UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 19, 2014 at 10:30 a.m.

1.	**13-29803-E-7**	**SPENCER ROBBINS AND**	**MOTION TO SELL**
	HCS-3	**MONICA IBARRA-ROBBINS**	**5-15-14 [63]**
		Holly S. Burgess	

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtors having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on May 15, 2014. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2) 21 day notice and L.B.R. 9014-1(f)(1) 14-day opposition filing requirement.)

The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtors having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as the estate's 100% membership interests in the following limited liability companies for a total of $190,000:

a. Gemini 305 West 39th Street, LLC ("Gemini 305"); and

b. Gemini Parkway Plaza 19, LLC ("Gemini Parkway"),

collectively referred to as the Membership Interests.

Under the proposed sales, Partnership Liquidity Investors, LLC ("PLI") will buy the estate's interest in Gemini 305 for $125,000. PLI will also buy the estate's interest in Gemini Parkway for $65,000.00.

On July 25, 2013, the Debtors filed this case under Chapter 13 of the Bankruptcy Code. Debtors filed a Notice of Voluntary conversion to Chapter 7 on August 28, 2013. In their Schedule G, the Debtors disclosed:

1. A 3.797% interest in commercial real property described as an "Investment Contract in 78-room, limited service hotel, 305 West 39th Street, New York, New York" (the "Gemini 305 Property"); and

2. A 2.938% interest in commercial real property described as follows: "Investment Contract in 262,582 square foot shopping center–Parkway Plaze [sic] 588 Ed Noble Parkway, Norman, Oklahoma" (the "Gemini Parkway Property") (Dckt. No. 32).

The Trustee investigated this and determined that in fact, the Debtors own 100% of the Gemini 305 West 39th Street 5, LLC, which in turn owns a 3.797% interest in the Gemini 305 Property. The Trustee also determined that the Debtors own 100% of Gemini Parkway Plaza 19, LLC, which in turn owns a 2.938% interest in the Gemini Parkway Property.

At the November 18, 2013, continued Section 341 Meeting of Creditors, Debtors provided to Trustee copies of the operating agreements for Gemini 305 and Gemini Parkway. The operating agreements state that the Debtors own a 100% interest in each of Gemini 305 and Gemini Parkway limited liability companies; Gemini 205 and Gemini Parkway are special purposes entities created solely to acquire, own, and transfer the Gemini 305 Property and the Gemini Parkway Property, respectively. Gemini 305 West 39th Street, LLC purchased the Gemini 305 Property for $450,00 on or about October 3, 2007; and Gemini Parkway Plaza 19, LLC purchased the Gemini Parkway Property for $375,000 on or about October 26, 2007.

The Trustee understands Gemini Real Estate Advisors, LLC, to manage the property. Trustee contacted Gemini REA to try to discuss a possible sale of the Debtor's membership interests, but did not receive a return call. However, Trustee's counsel spoke with Dante A. Massaro, Managing Director at Gemini REA, who referred Trustee's counsel to Racheal Fuertado at Gemini REA, whom he stated he would be able to assist in marking the Membership Interests for sale. Ms. Feurtado failed to respond to Trustee's multiple efforts by phone, email, and other correspondence to reach out to her regarding the sale of the property.

On December 12, 2013, the Trustee received a telephone call from Eugene Davidson of AmericBid, who stated that his client, PLI was interested in making an offer to purchase the Membership Interests.

On January 17, 2014 and January 21, 2014, PLI, through Mr. Davidson, presented to the Trustee formal offers to purchase the Membership Interests for $125,000 and $65,000, respectively. The Trustee believes that the

Purchase Amounts are reasonable because membership interests are difficult to market to third party investors. The Trustee attempted to market the Membership Interests to the other investor owners of the properties through Gemini REA, but Gemini REA failed to cooperate with the Trustee despite multiple diligent attempts by her and her counsel.

Additionally, the Debtors told the Trustee that the anchor tenant at the Gemini Parkway Property had recently departed, which the Trustee believes reduces the value of the Gemini Parkway Property. In addition, the Debtors told Trustee that Gemini REA was attempting to obtain refinancing for the Gemini 305 Property but was encountering difficulty because of its deflated value. Trustee therefore believes that the Purchase Amounts are reasonable and that the proposed sales are in the best interests of the creditors. The Trustee accepted the offers and parties' signed purchase agreements documenting the sale.

The sales are conditional on this court granting this motion and the Trustee is amenable to overbidding at the hearing on terms that are agreeable to the court. In addition, because Trustee wishes to obtain the best possible price, Trustee is still engaging in other marketing efforts. She has listed the Membership Interests for sale on the website for the National Association of Bankruptcy Trustees, and on inforuptcy.com, a website targeting bankruptcy trustees, attorneys, creditors, other professionals, and the public who are interested in finding information about bankruptcy or in searching a database of bankruptcy assets that are listed for sale. As of the filing of the present Motion, the Trustee has not received any other offers to purchase the Membership Interests.

Further, the Trustee is serving Gemini REA with this motion in case it wishes to market the Membership Interests to the other investor owners of the Properties.

OBJECTION TO SALE AND MOTION TO RE-CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13

Debtors Spencer David Robbins and Monica T. Ibarra-Robbins ("Debtors"), oppose the Trustee's Motion to Sell on the basis that Debtors believe that Trustee has failed to properly investigate the financial status of the LLC interests, and has undervalued them.

Debtors state that their "own investigation has revealed the true value of the LLC's claims," but do not offer an alternate valuation of the ownership interests at issue. Instead, Debtors delve into the history of their case, stating that they filed a Notice of voluntary Conversion to convert their original Chapter 13 case to a Chapter 7 case on August 28, 2013. The Debtors state that since they converted their case, Debtors have secured regular monthly income that would support a viable Chapter 13 Plan.

Debtors are the sole owners and principals of the two subject LLCs. which were created for the purpose of purchasing an interest in the Gemini 305 and Gemini Parkway Properties. Debtors assert that the offer to purchase the Debtors' 3.797% interest in the Gemini 305 property for $125,000.00 as "unreasonably low" and far below its current market value, but do not expound on what Debtors believe is a more reasonable figure. Debtors vaguely assert that they were advised that a buyer made an offer of

$31,500,000.00 for the Gemini Property, on which Debtors' proportionate share based on the net sales proceeds would be $396,514.67 based on a 3.797% share. Debtors do not detail in their Opposition who presented this offer (whether it was the Trustee who brought this prospective purchaser to the Debtors' attention), who made the offer, and why Debtors believe that this amount more accurately represents the value of the property.

The Debtors dump a number of letters, email correspondence, investor information sheets, and bankruptcy schedules as an attachment to the declaration for the court's review as an attachment to the Declaration of Joint Debtor Spencer Robbins. FN.1.

FN.1. The exhibits that Debtors refer to are attached to the Declaration of Joint Debtor Spencer Robbins as one document. Dckt. No. 72. This is not the practice in the Bankruptcy Court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1).

The Debtors provide no context for most of the documents, and in the absence of explanation of the significance of the documents, the court sees little probative value or credibility to the "pile of exhibits" dumped on the court. The "letter of intent" portrayed as being from prospective buyers of the subject property, and the following, unauthenticated email from Racheal Feurtado seems to indicate that the offer was rescinded. The court is uncertain as to whether Debtors are offering these documents to show a different valuation of the property which they argue should be valued higher than the values assigned to the subject property by the Trustee.

The Debtors state that they learned that this offer to buy (for which little detail Is provided) was withdrawn on May 15, 2014. The Debtors state that the Trustee would have known this had it tried to contact Gemini since the last time her counsel communicated with them in late January 2013 (which clearly contradicts Trustee's claims that Trustee has repeatedly tried to contact Gemini and its brokers to assist Trustee in marketing the Membership Interests to no avail).

Debtors now wish to reconvert their case to a Chapter 13 case to reacquire possession and control of the estate property which has equity, stating that Debtors' monthly income has now increased to $5000 per month. Debtors state that their preliminary Chapter 13 Plan projects that they can now afford a repayment plan that will repay unsecured claim holders an amount equal or greater than liquidation would generate under a Chapter 7 bankruptcy.

REPLY BY TRUSTEE

The Chapter 7 Trustee replies to Debtors' charges that the Trustee did not obtain sufficient information regarding the value of the estate's 100% membership interests in the Gemini 305 and Gemini Parkway properties, asserting that the Debtors' attempts fail for multiple reasons.

First, Debtors fail to provide any evidence that the value of the assets exceeds the proposed sales price. Second, the Opposition ignores the Trustee's numerous attempts to obtain valuation information from the Debtors' counsel and from Gemini Real Estate Advisors, LLC ("Gemini REA"), the entity that manages the Properties, and those parties' refusal to cooperate with the Trustee. The Opposition does not explain why Debtors withheld from the Trustee and her counsel information that was requested on multiple occasions, only for the Debtor to attach such information as exhibits to their Opposition.

Trustee offers additional facts to "set the record straight," in light of what she terms as Debtors' selective inclusion of facts to create an inaccurate record as to the Trustee's efforts to market and sell the property. Trustee states that on March 12, 2014, the Trustee's counsel, Loris L. Bakken sent to Debtors' counsel, Holly Burgess, the sale agreements for the sale of the Membership Interests. Ms. Bakken asked that Ms. Burgess contact her with any questions or comments that the Debtors may have, Ms. Burgess acknowledged receipt of the agreements, but provided no response. ¶ 2, Declaration of Loris L. Bakken, Dckt. No. 84.

On March 13, 2014, the Trustee sent to Ms. Burgess an email that stated that she intended to sell the Membership Interests and requested that the Debtors provide details of the Section 1031 exchange that the Debtors executed to acquire funds to purchase the Properties. Specifically, the Trustee requested the following information from the Debtors:

A. When they sold the home used to generate the investments;

B. Whether they improved the home;

C. Whether they depreciated the home;

D. The basis for the home and the sale price; and

E. Whether there were other 1031 transactions that allowed the Debtors to invest in the properties.

On March 19, 2014, Trustee sent a follow up email to Ms. Burgess asking for a progress report. Mr. Burgess responded that she forwarded the documents to the Debtors and that the Debtors were "looking for information." On March 25. 2014, Ms. Bakken telephoned Ms. Burgess to discuss the sale and requested documents. Ms. Burgess's assistant stated that Ms. Burgess was working to meet and deadline and would return the call that evening; however, Ms. Burgess failed to return the call.

On March 27, 2014, Ms. Bakken sent to Ms. Burgess an email asking her to telephone her on March 28, 2014, to discuss this matter so that Trustee could move forward with the Motion to sell. Ms. Burgess failed to return the call. On March 31, 2014, Ms. Bakken telephoned Ms. Burgess and left a voice message asking her to return the call, but Ms. Burgess failed

to return the call.

On April 1, Ms. Bakken sent Ms. Burgess a follow up email asking her to telephone Ms. Bakken on April 2, 2014 to discuss the matter. Ms. Burgess again failed to return the call. On April 2, 2014, Ms. Bakken received from Ms. Burgess an email stating that she was conferring with Mr. Robbins, who had some concerns about the sale. Ms. Burgess stated that she would call Ms. Bakken on April 3, 3014. On April 3, 2014, Ms. Bakken spoke to Ms. Burgess, who agreed to discuss the sale agreements with the Debtors and return the sale agreements with any changes in the "Track Changes" so that Ms. Bakken and Trustee could review the Debtors' suggested revisions. Ms. Burgess also agreed to telephone Ms. Bakken on April 9, 2014, at 1:30 pm to discuss this further. In addition, Ms. Burgess stated that the Debtors had tax and valuation information to provide to Trustee and that she would send the information to Ms. Bakken as soon as possible. Ms. Bakken sent a follow up email to Ms. Burgess confirming all of these things.

On April 9, 2014, Ms. Burgess failed to telephone Ms. Bakken. Thus, Ms. Bakken telephoned Ms. Burgess and left a left message, but Ms. Burgess failed to return the call. On April 10, 2014, Ms. Bakken again telephoned Ms. Burgess and left a voice mail, and Ms. Burgess failed to return the call. On April 10, 2014, Trustee also telephoned Ms. Burgess and left a voice message, requesting that she telephone Ms. Bakken by the end of the day, which Ms. Burgess did not do.

On April 11, 2013, Ms. Bakken received an email from Ms. Burgess stating that she had nothing new to report and that the Debtors' accountant could not get the requested information to the Debtors until after April 15, 2014. Ms. Burgess stated that she would telephone Ms. Bakken the following week.

On April 11, 2014. Ms. Bakken responded to Ms. Burgess by email and stated that she would move forward with the motion to sell based on the assumption that the Debtors would provide the signed sale agreements by the end of the following week. Ms. Burgess responded by email that Debtors had issues with sale agreements, and that she would get back to Ms. Bakken by the following week.

On April 17, 2014, Ms. Bakken sent an email to Ms. Burgess reiterating the Trustee's request for information regarding the Membership Interests, including the tax basis of the property the Debtors sold to invest in the Properties, the fair market value of each, and whether the Properties had appreciated. Ms. Bakken requested this information by April 21, 2014, and requested that Ms. Burgess send the Debtors' revisions to the sale agreements. Ms. Bakken explained that Trustee had already delayed the sale too long in an attempt to accommodate the Debtor's requests to revise the sale agreement, and to obtain the requested information from the Debtors. Ms. Burgess failed to respond and give over the requested information.

On April 26, 2014, Trustee sent an email to Ms. Burgess stating that the delay on the part of Ms. Burgess and Debtors would not delay the sale, and offered Ms. Burgess a two-day opportunity to alert the Trustee of any issues with the Motion to Sel. On April 27, 2014, Trustee received an email from Ms. Burgess stating that once again, Debtors were waiting for

information from their accountant, and that Ms. Burgess would discuss with the Debtors.

After waiting another two weeks for Ms. Burgess to provide the information (with no resulting response), Trustee filed the motion on May 14, 2014. According to the Debtors, in the meantime they received a Letter of Intent dated March 19, 2014, detailing an offer to purchase the Gemini 305 property for $31,500,000.00, but neither the Debtors nor Ms. Burgess provided this information to the Trustee or Ms. Bakken. Trustee accuses Debtors and Ms. Burgess of withholding information.

On May 23, 2014, Ms. Bakken sent Ms. Burgess an email requesting, once again, the information regarding the Membership Interests, including the tax basis of the property, the fair market value of the properties, and whether the properties had appreciated. Ms. Burgess has failed to respond.

Since the filing of this Motion, Trustee engaged in additional marketing efforts, listing the Membership Interests for sale on the website for the National Association of Bankruptcy Trustees and on www.inforuptcy.com.

Trustee reiterates that the court should approve the sale, because it is in the best interests of the estate. The sale will allow the estate to recover $190,000.00 for membership interests in entities that own only fractional interests in real property, and that are difficult to market to third party investors. 11 U.S.C. § 363(b) provides that a trustee, after notice and a hearing, may sell property of the bankruptcy estate other than in the course of ordinary business. Trustee asserts that the sale is reasonable and in the best interests of creditors.

DISCUSSION

The court does not find Debtors' last minute request to reconvert to a Chapter 13 Case a credible attempt to restructure or reorganize under Chapter 13. While the Debtor assert that the Chapter 7 Trustee is undervaluing the assets being sold, the Debtor elected to give up those assets for the extraordinary relief under Chapter 7. The assets being sold by the Debtors were not disclosed in the bankruptcy case (the 100% member interests in limited liability companies), but were ultimately misstated as small fractional interests in real estate.

Original Schedules A and B, filed under penalty of perjury by the Debtors, does not disclose this asset – either as the 100% member interests or small fractional interests in real property. Dckt. 32 at 3, 4-7. The Schedules in this case were filed on September 11, 2013, which was two months after the case was originally filed.

On October 10, 2013, the Debtors filed their First Amended Schedule B, under penalty of perjury, which does not list the 100% member interests. Dckt. 34. No amended Schedule B has been filed by the Debtors truthfully and accurately stating, under penalty of perjury, their ownership of the 100% member interests. The Debtors never filed a Schedule A which listed a "misstated" small fractional interest in the underlying properties.

Facing the dilemma of losing the theretofore undisclosed assets (and

for which the Debtors have failed to amend their Schedules as of the court's June 16, 2014 review of the file), the Debtors rushed in saying that now they want to reconvert the case to one under Chapter 13. They filed a pleading titled "Objection to Sale of Interest in LLCs and Motion to Re-Convert Case From Chapter 7 to Chapter 13." Dckt. 71. This pleading suffers from several major deficiencies.

First, Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 allowing for the joinder of claims and remedies has not been incorporation in the contested matter (including law and motion) proceedings in bankruptcy court. Fed. R. Bank. P. 9014. As this court has addressed on other occasions, the reason is obvious – in a bankruptcy case most of the substantive work and decisions are made in contested mattes, not adversary proceedings. Contested matters can be heard on anywhere from 28-days to 42-days notice, with written opposition due 14 days in advance. Local Bankruptcy Rule 9014-1(f)(1), Federal Rule of Bankruptcy Procedure 2002(a). Allowing a movant to bury multiple claims for relief in one motion set for a quick hearing (as opposed to the multi-year process for adversary proceedings) is a recipe for deception and judicial disaster.

Second, the Debtors have not properly served a motion to reconvert the case on creditors. Rather, they merely served the pleadings by "Electronic Mail," not the parties in interest as disclosed on the Schedules and Mailing Matrix.

Third, the evidence presented, as discussed below, does not support a reconversion of the case at this time.

Trustee's statements regarding her failed attempts to maintain communication and obtain information from the Debtors and Debtors' counsel is of grave concern to the court. Although Debtors imply that the Trustee has not communicated with Debtors' counsel since late January, 2013--Trustee's Reply, and the attendant declarations of Trustee Kimberly Husted and Trustee's Counsel, Loris L. Bakken--state otherwise. Trustee makes it clear that Trustee and Trustee's Counsel have engaged in exhaustive attempts to reach the Debtors and Debtors' counsel and request information regarding the Membership Interests, including the tax basis of the property the Debtors sold to invest in the Properties, the fair market value of each, the basis for Debtors' valuation of the home and sales prices, and whether the Properties had appreciated.

Additionally, Debtors apparently received an offer from an undisclosed buyer, on which Debtors' proportionate share of the net sale proceeds would have been $396,514.67, and failed to inform the Trustee. The majority of shareholders in Gemini 305 voted to accept the offer, but the purchase withdrew the offer on May 15, 2014. The Debtors were informed of Trustee's plans to sell their Membership Interests in the Gemini 305 and Gemini Parkway Properties, but either neglected or intentionally ignored Trustee's requests for further information.

Now, Trustee seeks to sell the Debtors' Membership Interests to Partnership Liquidity Investors, LLC ("PLI"), on terms that appear to be fair and reasonable to the court after Trustee conducted due diligence on the equity and marketability of the property. PLI will buy the estate's

interest in Gemini 305 for $125,000 and the estate's interest in Gemini Parkway for $65,000.00.

The Debtors are now suddenly requesting, as improperly pled in their Opposition to a Motion brought forth by the Trustee, that given the positive equity that they have now discovered in the Gemini 305 property, and their "increased monthly income," that the court reconvert their case to a Chapter 13 case. Debtors offer no explanation or evidence of how their previously combined monthly income of $2,499 has magically increased twofold to $5,000 per month. The court cannot read this sudden, fortuitous and unexplained change of circumstances as anything other than an attempt by Debtors, who have now have realized that they may now actually "lose" these undisclosed assets. Debtors seek to reconvert the case to remove a Trustee who is properly administering the assets of the estate and allow the Debtors to retain control for whatever purposes they desire – irrespective of the fiduciary obligation they would owe to the bankruptcy estate. Debtors have suddenly claimed an unrealistic increase in their income, unsupported by any explanations or evidence, and curiously claim that they can now afford to carry out a Chapter 13 repayment plan in contradiction of their sworn schedules and income statements in their Chapter 7 case.

Even if the Debtors had brought a properly noticed motion to reconvert their Chapter 7 case to a Chapter 13 case before the court, the court would have to carefully consider the circumstances of the Debtors' case before granting reconversion. The right to convert to a Chapter 13 case is not always absolute. A "bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of bad faith" even when it is the almost absolute right arising under 11 U.S.C. § 706(a) [whether the case has not been converted to Chapter 7 from another Chapter]. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 379 (2007). The authority to convert is left to the discretion of the bankruptcy court. *Id.* at 377. In determining whether the debtor's conversion involved bad faith, "a bankruptcy judge must review the totality of the circumstances." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994).

Under the "totality of the circumstances" test, the court examines whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or filed his Chapter 13 petition or plan in an inequitable manner. *Id.* Debtor's history of filings and dismissals is relevant in determination of "bad faith." *Id.*

The overriding factor in determining the rights of a debtor to convert or a dismiss a Chapter 13 case goes to the core of bankruptcy proceedings. With the ability to get great benefits from bankruptcy, debtors must proceed in good faith, providing candid, honest information. The Ninth Circuit Court of Appeals most recently review this concept in *Danielson v. Flores* (*In re Flores*), ___ F.4th ___, 2013 U.S. App. LEXIS 18413 (9th Cir. 2013), stating,

> "Finally, our interpretation of § 1325(b)(1)(B) is consistent with the policies that underlie the Bankruptcy Code and the BAPCPA amendments. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007)

(quoting Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)).”

The Collier on Bankruptcy discussion of *Marrama* notes there being a simple, practical reason for the conversion right to 13 being “almost absolute,” if converted it is the bankruptcy judge who will consider whether it should be reconverted to a Chapter 7 due to the debtor’s conduct. 6 COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 706.02.

Here, the Debtors filed a Chapter 13 case, then converted it to one under Chapter 7 – presumably making the determination that the proper relief available was under Chapter 7 rather than providing for payments to creditors through a Chapter 13 plan. Though 11 U.S.C. § 706 does not appear on its face to allow debtors to seek to reconvert a case, most courts find such power to exist for the court. *In re Carter*, 84 B.R. 744 (D.C. Kan. 1988) (such restriction to discretionary conversion by a debtor under § 706(a) bars repeated attempts to convert cases for purposes of delay). The court considers, as it does under other conversions, whether the debtor demonstrates an eligibility and ability to prosecute in good faith a case under the new Chapter of the Bankruptcy Code.

While the standard under Marrama to restrict the “almost absolute right” to convert a case under § 706(a) does not directly apply, it is instructive in the framework of considering the merits of whether conversion is proper and in the best interests of the estate.

DEBTORS’ CONDUCT AND EVIDENCE DOES NOT SUPPORT A CONCLUSION THAT (1) THE MEMBER INTERESTS ARE NOT BEING SOLD FOR FAIR VALUE AND (2) DEBTORS INTEND TO PROSECUTE A CHAPTER 13 CASE IN GOOD FAITH.

The Debtors and Debtors’ refusal to cooperate with the Trustee in providing information on the Gemini 305 and Gemini Parkway Properties undermine Debtors’ effort to reconvert their bankruptcy case to one under Chapter 13 of the Bankruptcy Code. Debtors have also failed to bring a separate, properly noticed and served Motion to Reconvert the Case.

If the Debtors unauthenticated evidence that an offer was made to purchase the Gemini 305 property for $31,500,000.00, and yielding a $396,514.67 return for the bankruptcy estate’s interests, then the Debtors would have to fund a plan to pay at least the $400,000.00 to creditors over four years of a plan (the Debtors having already squandered the first year of the bankruptcy case). Since there does not appear to be a sale, based on the Debtors arguments, the minimum monthly plan payments would be $8,333.00 ($400,000.00 divided by 48 months).

Debtor’s counsel in the Opposition argues that the Debtors now have total income of $5,000.00 a month. The Debtors now testify under penalty of perjury that their income (for undisclosed reasons, other than Spencer Robbins stating “due to my position with Allstate”) has now increase to $5,000.00 a month, and that they can fund (based on their attorney’s projections) a plan payment of $2,000.00. The Debtors offer no income and expense analysis to show why or how they can fund a plan with $2,000.00 a month.

The Schedule J expenses stated under penalty of perjury by the Debtors are ($5,921.08) Dckt. 32 at 22. This includes a rent or mortgage expense of only $1,225.00 – not indicating artificially high total Schedule J expenses due to a mortgage payment for property the Debtors would be surrendering. It appears that with the purported increase in income, the Debtors will just be able to barely make ends meet after cutting ($921.08) from the amount shown on Schedule J. FN.2.

FN.2. The court also notes that Schedules I and J make no provision for the payment of income taxes by Spencer Robbins. Likely the expenses are higher or the net income is lower than the $5,000.00 stated under penalty of perjury in the Declaration.

If the Debtors had a good faith belief that the two member interests had a greater value, intended to prosecute the bankruptcy case in good faith, and desired to prosecute a bona fide Chapter 13 Plan, they would have immediately notified the Chapter 7 Trustee of the possible sale of the property in which the limited liability companies have an interest. The latest date they were aware of such a potential value for the undisclosed assets was the March 19, 2014 letter they have provided as Exhibit A. The Declaration carefully avoids making any statements about earlier information concerning the value of the real property and the limited liability companies' interests in those properties.

Instead, the Debtors wait until June 5, 204 to sign the Declaration and file the Opposition to the proposed sale (still not having filed amended Schedules A and B, as appropriate). This demonstrates that the Debtors are not prosecuting the case in good faith, but only defensively acting to protect what they hoped where hidden assets which could be "snuck past the court and creditors."

The Debtors have not provided the court with credible evidence they could fund a plan. They state now that the amount of general unsecured claims are much lower, as they were overstated by duplicate listing of claims which had been transferred. However, the Debtors signed Original Schedule F (and no amended Schedule F has been filed) stating under penalty of perjury that the information therein was true and correct. Possibly it could have been in error, the Debtors just signing whatever documents that the attorney put in front of them. Alternatively, the Debtors may have intended to misstate the number, to falsely make it appear that their debts were much larger as they tried to avoid an 11 U.S.C. § 707(b) dispute with the U.S. Trustee when the case was converted.

With respect to funding the Plan, the information provided under penalty of perjury in the Schedules and the Declaration demonstrate that the Debtors do not have money to fund a plan to pay creditors the value of these assets, much less fund a plan with projected disposable income. The Debtors' expenses as shown on Schedule J exceed the high income that the Debtors state they have in 2014.

In addition to offering no evidence to show that there was a bona fide good faith offer for the Gemini 305 property and the reason such a bona fide offer was withdrawn, the Debtors offer no credible evidence as to what the estate's interest in the partnership, which has an interest in the

property is worth. There is no analysis of the costs of sale, administrative costs for the company managing the property, and tax consequences to the estate through the limited liability company from the sale.

After considering the Trustee's efforts in marketing the Membership Interests, the difficulties in marketing the interests to third party investors, and the $190,000.00 purchase price offered for the estate's interests in Gemini 305 West 39th Street, LLC ("Gemini 305"); and Gemini Parkway Plaza 19, LLC ("Gemini Parkway") to Partnership Liquidity Investors, LLC for $190,000, the motion is granted. Subject to overbids presented at the hearing, the court believes that the purchase offers received from PLI are reasonable, consistent with the duties and obligations of the Chapter 7 Trustee to market property of the estate, and that the purchase amounts reflect reasonable offers for the property at issue. Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

At the hearing the court was presented with the following overbids: xxxxxxxxxxxxxxxxxxxxxx.

The Motion to sell is granted.

To the extent that the Opposition has improperly attempted to assert a motion to convert the case to one under Chapter 13, that motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by Kimberly J. Husted the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Kimberly J. Husted, the Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Partnership Liquidity Investors, LLC, or nominee, ("Buyer"), all of the Bankruptcy Estate's interests in Gemini 305 West 39th Street, LLC; and Gemini Parkway Plaza 19, LLC (collectively referred to as the "Property") for a total sales price of $190,000.00, as follows:
>
> 1. $125,000.00 for all of the Bankruptcy Estate's interest in Gemini 305 West 39th Street, LLC;
>
> 2. $65,000.00 for all of the Bankruptcy Estate's interests in and Gemini Parkway Plaza 19, LLC;
>
> 3. The Property shall be sold on the terms and conditions set forth in the Purchase Agreement with PLI for the purchases of Gemini 305 and Gemini Parkway, Exhibits H and I, Dckt. 67, and as further provided in this Order.

4. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

The court shall issue a separate minute order for the Opposition Motion to Convert substantially in the following form, designated to both DCN: HCS-3 and HSB-1,

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

The Spencer Robbins and Monica Ibarra-Robbins have filed a pleading titled "Objection to Sale of Interest in LLCs and Motion to Re-Convert Case From Chapter 7 to Chapter 13" the Chapter 7 Trustee's Motion to Sell Property of the Estate (DCN: HSC-3; Dckt. 63). The combined Opposition and Motion having been given two different Docket Control Numbers on the court's Docket (HSC-3 and HSB-1). The court has throughly reviewed the Motion to Re-Convert this case back to one under Chapter 13, to the extent one has been presented as part of the opposition in connection with the court's ruling on the Motion to Sell. The court incorporates herein the findings of fact and conclusions of law stated in the Civil Minutes for the June 19, 2014 hearing on the Trustee's Motion to Sell (DCN: HSC-3). Upon review of the Opposition/Motion, the opposition, pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to reconvert the case to one under Chapter 13 is denied.

2. 11-48305-C-13 JOHN/DARLENE DOERR
PGM-7 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM PLAN
1-27-14 [183]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee, all creditors, and Office of the United States Trustee on January 24, 2014. By the court's calculation, 46 days' notice was provided. 42 days' notice is required.

Tentative Ruling: The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee and Creditor having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to deny the Motion to Confirm the Amended Plan. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

JUNE 19, 2014 CONTINUED HEARING

At the hearing...

PRIOR HEARINGS

At the March 11, 2014 hearing, the Debtors requested additional time to brief and present their arguments as to what it means for the avoided transfer of the Wells Fargo, N.A. deed of trust to be preserved for the benefit of the estate.

At the May 20, 2014 hearing, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. The court continued the hearing to this date to permit Debtors additional time to brief their arguments. Civil Minutes, Dckt. No. 230.

Nothing further on this matter has been filed on the court docket.

REVIEW OF MOTION

11 U.S.C. § 1323 permits a debtor to amend a plan any time before

confirmation. In this instance, Creditor Wells Fargo Bank, N.A. ("Creditor") and the Chapter 13 Trustee have opposed confirmation of the plan.

CREDITOR'S OPPOSITION, filed 02/20/14 (Dckt. 197)

Creditor objects to Debtors' Motion to Confirm the Fifth Amended Plan on the following grounds:

On November 5, 2013, the Debtors prevailed in their adversary proceeding to avoid (11 U.S.C. § 544) the lien of Creditor in the amount of $222,593.65. Even though Debtors avoided Creditor's lien, Creditor still objects on the basis that the plan fails to satisfy the Chapter 7 liquidation analysis of 11 U.S.C. § 1325(a)(4), which requires that Debtors propose a plan that pays the unsecured claims of creditors at least the amount that they would be paid in a Chapter 7 liquidation. Specifically, Creditor asserts that based on Wells Fargo's appraisal, the Debtors' residence located at 815 Braddock Court, Davis, California, has a value of not less than $417,000.00, and is subject only to a lien secured by a first deed of trust in the amount of $221,320.62.

1. Based upon the appraised value of $417,000.00, and the fact that the Wells Fargo lien was avoided for the benefit of the Debtors' estate, there is equity available to the unsecured creditors of the Debtors' estate of $195,679.381, which Debtor did not provide for in their plan. The appraisal and sworn declaration of the appraiser, Bruch Elisher, was filed in support of the objection. Creditor also objects to Debtors' valuation of their residence in any amount less than $417,00, which was Creditors' appraised value of the property as of December 6, 2011, since property values have increased since that time.

   Creditor asserts that now that its lien has been avoided, the obligation of the Debtors is to pay more to unsecured creditors than they had proposed in their Fourth Amended Plan where they proposed to pay into the Plan $59,406. Currently, not only does the Debtors' Fifth Amended Plan not match what they had proposed before the avoidance of the Wells Fargo lien, but their Fifth Amended Plan proposes almost $10,000 less after avoiding the Wells Fargo lien of $222,593.65.

2. Creditor opposes Debtors' utilization of their homestead exemption and not accounting for the avoided lien. Creditor argues that 11 U.S.C. § 544 provides that any transfer avoided, is preserved for the benefit of the estate. Since the court avoided the Creditor's lien of $222,593.65, the lien is preserved for the benefit of the estate. Under the current plan, the Debtors' proposed Fifth Amended Plan proposes a distribution that is approximately $195,679.38 less than a current liquidation analysis in a Chapter 7 liquidation, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4). FN.1.

FN.1. In addition to the statutory provisions of 11 U.S.C. § 551 for the automatic preservation of an avoided lien or transfer for the benefit of the

estate, the judgment in the adversary proceeding expressly states, "IT IS ORDERED that judgement is for plaintiff and **the lien is avoided for the benefit of the estate**." (Emphasis added) 12-02153 Dckt. 118.

---

3. Creditor further objects on the basis that once the value of the Creditor's avoided lien has been properly scheduled for repayment to holders of unsecured claims, Debtors cannot feasibly complete their Plan as proposed.

4. Creditor also contends that the proceeding was filed in bad faith.

TRUSTEE'S OPPOSITION

Trustee opposes confirmation of the Plan on three grounds: (1.) that the plan fails to pay unsecured creditors what they are entitled to in the event of a Chapter 7 under 11 U.S.C. § 1325(a)(4); (2.) Debtor has not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6); and that (3.) the plan is not proposed in good faith under 11 U.S.C. § 1325(a)(3).

Chapter 7 Liquidation

Debtors maintain that the effective plan date is December 6, 2011. Page 2, Motion to Confirm, Dckt. No. 183. Debtor takes this position, even though their plan, Dckt. No. 186, sets forth that the Plan will be effective upon confirmation. Debtors ignore the court's ruling on a prior but similar plan, that ruled "The plan is effective upon confirmation." Civil Minutes, Dckt. No. 176. Trustee argues that Debtors are ignoring 9th Circuit case law holding that post-petition appreciation in the property of the estate is required to insure the benefit of the estate. *Gebhart v. Gaughan (In re Gebhart), 621 F.3d 1206, 1210 (9th Cir. 2010); Alsberg v. Robertson (In re Alsberg), 68 F.3d 312, 314-15 (9th Cir. 1995)*; *Hyman, 967 F.2d at 1321*; *Schwaber v. Reed (In re Reed), 940 F.2d 1317, 1323 (9th Cir. 1991)*; *In re Chappell* (9th Cir. BAP 2010), 373 B.R. 73, 79.); *Viet Vu v. Kendall (In re Viet Vu)*, 245 B.R. 644, 647-48 (9th Cir. BAP 2000).

Debtor refers to lay opinion and an appraisal with no docket reference to the appraisal, and the appraisal is not filed with the moving papers. Trustee objects to the consideration of this appraisal when Trustee cannot view the appraisal. Trustee also notes that the Debtor previously maintained that the value of the property was $180,000.00 (Declaration of Debtors in Support of the Motion to Value, Dckt. No. 22 at 1,) where they attempt to assert a value of $380,000 in this motion, so the lay opinion should not appear very convincing.

Debtors refer to an unopposed claim of exemption of $175,000.00 under California Code of Civil Procedure § 704.070, but does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. Debtors do not address of the court's prior order that the lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013.

Debtor has not proven that the plan pays unsecured creditors at

least what they would receive in the event of a Chapter 7.

Ability to Make Payments

Trustee also asserts that Debtors have not proven that they will be able to make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors' original plan, Dckt. No. 5, proposed $100,00 for 36 months and no less than 0% to holders of unsecured claims. The present plan proposes $150.00 for 9 months, $350.00 for 12 months, $754.00 for 39 months, and then a lump sum payment of $15,000 on or before the 60th month, with at least 14.5% to the holders of unsecured claims. Dckt. No. 186. Debtors do not give specific evidence of the ability to pay the lump sum, and instead, state,

> This lump sum will be from a combination of my husband's business as a private investigator, document server, which appears to be increasing this last few months, my regular cost of living increases at work, and/or a retirement loan, or a refinance of our real property. Page 2, Declaration of Debtors, Dckt. No. 185.

The court noted in its Civil Minutes in denying the last plan, on Dckt. No. 176, on page 3, that,

> The court is also skeptical of the plan relying on a lump sum payment to be drawn from a future refinance. Many unforseen factors and outside issues could impact the reliability of this projection. Debtors' reliance on refinance undermines the courts confidence in the feasibility of the plan.

Debtors have simply added additional factors, without specific evidence, to make it seem that Debtor will suddenly be able to make more than 15 extra monthly payments, as long as the court will let Debtors delay to the maximum time allowed by the law. Debtors have not provided sufficient evidence to show the ability to make the payments called for by the plan.

Plan Not Proposed in Good Faith

Debtors have proposed their 5th amended plan, and have ignored the rulings of the court as to the effective date of the plan, as to the preservation of an avoided transfer for the benefit of the estate, and as to the difficulty of proving the ability to pay a lump sum based on a refinance. Debtor continues to propose plans that do not comply with the court's prior rulings. Failure to propose a confirmable plan when Debtors are aware of the prior rulings appears to demonstrate bad faith under Factor #4 of In re Warren, 89 B.R. 87, 93 (9th Cir. 1987):

> (4) The accuracy of the plan's statements of the debts, expenses, and percentage of repayment of unsecured debt, and whether an inaccuracies are an attempt to mislead the court;

If Debtor is not going to propose a confirmable plan, and this Debtor has not demonstrated that they are willing to do so after five

attempts, Trustee asks that the court consider denying confirmation without leave to amend.

DEBTORS' SUPPLEMENTAL REPLY TO WELLS FARGO BANK, N.A.'S OBJECTION

Debtor provides the following supplemental arguments in support of confirmation:

1. Debtors argue that their plan passes liquidation analysis. Debtors assert that they submitted "proper expert opinion" on the value of the subject real property at the time of filing being $380,000. (Exh. 1, Dckt.). According to Debtors, this leaves $127,007 in non-exempt equity that will be paid through the plan.

2. Debtors state they are seeking to value the security interest in the property located at 815 Braddock Court, Davis California. Debtors estimates a value of $127,007 will be assigned to that secured claim.

3. Debtors assert that their plan is not proposed in bad faith. The plan proposes to pay $7,812 from December 2013 through December 2013 ($754 x 30 months) plus a lump-sum payment of $92,051. Debtors concede that they must pay not less than $127,007 to unsecured creditors.

4. Debtors contemplate being able to afford a $92,051 lump-sum payment because of a recent approval of a refinance of the first deed of trust on their residence. Debtors assert that the "naturally inclining value" and the exemption held by debtor allows for the equity necessary to make the $95,000 payment.

WELLS'S FARGO MEMORANDUM IN SUPPORT OF OBJECTION

In support of its objection to confirmation, Wells Fargo Bank, N.A. provides the following:

1. Wells Fargo objects to the valuation of Debtors' residence in any amount less than $417,000, as this is the appraised value of the property as of December 6, 2011, based on the appraisal conducted for Wells Fargo and filed with the court on other occasions. Using this figure, Wells Fargo asserts that unsecured creditors need to be paid $162,320 for Debtors' plan to pass the Chapter 7 liquidation analysis.

2. Wells Fargo asserts that Debtors' plan is not feasible as it relies upon their refinance of their residence almost three years from now. The uncertainty of this lump-sum does not meet the confirmation requirement that Debtors will be "able to make all payments under the Plan and to comply with the Plan." 11 U.S.C. § 1325(a)(6).

STIPULATION

On April 24, 2014, Debtors' Counsel, Creditor's Counsel, and the Chapter 13 Trustee agreed to continue the hearing on this matter from May 6 2014 to May 20, 2014 to allow time for the parties to negotiate an amicable resolution. As of May 17, 2014, no resolution has been presented to the court.

DECLARATION OF JOHN DOERR IN SUPPORT OF CONFIRMATION

Debtor John Doerr provides the following in support of confirmation:

1. John Doerr declares that his credit score is 580 and his wife's credit score is 626. He admits he needs to raise his score to be approved for a refinance.
2. John Doerr has started his credit repair and believes that within six months the qualification for refinance will be possible.

DISCUSSION

Debtors' Chapter 13 Plan continues to be deficient in a myriad of ways. The court notes that Debtors represented that their opinion of the fair market value of the property was $180,000.00 on the first Motion to Value the Secured Claim of Creditor, PGM-1. The adversary case between Debtors and Creditor was filed by Debtors to obtain a declaratory judgment that Debtors are the owner of the fee simple interest in the subject property, and that Creditor has no secured interest in the property adverse to Debtors because Creditor did not properly record a lien on Debtors' property. Debtors alleged that Creditor did not record the deed of trust in the correct county, and thus the recording was not reflected in the chain of title for the property at issue. ¶ 31, Dckt. No. 1, Adv. No.: 12-02153. The court decided in favor of the Plaintiff and ordered that the lien of Creditor is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. Debtors now apparently assert that the value of the property is $380,000.

The different figures cited by Debtors for the fair market value of their residence, coupled with an authenticated appraisal performed by a licensed appraiser (whose declaration is attached as Exhibit "B" in support of Creditor's opposition), which includes a Uniform Residential Appraisal Report that includes an analysis of comparable properties and adjustments for the current condition of the subject property, concluding that the value of the property is no less than $417,000.00 (Exhibit A, Dckt. No. 198), casts doubt over Debtors' less credible, less persuasive lay opinion that the value of the property is alternately $180,000 or $380,000.00.

As Creditor and Trustee pointed out, Debtors also claim an exemption of $175,000.00 on the property under California Code of Civil Procedure § 704.070, but still does not explain what affect 11 U.S.C. § 551 has on the claim of exemption. There is a prior court's order declaring that the Creditor's lien is avoided for the benefit of the estate. Order, Bankr. E.D. Cal., Adv. No.: 12-02153, Dckt. 118, November 5, 2013. 11 U.S.C. § 551 provides that any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate with respect to the property of the estate. 11 U.S.C. § 551. The avoided lien does not seem to

have been preserved for the benefit of the bankruptcy estate by the Debtors, as the Plan still seems to proposes a distribution that is less than a distribution under a Chapter 7 liquidation test, therefore not meeting the best interests of creditors standard set forth in 11 U.S.C. § 1325(a)(4).

It is also remains unclear whether Debtors can make the payments called for by the plan under 11 U.S.C. § 1325(a)(6). Debtors propose paying a lump sum of $92,000 on or before the 60th month of the plan. Debtors acquisition of this amount of money depends on improving their credit score, increased property value, and final approval of a refinance. There is no set date in the future when this will occur. The court cannot determine whether plan payments are feasible with this level of uncertainty. It would be different if Debtors had a date marked in the future when the refinance will be approved and presented the court with credible evidence of the equity thereafter available. As it stands, the court lacks such reliable evidence. This is not sufficient evidence of Debtors' ability to make and afford the plan payments.

The court also recognizes that this is Debtors' 5th Amended Plan, and that many mistakes committed in Debtors' previous plans have been repeated, and have not been properly corrected. Debtors have not incorporated the court's rulings in the drafting of their plan. Trustee has even alleged bad faith on Debtors' part.

Good faith, under 11 U.S.C. § 1325(a)(3), is determined based on an examination of the totality of the circumstances. *In re Warren,* 89 B.R. 87, 92 (B.A.P. 9th Cir. 1988) (citing *In re Goeb*, 675 F.2d 1386, 1389-1390 (9th Cir. 1982)). Factors to consider include:

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

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

3) The probable or expected duration of the plan;

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

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

6) The extent to which secured claims are modified;

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

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

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

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

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

Warren, 89 B.R. at 93 (citing *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (quoting *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))). Additionally, when considering Chapter 13 dismissal due to bad faith in its filing, bankruptcy courts consider: whether the debtor misrepresented facts in the petition or unfairly manipulated the Code; the debtor's history of filings and dismissals; and whether the debtor intended to defeat state court litigation; and —whether egregious behavior is present. *In re Ellsworth*, 455 B.R. 904, 917 (B.A.P. 9th Cir. 2011).

Debtors have struggled with including accurate statements of debts in their Chapter 13 Plan, a marker of bad faith under Factor 4 of *In re Warren*. It is not difficult to understand why Debtors' creditors and the Trustee would assert that Debtors have unfairly manipulated the Bankruptcy Code, and that Debtors have been prosecuting their case in bad faith. Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans.

This case was filed in December 6, 2011. No Chapter 13 Plan has yet been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation. This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3)*; see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is not confirming this plan as it does not meet confirmation requirements.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Plan is denied and the proposed Chapter 13 Plan is not confirmed.

3. 11-48305-C-13 JOHN/DARLENE DOERR CONTINUED MOTION TO DISMISS

TSB-1 **Peter G. Macaluso** **CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE**
1-22-14 [179]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 22, 2014. 28 days' notice is required. That requirement was met.

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

The court's tentative decision is to grant the Motion and convert the case to one under Chapter 7. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

JUNE 19, 2014 HEARING

At the hearing...

PRIOR HEARINGS

The Chapter 13 Trustee moved to Dismiss Debtors' Bankruptcy Case because Debtor's Motion to Confirm was heard and denied on December 10, 2013. Trustee initially requested the case be dismissed unless Debtors file and serve an amended plan and motion to confirm an amended plan no later than February 5, 2014, or Debtors file a response no later than February 5, 2014 explaining the reason for the delay and why it was reasonable.

At the February 19, 2014 hearing, Debtors responded and stated that they filed, set, and served a Motion to Confirm for March 11, 2014. Debtors are current pursuant to the proposed plan and are prosecuting their case. The court determined that Debtors had provided an adequate response to Trustee's concerns and were sufficiently prosecuting their case, as an amended plan was filed January 27, 2014 with a Motion to Confirm. The court determined that cause did not exist to dismiss Debtors' case and the Motion to Dismiss was continued.

At the March 11, 2014 hearing, it was unclear whether Debtors could achieve confirmation of a feasible plan that complies with the provisions of 11 U.S.C. § 1322 and 1325(a).

At the May 20, 2014 hearing on this matter, the Debtors requested one final continuance in an effort to work with creditors, resolve the dispute with Wells Fargo Bank, N.A., and propose a plan which provides the value from the avoided lien for creditors with general unsecured claims. Dckt 232.

Nothing further, however, has been filed on the court docket on this matter.

REVIEW OF THE MOTION

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

The Bankruptcy Code Provides:

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

11 U.S.C. § 1307(c)(1).

After having reaped the benefits of Chapter 13 and all of its protections, just dismissing the is case at this juncture may not be proper or in the best interests of all creditors. While Wells Fargo Bank, N.A. may well be anxious to have the case dismissed so that it can correct its lien recording error that led to the lien being avoided, such may not be in the best interests of the estate and creditors. While the Debtors may now be anxious to have this case dismissed, having exhausted 27 months of bankruptcy protection, and start a new case, such may not be in the best interests of creditors and the estate.

Further, when considering dismissals, the court should consider whether a dismissal with prejudice is warranted. Such a motion has not been filed, and in connection with this motion that issue is not before the court. But in light of what has transpired in this case and the large non-exempt equity in the property for creditors holding general unsecured claims, any request to dismiss should inform the court, creditors, Debtors, and other parties in interest the calculation for such relief not being requested as part of the motion to dismiss.

The court set the motion for further hearing to address the issue whether dismissal or conversion to Chapter 7 is in the best interests of creditors and the estate. However, neither the Chapter 13 Trustee nor Debtor filed supplemental documents with the court.

The court finds sufficient cause to dismiss Debtors' case for unreasonable delay that is causing prejudice to creditors. 11 U.S.C. § 1307(c).

This case was filed in December 6, 2011. No Chapter 13 Plan has yet been confirmed, after five attempts, over a span of over two years, to propose plans that have not complied with 11 U.S.C. §§ 1322 and 1325(a). Debtors have continually failed to cure the defects of their amended plans, and ignored court rulings in drafting new Chapter 13 Plans. Debtors have ignored court rulings on what needs to be addressed in order to achieve plan confirmation.

This case is at serious risk of being dismissed for the Debtors' inability to effectuate a plan. A debtor's failure to timely file a Chapter 13 plan is cause for conversion or dismissal. 11 U.S.C. § 1307(c)(3)*; see In re Elkin*, 5 B.R. 21, 22 (Bankr. S.D. Cal. 1980). The Chapter 13 Trustee has filed previous Motions to Dismiss the Case for prejudicial delay to Debtor's creditors and now Debtors propose a plan based on a very contingent, large lump-sum payment of $92,000. The court is denying confirmation of the proposed fifth amended plan because it does not propose reliable terms of payment, which only compounds the continued prejudice facing creditors of Debtors.

Dismissal of this case is not in the best interests of the estate or creditors. The Debtor's successfully prosecuted an action to avoid the lien of Wells Fargo Bank, N.A. on real property pursuant to 11 U.S.C. § 544 (the Bank having recorded its deed of trust in the wrong county). Judgment, Adv. 12-2153 Dckt. 118. That lien, though avoided as to Wells Fargo Bank, N.A., is preserved for the benefit of the Bankruptcy Estate. 11 U.S.C. § 551.

If the court were to just dismiss the case, the creditor's right and ability to be paid from this preserved lien would be lost. As a fiduciary of the bankruptcy estate, the Debtors cannot just "throw away" that asset of the estate. On its face, this assets has a value of approximately $222,593.65 (plus additional accrual of interest) in the amount of the obligation secured by the avoided lien. See Civil Minutes from June 19, 2014 hearing on Motion to Confirm Plan, DCN: PGM-7, which are incorporated herein and made part of the ruling on this Motion.

The bankruptcy estate having a $222,593.65 asset which would be lost if the case were dismissed and creditors holding general unsecured claims thereby forfeiting the right to be paid pro rata from such monies if the case was dismissed, the Motion is granted and the case is converted to one under Chapter 7 of the Bankruptcy Code.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the case is converted to one under Chapter 7.

4.	**13-20051-E-7** **HSM-4**	**TYRONE BARBER** **Cory A. Birnberg**	**MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR** **5-19-14 [246]**

Final Ruling: No appearance at the June 19, 2014 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Hearing Required (Stipulation filed).

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on May 19, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Extend the Time to File an Objection has been set for hearing on the notice required by 9014-1(f)(1). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Extend the Time to File an Objection to Discharge filed by the Chapter 7 Trustee is granted.

REVIEW OF MOTION

The Chapter 7 Trustee seeks an extension of time to object to the entry of Debtor's discharge. The deadline to file a complaint objecting to the discharge of the Debtor is set for May 19, 2014. The Trustee requests that the deadline for the Trustee to file a complaint objecting to the discharge of the Debtor be extended until July 18, 2014.

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The Chapter 7 Trustee explains that he is currently investigating the assets and liabilities of the Debtor and Debtor's pre-petition use of assets of the Estate. This was caused by Debtor's filing of at least twelve (12) schedule amendments. The Debtor again has recently filed further amendments to Schedules A and C, on April 23, 2014. Trustee states that these will take time to review and investigate. Further, the Trustee and Debtor are engaged in discussions concerning a potential agreement for the Debtor to purchase certain assets, some of which are presently in the Debtor's possession or control.

Pending the outcome of discussions and approval of any agreement by the court, or alternatively, the Trustee's administration of assets if his

discussions with the Debtor are not successful, the estate and its creditors must be protected from waste or dissipation of the assets presently in the Debtor's possession or control. The Trustee anticipates the Debtor's cooperation in these matters.

OPPOSITION BY DEBTOR

Debtor states that the Trustee previously filed a Motion for an Order Extending Time to File Objections to Debtor's Claim of Exemptions on March 24, 2014.

Debtor protests that while the court may extend the filing deadline for cause, the fresh start policy promoted by the bankruptcy rules would be weakened by discharge litigation long after bankruptcy. Debtor asserts that the Trustee in this case has had ample information and time to file an objection to the discharge of the debtor. Debtor argues that he should be allowed to make his fresh start as the code intends, and that the motion should not be granted because cause does not exist. "

Debtor's case was converted on November 23, 2013. Debtor asserts that the Trustee has had over six months to investigate this matter. Further, as noted in Debtor's prior Opposition to Trustee's Motion to Extend Time to Object to Debtor's Claimed Exemptions, the Debtor has "fully cooperated" and provided all the documents requested by the Chapter 7 Trustee, including a years worth of bank statements prior to the filing of the Chapter 11 in December 20, 2012. Debtor claims that he provided all the documents for the past due child support and order for attorney's fees of over $100,000. On February 21, 2014, the Debtor provided his tax returns for 2011, 2012, and 2013, and on March 3, 2014, the Debtor provided the same tax returns plus a proof of claim of the IRS.

Debtor argues that there is not sufficient cause for the court to grant an extension of time where Trustee has caused the resolution of this matter to be delayed by filing for multiple time extensions. Debtor states that Trustee has been in possession of this information for months, and that Debtor's amendments to these schedules are minor changes in regards to the value of Debtor's Philippine property following an appraisal. Debtor states that Schedule A was merely changed to reflect the $14,502 value of the property(from a zero valuation), while Schedule C was amended to exempt the same property.

Debtor asserts that Debtor and Trustee's discussions "concerning a potential agreement for the Debtor to purchase certain assets" do not and will not impair Trustee's ability to file any objection to Debtor's discharge.

STIPULATION

Debtor and the Trustee have entered into a stipulation for an order extending the time for the Trustee to file an objection to the discharge of the Debtor. Dckt. No. 265. The Trustee and Debtor have agreed to extend the deadline for the Trustee to object to the Debtor's discharge until August 15, 2014. The parties state that cause exists for the agreed upon extension of the deadline for the Trustee to object to the Debtor's discharge, until August 15, 2014, in that the Trustee and Debtor have

reached an agreement pursuant to which the Debtor will buy back assets from the estate. The agreement provides for installment payments over a period of eight months, commencing one month after an entry of order granting the Trustee's motion to approve the sale, which the Trustee anticipates setting for hearing on August 7, 2014.

The parties have agreed that the deadline within which the Trustee may file a complaint objecting to the Debtor's discharge shall be extended until August 15, 2014. The Motion is granted pursuant to the terms of the parties' stipulation, and the deadline for the Trustee to object to the Debtor's discharge will be extended to August 15, 2014.

The court has issued an order based on the above ruling.

5. 12-36884-E-7 JENNY PETTENGILL
HLC-2 Richard A. Hall

MOTION TO EMPLOY CHASE INTERNATIONAL REAL ESTATE AS BROKER(S)
5-28-14 [189]

No Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on May 28, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Employ is xxxxxxxxxxxxxxxxxxxxx.

John R. Roberts, the Chapter 7 Trustee, seeks to employ Chase International Real Estate as his real property broker. Debtor Jenny

Pettengill ("Pettengill") filed a Chapter 13 petition in bankruptcy on September 19, 2012 (Case No. 12-36884-E-7), which was converted to a Chapter 7 case on July 1, 2013. Pettengill's former husband, Debtor Stanislav Lazutkine ("Lazutkine") filed his own Chapter 7 case in bankruptcy on February 13, 2013 (Case No. 13-21893-B-7).

The two cases were administratively consolidated by an "Order Approving Stipulation to Administrative Consolidation and Conduct of Proceedings re Claims Against Corrigan Finance Limited, Counterclaims, and Leasing and Sale of Real Property," entered by this court on February 16, 2014. Dckt. No. 187 in Pettengill's case, and Dckt. No. 115 in Lazutkine's case. The order approved a stipulation regarding the procedure for employing a broker to list and market certain real property located in Placer County at 1590 N. Lake Boulevard in Tahoe City, California.

The terms for this process were laid out in the Approved Stipulation as follows:

1. Trustee and Corrigan are authorized to jointly retain a real estate broker (the "Broker") to list for sale that certain real property but none of the personal property located at 1590 North Lake Boulevard in Tahoe City, California (the "Property"). All parties have reserved all rights regarding the personal property located at the Property.

2. Employment of the Broker shall be subject to approval in advance of any engagement by the Court, pursuant to applicable laws and rules of procedure, including but not limited to 11 U.S.C. §§ 327 and 328. The Broker must be a disinterested person as defined by 11 U.S.C. § 101(14), reputable, and have a demonstrated ability to fully and competently expose the Property to the market.

3. Any noticed motion to employ the Broker shall, in addition to complying with the foregoing rules and standards: (a) demonstrate his or her understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; (b) demonstrates its expertise in the marketing of a Property of this sort in the Tahoe market, and (c) include the Broker's professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

4. While Corrigan shall have the authority and lead responsibility to give direction and instructions to the Broker once said Broker has been approved by the Court, Corrigan, and Trustee shall cooperate with each other and with the Broker with respect to the marketing and offer approval process. The Trustee or his counsel may communicate directly with the Broker and shall be copied on all correspondence, inquiries, and marketing data within 24 hours of transmission or receipt, as applicable. If there is a disagreement between the Broker and the Trustee, the Broker shall take no action without a petition for instructions and order of the court.

5. The Broker shall ensure that both Corrigan and the Trustee are promptly copied with and/or advised of all material marketing

materials and marketing efforts. The Trustee may provide input and direction on the marketing of the Property to Corrigan, to which input and direction Corrigan shall not unreasonably object. The Broker shall market the Property independently and in a manner to provide reasonable assurances that any potential purchaser is a good-faith, arms' length buyer; provided, however, that a bidder connected to a party in interest herein shall fully disclose in writing the nature and extent of all connections with any of the parties who have a direct or indirect relationship, known to the bidder, to any of the parties or professionals as a predicate to proposing a bid. Such connections shall also be fully disclosed in any motion for approval of the sale.

6. Any offer to purchase the Property proposed by Corrigan and/or Trustee shall be subject to approval of the court under Bankruptcy Code 11 U.S.C. § 363 following a noticed hearing in compliance with Federal Rules of Bankruptcy Procedure 2002(c)(1) and 6004, and shall be subject to overbids by third parties as specified in the order approving the listing.

Order, Dckt. No. 187.

Retention of Chase International Real Estate

Trustee and Corrigan Finance Limited ("Corrigan"), with the input of Captain Enterprises, LLC (Pettengill's largest unsecured creditor) have agreed to jointly retain Chase International Real Estate, BRE License #01802170) to assist him in the listing, market and lease and/or sale of the Tahoe Property. The Trustee offers the accompanying declaration of Katrine (Trinkie) Watson to attest to Broker and its representing agent, Ms. Watson (BRE License #00326518) having not disqualifying connection with the Debtors, creditors, the Office of the United States Trustee, or any of its other employees, or any other party in interest.

The Declaration also states that the Broker does not hold any adverse interest to the Debtors or the estate in the matters upon which it is to be engaged, that the Broker has not previously represented a creditor, equity security holder, partner, or any other individuals who are otherwise adverse or potentially adverse to the Debtors or their estate on any matter, and that the Broker has not ever represented an insider of the Debtors.

The terms of the Broker's Residential Listing Agreement (Exclusive Authorization and Right to Sell) attached to the accompanying Watson Declaration as Exhibit A are summarized as follows:

1. The proposed listing price for the Tahoe Property, excluding all furnishings, is $2,750,000;

2. Broker would have an exclusive right to list the Property through June 30, 2015;

3. Broker shall, subject to court approval, receive as compensation for services rendered with respect to any sale of the Property 5% of the gross purchase price if it represents both the Debtor and the Buyer, and 2.5% of the gross purchase price if the Buyer is represented by

another broker;

4. Any sale is subject to bankruptcy court approval.

Trustee states that there is no agreement of any nature as to the sharing of any compensation which has been, or which may be, paid to on account of services rendered on behalf of Trustee and Corrigan.

OPPOSITION BY CREDITOR

Creditor Captain Enterprises, LLC ("Creditor") opposes the instant Motion on the basis that Broker "has failed to provide evidence of her expertise and plan to liquidate the subject property," which is a lakefront property that Creditor asserts will likely be the only asset available for paying creditors' claims in this case. Dckt. No. 196.

The subject real property is located at 1590 North Lake Boulevard, Tahoe City, California, and is currently titled to Corrigan. Creditor believes that it will be able to prove that the Tahoe Property and/or its sale proceeds should become an asset of both bankruptcy estates. The Order Approving the Stipulation includes a section stating:

> Any noticed motion to employ the Broker shall, in addition to complying with the foregoing rules and standards: (a) demonstrate his or her understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; (b) demonstrates its expertise in the marketing of a Property of this sort in the Tahoe market, and (c) include the Broker's professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

Creditor argues that the present Motion fails to meet the requirements of that order, in that the Broker does not provide any evidence of her expertise and plan to sell the Tahoe Property. Creditor protests the fact that no marketing plan has been submitted to address whether the premises will be staged, if the proposed price is in line with the market, what listings will be used, and what type of marketing strategies will be used to show this type of property in the Tahoe area.

Creditor also asserts that it is unclear what budget is available to repair the Tahoe Property, and what security will be provided for the premises when it is vacant. Creditor would also like the listing agreement to be limited to six to nine months, rather than the proposed twelve month period. Creditor also wants more information on whether renting will help, hinder, or have no impact on the efforts to sell the property.

Lastly, Creditor asserts that the Tahoe Property is uninsured, and that adequate property insurance be obtained to guard against potential losses to the Tahoe Property.

DISCUSSION

Creditor states that its attorneys have been in contact with the

lawyers for the Chapter 7 Trustee and Corrigan ("Corrigan") Financial Limited regarding this matter. Creditor does not discuss the extent of those discussions. Although both Creditor and Trustee mention that they have been engaged in communication regarding the employment of a realtor, the parties do not seem to have come to a collective resolution on who the Broker should be, and the responsibilities of the Broker at the outside for presenting a plan of liquidation to the parties involved. The parties' disagreement with the terms of employment and choice of broker are apparent in Creditor's opposition to the Motion.

There are two general areas of concern articulated in the Creditor's opposition. The first is that the Motion does not comply with the requirements for the Motion to Employ, as agreed upon by the parties and memorialized in the approved Stipulation to the Consolidation and Conduct of Proceedings regarding Claims Against Corrigan Finance Limited, Counterclaims, and Leasing and Sale of Real Property. Dckt. No. 178. The second type of opposition expressed by the Creditor involves objections to the absence of explanation of plans to market the property, the budget to repair the property for public showing, the length of the listing agreement, security for the premises, insurance for the Property, and other substantive details about the actual efforts that will be undertaken to sell the property.

Although the Creditor's first area of concern is well taken (and will be discussed below), the objections articulated by Creditor along the vein of Creditor's second type of opposition with the Motion are not within the parameters and standards set by the Bankruptcy Code, or the Stipulation reached by the parties. According to the Order Approving the Stipulation, there was no agreement that a Motion to Employ a Broker would be expected to contain a marketing plan to sell the property, and the media (social media, videos, internet, signage, open houses) that would be used by the Broker in her efforts to market and sell the property. Section 5 of the Order, Dckt. No. 187, does not require that the Motion include details about the budget that Broker may use to prepare the property for marketing and showings, and the length of the listing agreement.

The court will now consider whether the Motion complies with the requirements of the Bankruptcy Code's standards for employment and compensation of a professional, and whether the Motion follows the requirements of the Stipulation crafted by both parties and approved by the court.

Compliance with Bankruptcy Code

The guidelines contained in that Stipulation are not guidelines that originated with the Local Rules, the Bankruptcy Code, or the court, but rather are requirements drafted and agreed upon by the parties themselves. Before considering the stipulation, the court will determine whether the Motion to Employ hews to the requirements set out by the Bankruptcy Code.

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

interest adverse to the estate, and be a disinterested person.

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

Here, the Motion to Employ and the Declaration of Katrine Watson in Support of the Motion, Dckt. No. 191, demonstrates that the proposed Broker does not hold an adverse interest to the Estate and is a disinterested person, and describes the nature and scope of the services to be provided. The Residential Listing Agreement, which is attached to Ms. Watson's Declaration, provides that Ms. Watson, the proposed Broker, will have an exclusive right to list the Property through June 30, 2014, and shall receive as compensation for the services rendered with respect to any sale of the Property, 4% of the gross purchase price if Broker represents both the Debtor and Buyer, and 2.5% of the gross purchase price if the Buyer is represented by another broker. FN.1.

FN.1. The declaration prepared includes the Declaration of Katrine Watson and the Residential Listing Agreement in one document. Dckt. No. 191. This is not the practice in the Bankruptcy Court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). The failure to do so is cause to deny a motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Taking into account all of the relevant factors in connection with the employment and compensation of Ms. Watson, and Ms. Watson's testimony that she does not hold an adverse interest to the Estate or the Debtors, the court finds the proposed terms of Ms. Watson's employment to be reasonable and in compliance with the provisions of 11 U.S.C. §§ 327 and 328.

Compliance with the Stipulation Order

The Stipulation entered between the parties and approved by this court on February 16, 2014, provides that any noticed motion to employ the Broker shall demonstrate the Broker's understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; demonstrates the Broker's expertise in the marketing of a Property of this sort in the Tahoe market, and include the Broker's

professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

The court's order was prepared by counsel for Corrigan Finance Limited and the Chapter 7 Trustee. It was approved by counsel for the Debtor and Counsel for Captain Enterprises, LLC. It reflected the requirements of the court and addressed issues of dispute (possible bickering) between the parties between the Debtor, her ex-husband Stanislav Lazutkine, (debtor in the related case), Corrian Finance Limited (the entity alleged to be owned and controlled by Mr. Lazutkine), and Captain Enterprises, LLC (which is listed on the Schedule F as having funded litigation by Debtor against Mr. Lazutkine, but which has not filed a proof of claim in this case).

This is part was required by the court due to the serious allegations of misstatements and failure to disclose assets. Each party involved in the fight today has allegiances to one debtor or the other, (with the exception of the Trustee), and none stand in the position of a third-party, independent "aggrieved creditor."

It is interesting that the Captain Enterprises, LLC opposition does not assert that Chase International, with an office at 700 North Lake Blvd, Tahoe, City, California does not have the experience to market and sell the subject property. Rather, merely the technical argument (and while the court expects parties to comply with everything that is ordered, in context of the "Objection" it is technical) that the evidence is not sufficient to determine that it has the ability to market and sell the property. Captain Enterprises, LCC also asserts that the listing should be limited to six months, not a year for this multi-million dollar property.

Beginning with the latter "Objection," Captain Enterprises, LLC offers no explanation as to why a listing for this multi-million dollar property should be truncated to six months. This court commonly allows debtors who want to market and sell property a year to close the transaction. If the court were to file this "Objection" valid, the Trustee and other asserted owner would have the property put on the market at the start of the Summer season and have two month to market it before Fall. Then the balance of the marketing would be through the Thanksgiving and Christmas season. This seems to be unreasonably short, and a plan destined to move the property to bottom feeders rather than being properly exposed to the market. The court overrules this objection, just as it overruled the objection contending that the real estate broker was to provide all of the marketing strategy as part of this hearing.

The court is troubled by the Broker, Trustee, and Corrigan Finance Limited have ignored that portion of the order for the Broker to expressly address whether the property should be rented while it is on the market. As the court recalls, the Debtor in this case first contended that she should be allowed to retain possession of the Property pending sale. Then Corrigan Finance Limited asserted that is would find a tenant for the Property. Each of these "suggestions" seemed to be destined to make the property less marketable. The court was looking for an independent third-party to address this issue in advance in the event that the Trustee and Corrigan subsequently disagreed on the issue.

PRESENTATION AT THE HEARING

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is **xxxxxxxxxxxx**.

6. 13-21893-E-7 HLC-2 — STANISLAV LAZUTKINE — Andrew B. Reisinger — MOTION TO EMPLOY CHASE INTERNATIONAL REAL ESTATE AS BROKER(S) — 5-28-14 [117]

No Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on May 28, 2014. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Creditor having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Employ is xxxxxxxxxxxxxxxxxx.

John R. Roberts, the Chapter 7 Trustee, seeks to employ Chase International Real Estate as his real property broker. Debtor Jenny Pettengill ("Pettengill") filed a Chapter 13 petition in bankruptcy on September 19, 2012 (Case No. 12-36884-E-7), which was converted to a Chapter 7 case on July 1, 2013. Pettengill's former husband, Debtor Stanislav Lazutkine ("Lazutkine") filed his own Chapter 7 case in bankruptcy on February 13, 2013 (Case No. 13-21893-B-7).

The two cases were administratively consolidated by an "Order Approving Stipulation to Administrative Consolidation and Conduct of Proceedings re Claims Against Corrigan Finance Limited, Counterclaims, and Leasing and Sale of Real Property," entered by this court on February 16, 2014. Dckt. No. 187 in Pettengill's case, and Dckt. No. 115 in Lazutkine's case. The order approved a stipulation regarding the procedure for employing a broker to list and market certain real property located in Placer County at 1590 N. Lake Boulevard in Tahoe City, California.

The terms for this process were laid out in the Approved Stipulation as follows:

1. Trustee and Corrigan are authorized to jointly retain a real estate broker (the "Broker") to list for sale that certain real property but none of the personal property located at 1590 North Lake Boulevard in Tahoe City, California (the "Property"). All parties have reserved all rights regarding the personal property located at the Property.

2. Employment of the Broker shall be subject to approval in advance of any engagement by the Court, pursuant to applicable laws and rules of procedure, including but not limited to 11 U.S.C. §§ 327 and 328. The Broker must be a disinterested person as defined by 11 U.S.C. § 101(14), reputable, and have a demonstrated ability to fully and competently expose the Property to the market.

3. Any noticed motion to employ the Broker shall, in addition to complying with the foregoing rules and standards: (a) demonstrate his or her understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; (b) demonstrates its expertise in the marketing of a Property of this sort in the Tahoe market, and (c) include the Broker's professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

4. While Corrigan shall have the authority and lead responsibility to give direction and instructions to the Broker once said Broker has been approved by the Court, Corrigan, and Trustee shall cooperate with each other and with the Broker with respect to the marketing and offer approval process. The Trustee or his counsel may communicate directly with the Broker and shall be copied on all correspondence, inquiries, and marketing data within 24 hours of transmission or receipt, as applicable. If there is a disagreement between the Broker and the Trustee, the Broker shall take no action without a petition for instructions and order of the court.

5. The Broker shall ensure that both Corrigan and the Trustee are promptly copied with and/or advised of all material marketing materials and marketing efforts. The Trustee may provide input and direction on the

marketing of the Property to Corrigan, to which input and direction Corrigan shall not unreasonably object. The Broker shall market the Property independently and in a manner to provide reasonable assurances that any potential purchaser is a good-faith, arms' length buyer; provided, however, that a bidder connected to a party in interest herein shall fully disclose in writing the nature and extent of all connections with any of the parties who have a direct or indirect relationship, known to the bidder, to any of the parties or professionals as a predicate to proposing a bid. Such connections shall also be fully disclosed in any motion for approval of the sale.

6. Any offer to purchase the Property proposed by Corrigan and/or Trustee shall be subject to approval of the court under Bankruptcy Code 11 U.S.C. § 363 following a noticed hearing in compliance with Federal Rules of Bankruptcy Procedure 2002(c)(1) and 6004, and shall be subject to overbids by third parties as specified in the order approving the listing.

Order, Dckt. No. 115.

Retention of Chase International Real Estate

Trustee and Corrigan Finance Limited ("Corrigan"), with the input of Captain Enterprises, LLC have agreed to jointly retain Chase International Real Estate, BRE License #01802170) to assist him in the listing, market and lease and/or sale of the Tahoe Property. The Trustee offers the accompanying declaration of Katrine (Trinkie) Watson to attest to Broker and its representing agent, Ms. Watson (BRE License #00326518) having not disqualifying connection with the Debtors, creditors, the Office of the United States Trustee, or any of its other employees, or any other party in interest.

The Declaration also states that the Broker does not hold any adverse interest to the Debtors or the estate in the matters upon which it is to be engaged, that the Broker has not previously represented a creditor, equity security holder, partner, or any other individuals who are otherwise adverse or potentially adverse to the Debtors or their estate on any matter, and that the Broker has not ever represented an insider of the Debtors.

The terms of the Broker's Residential Listing Agreement (Exclusive Authorization and Right to Sell) attached to the accompanying Watson Declaration as Exhibit A are summarized as follows:

1. The proposed listing price for the Tahoe Property, excluding all furnishings, is $2,750,000;

2. Broker would have an exclusive right to list the Property through June 30, 2015;

3. Broker shall, subject to court approval, receive as compensation for services rendered with respect to any sale of the Property 5% of the gross purchase price if it represents both the Debtor and the Buyer, and 2.5% of the gross purchase price if the Buyer is represented by another broker;

4. Any sale is subject to bankruptcy court approval.

Trustee states that there is no agreement of any nature as to the sharing of any compensation which has been, or which may be, paid to on account of services rendered on behalf of Trustee and Corrigan.

OPPOSITION BY CREDITOR

Creditor Captain Enterprises, LLC ("Creditor") opposes the instant Motion on the basis that Broker "has failed to provide evidence of her expertise and plan to liquidate the subject property," which is a lakefront property that Creditor asserts will likely be the only asset available for paying creditors' claims in this case. Dckt. No. 196.

The subject real property is located at 1590 North Lake Boulevard, Tahoe City, California, and is currently titled to Corrigan. Creditor believes that it will be able to prove that the Tahoe Property and/or its sale proceeds should become an asset of both bankruptcy estates. The Order Approving the Stipulation includes a section stating:

> Any noticed motion to employ the Broker shall, in addition to complying with the foregoing rules and standards: (a) demonstrate his or her understanding of the bankruptcy process and the fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; (b) demonstrates its expertise in the marketing of a Property of this sort in the Tahoe market, and (c) include the Broker's professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

Creditor argues that the present Motion fails to meet the requirements of that order, in that the Broker does not provide any evidence of her expertise and plan to sell the Tahoe Property. Creditor protests the fact that no marketing plan has been submitted to address whether the premises will be staged, if the proposed price is in line with the market, what listings will be used, and what type of marketing strategies will be used to show this type of property in the Tahoe area.

Creditor also asserts that it is unclear what budget is available to repair the Tahoe Property, and what security will be provided for the premises when it is vacant. Creditor would also like the listing agreement to be limited to six to nine months, rather than the proposed twelve month period. Creditor also wants more information on whether renting will help, hinder, or have no impact on the efforts to sell the property.

Lastly, Creditor asserts that the Tahoe Property is uninsured, and that adequate property insurance be obtained to guard against potential losses to the Tahoe Property.

DISCUSSION

Creditor states that its attorneys have been in contact with the lawyers for the Chapter 7 Trustee and Corrigan (“Corrigan”) Financial Limited regarding this matter. Creditor does not discuss the extent of those discussions. Although both Creditor and Trustee mention that they have been engaged in communication regarding the employment of a realtor, the parties do not seem to

have come to a collective resolution on who the Broker should be, and the responsibilities of the Broker at the outside for presenting a plan of liquidation to the parties involved. The parties' disagreement with the terms of employment and choice of broker are apparent in Creditor's opposition to the Motion.

There are two general areas of concern articulated in the Creditor's opposition. The first is that the Motion does not comply with the requirements for the Motion to Employ, as agreed upon by the parties and memorialized in the approved Stipulation to the Consolidation and Conduct of Proceedings regarding Claims Against Corrigan Finance Limited, Counterclaims, and Leasing and Sale of Real Property. Dckt. No. 178. The second type of opposition expressed by the Creditor involves objections to the absence of explanation of plans to market the property, the budget to repair the property for public showing, the length of the listing agreement, security for the premises, insurance for the Property, and other substantive details about the actual efforts that will be undertaken to sell the property.

There are two general areas of concern articulated in the Creditor's opposition. The first is that the Motion does not comply with the requirements for the Motion to Employ, as agreed upon by the parties and memorialized in the approved Stipulation to the Consolidation and Conduct of Proceedings regarding Claims Against Corrigan Finance Limited, Counterclaims, and Leasing and Sale of Real Property. Dckt. No. 178. The second type of opposition expressed by the Creditor involves objections to the absence of explanation of plans to market the property, the budget to repair the property for public showing, the length of the listing agreement, security for the premises, insurance for the Property, and other substantive details about the actual efforts that will be undertaken to sell the property.

The Creditor's first area of concern are discussed below, the objections articulated by Creditor along the vein of Creditor's second type of opposition with the Motion are not within the parameters and standards set by the Bankruptcy Code, or the Stipulation reached by the parties. According to the Order Approving the Stipulation, there was no agreement that a Motion to Employ a Broker would be expected to contain a marketing plan to sell the property, and the media (social media, videos, internet, signage, open houses) that would be used by the Broker in her efforts to market and sell the property. Section 5 of the Order, Dckt. No. 115, does not require that the Motion include details about the budget that Broker may use to prepare the property for marketing and showings, and the length of the listing agreement..

The court will now consider whether the Motion complies with the requirements of the Bankruptcy Code's standards for employment and compensation of a professional, and whether the Motion follows the requirements of the Stipulation crafted by both parties and approved by the court.

Compliance with Bankruptcy Code

The guidelines contained in that Stipulation are not guidelines that originated with the Local Rules, the Bankruptcy Code, or the court, but rather are requirements drafted and agreed upon by the parties themselves. Before considering the stipulation, the court will determine whether the Motion to Employ hews to the requirements set out by the Bankruptcy Code.

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

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

Here, the Motion to Employ and the Declaration of Katrine Watson in Support of the Motion, Dckt. No. 119, demonstrates that the proposed Broker does not hold an adverse interest to the Estate and is a disinterested person, and describes the nature and scope of the services to be provided. The Residential Listing Agreement, which is attached to Ms. Watson's Declaration, provides that Ms. Watson, the proposed Broker, will have an exclusive right to list the Property through June 30, 2014, and shall receive as compensation for the services rendered with respect to any sale of the Property, 4% of the gross purchase price if Broker represents both the Debtor and Buyer, and 2.5% of the gross purchase price if the Buyer is represented by another broker. FN.1.

FN.1. The declaration prepared includes the Declaration of Katrine Watson and the Residential Listing Agreement in one document. Dckt. No. 191. This is not the practice in the Bankruptcy Court. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that the motion, points and authorities, each declaration, and the exhibits document to be filed as separate electronic documents. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents, ¶(3)(a). The court's expectation is that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). The failure to do so is cause to deny a motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Taking into account all of the relevant factors in connection with the employment and compensation of Ms. Watson, and Ms. Watson's testimony that she does not hold an adverse interest to the Estate or the Debtors, the court finds the proposed terms of Ms. Watson's employment to be reasonable and in compliance with the provisions of 11 U.S.C. §§ 327 and 328.

Compliance with the Stipulation Order

The Stipulation entered between the parties and approved by this court on February 16, 2014, provides that any noticed motion to employ the Broker shall demonstrate the Broker's understanding of the bankruptcy process and the

fiduciary duty owed to Corrigan, the Trustee and the bankruptcy estate; demonstrates the Broker's expertise in the marketing of a Property of this sort in the Tahoe market, and include the Broker's professional opinion as to whether renting the Property will help, hinder, or have no impact upon reasonable efforts to market and sell the Property.

The court's order was prepared by counsel for Corrigan Finance Limited and the Chapter 7 Trustee. It was approved by counsel for the Debtor and Counsel for Captain Enterprises, LLC. It reflected the requirements of the court and addressed issues of dispute (possible bickering) between the parties between the Debtor, his ex-wife Jenny Pettengill, (debtor in the related case), Corrian Finance Limited (the entity alleged to be owned and controlled by Mr. Lazutkine), and Captain Enterprises, LLC (which is listed on the Schedule F in the related case as having funded litigation by Jenny Pettengill Mr. Lazutkine, but which has not filed a proof of claim in Ms. Pettengill's bankruptcy case).

This is part was required by the court due to the serious allegations of misstatements and failure to disclose assets. Each party involved in the fight today has allegiances to one debtor or the other, (with the exception of the Trustee), and none stand in the position of a third-party, independent "aggrieved creditor."

It is interesting that the Captain Enterprises, LLC opposition does not assert that Chase International, with an office at 700 North Lake Blvd, Tahoe, City, California does not have the experience to market and sell the subject property. Rather, merely the technical argument (and while the court expects parties to comply with everything that is ordered, in context of the "Objection" it is technical) that the evidence is not sufficient to determine that it has the ability to market and sell the property. Captain Enterprises, LCC also asserts that the listing should be limited to six months, not a year for this multi-million dollar property.

Beginning with the latter "Objection," Captain Enterprises, LLC offers no explanation as to why a listing for this multi-million dollar property should be truncated to six months. This court commonly allows debtors who want to market and sell property a year to close the transaction. If the court were to file this "Objection" valid, the Trustee and other asserted owner would have the property put on the market at the start of the Summer season and have two month to market it before Fall. Then the balance of the marketing would be through the Thanksgiving and Christmas season. This seems to be unreasonably short, and a plan destined to move the property to bottom feeders rather than being properly exposed to the market. The court overrules this objection, just as it overruled the objection contending that the real estate broker was to provide all of the marketing strategy as part of this hearing.

The court is troubled by the Broker, Trustee, and Corrigan Finance Limited have ignored that portion of the order for the Broker to expressly address whether the property should be rented while it is on the market. As the court recalls, the Debtor in this case first contended that she should be allowed to retain possession of the Property pending sale. Then Corrigan Finance Limited asserted that is would find a tenant for the Property. Each of these "suggestions" seemed to be destined to make the property less marketable. The court was looking for an independent third-party to address this issue in advance in the event that the Trustee and Corrigan subsequently disagreed on the issue.

PRESENTATION AT THE HEARING

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is **xxxxxxxxx**.