement

of Undisputed Facts, Dckt. 19, 3:13-14, 3:9-10; Exhibit 1, Dckt. 20 at US000002; Exhibit 5, Dckt. 24 at US000023-59; and Exhibit 5, Dckt. 24 at US000024)

M. Plaintiff-Debtor's mailed return was noted as a "Duplicate" and "Amended" since Defendant already prepared a substitute return for Plaintiff-Debtors. (Statement of Undisputed Facts, Dckt. 19, 3:15-17 and Exhibit 1, Dckt. 20 at US000002)

N. Large portions of the deficiencies identified in Defendant's Notice were removed from Plaintiff-Debtor's accounts. (Statement of Undisputed Facts, Dckt. 19, 3:21-23 and Exhibit 1, Dckt. 20 at US000003)

O. Plaintiff-Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code in this court on April 30, 2014. (Statement of Undisputed Facts, Dckt. 19, 3:24-25 and Complaint, Dckt. 1).

P. Defendant filed Claim 2-1 in relation with Plaintiff-Debtor's bankruptcy case, and that Claim 2-1 listed various balances owed for the 2008 tax year. (Statement of Undisputed Facts, Dckt. 19, 4:1-3; Complaint, Dckt. 1, 2:4-9; Exhibit 6, Dckt. 25 at 3; and Claim 2-1).

Q. Plaintiff-Debtor paid off all secured and priority taxes identified in Claim 2-1 and obtained their discharge on February 18, 2020. (Statement of Undisputed Facts, Dckt. 19, 4:10-11 and Complaint, Dckt. 1, 2:12-13).

The only issue that appears to be in contention between the parties is whether Plaintiff-Debtor's delay in filing their 2008 Return constitutes "an honest and reasonable attempt to satisfy the requirements of the tax law." *See* Memorandum of Points and Authorities at 3, Dckt. 26; *United States v. Hatton* (*In re Hatton*), 220 F.3d at 1060-61. Accordingly, there are no material facts in dispute, rather, a legal question as to whether Plaintiff-Debtor's actions constituted an honest and reasonable attempt.

Defendant notes that Plaintiff-Debtor's conduct in the present case is analogous to the taxpayer's conduct in prior controlling cases *United States v. Hatton* (*In re Hatton*), 220 F.3d 1057 (9th Cir. 2000); *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094 (9th Cir. 2016); and *United States v. Martin* (*In re Martin*), Bankr. No. 11-62436, A.P. No. 12-1131, Doc. 106 (Jan. 17, 2017).

In *Hatton*, the taxpayer, Hatton, failed to file a federal tax return on his own initiative and never attempted to cure this failure until after the Internal Revenue Service threatened to levy his wages and bank account and seize his personal property. *United States v. Hatton* (*In re Hatton*), 220 F.3d, 220 F.3d 1057, 1061 (9th Cir. 2000). Additionally, it took months of negotiations between the Internal Revenue Service and Hatton to agree on a settlement for an installment agreement. *Id.* The Ninth Circuit found that Hatton's "belated acceptance of responsibility" does not constitute an "honest and reasonable attempt" to comply with tax law. *Id.* Instead, Hatton waited until the Internal Revenue Service left him with no other choice. The Ninth Circuit thus concluded that Hatton's tax liability for the year at issue was nondischargeable due to a lack of an honest and reasonable attempt to satisfy the *Beard* test. *Id.*

In *Smith*, another Ninth Circuit case, the taxpayer, Smith, failed to make a tax filing until seven years after his return was due and three years after the Internal Revenue Service calculated the

deficiency and issued an assessment. *Smith v. United States IRS* (*In re Smith*), 828 F.3d 1094, 1097 (9th Cir. 2016).

In *Martin*, the Ninth Circuit Bankruptcy Appeal Panel noted that there is binding Ninth Circuit Authority predating the 2005 amendments to determine when a taxpayer should be treated as a return for nondischargeability purposes. *United States v. Martin* (*In re Martin*), 542 B.R. 479, 480 (B.A.P. 9th Cir. 2015). *Martin* establishes that *Hatton* is the appropriate legal standard to determine whether there is an honest and reasonable effort to comply with the applicable tax laws. Additionally, *Martin* uses *Hatton* and *Nunez* to confirm that post-assessment tax return is not the functional equivalent of "no tax return at all." The Ninth Circuit Bankruptcy Appeal Panel vacated and remanded to apply the proper legal standard.

Defendants asks the court to review the remand of *Martin*. This court held a short trial of the case. Case No. 12-01131; Dckt. 106. A judgment was issued in favor of the United States. Dckt. 108. It is unclear to the court why judgment was issued in favor of the United States as no transcript has been provided of the trial. However, the facts of *Martin* indicate that the Martins failed to file their tax returns for 2004, 2005, and 2006 at the time they were due. The Internal Revenue Service issued a notice of deficiency for each of the years, which the Martins did not respond to. The Martins prepared their missing tax returns through an accountant, but did not sign them until about six months later. The Internal Revenue Service had not heard from the Martins and had to make assessments without the returns. The Internal Revenue Service then gave the Martins notice of its intent to collect the assessed taxes by levy. Only after the Internal Revenue Service threatened to collect the unpaid tax did they finally file their tax returns.

Collier on Bankruptcy, discusses this issue and consideration of factors in determining whether the late filed return is one that can prevent the tax obligation being nondischargeable. 11 Collier on Bankruptcy P TX4.02 (16th 2021). The discussion by Collier in this section of the treatise includes:

> Thus, the First, Fifth and Tenth Circuits, along with the majority of lower courts, have adopted a literal interpretation of section 523(a)(1)(B) and held that the phrase "applicable filing requirements" is unambiguous and includes deadlines for filing tax returns. This has been referred to as the "one day late" rule because a return filed even one day late will preclude discharge. While this approach is one reading of the statutory text and is simple to apply, an increasing number of courts, including most recently the Eleventh Circuit, have correctly criticized the approach as inconsistent with the statutory intent and for the harshness of its results.
>
> . . .
>
> In *In re Shek*, the Court of Appeals for the Eleventh Circuit reasoned that "applicable filing requirements" do not unambiguously include filing deadlines, but instead should only include aspects of the return that have a "material bearing on whether or not it can reasonably be described as a 'return'—but not to more tangential considerations." The court contrasted its ruling from the rulings in the First, Fifth and Tenth Circuits by asserting that those courts "discounted the force of the surplusage canon" and that their interpretation would render section 523(a)(1)(B)(ii) "insignificant." In addition, even the IRS does not support the "one day late" rule [citing to briefs filed by the IRS in other cases].

. . .
In *In re Martin*, the Bankruptcy Appellate Panel for the Ninth Circuit also rejected the literal approach to interpreting the hanging paragraph in section 523(a)(*) as applying an "unforgiving view of congressional intent." The court instead held that the determination of whether a return is filed is governed by United States v. Hatton (In re Hatton), which considers whether the document (1) purports to be a return, (2) is executed under penalty of perjury, (3) contains sufficient data to calculate the tax and (4) is an honest and reasonable attempt to satisfy the law.
. . .
Other courts after the *Hindenlang* decision disagreed with *Hindenlang* and recognized a return filed by a taxpayer even after the assessment of a tax liability under section 6020(b) of the IRC. One example is a decision of the Ninth Circuit Bankruptcy Appellate Panel which, on very similar facts, came to the opposite conclusion. In *In re Nunez*, the debtor did not timely file tax returns, the IRS prepared substitutes for returns and assessed tax liabilities for the years in question, and the debtor filed income tax returns reflecting the same wage income as the substitute returns filed by the IRS. The IRS argued for "an absolute rule that where it prepares substitute returns and assesses the taxes due, any document subsequently filed by the debtor cannot be deemed a return." The Ninth Circuit B.A.P. rejected this approach first by concluding that the existence of an assessment by the IRS does not bar dischargeability. Section 523(a)(1)(B) does not state that a return must be filed prior to an assessment by the IRS to be effective for dischargeability purposes.
. . .
The fourth prong of the four part test for the filing of a "return" is the factual issue of good faith: is there an honest and reasonable attempt to satisfy the requirements of the tax laws? The Courts of Appeals for the Third and Eleventh Circuits recently have joined the Fourth, Sixth, Seventh and Ninth Circuits in holding that delinquency in filing is relevant to this *Beard* factor. In *In re Justice*, the Eleventh Circuit held that "[f]ailure to file a timely return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law. This interpretation comports with the common-sense meaning of 'honest and reasonable.' " In *In re Giacchi*, the Third Circuit cited Justice in concluding that a debtor's "belated filings [were] merely self-serving bids to reduce his tax liabilities, rather than attempts to comply with the requirements and objectives of prompt self-reporting and self-assessment."

The Court of Appeals for the Tenth Circuit in *In re Savage* concluded the honest and reasonable attempt test requires the document to "appear on its face to constitute an honest and genuine endeavor to satisfy the law." Under this version of the test for a "good faith" filing, a court is asked only to determine if the document in question "on its face" was filed in good faith. The good faith standard for the filing of a return under section 523(a)(1)(B) was therefore narrow in scope:

> The good faith inquiry under section 523(a)(1)(B) should focus on the debtor's intent at the time the returns were filed. This keeps the inquiry relevant to section 523(a)(1)(B). A focus on the delay in filing, or the

> number of missed years is relevant instead to an inquiry under section 523(a)(1)(C). …
> … .
> The IRS has the ultimate burden of proof as to whether a return has been filed. It has failed to present evidence raising a genuine issue as to a material fact on the issue of good faith, even under the broad scope argued for by the IRS.

> The decision in *In re Nunez* confirms the requirement for a factual determination of the taxpayer's good faith in filing the returns, and further places the burden of proof on the existence of a filed return on the IRS. This burden is consistent with the general rule that exceptions to discharge are to be narrowly construed and the party objecting to the granting of a discharge bears the burden of proof.

As discussed, it is undisputed that Plaintiff-Debtor did not prepare their 2008 Return until almost two years after the original due date and that Plaintiff-Debtor did not file their 2008 Return for nearly five months after completing and signing it. Defendant alleges that in doing so, Plaintiff-Debtor "approached their federal tax obligations so lackadaisically and carelessly that their conduct was not an honest or reasonable attempt to comply with the law." Dckt. 26, 6:1-2. In its conclusion, Defendant maintains that Plaintiff-Debtor's 2008 Return could not be considered a return within the meaning of the Bankruptcy Code because Plaintiff-Debtor's "dilatory conduct" fails to satisfy the "honest and reasonable" requirement under the *Beard* test.

Although Defendant conducted an assessment without a filed tax return, this is not dispositive of a nondischargeable debt. *See United States v. Martin* (*In re Martin*), 542 B.R. 479, 480 (B.A.P. 9th Cir. 2015).Plaintiff-Debtor requested a six month extension, which they received, and filed their deficient tax return about one month after Defendant assessed Plaintiff-Debtor's deficiencies. This distinguishes from *Smith*, where Smith waited nearly three-years after the assessment to file their deficient tax return. Additionally, unlike *Hatton* and *Martin*, there is no indication that Defendant threatened Plaintiff-Debtors to levy their wages, or threaten to take any personal property. Although untimely, it only took Plaintiff-Debtors one month after Defendant's assessment to file their tax returns. This does not reflect a "belated acceptance of responsibility." *See United States v. Hatton* (*In re Hatton*) 220 F.3d 1057, 1061 (9th Cir. 2000) ("[debtor] never filed a return and only cooperated with the [Internal Revenue Service] once collection became inevitable.").

Oral Argument

xxxxxxx

The court finds that Defendant ~~has established/failed to establish~~ that Plaintiff-Debtor did not have an honest and reasonable attempt to file their taxes. Based on the statement of undisputed facts, although untimely, Plaintiff-Debtor's action ~~appear/do not appear~~ to be honest and reasonable. Therefore, Defendant ~~has/had not~~ established that Plaintiff-Debtor's claim is nondischargeable under 11 U.S.C. § 523(a)(1)(B). Defendant's Motion for Summary Judgment is denied.

The court finds that Plaintiff-Debtor ~~has established/failed to establish~~ that Plaintiff-Debtor

did have an honest and reasonable attempt to file their taxes. Based on the statement of undisputed facts, although untimely, Plaintiff-Debtor's action ~~appear/do not appear~~ to be honest and reasonable. Therefore, Plaintiff-Debtor ~~has/had not~~ established that Plaintiff-Debtor's claim is dischargeable under 11 U.S.C. § 523(a)(1)(B). Plaintiff-Debtor's Crossmotion for Motion for Summary Judgment ~~is granted/ denied~~.

XXXXXXX

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 Summary Judgment filed by the Internal Revenue Service ("Defendant") 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 For Summary Judgment is **XXXXXXX**

2. **14-24616-E-13 21-2012** **NICOLE GOLDEN/ STEPHEN ALTER JGD-10** **Paul PascuzziJUDGMENT** **CONTINUED MOTION FOR SUMMARY**
GOLDEN ET AL V. UNITED STATES OF AMERICA (INTERNAL REVENUE **12-3-21 [28]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on all parties appearing in this action on December 3, 2021. By the court's calculation, 48 days' notice was provided. 42 days' notice is required. Local Bankruptcy Rule 7056-1(a).

The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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 for Summary Judgment is xxxxxxxxx.

The Court will issue one unified ruling for the Crossmotions for Summary Judgment, which is addressed in the tentative above.

3. **14-24616-E-13 21-2012** **NICOLE GOLDEN/STEPHEN ALTER CAE-1 John Downing**

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT FOR DETERMINING DISCHARGEABILITY AND VOIDING LIEN
2-8-21 [1]

GOLDEN ET AL V. UNITED STATES OF AMERICA (INTERNAL REVENUE)

Plaintiff's Atty: John G. Downing
Defendant's Atty: Ty Halasz

Adv. Filed: 2/8/21
Answer: 3/15/21

Nature of Action:

Notes:
Continued from 1/20/22 to be conducted in conjunction with the hearing on cross motions for summary judgment.

The Status Conference is xxxxxxx

4. **10-27435-E-7 THOMAS GASSNER** **MOTION TO APPROVE STIPULATION**
19-2006 DNL-9 Paul Pascuzzi **RE: TURNOVER OF STOCK**
HUSTED V. MEPCO LABEL SYSTEMS **1-4-22 [188]**
ET AL

4 thru 6

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee (Plaintiff), Defendants' Attorneys, and Interested Party's Attorney, on January 4, 2022. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Approve Stipulation has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Stipulation Regarding Turnover of Stock is granted.

Kimberly J. Husted, the Chapter 7 Trustee ("Movant") requests that the court approve a compromise and settle competing claims and defenses with MEPCO Label Systems, a California Corporation ("MEPCO"), LAURA STROMBOM, trustee of the Thomas A. Gassner Trust ("Strombom"), and CAROL L. GASSNER and ALFRED M. GASSNER, individually and as settlors and trustees of the Thomas A. Gassner Trust ("Gassners"), (collectively, "Defendants").

The claims and disputes to be resolved by the proposed settlement are the valuation of 2,000 shares of class "B" non-voting stock in MEPCO.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 191):

A. Strombom shall turn over the Shares to the Trustee on or before December 31, 2021.

B. The Trustee may market and sell the Shares in accordance with applicable bankruptcy and non-bankruptcy law.

C. The Bankruptcy Dispute Resolution Program ("BDRP") mediation shall be continued to a mutually agreed upon date, after the Shares are sold, not to exceed six (6) months.

D. This adversary proceeding shall be stayed except for discovery reasonably necessary to facilitate the Trustee's efforts to market the Shares.

E. Prospective purchasers shall be required to enter into a non-disclosure agreement mutually approved by the Parties to protect MEPCO.

F. All confidential financial data and marketing materials shall be made available only in a secure data room for viewing by prequalified prospective purchasers.

DISCUSSION

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." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *Collect Access LLC v. Hernandez (In re Hernandez)*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *see also* 11 U.S.C. §§ 541(a), 542(a). Section 542(a) requires someone in possession of property of the estate to deliver such property to the trustee. Pursuant to 11 U.S.C. § 542, a trustee is entitled to turnover of all property of the estate from a debtor. Most notably, pursuant to 11 U.S.C. § 521(a)(4), Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 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 Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (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); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

The proposed settlement permits Movant to immediately list for sale and then sell Defendant's interests in the personal property commonly known as MEPCO Shares. The Stipulation resolves the complicated dispute over the MEPCO Shares and allows Trustee to realize the actual market value of the Shares.

Probability of Success

Trustee is not confident that she would be successful in litigation as there are inherent risks in litigating the value of the Shares. Trustee believes a more reasonable course is one agreed to by the parties.

Difficulties in Collection

Trustee is not aware of any difficulties with respect to collection.

Expense, Inconvenience, and Delay of Continued Litigation

Trustee expects litigation to be costly and timely. The Stipulation wholly avoids any further expense or delay allowing a distribution to creditors without incurring unnecessary administrative costs.

Paramount Interest of Creditors

Trustee argues this factor supports approving the Stipulation and the Stipulation is in the best interest of the Bankruptcy Estate.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

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 because it provides an efficient administration of Debtor's estate and resolves the longstanding dispute as to the valuation of the Shares.

The court notes, however, there is no reference in the Stipulation to what occurs upon Movant selling the Shares. Movant and Defendant have not indicated who will recover the proceeds from the sale. The court presumes Movant will hold on to the proceeds until the determination of ownership of the Shares. At the hearing, XXXXXXXXXX

The Motion is granted.

The court shall issue an 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 Approve Compromise filed by Kimberly J. Husted, the Chapter 7 Trustee ("Movant") 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 for Approval of Compromise between Movant and MEPCO Label Systems, a California Corporation ("MEPCO"), LAURA STROMBOM, trustee of the Thomas A. Gassner Trust ("Strombom"), and CAROL L. GASSNER and ALFRED M. GASSNER, individually and as settlors and trustees of the Thomas A. Gassner Trust ("Gassners"), (collectively, "Defendants") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 191).

5. **10-27435-E-7** **THOMAS GASSNER** **MOTION TO AMEND SCHEDULING ORDER**
19-2038 **Paul Pascuzzi**
GASSNER V. GASSNER ET AL **12-20-21 [143]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Trustee's Attorney, Defendant's Attorney, Plaintiff's Attorney, and Interested Parties on December 20, 2021. By the court's calculation, 52 days' notice was provided. 28 days' notice is required. Local Bankruptcy Rule 9014-1(f).

The Motion to Amend Scheduling Order has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least twenty-one days prior to the hearing as required by Local Bankruptcy Rule 7056-1(f) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Amend Scheduling Order is granted.

Defendants Carol L. Gassner and Alfred M. Gassner ("Defendants"), settlors of the Thomas A. Gassner Trust, move the court for an Order Amending the Scheduling Order. Dckt. 143. Defendants state there is no current scheduling order in this matter. Defendants request to set dates for opening discovery on the grounds that Defendants are elderly and any further delay may pose a real risk to adequately defend their case.

Plaintiff's Response

Plaintiff Georgene Gassner ("Plaintiff") filed a response to Defendants' motion. Dckt. 159. Plaintiff reminds the court that at the January 21, 2021, Status Conference, the court determined that this Adversary Proceeding should be stayed while Trustee Kimberly Husted's Adversary Proceeding ("Husted Adversary"), Case No. 19-02006, is litigated. The status conference was continued to be held in conjunction with this matter.

Being heard also in conjunction with this matter is a Motion to Approve Stipulation in the Husted Adversary ("Husted Stipulation"). The Husted Stipulation is designed to determine the value of the shares at issue. *See* Motion to Approve Stipulation, Adv. Case No. 19-02006, Dckt. 188. Plaintiff asserts that it would be prudent to continue with this adversary proceeding until both the Husted

Stipulation is approved and parties take the actions contemplated in the stipulation. Response at ¶ 4, Dckt. 159.

Plaintiff recommends the court not lift the discovery stay until Plaintiff either:

(A) is able to obtain a stipulation to add parties or

(B) is able to obtain a ruling on a motion to add parties and such parties respond to the complaint.

Plaintiff states pursuing with discovery prior to adding additional parties would be inefficient and wasteful. *Id.*

Defendants' Reply

On January 27, 2022, Defendants filed a reply to Plaintiff's response. Dckt. 162. Defendants argue the Husted Stipulation provides no support for the continued delay of discovery. Rather, Defendants state the determination of the value of the shares supports opening discovery. .

Defendants further assert the Husted Stipulation is not dispositive of any facts relevant in the current case. Reply at ¶ 4, Dckt. 162. Rather, the Stipulation simply provides for the transfer of shares to the Trustee for sale, allowing parties to determine and fix a value of the shares.

Defendants believe there is no reason both the Husted Adversary and the present adversary proceeding cannot proceed simultaneously.

Defendants state any further delay puts at risk one or both Defendants testimony due to their age.

JANUARY 21, 2021 CONTINUED STATUS CONFERENCE

On January 14, 2021, Plaintiff Georgene Gassner, Plaintiff, filed an updated Status Conference Statement. Dckt. 134. Plaintiff reports that she believes the court should continue to stay this Adversary Proceeding pending the litigation of related Adversary Proceeding 19-2006 which is being prosecuted by the Chapter 7 Trustee.

Plaintiff reports that there may be other persons that Plaintiff may be asserting violated the automatic stay in the Thomas Gassner bankruptcy case. These persons are identified as Jennifer Gassner-Tracy, Alfred Karl Gassner, MEPCO, and Mis Pasadena Properties, LLC. When the stay is lifted as to this Adversary Proceeding, Plaintiff may seek to amend the complaint to add them as parties.

At the Status Conference, Defendants' counsel discussed the perceived need to conduct a deposition of Plaintiff in light of the age of his clients. He stated that he foresees this need so that he can confer with his clients concerning Plaintiff's testimony, and if they disagree, possible rebuttal evidence he would need to develop.

Defendants' counsel focused the perceived necessary discovery to be of just the Plaintiff, and

would not be seeking a modification of the stay for other discovery. Counsel for Plaintiff expressed concern of opening discovery in this Adversary Proceeding.

The court discussed with the Parties some of the fundamental legal issues and application of federal law concerning the automatic stay, termination of the stay, and the discharge injunction as it relates to unsecured or non-offset pre-petition claims.

The Parties will meet and confer concerning the discovery that Defendants believe they need to conduct now. If the parties agree to an exception to the current stay in this Adversary Proceeding they may file an *ex parte* motion to allow specific discovery. If they do not agree, a party who believes the stay should be modified may file an motion seeking such relief in this Adversary Proceeding.

The court confirmed with counsel that if they believed some action in this Adversary Proceeding is proper, they may seek a modification of the stay prior to the continued Status Conference.

JANUARY 5, 2022 STATUS CONFERENCE

Plaintiff Georgene Gassner filed an updated Status Conference Statement on December 29, 2021. Dckt. 149. In it, Plaintiff discusses what appears to be a successful mediation in the related Adversary Proceeding *Husted v. MEPCO Label Systems et al*, 19-2006, and that Plaintiff believes that the parties in that Adversary Proceeding will be seeking approval of a settlement in the Thomas Gassner bankruptcy case (10-27433).

Plaintiff states that once that settlement has been approved and the issues therein resolved, then this Adversary Proceeding can proceed. As addressed in Plaintiff's prior Status Report, Plaintiff anticipates adding additional parties to this action.

In light of that information, Plaintiff requests that the Status Conference be continued to February 10, 2022, to be held in conjunction with Defendants' Motion to Amend the Scheduling Order in this Adversary Proceeding.

Defendants filed their Motion to Amend Scheduling Order, Dckt. 143, which includes information that would have been included in an updated status report. In substance, the Motion states that there is no current scheduling order in this Adversary Proceeding, the court having stayed this Adversary Proceeding while the Defendants in this Adversary Proceeding proceed with their litigation in the *Husted v. MEPCO* Adversary Proceeding.

DISCUSSION

The present adversary proceeding has been pending for almost three (3) years now being that the issue of proper ownership of the Shares is being litigated in the Husted Adversary. *See* Amended Complaint, Adv. Case No. 19-02006, Dckt. 98.

Plaintiff states the following causes of action in their Complaint:

(1) SANCTIONS FOR WILLFUL VIOLATION OF THE AUTOMATIC STAY [Against the Settlors];

(2) SANCTIONS FOR WILLFUL VIOLATION OF THE AUTOMATIC STAY [Against Strombom];

(3) BREACH OF FIDUCIARY DUTY [Against Strombom];

(4) DECLARATORY RELIEF [Against All Defendants];

(5) INJUNCTIVE RELIEF/ FURTHER RELIEF BASED ON DECLARATORY JUDGMENT [Against the Settlors];

(6) SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION [Against The Settlors].

Amended Complaint, Dckt. 20.

The pending Husted Stipulation does not resolve the hotly contested issue of who has rightful ownership of these Shares, whether it be the Bankruptcy Estate or Defendants. *See* Exhibit A, Motion to Approve Stipulation, Adv. Case No. 19-02006, Dckt. 191. Rather, it only seeks to clarify what the proper value of the Shares is. Therefore, even if the Husted Stipulation is approved, the question of ownership will not be resolved.

The court cannot determine whether the automatic stay was violated until it is determined whether the Shares were and are property of the Bankruptcy Estate. As such, the court grant relief in the present adversary proceeding until it is determined whether the Shares are property of the Bankruptcy Estate, which will be determined in the Husted Adversary. As Plaintiff suggests, it would be prudent to continue with this adversary until the determination of ownership of the shares is actually litigated.

However, the court is aware of the present concern of Defendants and how a stay of the proceedings may prejudice their defense. Defendants are elderly, and their defense may be jeopardized due to the delays. Therefore, although trial will continue to be delayed until the Husted Adversary is litigated, parties in the present adversary proceeding should be allowed to proceed with discovery. Discovery must be limited in scope to the issues in the present adversary proceeding, and not include discovery into the issues being litigated in the Husted Adversary (such as discovery into ownership of the shares). This will allow Defendants to obtain testimony, on the record, to defend their case and prevent any further prejudice.

The court shall issue an 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 Amend Scheduling Order 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 Amend Scheduling Order is granted, and the court Amends the Scheduling order to provide for discovery in

the limited scope to issues addressed in the present adversary as follows:

A. xxxxxxx

B. xxxxxxx

C. xxxxxxx

D. xxxxxxx

6. **10-27435-E-7 THOMAS GASSNER** **CONTINUED STATUS CONFERENCE**
19-2038 CAE-1 Paul Pascuzzi **RE: AMENDED COMPLAINT**
GASSNER V. GASSNER ET AL **7-12-19 [20]**

Plaintiff's Atty: Holly A. Estioko
Defendant's Atty:
Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner]
Charles L. Hastings [Laura Strombom]

Adv. Filed: 3/12/19
Answer: 4/11/19 [Laura Strombom]
4/11/19 [Alfred M. Gassner; Carol L. Gassner]
Amd. Cmplt. Filed: 7/12/19
Answer: 8/5/19 [Alfred M. Gassner; Carol L. Gassner]
8/13/19 [Laura Strombom]
Amd. Answer: 8/13/19 [Alfred M. Gassner; Carol L. Gassner]
8/26/19 [Alfred M. Gassner; Carol L. Gassner]

Nature of Action:
Sanctions for willful violation of automatic stay (against Settlors and Strombom)
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
Declaratory judgment
Injunctive relief - other
Notes:
Continued from 1/5/22 to be conducted in conjunction with Defendant's Motion for court to issue a scheduling order and, implicitly, lift the stay of this Adversary Proceeding.

The Status Conference is xxxxxxx