UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 30, 2013 at 10:00 a.m.

---

1. 11-48013-A-11 RONALD/JULIE JACKSON — OBJECTION TO CLAIM
LR-10
VS. RESURGENT CAPITAL, LLC — 8-8-13 [134]

Final Ruling: The objection will be dismissed without prejudice because there is no objection to the proof of claim filed with the objection papers. The objection papers consist solely of a notice of hearing (Docket 134), a proof of service (Docket 135), and an amended proof of service (Docket 136). The notice of hearing refers to "the Objection to Allowance of Claim," but there is no such pleading on file. Docket 134 at 1.

2. 11-48013-A-11 RONALD/JULIE JACKSON — MOTION TO CLOSE CASE
LR-11
8-9-13 [137]

Tentative Ruling: The motion will be denied.

The debtors ask for the entry of final decree.

The motion will be denied without prejudice because it assumes that the court will be adjudicating an objection to the proof of claim of Resurgent Capital, LLC (DCN LR-10). That objection was dismissed.

3. 12-41813-A-11 THOMAS/CARLA EATON — MOTION TO CONVERT OR TO DISMISS CASE
UST-1
5-30-13 [40]

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee moves for conversion to chapter 7 or dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have not filed their operating reports for February, March, and April of 2013, and that they have not filed Form 26 for their Floors to Go Sofa and Loveseats, Inc., business, as required by Fed. R. Bankr. P. 2015.3.

11 U.S.C. § 1112(b)(1) provides that "on 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 section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." 11 U.S.C. § 1112(b)(4)(F).

After this motion was filed, the debtors filed the missing operating reports.

Dockets 45, 46, 47. The debtors have represented that they will be filing Form 26 "shortly." Docket 58 ¶ 9. The debtors have given no reason for their failure to file timely the reports and form. Mrs. Eaton says that she prepared the reports and "[b]efore the 15th of each month [she] forwarded the report[s] to [her] attorney for review and filing." But, "[a]pparently, the complete reports were not filed by my attorney after [she] forwarded them to her." Docket 58 ¶¶ 6, 7. Beyond this, the debtors do not explain their failure to file the reports timely.

As to Form 26, the debtors say that the corporation's CPA was required to prepare it, "but the documents required were not completed until recently." Docket 58 ¶ 9.

None of the foregoing rises to the level of explanation about why the debtors did not file timely the operating reports and Form 26. The debtors cannot blame their attorney or the corporation's accountant for their defaults. After all, both their personal attorney and the corporation are subject to their direct control. They are liable for the actions or lack of action by their professionals. The court cannot excuse the late filing of the operating reports and the still outstanding Form 26.

The above defaults by the debtors then are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

Conversion to chapter 7 would be in the best interest of the creditors and the estate because the debtors have substantial nonexempt and unencumbered assets that could be administered for the benefit of creditors. Some of the debtors' nonexempt and unencumbered assets include: a backhoe with a scheduled value of $4,000, tractor with a scheduled value of $2,000, $16,550 of nonexempt equity in the debtors' Floors to Go Sofa and Loveseats Inc. business, 1994 Chevy Suburban with a scheduled value of $1,000, 2004 Ford Econoline with a scheduled value of $3,000, $1,475 of nonexempt equity in a 2005 Toyota Tacoma, 1984 Star craft pontoon outboard with a scheduled value of $1,500, 1994 Mastercraft 19' with a scheduled value of $4,000, "Funds seized by sheriff" with a scheduled value of $12,500, and a franchise with Floors to Go with a scheduled value of unknown. The motion will be granted and the case will be converted to chapter 7.

4. 13-32417-A-11 BALBIR/SAWARNJIT SEKHON — MOTION TO USE CASH COLLATERAL O.S.T. 9-25-13 [11]
MRL-2

Tentative Ruling: The motion will be denied without prejudice.

The debtors seek approval to use the cash collateral of Heritage Bank of Commerce, consisting of proceeds generated from the debtors' operation of a 69-room hotel. HBC holds the first deed of trust on the hotel property, securing a claim for approximately $1.758 million. The debtors admit that the property has a value of approximately $900,000. The hotel generates approximately $48,159 a month. The debtors desire to use those proceeds to make monthly adequate protection payments of $7,450.71 to HBC and to pay the monthly expenses associated with keeping the hotel business open, including:

- $11,929 for payroll,
- $2,904 for supplies,
- $905 for guest breakfast,
- $8,769.33 for utilities,
- $1,302.50 for maintenance expenses,
- $608.83 for credit card fees,
- $1,527.33 for insurance,
- $882.33 for advertising and commission,

- $4,500 as a fee to the debtors for their management of the hotel,
- $338 for an auto clerk expense that is not explained in the motion,
- $132.33 to maintain the permits necessary for the operation of the hotel,
- $797.75 for property taxes,
- $288.84 for miscellaneous expenses,
- $350 for legal, accounting and other professional fees,
- $800 for U.S. Trustee fees,
- $800 for bankruptcy attorney's fees.

Total Budget = $44,285.95

This leaves $3,873.05 of net income, after the total budget of $44,285.95 is subtracted from the $48,159 in monthly gross income. The debtors propose to deposit the income in the debtors' DIP account, not to be utilized absent further court order or consent of HBC.

In addition, the debtors are asking for permission to deviate from the above budget by no more than 15% without further order of the court. But, as the net income of $3,873.05 is only 8.7% of the total budget, this request, even if granted, will not allow for a 15% budget deviation.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The motion will be denied. The motion seems to focus on the protection of HBC's interest in the real property rather than in the cash collateral. The court is not concerned with protecting HBC's interest in the real property. There is no evidence that the property is depreciating in value. And, the debtors are asking to use the cash collateral of HBC. The court is concerned about the protection of HBC's interest only in the cash collateral that is to be used by the debtors.

While there is an important benefit from the proposed use of the cash collateral - namely, keeping the hotel business open and continuing to generate revenue - the motion does not establish that HBC's interest in the cash collateral is adequately protected.

The debtors admit that there is no equity in the hotel by which HBC's interest in the $48,159 of cash collateral can be protected. And, the proposed adequate protection payment of $7,450.71 obviously does not provide adequate protection for HBC's interest in the $48,159 cash collateral. Accordingly, the motion will be denied.

5.	11-45927-A-7 12-2058 KOOI V. KOOI ET AL	RICHARD/TERESA KOOI DTW-5	MOTION TO APPROVE COMPENSATION OF PLAINTIFFS' ATTORNEY (FEES $3,755) 8-22-13 [159]

Tentative Ruling: The motion will be denied.

The plaintiff Clarence Kooi requests expenses under Fed. R. Civ. P. 37(a)(5)(B) as sanctions for having to defend a discovery motion by the defendant Richard Kooi which was denied.

The defendant opposes the motion, arguing that the substance of the motion was

granted, he should not be penalized for misnaming the motion as a pro se litigant, and, in the alternative, the fees are unreasonable and should be reduced.

Fed. R. Civ. P. 37(a)(5)(B) prescribes that, "[i]f [a discovery] motion is denied, the court may issue any protective order authorized under Rule 26© and *must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees*. But the court *must not order this payment if the motion was substantially justified* or other circumstances make an award of expenses unjust [emphasis added]."

The defendant filed a motion to dismiss the case due to the plaintiff's failure to comply with discovery requests. Docket 142. The motion was denied because dismissal was not warranted. Docket 157. Yet, the court ordered the plaintiff to comply with some of the discovery requests, including making himself available for deposition and producing documents. Docket 157.

However, in ordering the plaintiff to make documents available for inspection to the defendant, the court noted that "the plaintiff has provided evidence that he made the requested documents available to the defendant. It was incumbent on the defendant to inspect and obtain those documents." In other words, although the court was ordering the plaintiff to make the documents available, it was the defendant who had neglected to inspect them when the plaintiff had made them available for inspection earlier.

Hence, in short, even though the motion was disposed as "denied", the plaintiff was the prevailing party only in part - the motion was not dismissed and the court recognized that the plaintiff had made the documents available for inspection to the defendant earlier. The defendant was the prevailing party as to the request to depose the plaintiff. Given this, the court concludes that the discovery motion was substantially justified and expenses under Rule 37(a)(5)(B) are not warranted. The motion will be denied.

6. 12-38128-A-11 JANET/FRANCISCO CUBOL — MOTION TO CONVERT OR TO DISMISS CASE 8-14-13 [87]
UST-1

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The U.S. Trustee moves for conversion to chapter 7, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have not filed the April, May and June 2013 operating reports and that they can no longer confirm a plan because the 300-day deadline of 11 U.S.C. § 1121(e)(2) has passed.

11 U.S.C. § 1112(b)(1) provides that "on 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 section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." 11 U.S.C. § 1112(b)(4)(A), (F).

The debtors have not filed their April and May 2013 operating reports.

Also, this is a small business case and the debtors are no longer able to confirm a chapter 11 plan or file another chapter 11 plan.

11 U.S.C. § 1121(e) provides that "In a small business case-

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—
(A) extended as provided by this subsection, after notice and a hearing; or
(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—
(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
(B) a new deadline is imposed at the time the extension is granted; and
© the order extending time is signed before the existing deadline has expired."

11 U.S.C. § 1129(e) also provides that "In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3)."

This case was filed on October 11, 2012 and the debtors filed a plan and disclosure statement on April 5, 2013. However, they did not obtain confirmation of that plan within 45 days of filing it and, although the court extended the 45-day deadline of section 1129(e) to July 8, 2013 (Docket 70), the debtors still failed to obtain plan confirmation. And, the 300-day deadline of section 1121(e)(2) expired on August 7, 2013, meaning that the debtors may no longer file another plan. Accordingly, the debtors cannot confirm a plan in this case any longer. This is cause for conversion or dismissal of the case.

Conversion to chapter 7 is in the best interest of the creditors and the estate as the debtors have $8,000 in cash or in their bank account and have $10,671 in receivables. Docket 94, July 2013 Operating Report, filed September 10, 2013. The motion will be granted and the case will be converted to chapter 7.

7. 12-35330-A-12 BETTE SPAICH — MOTION TO COMPEL O.S.T. 9-16-13 [125]
BS-12

Tentative Ruling: The hearing on the motion will be continued to October 15, 2013 at 10:00 a.m.

The debtor is asking the court to compel Auction.com, LLC to respond to a subpoena issued on August 22, 2013 for the production of documents related to bidder accounts, pre-auction bids and bid records for Alfred Nevis I and or The Nevis Co., covering the period of July 2010 until the present.

Auction.com opposes the motion, stating that its policies preclude it from disclosing non-public, personal information except when it is in response to a valid subpoena, court order or other legal process.

Auction.com has not challenged the validity of the subpoena. It merely says that it is uncertain about the relationship between the debtor and Mr. Nevis and The Nevis Co, and it is uncertain about whether Mr. Nevis has had the opportunity to intervene to oppose the production of information pursuant to the subpoena. Auction.com claims that it "was required to object to the subpoena to permit this Court to determine if the scope, breadth and substance of the information sought by the subpoena is appropriate."

In other words, Auction.com was not certain if the subpoena was proper so it objected to the subpoena just in case it was not proper.

The court will stay enforcement of the subpoena, as Mr. Nevis and The Nevis Co. have not been served with it and have not been served with this motion. The court has been unable to locate a proof of service on the docket.

Because the information pertains to Mr. Nevis and The Nevis Co. and implicates their privacy rights, they should have an opportunity to intervene in this motion. Accordingly, the debtor shall serve Mr. Nevis and The Nevis Co. with this motion no later than October 7, 2013, and the hearing on this motion will be continued to October 15, 2013 at 10:00 a.m.

8. 13-24841-A-11 PETER ALBERS
FWP-3

MOTION TO APPROVE COMPENSATION OF CREDITOR COMM. ATTORNEY (FEES $58,100.75, EXP. $542.85)
8-30-13 [231]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

Felderstein Fitzgerald Willoughby & Pascuzzi LLP, counsel for the official committee of unsecured creditors, has filed its first interim motion for compensation. The requested compensation consists of $58,100.75 in fees and $542.85 in expenses, for a total of $58,643.60. This motion covers the period from April 25, 2013 through July 31, 2013. The court approved the movant's employment as the counsel for the committee on May 6, 2013. In performing its services, the movant charged hourly rates of $495, $425, $385, and $195.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" "employed under section ... 1103" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) analyzing the debtor's

assets in preparation for the meeting of creditors; (2) participating in asset sale negotiations; (3) analyzing the debtor's business operations; (4) analyzing cash collateral and financing options; (5) managing claims administration and analyzing objections; (6) drafting creditor's committee bylaws, confidentiality agreements, minutes, and conference statements; (7) preparing and filing employment and compensation motions, (8) drafting motion regarding executory contracts and leases, (9) general case administration, (10) reviewing and analyzing petition, schedules, and statement of affairs, and (11) reviewing the employment motions of the estate's professionals.

The court concludes that the compensation is for actual and necessary services rendered for the benefit of the estate's creditors. The requested compensation will be approved.

9. 13-24841-A-11 PETER ALBERS
PLC-14

MOTION FOR ADMINISTRATIVE EXPENSES, TO APPROVE COMPENSATION FOR DEBTOR'S ATTORNEY (FEES $52,000), TO PAY AND TO DISMISS CASE O.S.T. 9-17-13 [248]

Tentative Ruling: The motion will be granted in part.

The debtor is asking for the court to approve payment of the following administrative expenses and unsecured claims, to distribute the remaining equity to the debtor, and to dismiss the case. The debtor says that he will be submitting a stipulation for the approval of all payments.

The proposed administrative expenses to be paid, estimated at approximately $125,000, include:

- compensation for committee counsel of approximately at least $58,056.60,

- U.S. Trustee fees estimated at between $10,000 and $15,000,

- compensation of the debtor's counsel, estimated at approximately $52,000.

The real estate broker was paid from the recent sale of the dairy property and the estate's accountant is willing to be paid post-dismissal, when preparing the debtor's 2013 tax return.

The proposed unsecured claims to be paid include:

- IRS, $1,969.80,
- SBE, $115,
- FIA Card Services, $250.83,
- Associated Feed & Supply, $759,200.01,
- Robert Robben, $1,896.01,
- Nancy Albers, trustee of the Albers Family Trust, $260,496.71,
- Vestra Resources, Inc., $6,942.22,
- Harold Robben, Jr., $878,682.42,
- bankruptcy estate of Raymond Albers, $120,085,
- Brian and Alan Simonis, $148,348.35 (claim not filed),
- Dave Walser Haybanking, Inc., $15,000 (claim not filed).

The debtor in possession is asking that the funds remaining (estimated at more than $4 million) after payment of the administrative expenses and unsecured claims be paid to the debtor.

The Official Committee of Unsecured Creditors has filed a response, seeking conditions to dismissal including:

- payment to unsecured creditors to include interest and attorney's fees,

- final allowance of the attorney's fees and costs of counsel for the debtor and the committee is provided for in the order,

- approval and payment of the U.S. Trustee fees is provided for in the order,

- outside closing date for the payments is provided for in the order,

- declaration be filed prior to dismissal to establish that the proposed payments are made as prescribed, and

- the order provides that the debtor will satisfy his and the estate's tax obligations from funds he retains after the proposed payments are made.

As the allowance of administrative expenses requires a notice and a hearing, the court will authorize the proposed payments only if debtor submits a stipulation signed by all parties in interest or the expenses are approved after appropriate notice and a hearing.

In addition, as proposed by the committee, the court will impose a deadline for the payment of all claims and will require a declaration to be submitted that all conditions prior to dismissal have been satisfied, before the court will dismiss the case.

Finally, to the extent some claims will not be paid because the debtor asserts that there is no basis for paying them, the court is not adjudicating the validity of such claims by allowing the debtor not to pay them. The debtor is likely to have sufficient funds to pay contested claims not paid in connection with dismissal. Although the debtor has identified one claim he is not paying - the claim of Mauro Valles (unfiled) because the Labor Commissioner denied his claim - it is unclear from the motion whether more such claims exist.

10. 11-39843-A-7 LILIA KRYVOSHEY — MOTION TO EXTEND TIME
12-2221 KEK-1 — 8-28-13 [40]
KRYVOSHEY V. DEUTSCHE BANK NATIONAL TRUST COMPANY ET AL

Tentative Ruling: The motion will be granted in part and dismissed as moot in part.

Defendants Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc. ask for extension of the time to respond to the first amended complaint of the plaintiff, Liliya Kryvoshey, from August 16, 2013 until September 6, 2013.

The motion will be dismissed as moot as to Deutsche Bank National Trust Company because the proof of service for that defendant (Docket 36) indicates that Deutsche Bank was not served with the first amended complaint (Docket 29). The proof of service for Deutsche Bank states that the purported agent for service of process, CT CORP, is not an agent for Deutsche Bank. Docket 36.

The court rejects the plaintiff's contention that service is satisfied somehow because Deutsche Bank failed "To Ensure Its's Agent For Service Of Process Is Accurately Listed With the State Of California Office Of The Secretary Of State." Proper service under Fed. R. Bankr. P. 7004(b)(3) is a prerequisite before the court would consider ruling against anyone.

MERS, on the other hand, was served with the FAC on July 25, 2013. Docket 35. According to the last-issued summons on July 17, 2013, its response to the FAC was due August 16, 2013, 30 days after the summons was issued. MERS did not

file a response to the FAC until September 5, 2013. Docket 51.

The court notes that Fed. R. Civ. P. 6 does not apply here. Rather, Fed. R. Bankr. P. 9006 applies. Nonetheless, the standard for extension of a deadline after expiration of the deadline is remains excusable neglect.

Fed. R. Bankr. P. 9006(b)(1) provides: "Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) *on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect*."

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the debtor; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

The court is satisfied that there is excusable neglect to allow MERS until September 5, 2013 to respond to the FAC.

First, the length of the delay in responding to the first amended complaint was only 20 days, from August 16 until September 5. This was a minor delay considering that the plaintiff: has litigated this action for 16 months already - since May 15, 2012; has had six summons issued by the court over the life of the case; has had three summons issued only since the filing of the FAC on May 14, 2013; has taken over two months after filing, to serve the FAC; has known who represents the defendants for approximately seven months - since February 19, 2013 when the defendants filed their first motion to dismiss; and did not apprise the defendants' counsel of the service of the last-issued summons, even though the defendants had asked the plaintiff to apprise their counsel of service. Docket 43, Ex. 1.

More, assuming the plaintiff still intends to prosecute her claims against Deutsche Bank, the delay is insignificant given that the plaintiff has not properly served the last summons and the FAC on Deutsche Bank.

The court also notes that the defendants contacted the plaintiff on August 26, 2013 - only 10 days after the deadline to respond to the FAC - for an extension of the time to respond to the first amended complaint, but the plaintiff's counsel did not respond to such a request. Docket 43, Ex. 2.

Second, the court sees no danger of prejudice to the plaintiff, as the delay in response by MERS has not deprived her from any advantage. This is especially true if the plaintiff still intends to prosecute her claims against Deutsche Bank.

Third, there is no evidence that the defendants have not acted in good faith, especially given their letter requesting that their counsel be apprised when the plaintiff effectuates service of the last summons and the FAC on them. Docket 43, Ex. 1. While the plaintiff's counsel says that he did not receive the letter from the defendants, this does not mean that the letter was not sent.

Fourth, as reason for the neglect, MERS vaguely asserts "an inadvertent mistake on behalf of MERS in notifying its counsel of service." But, although MERS gives no real explanation of the neglect, whatever the neglect, given the lack of prejudice to the plaintiff, the short period of delay, and the plaintiff's protracted litigation of this action, the court is persuaded that excusable neglect exists. The court is not satisfied that the neglect of MERS warrants the court to deprive it from litigating the claims on the merits.

Fifth, as a further reason for permitting the extension in favor of MERS, the actions of the plaintiff in serving the last-issued summons and FAC, in filing the respective proofs of service, in opposing this motion, in failing to serve Deutsche Bank, and in filing the request for entry of default as to Deutsche Bank, nevertheless, amount to sanctionable conduct.

The plaintiff did not serve the last-issued summons and FAC until over two months after the complaint was filed. The complaint was filed on May 14, 2013, whereas it was not served on MERS and attempted to be served on Deutsche Bank until July 25 and 23, respectively. Dockets 29, 35, 36. Additionally, there is no explanation of why the plaintiff waited over one month after issuance of the summons and just after the deadline for responding to the FAC expired, to file the proofs of service. Dockets 35 & 36. The proofs of service were not filed until August 20. This is especially important because, at the time she served the FAC, the plaintiff had known who is counsel for the defendants for five months already (since February 19, 2013) and knew that the defendants' counsel would be monitoring the case docket for activity.

The plaintiff's request for entry of default against Deutsche Bank is clearly without merit as the proof of service for Deutsche Bank unambiguously states that service was never effectuated. Yet, the request for entry of default says that Deutsche Bank was served pursuant to Fed. R. Bankr. P. 7004(b)(8). Docket 36. Deutsche Bank was not served. Dockets 36 & 37. This is especially egregious as it involves factual misrepresentations in pleadings filed with the court. The motion will be granted as to MERS.

Finally, whether or not MERS is given until September 5 to respond to the FAC, the court is hard pressed to think of a reason the claims asserted in the FAC should not be dismissed. Aside from asserting claims against parties not named in the complaint (naming defendants as DOES 1 to 100 is not permitted in federal court) - such as Power Default Services, Inc. and American Home Mortgage Servicing Inc. - the plaintiff has asserted four causes of action against Deutsche Bank and MERS, including:

- (CLAIM 1) a claim to determine that the defendants have no "secured or unsecured claim against property of the estate in bankruptcy,"

- (CLAIM 2) a claim to determine that the defendants do not hold "perfected and secured claim in the residential real estate of the Debtor and the property of this estate in bankruptcy and that all of the said Defendants are estopped and precluded from asserting an unsecured claim against this estate pursuant to Sections 105(a), 502(b)(1), 506 and 544(a) of the Bankruptcy Code and Rule 3007 of the Bankruptcy Rules,"

- (CLAIM 3) a claim seeking actual and punitive damages and equitable relief under 11 U.S.C. §§ 362(a) and 105(a) "for intentionally foreclosing and filing a motion for relief from stay knowing defendants, in particularly DBNTC, as trustee for the Trust did not have standing, and for filing false proofs of claim and false declarations," and

- (CLAIM 4) a claim for fraudulent, deceptive, unfair and illegal practices pursuant to "California Civil Code § 1750 et seq. and California Business and Professions Code Section 17200."

Only the trustee has standing to assert claims for the bankruptcy estate.

To establish standing, a plaintiff must meet both the constitutional and prudential requirements of standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). To establish standing under the case or controversy requirement of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

The prudential requirements of standing are: (1) the litigant must assert his own legal interests and not those of third parties, known as the real party interest; (2) the litigant must assert an injury peculiar to himself or to a distinct group of which he is a part; and (3) the interest of the litigant must be within the "zone of interests" to be protected by the statute under which his claim arises. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

The plaintiff's bankruptcy case is still open and the court has not ordered any of the estate's claims abandoned. See 11 U.S.C. § 554. The plaintiff has no apparent prudential standing to assert claims for the bankruptcy estate.

Given the trustee's report of no distribution, as the court determined in its ruling on the prior motion to dismiss, this court does not have subject matter jurisdiction over the claims that are only related to a case under title 11. The plaintiff's bankruptcy case is over. The trustee has issued a no asset report, indicating that she will not be administering any assets for the benefit of creditors. Thus, claim 2 - to the extent it does not involve the estate, the wrongful foreclosure aspect of claim 3 - which is based solely on state law, and claim 4 - which is based also solely on state law, should be dismissed as the court lacks subject matter jurisdiction over such claims.

Third, the court should dismiss claim 3 as well, because it fails to state a claim upon which relief can be granted. The claim does not seek damages for violation of the automatic stay. Rather, it seeks damages "for . . . filing a motion for relief from stay knowing defendants, in particularly DBNTC, as trustee for the Trust did not have standing, and for filing false proofs of claim and false declarations." This is an issue that should have been raised in connection with the motion for relief from the automatic stay.

The plaintiff has not established her constitutional standing to assert the remainder of claim 3. To have such standing, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan, 504 U.S. at 560-61).

The plaintiff has not shown that she has suffered some actual or threatened injury due to alleged illegal conduct of the defendants. Specifically, the court sees no actual or threatened injury to the plaintiff from the alleged lack of standing of Deutsche Bank in filing a motion for relief from the automatic stay that was not granted, and the defendants' filing of purported

false proofs of claim and false declarations. Proof of claim 9 filed by Deutsche Bank will not be paid because the bankruptcy is a no-asset case.

11. 11-39843-A-7 LILIA KRYVOSHEY — OPPOSITION TO
12-2221 KEK-1 — PLAINTIFF'S REQUEST FOR ENTRY OF
KRYVOSHEY V. DEUTSCHE BANK — DEFAULT
NATIONAL TRUST COMPANY ET AL — 8-28-13 [45]

Tentative Ruling: The objection will be sustained.

Defendants Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc., object to the request for entry of default filed by the plaintiff, Liliya Kryvoshey, arguing that the plaintiff did not properly and timely serve the defendants.

Fed. R. Civ. P. 55(b)(2) does not apply here because that rule applies solely to requests for entry of default judgment. This objection pertains only to the plaintiff's request for entry of default.

That rule prescribes: "In all other cases [including cases for claims that are not for 'sum certain or a sum that can be made certain by computation'], the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; © establish the truth of any allegation by evidence; or (D) investigate any other matter."

Nevertheless, the objection will be sustained. Both requests for entry of default filed by the plaintiff on August 24, 2013 (Dockets 37 & 38) indicate that the defendant is the United States and that service of the complaint was effectuated under Fed. R. Bankr. P. 7004(b)(8). This is untrue, as neither of the defendants is the United States. Deutsche Bank National Trust Company and Mortgage Electronic Registration Systems, Inc. are corporations that should have been served pursuant to Fed. R. Bankr. P. 7004(b)(3).

Further, Deutsche Bank National Trust Company was not properly served with the last-issued summons (on July 17 - Docket 34) and the first amended complaint (Docket 29). Docket 36. The proof of service for Deutsche Bank National Trust Company states that the purported agent for service of process, CT CORP, is not an agent for the Company. Docket 36. The objection to the request for entry of default will be sustained.

12. 11-39843-A-7 LILIA KRYVOSHEY — STATUS CONFERENCE
12-2221 — 5-14-13 [29]
KRYVOSHEY V. DEUTSCHE BANK
NATIONAL TRUST COMPANY ET AL

Tentative Ruling: None.

13. 11-24752-A-7 DANIEL ROGERS — MOTION FOR
13-2207 DNL-1 — ENTRY OF DEFAULT JUDGMENT
HOPPER V. ROGERS — 8-20-13 [15]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the defendant, the U.S. Trustee, and any other party in interest to file written opposition at least 14

days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The plaintiff, J. Michael Hopper, moves for default judgment on its 11 U.S.C. § 727(d)(2) claim against the defendant, Daniel Rogers, who is the debtor in the underlying bankruptcy case.

Fed. R. Civ. P. 55(b)(2) provides that:

"A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
© establish the truth of any allegation by evidence; or
(D) investigate any other matter."

The factors courts consider in determining whether to enter a default judgment include: (I) the possibility of prejudice to the plaintiff, (ii) the merits of the plaintiff's substantive claim, (iii) the sufficiency of the complaint, (iv) the amount at stake, (v) the possibility of a dispute over material facts, (vi) whether the default was due to excusable neglect, and (vii) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. See Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9th Cir. 1991).

11 U.S.C. § 727(d)(2) provides that "On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

. . .

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee."

The movant has produced evidence showing that the defendant acquired property of the estate, namely $5,391.87 from an UBS stock account and $4,666 from Bank of the West and Wells Fargo Bank accounts (total $10,057.87). And, the defendant has refused to turn over the funds to the trustee, despite requests by the trustee. Docket 16.

This satisfies the requirements of 11 U.S.C. § 727(d)(2). The defendant's default was entered on July 25, 2013. Docket 10. Although the defendant filed an answer to the complaint on August 15, 2013, that answer was filed after the entry of default. The defendant has not moved to vacate the entry of default.

Accordingly, the court will grant this motion and will enter a separate judgment revoking the defendant's June 8, 2011 bankruptcy discharge in Case No. 11-24752.

14. 12-33158-A-12 GREG HAWES — MOTION TO INCUR DEBT
SAC-11 — 9-16-13 [144]

Tentative Ruling: The motion will be granted as provided in the ruling below.

The debtor asks for authority to borrow $50,000 from Glenn Hawes, in order to permit him "to open the farm for the agritainment business." The debtor proposes to repay the loans by November 15, 2013 with 4% interest per annum.

11 U.S.C. § 1203 provides that "[s]ubject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation." This includes rights under 11 U.S.C. § 364.

11 U.S.C. § 364(b) provides: "The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503 (b)(1) of this title as an administrative expense." 11 U.S.C. § 364(a) allows an operating bankruptcy estate to incur unsecured debt in the ordinary course of business.

The debtor is asking for authority to borrow funds so he can open his farm for agritainment during the upcoming season. The debtor claims to have eight years of experience in agritainment. The proposed agritainment operation will include a pumpkin patch, a train, corn mazes, a petting zoo, pig races, food, jumping pillow, a barrel train, hay rides, stage coach rides, flower picking, pumpkin launching, a haunted barn, a haunted corn maze, a mechanical bull, and hosting of group events, parties and special events. In past years, the debtor alleges that he has borrowed as much as $100,000 for the agritainment operation. Last year, the debtor borrowed $75,000 pursuant to an order of this court. This year the debtor says he needs only $50,000, as the proceeds from his hay crop will cover the remaining costs. The budget attached to the debtor's declaration reflects agritainment operation costs totaling $100,000.

The debtor has a history of conducting the seasonal agritainment operation. The debtor may borrow the funds. But, except for repayment of the loan, the proceeds generated from the agritainment operation this year should not be used by the debtor without further order of the court. The debtor has been in this chapter 12 case for over 14 months now without a confirmed plan. This case was filed on July 17, 2012. The last plan, whose confirmation was denied, was filed on August 20, 2012.

15. 12-27062-A-11 CECIL PULLIAM — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEES $8,760) AND (FEES $5,887.50)
MRL-6 — 9-6-13 [105]

Final Ruling: The movant has provided only 23 days' notice of the hearing on this motion. Nevertheless, the notice of hearing for the motion requires written opposition at least 14 days before the hearing, in accordance with Local Bankruptcy Rule 9014-1(f)(1). Motions noticed on less than 28 days' notice of the hearing are deemed brought pursuant to Local Bankruptcy Rule

9014-1(f)(2). This rule does not require written oppositions to be filed with the court. Parties in interest may present any opposition at the hearing. Consequently, parties in interest were not required to file a written response or opposition to the motion. Because the notice of hearing stated that they were required to file a written opposition, however, an interested party could be deterred from opposing the motion and, moreover, even appearing at the hearing. Accordingly, the motion will be dismissed.

16. 12-33467-A-7 RONALD DUNCAN — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEES $16,020, EXP. $33.20)
LR-8 — 9-6-13 [147]

Tentative Ruling: The motion will be denied.

Stephen Reynolds, attorney for the debtor during the chapter 11 portion of the case, has filed his first and final motion for approval of compensation.

The motion will be denied because it is difficult to tell the exact compensation amount being requested by the movant. In the prayer for relief, the motion asks for $15,120 in fees plus additional $900 for preparing this motion (total of $16,020), plus $33.20 in expenses (total $16,053.20). In the body of the motion, the fees listed on page three total only $14,520. On page one of the motion, there are more inconsistent figures, requesting $15,420 in fees and $33.20 in expenses (total of $15,453.20). The court should not have to speculate about the exact compensation being sought by the movant, especially as this is the movant's fourth attempt to obtain approval of his compensation. The motion will be denied.

17. 13-22486-A-12 STEVEN SAMRA — STATUS CONFERENCE
13-2158 — 5-9-13 [1]
COATE V. SAMRA

Tentative Ruling: None.

18. 13-22486-A-12 STEVEN SAMRA — MOTION TO DISMISS CASE
MAS-1 — 7-10-13 [69]

Tentative Ruling: The motion will be granted in part and the case will be dismissed with prejudice.

Creditor Ag-Seeds Unlimited asks for dismissal with prejudice of this chapter 12 case pursuant to 11 U.S.C. § 349(a) and 11 U.S.C. § 1208(c)(1) and (c)(9).

The debtor opposes the motion, contending that he filed a first amended plan on July 22, 2013, providing for the movant's claim. He asks the court to continue the hearing on this motion to September 3 so it can be heard with the first amended plan confirmation motion.

The court will strike Mr. Coate's joinder to the motion. The civil and bankruptcy rules of procedure do not allow for the joinder of parties to motions or oppositions to motions.

11 U.S.C. § 349(a) governs the dismissal of a case "with prejudice." Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997). Pursuant to 11 U.S.C. § 349(a), "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar discharge, in a later case under this title . . . nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under

this title[.] . . .” 11 U.S.C. § 349(a). “Section 349 establishes a general rule that dismissal of a case is without prejudice, but it also expressly grants a bankruptcy court the authority to ‘dismiss the case with prejudice thereby preventing the debtor from obtaining a discharge with regard to the debts existing at the time of the dismissed case, at least for some period of time.’” Id. (quoting 3 COLLIER ON BANKRUPTCY § 349.01, at 349-2-3 (15th ed. 1997)).

“‘Cause’ under § 349 has not been defined by the Code. A review of the case law indicates that ‘egregious’ conduct must be present, but that a finding of bad faith constitutes such egregiousness.” Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 939 (B.A.P 9th Cir. 1997). “Bad faith, which is generally held to be cause for dismissal of a case under § 1307, is also cause for dismissal with prejudice under § 349(a).” Id. (citing Morimoto v. United States (In re Morimoto, 171 B.R. 85, 86-87 (B.A.P. 9th Cir. 1994).

“To determine bad faith[,] a bankruptcy judge must review the ‘totality of the circumstances.’” Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (quoting In re Goeb, 675 F.2d 1386, 1391 (9th Cir. 1982)).

“The bankruptcy court should consider the following factors in determining bad faith: (1) whether the debtor ‘misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;’ (2) ‘the debtor’s history of filings and dismissals;’ (3) whether ‘the debtor only intended to defeat state court litigation;’ and (4) whether egregious behavior is present.” Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999) (known as Leavitt I).

Yet, a finding of bad faith does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. Leavitt at 1224-25 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

“Multiple or successive filings do not necessarily constitute bad faith.” In re Merrill, 192 B.R. 245, 249 (Bankr. D. Colo. 1995) (citing Johnson v. Home State Bank, 501 U.S. 78, 87, 111 S. Ct. 2150, 2156, 115 L. Ed. 2d 66 (1991); In re Rasmussen 888 F.2d 703, 705 (10th Cir. 1989)). “However, a debtor’s history of filings and dismissals may be evidence of a debtor’s bad faith.” Id. (citing In re Oglesby, 158 B.R. 602, 602 (Bankr. E.D. Pa. 1993); In re Earl, 140 B.R. 728, 728 (Bankr. N.D. Ind. 1992)). “When a debtor has serial petitions, dismissal for bad faith may be avoided if the debtor shows a change of circumstances between filings. Id. (citing In re Armwood, 175 B.R. 779, 779 (Bankr. N.D. Ga. 1994); In re Jones, 105 B.R. 1007, 1007 (Bankr. N.D. Ala. 1989)). “Past filings and dismissals are circumstantial evidence of a debtor’s motivation and ability to perform obligations under the Code.” Id.

On motion to dismiss or to dismiss with prejudice, the debtor bears the burden of proving that the petition was filed in good faith. Leavitt at 940. Even though this rule has been called into question by Ellsworth v. Lifescape Medical Associates (In re Ellsworth), 455 B.R. 904, 918 (B.A.P. 9th Cir. 2011), the Leavitt (known as Leavitt II) decision has not been overturned.

And, while this court is inclined to read Leavitt II and Ellsworth as requiring the moving party to at the least satisfy the burden of going forward in providing sufficient evidence of cause under section 349(a), shifting or triggering the burden of persuasion with the debtor, in this case the evidence with the motion satisfies the burden of going forward, assuming there is one.

The standard by which bad faith must be established is preponderance of the evidence. Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 634 (B.A.P. 9th Cir. 2010). “Proof by the preponderance of the evidence means that it is

sufficient to persuade the finder of fact that the proposition is more likely true than not." Id. at 631 (quoting United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994)).

Further, 11 U.S.C. § 1208© provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including-

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

. . .

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation."

11 U.S.C. § 1221 requires that "The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable."

The court concludes that there is cause for dismissal of this case with prejudice under 11 U.S.C. § 349(a). This is the debtor's third bankruptcy case since September 29, 2010. On September 29, 2010, the debtor filed a skeletal chapter 13 case, Case No. 10-45958. The bankruptcy schedules and statements were not filed until October 12, 2010. The debtor filed one original and three amended chapter 13 plans, but he did not obtain confirmation of any of the plans. The court dismissed the case on August 26, 2011 due to the debtor's failure to make payments to the trustee under a proposed plan and his failure to file pre-petition tax returns.

On October 17, 2011, the debtor filed a skeletal chapter 12 bankruptcy case, Case No. 11-44699. The debtor did not file the bankruptcy schedules and statements until October 31, 2011. The debtor did not file a chapter 12 plan until the last day mandated by 11 U.S.C. § 1221, January 17, 2012, 92 days after the order for relief. Plan confirmation was denied on April 5, 2012 and the debtor filed another chapter 12 plan on April 6, 2012. This plan was never set for confirmation hearing. After the filing of a motion to dismiss the case, the debtor filed another chapter 12 plan on February 18, 2013. But, the court dismissed the case on February 25, 2013 "because of unreasonable delay by the debtor that is prejudicial to creditors." Docket 145. A portion of the court's ruling follows below:

"While the debtor complains that AG-Seeds has been violating the automatic stay, preventing him from having a bank account and attempting to influence vendors not to do business with the debtor, the debtor does not explain how this has prevented him from filing and confirming a plan. The motion does not convincingly connect the alleged misconduct of AG-Seeds with the debtor's failure to file a plan. While the motion says that the stay violations have deprived the debtor of income needed to fund a plan, the motion does not identify what income and how much income the debtor has lost as the result of what AG-Seeds has been doing.

"Importantly, the motion also does not reveal why it has taken over one year for the debtor to make such serious allegations against AG-Seeds. It begs the question of why the debtor did not file a motion for violation of the automatic stay or why the debtor did not open a debtor-in-possession bank account if he was worried about AG-Seeds enforcing its judgment against the debtor's account.

"The court notes that the debtor filed an adversary proceeding against AG-Seeds for violation of the automatic stay on January 9, 2013, nine months after the

only plan confirmation hearing in this case on April 5, 2012. See Adv. Proc. 13-2011.

"This motion states in a conclusory fashion only that the debtor lost income due to the misconduct of AG-Seeds, which prevented the debtor from preparing and filing a plan. This does not explain the passage of nearly 11 months without a plan.

"And, even though Mr. Cooper was retained recently, the debtor has had the benefit of other counsel, Peter Cianchetta, who filed the case and filed and prosecuted the confirmation of the debtor's only chapter 12 plan."

Docket 145.

On February 26, 2013, one day after entry of the order dismissing Case No. 11-44699, the debtor filed the instant case. Once again, it was a skeletal filing. The debtor's schedules and statements were not filed until March 12, 2013. And, the debtor did not file a plan until May 28, 2013, 91 days after the order for relief. See 11 U.S.C. § 1221. The court denied confirmation of that plan on July 8, noting several serious issues with the plan. The court ordered the debtor to file another plan no later than July 22 and obtain confirmation of that plan within 45 days of filing. The debtor filed a first amended plan on July 22, setting it for a confirmation hearing on September 3.

The totality of the foregoing amounts to cause under 11 U.S.C. § 349(a). The debtor has been manipulating the Bankruptcy Code by filing consecutive petitions to evade the collection of a non-dischargeable debt.

The movant filed a breach of contract lawsuit against the debtor in state court on December 22, 2008 and obtained a judgment against the debtor on July 8, 2010 for $96,988.20. In the debtor's chapter 13, Case No. 10-45958, the movant obtained a non-dischargeability judgment against the debtor on August 8, 2011. In the subsequent chapter 12 case, Case No. 11-44699, the movant obtained on May 3, 2012 another non-dischargeability judgment against the debtor.

This is the debtor's third reorganization bankruptcy case in less than three years and the debtor has not obtained a single plan confirmation. Also, the debtor's schedules, statements and reorganization plans reflect continuous delay that is prejudicial to creditors. All three petition filings were initially skeletal and plans were filed always on the last possible day or late. This case has been pending for over five months now and the debtor is nowhere near plan confirmation, in spite of spending more than two years prior to this case in reorganization cases.

More, the debtor has come forward with no admissible evidence to explain the serial filings and dismissals and the protracted setting of plan confirmation hearings. The opposition says nothing about a change of circumstances between filings. The opposition has no evidence with it. It simply urges the court to continue the hearing on this motion to September 3 so it can be heard with the first amended plan confirmation motion. The court is unwilling to do this in light of the totality of circumstances described in this ruling.

In addition, when the court denied confirmation of the debtor's original plan in this case on July 8, it concluded that "the court is not persuaded that the debtor is proposing the plan in good faith. See 11 U.S.C. § 1225(a)(3). Ag-Seeds has produced evidence that 'Debtor categorically failed and refused to provide any information regarding land that he was leasing for farming operations, the parties from whom he was obtaining equipment and supplies, his source of financing, the parties to whom he was going to be selling his crops, and parties with whom he was going to be sharing crop proceeds.' Docket 53 paragraph 5." Docket 65.

There is no evidence from the debtor that he has responded to the movant's requests for "information regarding land that he was leasing for farming operations, the parties from whom he was obtaining equipment and supplies, his source of financing, the parties to whom he was going to be selling his crops, and parties with whom he was going to be sharing crop proceeds." The information is crucial in this case for assessment of the proposed chapter 12 plan's feasibility because, according to his schedules and statements, the debtor owns no real property, has no executory contracts or unexpired leases, and has generated only $34,000 and $20,000 in business income in 2012 and 2011, respectively. Schedules A & G; SFA at 1.

The court determines also that the creditors have been prejudiced by the debtor's nearly three-year delay in obtaining plan confirmation.

Given the totality of the circumstances, the court concludes that the debtor's conduct in the filing and prosecution of this and the other two prior bankruptcy cases amounts to bad faith that is cause for the dismissal of this case with prejudice under 11 U.S.C. § 349(a). The case will be dismissed with prejudice to the debtor filing, or causing to be filed, any subsequent petition for relief under chapters 11, 12 or 13 of title 11 of the United States Code, in the United States Bankruptcy Court for the Eastern District of California, for a period of two (2) years after entry of the order on this motion. The motion will be granted in part.

19. 13-28493-A-12 BUCKHORN RANCH, LLC — MOTION TO CONFIRM PLAN
WW-5 — 8-2-13 [40]

Tentative Ruling: The motion will be denied.

The debtor is seeking confirmation of its chapter 12 plan, filed on August 2, 2013.

Tom Gifford and Tri-Counties Bank, creditors secured by a ranch property, object to confirmation. Mr. Gifford holds a first priority claim secured by the property in the amount of approximately $280,000 as of the petition date and the bank holds three loans secured by the three subsequent-in-priority deeds of trust against the property, totaling approximately $2.8 million. The issues raised by the oppositions include:

- the debtor's ranch property was transferred from the debtor's two members, Charles and Tracy Boggs, to the debtor pre-petition in August 2010 and on the eve of a $2.5 million judgment against the Boggs by a creditor named Ben Eastman;

- the debtor transferred the ranch property back to the Boggs shortly before the June 25, 2013 filing of this petition, on June 18, 2013 (Docket 73, Ex. 8 at 5, 39);

- whether the debtor is eligible for chapter 12 relief, given the abstracts of judgment recorded in Lassen County against the Boggs;

- whether the plan properly provides for the claims of Mr. Gifford and Tri-Counties Bank, including the amortization term (30 years for all four claims), amount ($270,547 for Mr. Gifford's claim and $1,754,622, $632,085, $372,279 for the bank's claims) and interest (3% for Mr. Gifford's claim and 3.25%, 3.50%, 3.75% for the claims held by the bank) of the claims;

- whether the plan is feasible, given the debtor's past three-year history of consistently posting losses;

- whether the plan is proposed in good faith.

Preliminarily, the court rejects the debtor's contention that the plan confirmation objection by Mr. Gifford should not be considered as it was late. The court exercises its discretion to consider Mr. Gifford's objection, given that the debtor did not submit its brief in support of plan confirmation until September 23, 2013. That brief should have been submitted with the one-page motion for plan confirmation filed on August 2. The late submission of the brief by the debtor necessitated a much more extensive and time-consuming review of the evidence in support of plan confirmation by the creditors in assessing the terms of the plan and the debtor's compliance with 11 U.S.C. § 1225.

The motion will be denied and the court will not hold an evidentiary hearing on plan confirmation as no one has complied with the requirements of Local Bankruptcy Rule 9014-1(f)(1)(B) and ©, requiring the party seeking an evidentiary hearing to submit a separate statement of disputed material factual issues. Here, the debtor has asked for an evidentiary hearing but has not submitted such a statement with its reply.

Confirmation will be denied.

First, the court is unconvinced that the debtor is eligible for chapter 12 relief.

11 U.S.C. § 109(f) provides: "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title." 11 U.S.C. § 101(18) further provides that "The term 'family farmer' means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,031,575 [effective April 1, 2013 per 11 U.S.C. § 104] and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(I) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding;

the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(I) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $3,237,000 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such

partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded."

While the debtor lists only $3,812,010 in aggregate debt in its schedules, the debtor ignores judgment liens attaching to the ranch property purportedly owned by the debtor, totaling an additional approximately $3.492 million. Those judgment liens are based on the claims against the Boggs in their individual capacity. The debtor cannot simply ignore the involuntary debt secured by the ranch property. See Cal. Civ. Proc. Code § 697.340(a) (providing that abstracts of judgment attach as liens on all interests in real property). Just because the Boggs transferred the ranch property to the debtor in 2010 does not mean that their remaining equitable interest in the property was not encumbered by the judgment liens recorded against them post-transfer. Notably, the property has been transferred back to the Boggs now. Assuming the debtor owns the property, the total debt of the debtor, including the total debt secured by the real property, is in excess of $7 million, well above the $4,031,575 limit of 11 U.S.C. § 101(18)(A).

Second, the debtor has not established the feasibility of the proposed chapter 12 plan. The debtor had admittedly lost $319,995, $370,591 and $285,244 in 2010, 2011 and 2012 respectively. Docket 56 ¶ 6. There is insufficient evidence that the debtor will be able to reverse such heavy losses and meet the projected $53,922 of net income by December 2013, $358,706 of net income by December 2014, and $590,205 by July 2015.

The debtor's own statement of financial affairs, item 1, says that the debtor's gross income from January until June 2013 is merely $67,367, when for the entire 2012 its gross income was $571,729. With such figures entering into the bankruptcy case, with such history of heavy losses for the past three years, and with the declarations of Mr. Gifford and Dr. Marcum painting a far more bleak financial picture for the operation of the ranch property, the court is not persuaded that the plan is feasible and that the debtor will be able to meet its financial projections. Dockets 70 & 77.

Third, the court will not confirm a plan that administers debt not incurred by the debtor and that is funded by the debtor's operation of a real property not owned by the debtor. The Boggs transferred the property to the debtor in 2010 on the eve of a judgment that was about to be entered against the Boggs. Prior to that transfer, there is no evidence that the property was ever owned by the debtor. The reason for the 2010 transfer was for the Boggs to evade the entry of a judgment and the recordation of a judgment lien against the property.

This case was filed on June 25, 2013 and only seven days earlier, on June 18, the debtor transferred the property back to the Boggs. Docket 73, Ex. 8 at 5, 39. Whether or not the bank is estopped from asserting that the June 18, quitclaim deed transferring the property from the debtor to the Boggs affects the debtor's interest in the property, there is such a deed in the record, signed by Mr. Boggs in his capacity as manager of the debtor. Docket 73, Ex. 8 at 39.

Based on these transfers, the court concludes that the ranch property is not owned by the debtor. It is owned by the Boggs personally. The court rejects the debtor's assertion that the transfer to Boggs was without the "present intent to transfer title to Boggs" and that it "only intended for the deed to become effective if the Bank agreed that it was sufficient to cure the default and avoid foreclosure." Docket 98 at 7. The deed does not contain such a condition of the transfer to Boggs.

The court cannot infer the absence of present intent to transfer the property to Boggs from the fact that the deed was not recorded. The fact that the deed

was not recorded is not relevant, except as to the priority of interest in the property by other transferees.

More, the transfer of the property back to the Boggs is supported by the June 18, 2013 state court complaint which alleges that "[o]n June 18, 2013, [the Boggs] cured the underlying default by transferring title to the ranch from [the debtor] back to themselves. A true and correct copy of the deed transferring title from [the debtor] back to [the Boggs] is filed herewith as Exhibit 4 and expressly incorporated by reference as if set forth fully herein. As a result of the foregoing transfer, [the Boggs] have undone the transfer of title upon which the Notice of Default and Notice of Sale are based." Docket 73, Ex. 8 at 5-6. Given this, the court cannot infer that there was no intent to transfer the property to the Boggs. Mr. Boggs who executed the deed for the debtor had the intent to transfer the property to himself and Mrs. Boggs and that transfer took place. This leads the court to the next reason for denying confirmation.

Fourth, plan confirmation will be denied because the plan was filed in bad faith.

In deciding whether bad faith exists, courts consider the totality of the circumstances. Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994). The totality of the circumstances test was upheld also by Morimoto v. United States (In re Morimoto), 171 B.R. 85, 86 (B.A.P. 9th Cir. 1994) and In re Love, 957 F.2d 1350, 1355 (7th Cir. 1992). The totality of the circumstances test includes factors such as misrepresented facts in the bankruptcy petition, unfair manipulation of the Bankruptcy Code, preemption of the chapter 7 trustee's administration of the case, proposal of a chapter 13 plan in an inequitable manner, failure to file tax returns, or otherwise inequitable circumstances surrounding the petition filing and egregious behavior. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999); In re Barnes, 275 B.R. 889, 894-95 (Bankr. E.D. Cal. 2002); Morimoto, at 86 (dismissing the bankruptcy case only after the debtor had proposed a chapter 13 plan, the IRS had objected to confirmation of the debtor's plan, and the debtor had objected to IRS' proof of claim).

A finding of bad faith, however, does not require fraudulent intent, malice, ill will or an affirmative attempt to violate the law. In re Leavitt, 171 F.3d at 1224 (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)); see also Cabral v. Shabman (In re Cabral), 285 B.R. 563, 573 (B.A.P. 1st Cir. 2002).

The relationship between the debtor and its members, the Boggs, establishes that this plan is being proposed in bad faith. In short, the Boggs have been disregarding the separate and distinct corporate entity status of the debtor, at the detriment of the debtor's creditors and their creditors. This pattern continues post-petition and during the plan confirmation process.

By transferring the ranch property from the Boggs to the debtor back in August 2010, on the eve of the entry of a judgment against the Boggs, by transferring the property back to the Boggs just seven days pre-petition, by allowing judgment liens based on debt owed personally by the Boggs to attach against the property, and by reimbursing themselves from the debtor for their use of personal credit cards - whether or not all or part of the credit card debt belongs to the debtor - the court concludes that the Boggs have been using the debtor as a shell entity to transfer debt and prosecute a bankruptcy case with debt incurred personally by the Boggs.

The three loans given by the bank were not given to the debtor. They were given to the Boggs personally, at a time when they owned the ranch property without question, in 2007 and 2009. That is how the bank acquired collateral

interest in the property for its loans. There is no evidence that the ranch property was ever owned by the debtor prior to August 2010, when it was transferred to the debtor. The ranch property was actually purchased by the Boggs from Mr. Gifford in May 2006. The claim held by Mr. Gifford was also incurred by the Boggs personally. It was not incurred by the debtor.

Given the foregoing, the court concludes that this plan is proposed in bad faith, as it is attempting to administer claims not incurred by the debtor and secured by property not owned by the debtor. The court finds it unnecessary to address the remaining issues raised by the objections. The motion will be denied.

20. 11-44699-A-12 STEVEN SAMRA — STATUS CONFERENCE
13-2011 — 1-9-13 [1]
SAMRA V. AG-SEEDS UNLIMITED ET AL

Tentative Ruling: None.

21. 11-44699-A-12 STEVEN SAMRA — COUNTER MOTION FOR
13-2011 MAS-1 — SUMMARY JUDGMENT
SAMRA V. AG-SEEDS UNLIMITED ET AL — 7-10-13 [39]

Tentative Ruling: The motion will be granted in part and denied in part.

The defendants, Ag-Seeds Unlimited and Mark Serlin, move for summary judgment on the claim for violation of the automatic stay by plaintiff Steven Samra, the debtor in the now dismissed underlying chapter 12 bankruptcy case. The claims are based on 11 U.S.C. § 362(a)(1) and (2). Although not specifically stated, the complaint invokes 11 U.S.C. § 362(k)(1).

The court notes that the opposition to this counter-motion does not contain a response to the movants' statement of undisputed facts, in violation of Local Bankruptcy Rule 7056-1(b), which mandates that "[a]ny party opposing a motion for summary judgment or partial judgment shall reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon in support of that denial." Given this, the court will consider only the movants' statement of undisputed in adjudicating this motion.

Summary judgement is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©. The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

11 U.S.C. § 362(a)(1) and (2) provide: "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title."

Actions taken in violation of the automatic stay are void. Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), Inc., 754 F.2d 811, 816 (9th Cir. 1985); O'Donnell v. Vencor Inc., 466 F.3d 1104, 1110 (9th Cir. 2006).

A creditor who has violated the automatic stay is required to reverse any collection efforts that, even though were started pre-petition, resulted in a post-petition collection. The stay requires the creditor to direct a levying officer to return or reverse post-petition collections, such as bank account or wage levy. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

11 U.S.C. § 362(k)(1) provides that an individual injured by willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." A violation of the stay is willful when the creditor knows of the automatic stay and intentionally performs the action violating the stay. Neither good faith belief that the creditor had a right to the property, nor good faith reliance on the advice of counsel are relevant. Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 482-83 (9th Cir. 1989); Sciarrino v. Mendoza, 201 B.R. 541, 547 (E.D. Cal. 1996).

In determining whether and to what extent to award punitive damages, courts consider the nature of the violations, the amount of compensatory damages awarded, and the wealth of the party who has committed the violations. Prof'l Seminar Consultants, Inc. v. Sino American Tech., 727 F.2d 1470, 1473 (9th Cir. 1984). Punitive damage awards may not be grossly excessive or arbitrary. BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996) (a single-digit ratio between punitive and compensatory damages will satisfy due process); see also State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

A judgment of non-dischargeability allows the judgment creditor to collect against property of the debtor without first seeking relief from stay, as long as the property is not property of the debtor's bankruptcy estate. Watson v. City Nat'l Bank (In re Watson), 78 B.R. 232, 235 (B.A.P. 9th Cir. 1987).

Preliminarily, the court has found no evidence in the record before it that Mr. Serlin acted as an individual, on his own behalf in any of the purported misconduct violating the stay. As outlined below, all actions taken by Mr. Serlin in relation to the plaintiff were taken on behalf of Ag.

The facts giving rise to the instant disputes are as follows. The defendant Ag filed a breach of contract lawsuit against the plaintiff in state court on December 22, 2008. The defendant Mark Serlin represents Ag. Ag obtained a judgment against the plaintiff on July 8, 2010 for $96,988.20. On September 29, 2010, the plaintiff filed a chapter 13 bankruptcy case, Case No. 10-45958. Ag filed a non-dischargeability complaint against the plaintiff on December 20, 2010 and obtained a non-dischargeability judgment against him on August 8, 2011. The bankruptcy court dismissed the plaintiff's chapter 13 case on August 26, 2011. The plaintiff filed another bankruptcy case, a chapter 12, on

October 17, 2011, Case No. 11-44699. Ag filed another non-dischargeability complaint against the plaintiff in that case on January 9, 2012. Another non-dischargeability judgment was entered against the plaintiff on May 3, 2012.

The plaintiff filed this adversary proceeding on January 9, 2013. The purported stay violations enumerated in the complaint, fall into three categories. Although the complaint keeps referring to Mr. Serlin in his individual capacity, the court sees no evidence in the record that he acted in his individual capacity or on behalf of himself. All of Mr. Serlin's actions, as described below, were taken on behalf of Ag.

First, Ag obtained two writs of execution against the plaintiff, one on May 9, 2012 and another on May 22, 2012. Complaint, Exs. A & B.

Second, Ag obtained a notice of levy under writ of execution on a money judgment on September 14, 2012. The property to be levied upon included "Money/items in any and all deposit accounts and safe deposit boxes of Judgment Debtor Steven S. Samra, individually or with others, at Bank of America located at 5001 Laguna Blvd., Elk Grove, CA 95758, pursuant to Code of Civil Procedure §§700.140 and 700.150." The total debt owed to Ag at that time was identified as $138,250.38, with daily interest accruing at $34.49. Complaint, Ex. C.

On information and belief, the plaintiff contends in the complaint that Ag levied (1) the contents of a safety deposit box, including "a gold chain, letters and other sentimental items" and (2) the balances in two of the plaintiff's bank accounts, "collecting at least [$200] from such accounts and causing such accounts to be overdrawn."

Third, on October 22, 2012 Ag filed in the state court action an application and order for appearance and examination of the plaintiff's aunt, Norma Samra. Her examination was set for December 17, 2012. The application specified that "JUDGMENT DEBTOR STEVEN SAMRA HAS CLAIMED THAT HE IS WORKING FOR NKS FARMS, INC. THEREFORE, JUDGMENT CREDITORS BELIEVES HE IS RECEIVING WAGES, COMMISSIONS, OR OTHER RENUMERATION FROM NKS FARMS, INC. AND IS OWED AN AMOUNT IN EXCESS OF $500.00." Complaint, Ex. D.

On or about December 11, 2012, the plaintiff's counsel asked Ag to stop the prosecution of the state court action unless and until Ag obtains relief from the automatic stay in the bankruptcy case. Ag responded that it did not believe that examining a third-party like Ms. Samra violated the stay, but agreed to continue the examination of Ms. Samra. Complaint, Exs. E & F. At the December 17, 2012 state court hearing on the examination of Ms. Samra, that court noted that she did not appear and issued a bench warrant for her arrest, stayed until February 13, 2013. Complaint, Exs. G & H.

Based on the foregoing three categories of purported stay violations, the plaintiff is seeking at least $3.5 million in damages from the movant defendants, including lost profits, emotional distress damages, and punitive damages, and he is seeking attorney's fees and costs for enforcement of the automatic stay.

The underlying chapter 12 case, Case No. 11-44699, was dismissed on February 25, 2013 under 11 U.S.C. § 1208(c)(1) because of unreasonable delay by the debtor that is prejudicial to creditors.

The plaintiff filed another chapter 12 bankruptcy case on February 26, 2013.

As mentioned above, the claim against Mr. Serlin will be dismissed as there is no evidence that he acted as an individual, on his own behalf. All actions taken by Mr. Serlin in relation to the plaintiff were taken on behalf of Ag.

With respect to the claim against Ag, there are genuine issues of material fact as to whether Ag's enforcement of the non-dischargeable state court judgment against the plaintiff was directed at property that was not property of the estate. The evidence from Ag on this point is a self-serving declaration from Mr. Serlin, stating: "Based on the non-dischargeability judgments, my client made efforts to levy on assets which I believed were not property of any bankruptcy estate." Docket 44 ¶ 3. The standard is not what Mr. Serlin believed but what was the actual scope of the enforcement of the judgment.

The underlying bankruptcy case was a chapter 12 proceeding. In chapter 12, property of the estate is defined under 11 U.S.C. § 1207(a), which provides: "Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first."

11 U.S.C. § 541(a) adds: "The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510 © or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

© as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case."

These provisions establish a broad definition of what is property of a chapter 12 bankruptcy estate. For instance, the plaintiff's interest as a chapter 12 debtor in funds located in a bank account, acquired both pre-petition and post-petition, is property of the estate. Yet, Ag sought to enforce its non-dischargeable state court judgment against the plaintiff as to "Money/items in any and all deposit accounts and safe deposit boxes of Judgment Debtor Steven S. Samra . . . at Bank of America." Complaint, Ex. C.

The motion does not explain how a levy on "money/items in any and all deposit accounts and safe deposit boxes" is calculated to enforce the judgment solely against non-estate property of the plaintiff. As the definition of property as to which Ag was attempting to collect makes no effort to exclude in any way the recovery of money/items belonging to the plaintiff's bankruptcy estate, Ag's collection efforts may be interpreted as targeting property of the estate. Based on the above description of the property subject to the levy, the trier of fact could reasonably conclude that Ag was enforcing its judgment as to estate property. Ag has not met its burden of persuasion in demonstrating that no issues of material fact exist.

The scope of enforcement of the judgment is also relevant to whether the violation was willful. As noted above, a violation of the stay is willful when the creditor knows of the automatic stay and intentionally performs the action violating the stay. And, neither good faith belief that the creditor had a right to the property, nor good faith reliance on the advice of counsel are relevant. Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 482-83 (9th Cir. 1989); Sciarrino v. Mendoza, 201 B.R. 541, 547 (E.D. Cal. 1996).

While Ag contends that it believed that it was "free to pursue non-estate assets of Plaintiff," the scope of collection appears to have included estate assets.

Finally, the fact that Ag may not have collected anything from the plaintiff is not dispositive of the claim, as the claim is seeking emotional distress and attorney's fees and costs damages. The attorney's fees and costs are for the plaintiff's efforts to stop the stay violations. See Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010) (limiting the award of attorney's fees and costs pursuant to 11 U.S.C. § 363(k) to damages incurred for legal work necessary to remedy a violation of the stay). The motion will be denied as to the claim against Ag.

22. 13-30804-A-11 ELWYN/JEANNINE DUBEY STATUS CONFERENCE
8-16-13 [1]

Tentative Ruling: None.