

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

October 15, 2014 at 2:30 p.m.

1. [14-20708](#)-E-13 NOEL ORLANDO  
[14-2083](#)  
SNIDER LEASING CORP V. ORLANDO  
ADV. CASE DISMISSED 9/26/14

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
3-20-14 [[1](#)]

Final Ruling: No appearance at the October 15, 2014 Status Conference is required.

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Plaintiff's Atty: John A. Britton  
Defendant's Atty: unknown

The Plaintiff having voluntarily dismissed this Adversary Proceeding, the Status Conference is removed from the calendar.
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Adv. Filed: 3/20/14  
Answer: none

Nature of Action:  
Dischargeability - fraud as fiduciary, embezzlement, larceny  
Dischargeability - willful and malicious injury

Notes:

Plaintiff's Voluntary Dismissal filed 9/26/14 [Dckt 27]

October 15, 2014 at 2:30 p.m.

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2. [14-20708](#)-E-13 NOEL ORLANDO  
[14-2083](#)  
SNIDER LEASING CORP V. ORLANDO  
ADV. CASE DISMISSED 9/26/14

CONTINUED MOTION FOR ENTRY OF  
DEFAULT JUDGMENT  
8-21-14 [[18](#)]

Final Ruling: No appearance at the October 15, 2014 hearing is required.  
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**The Motion for Entry of Default is dismissed without prejudice.**

On September 26, 2014, Plaintiff filed a notice of voluntary dismissal of this Adversary Proceeding pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rule of Bankruptcy Procedure 7041. Dckt. 27. This Adversary Proceeding having been dismissed, this Motion for Entry of Default Judgment has been rendered Moot.

The court dismisses without prejudice the Motion for Entry of Default Judgment.

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

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

The Motion for Entry of Default Judgment  
filed by Snider Leasing Corporation, Plaintiff,  
having been presented to the court, the  
Adversary Proceeding having been voluntarily  
dismissed by Plaintiff, and upon review of the  
pleadings, evidence, arguments of counsel, and  
good cause appearing,

**IT IS ORDERED** that the Motion for Entry of  
Default Judgment is dismissed without prejudice.

3. [12-28312](#)-E-13 MARIANNE GULLINGSRUD  
[14-2214](#)  
GULLINGSRUD V. AURORA LOAN  
SERVICES, LLC ET AL

STATUS CONFERENCE RE: COMPLAINT  
7-23-14 [[1](#)]

**Final Ruling: No appearance at the October 15, 2014 Status Conference is required.**

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Plaintiff's Atty: Scott D. Shumaker  
Defendant's Atty: unknown

Adv. Filed: 7/23/14  
Answer: none

Nature of Action:  
Recovery of money/property - other

<b>The Status Conference is continued to 2:30 p.m. on January 15, 2015.</b>
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Notes:

Plaintiff's Status Conference Statement filed 10/6/14 [Dckt 7]

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

Plaintiff filed her Status Conference Statement on October 6, 2014. Dckt. 7. Plaintiff reports that her counsel was contacted by attorneys for Nationstar Mortgage, LLC, which is stated to be the successor in interest to loan and deed of trust which is the subject of the Complaint. As such, Plaintiff reports that she needs to now amend the Complaint, name the successor, and then proceed with discussions to determine if this matter can be resolved.

Plaintiff reports that settlement discussions have begun and the court recognizes both Nationstar Mortgage, LLC as a creditor who is appearing regularly in this court and its attorneys as counsel for creditors who regularly appear in this court.

Plaintiff's request for a continuance to allow preparation of an amended complaint and to engage in substantive settlement discussions.

The court continues the Status Conference to 2:30 p.m. on January 15, 2015. The First Amended Complaint shall be filed and served on or before October 31, 2014. The court grants more than the 30-day continuance requested by Plaintiff to afford the parties additional time, in light of the claims asserted in the Complaint, to conduct their substantive settlement discussions.

If either or both parties believe that an earlier Status Conference is necessary or would benefit the prosecution of this Adversary Proceeding, such may be requested by ex parte motion and the court will advance the Status Conference date.

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 Plaintiff's Status Conference Report having been reviewed by the court for the October 15, 2014 Status Conference, Plaintiff reporting her diligence in prosecution and identification of the successor in interest to the named defendants in the Complaint, Plaintiff requesting a continuance to allow for the filing of an Amended Complaint and to pursue substantive settlement negotiations with the successor to the named defendant, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Status Conference is continued to 2:30 p.m. on January 15, 2015. If any or all parties to this Adversary Proceeding believe that an earlier Status Conference is necessary or would benefit the prosecution of this Adversary Proceeding, such may be requested by *ex parte* motion and the court will advance the Status Conference date.

**IT IS FURTHER ORDERED** that Plaintiff shall file the First Amended Complaint and serve such amended complaint and an amended subpoena on or before October 31, 2014.

**IT IS FURTHER ORDERED** that discovery may commence in this Adversary Proceeding on December 1, 2014.

4. [10-26415](#)-E-13 IGNACIO/ANNA ADAM  
[14-2145](#)  
ADAM ET AL V. SUNTRUST  
MORTGAGE, INC.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
5-29-14 [[1](#)]

**Final Ruling:** No appearance at the October 15, 2014 Status Conference is required.

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Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: unknown

Adv. Filed: 5/29/14  
Reissued Summons: 10/2/14

Answer: none

Nature of Action:  
Validity, priority or extent of lien or other interest in property  
Declaratory judgment

<b>The Status Conference is continued to 2:30 p.m. on December 3, 2014.</b>
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Notes:

Continued from 9/10/14

Summons reissued 10/2/14 [Dckt 12]

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

Plaintiff reports that the Summons was reissued in this Adversary Proceeding on October 6, 2014 (the original summons having been issued on May 29, 2014) and the Complaint and reissued Summons served on October 6, 2014.

A review of the Certificate of Service for the Complaint and reissued Summons appears to document service as required by Federal Rule of Bankruptcy Procedure 7004.

Plaintiff requests that the Status Conference be continued until after November 7, 2014, so that Plaintiff may proceed with the entry of a default or have an answer or other responsive pleading to address.

#### **SEPTEMBER 10, 2014 STATUS CONFERENCE**

Plaintiff states in the Status Conference Statement that no response to the summons and complaint has been filed, and that the Adversary Proceeding is ripe for entry of a default judgment. Plaintiff has not requested entry of the Defendants default.

In reviewing the Certificate of Service, Dckt. 6, the court notes that Defendant Suntrust Mortgage, Inc. was served by First Class United States mail as follows:

SUNTRUST MORTGAGE, INC.  
Officer, managing or general agent,  
or person authorized to receive service of process  
BANKRUPTCY DEPARTMENT, RVW 3034  
PO BOX 27767  
RICHMOND, VA 23261

This attempted service as required by Federal Rule of Bankruptcy Procedure 7004(b)(3) is problematic for several reasons. First, service upon a post office box is deficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) (Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.).

Second, the California Secretary of State (<http://kepler.sos.ca.gov>) lists Suntrust Mortgage, Inc. as having an address of 1001 Semmes Avenue, VA-RVW-6045, Richmond, VA 23224. Further, the Secretary of State lists the corporations agent for service of process as Corporation Service Company Which Will Do Business In California As CSC-Lawyers Incorporating Service, 2710 Gateway Oaks Dr STE 150, Sacramento, California. The Corporation was not served at the Richmond Address and the registered Agent for Service of Process was not served. This Adversary Proceeding is not ripe for entry of a default judgment.

5. [12-36419-E-11](#) KFP-LODI, LLC

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
9-10-12 [[1](#)]

Debtor's Atty: Scott A. CoBen

No Tentative:
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Notes:

Continued from 5/28/14

Operating Reports filed: 8/27/14, 9/3/14

[SAC-12] Order granting motion for compensation filed 7/10/14 [Dckt 427]

Adversary filed 10/2/14 [Adv. Pro. No. 14-2284; *KFP-Lodi, LLC v. Terracotta Realty Fund, LLC*]

**Order for Injunctive Relief Pursuant to Stipulation in Adversary Proceeding 14-2284. Dckt. 14.**

6. [13-23119-E-13](#) CYNTHIA MCDONALD  
[14-2210](#)

STATUS CONFERENCE RE: COMPLAINT  
7-21-14 [[1](#)]

MCDONALD V. JPMORGAN CHASE  
BANK, N.A. ET AL

Plaintiff's Atty: Peter L. Cianchetta  
Defendant's Atty: Amy M. Spicer

Adv. Filed: 7/21/14  
Answer: none

Nature of Action:  
Recovery of money/property - other  
Other (e.g. other actions that would have been brought in state court if  
unrelated to bankruptcy case)

<b>No Tentative Ruling:</b>
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Notes:

Stipulation to Extension of Time to Respond to Plaintiff's Adversary Complaint  
filed 8/22/14 [Dckt 7]; no order submitted

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

Plaintiff states that the parties have stipulated to allow Defendant until  
September 30, 2014 to file a response to the Complaint. This was granted in  
light of the Parties engaging in settlement negotiations. The Plaintiff  
requests that the court continue the Status Conference for a sufficient amount  
of time for the Parties to conclude the settlement discussions.

As of the court's October 12, 2014 review of the Docket (twelve days  
after the deadline stipulated to for a response to the Complaint) no answer or  
responsive pleading has been filed. No motion for further extension of time  
to respond to the Complaint has been filed. Defendant has not appeared in this  
Adversary Proceeding.

The Complaint was filed on July 21, 2014. The October 15, 2014 Status  
Conference is eight-six (86) days after the Complaint was filed. The  
Complaint, with exhibits, is fifty-two (52) pages. The Complaint itself is  
thirteen (13) pages long. The Complaint states the following Causes of Action:

- I. First Cause of Action Objection to the JPMorgan Chase Bank Proof of  
Claim.
  - A. The substance of this Objection is that Proof of Claim No. 2  
filed by JPMorgan Chase Bank, N.A. misstates the claim because

it lists the following information,

1. Principal Balance.....\$187,774.58
2. Arrearage.....\$ 22,403.04
3. Which Amounts Total.....\$210,177.62.

- B. However, JPMorgan Chase Bank, N.A. has filed the claim for the lesser amount of \$204,873.32, which is \$5,300.00 than the total of the principal amount and arrearage.
- C. The amount of the Proof of Claim and the total of the Principal Balance and Arrearage cannot be reconciled.
- D. This difference which "cannot be reconciled" is sufficient to disallow the Proof of Claim.

II. Second Cause of Action for Violation of California Rosenthal Act.

- A. It is asserted that Plaintiff misapplied non-specific payments made by Plaintiff in 2012 and 2013, and that by misapplying the payments Defendant violated the Rosenthal Act.
- B. It is asserted that the Proof of Claim filed is a "misrepresentation of the debt," and such misrepresented Proof of Claim is a violation of the Rosenthal Act.

III. Third Cause of Action for Negligence.

- A. It is alleged that JPMorgan Chase Bank, N.A. had a duty to file a Proof of Claim in Plaintiff's bankruptcy case which "has some semblance of accuracy."
- B. JPMorgan Chase Bank, N.A. violated the duty to file such proof of claim when it filed Proof of Claim No. 2 in Plaintiff's bankruptcy case.

IV. Fourth Cause of Action for Fraud and Intentional Misrepresentation (Cal. Civ. §§ 1572, 1709, and 1710)

- A. It is alleged that when JPMorgan Chase Bank, N.A. filed Proof of Claim No. 2 it knew that the information therein was false. It is alleged that the Bank misapplied payments made by Plaintiff.

V. Fifth Cause of Action for Violation of Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601 et seq.).

- A. JPMorgan Chase Bank, N.A. misapplied nonspecified payments made by Plaintiff for the loan upon which Proof of Claim No. 2 is based.

VI. Sixth Cause of Action for Breach of Contract

- A. It is alleged that JPMorgan Chase Bank, N.A. has breached the



terms of the contract (promissory note) with Plaintiff. The breach of contract arises from misapplying nonspecified payments made by Plaintiff.

VII. Seventh Cause of Action for Conversion.

- A. It is alleged that JPMorgan Chase Bank, N.A. misapplying nonspecified payments made by Debtors to the Bank on the loan constitutes a conversion of said monies.

VIII. Eight Cause of Actions for Attorneys' Fees.

- A. Pursuant to a nonspecified term of the Note and Deed of Trust and the California Civil Code, Plaintiff is entitled to attorneys' fees.

Recently the court addressed an adversary proceeding in which the Plaintiff-Debtor was represented by counsel for Plaintiff in this case and Nationstar Mortgage, LLC, in which similar claims were asserted. Adv. Pro. 14-2187. In considering a motion to dismiss the first amended complaint in that case, the court reviewed the contention that because the amount of the secured claim stated on the proof of claim form was less than the amount of the principal balance and arrearage. In that Adversary Proceeding the court noted that merely adding the principal balance to the arrearage (which includes the missed monthly payments) would not necessarily accurately state the amount of the claim. This is because the missed monthly payments each contain a small principal payments. Attempting to add the principal balance and the arrearage, as done by Plaintiff, would necessarily overstate the amount of the claim (double counting a portion of the principal).

Proof of Claim No. 2 filed by JPMorgan Chase Bank, N.A. is attached as Exhibit 2 to the Complaint. The amount of the claim is stated to be \$204,873.32. Included as Proof of Claim No. 2 is the Mortgage Proof of Claim Attachment [Form 10(Attachment A)]. The information on Attachment is,

A.	Principal.....	\$187,774.58
B.	Interest Due as of Commencement.....	\$ 15,356.30
C.	Pre-petition Fees and Expenses.....	<u>\$ 2,707.17</u>
D.	Total Claim Computed From Part 1 and Part 2 of Attachment.....	\$205,838.05

Though less than Plaintiff's Principal + Arrearage Calculation, it is still higher than the \$204,403.04 amount stated by JPMorgan Chase Bank, N.A. on the Proof of Claim (Section 4).

From a review of the Proof of Claim attachment the court cannot readily identify the \$1,435.01 overstated amount.

7. [11-21422-E-13](#) SHMAVON MNATSAKANYAN AND CONTINUED STATUS CONFERENCE RE:  
[13-2300](#) YERMONIYA ARTUSHYAN COMPLAINT  
MNATSAKANYAN ET AL V. BAC HOME 9-25-13 [[1](#)]  
LOANS SERVICING, LP ET AL

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty:  
Bernard J. Kornberg [Green Tree Servicing, LLC]  
Stella Y. Kim [BAC Home Loans Servicing, LP]

Adv. Filed: 9/25/13  
Answer: none

Nature of Action:  
Declaratory judgment

<b>No Tentative Ruling:</b>
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Notes:

Continued from 7/9/14 to allow the Parties to have the loan modification recorded and the adversary proceeding dismissed.

Plaintiffs' Fifth Status Conference Statement filed 10/6/14 [Dckt 49]

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

Plaintiffs report in their Fifth Status Conference Statement that there is a settlement with all parties pending, which is based on the "recording of a loan modification." Dckt. 49. Plaintiffs request that the Status Conference be further continued an additional sixty days.

In their Fourth Status Conference Statement for the July 9, 2014 Continued Status Conference Plaintiffs reported,

"The Parties have agreed to a complete settlement of the instant adversary proceeding through the granting of a permanent loan modification. Said loan modification agreement has been fully executed, was granted Court approval on April 27, 2014, and is presently being prepared for recording at the County Records Office. Once that is completed, the parties are prepared to dismiss this adversary case."

Dckt. 46. Plaintiffs requested a sixty-day continuance so the settlement could be completed.

In their Third Status Conference Statement for the May 28, 2014 Continued Status Conference Plaintiffs Reported,

"Plaintiffs have conferred with BAC and Green Tree, (hereinafter collectively referred to as the "Parties") and have agreed to a settlement of the issues within the instant adversary proceeding through the granting of a permanent loan modification. The parties have executed said loan modification agreement and Court approval of this loan modification was granted in the Motion to Approve Loan

Modification, DCN: PGM-5, on April 27, 2014, Docket No. 152."

Dckt. 43. Plaintiffs requested a sixty-day continuance of the Status Conference to complete the settlement.

In their Second Status Conference Statement for the March 19, 2014 Continued Status Conference Plaintiffs Reported,

"Plaintiffs have conferred with BAC and Green Tree, (hereinafter collectively referred to as the "Parties") and have agreed to a settlement of the issues within the instant adversary proceeding involving the granting of a permanent loan modification. Said permanent loan modification has been approved by the Parties and is awaiting Court approval through the Motion to Approve Loan Modification, docket control no. PGM-5, which is set for a continued hearing on March 25, 2014 at 3:00 p.m. Resolution is expected in this case."

Dckt. 37. Plaintiff requests a sixty day continuance of the Continued Status Conference to allow the parties to obtain court approval of the loan modification so that the Adversary Proceeding could be settled.

While the court believes that the judicial process should not trample parties reaching good faith settlement in which the various competing interests and reconciled merely for "court case management purposes," these parties have been given 287 days from the original March 19, 2014 Continued Status Conference when the court was advised that "sixty-days" were needed to conclude the settlement.

The parties identified for the court the following problems with the "recording of the loan modification" which will be resolved during the requested continuance:

- A.
- B.
- C.
- D.

8. [14-29231](#)-E-11 MIZU JAPANESE SEAFOOD  
BUFFET, INC.

STATUS CONFERENCE RE: VOLUNTARY  
PETITION  
9-15-14 [[1](#)]

Final Ruling: No appearance at the October 15, 2014 Status Conference is  
required.

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Debtor's Atty: Stephen M. Reynolds

The Status Conference is continued to 10:30 a.m. on October 23, 2014, to be conducted in conjunction with a Motion to Sell Assets.
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Notes:

Statement Regarding Authority to Sign and File Petition filed 9/15/14 [Dckt 5]

[RLC-1] Ex Parte Motion for Protective Order filed 9/17/14 [Dckt 12]; Order  
Restricting Public Access filed 9/18/14 [Dckt 17]

[RLC-3] Ex Parte Application for Order Shortening Time for Hearing on Motion  
to Approve Sale filed 9/26/14 [Dckt 22]; Order granting filed 10/3/14 [Dckt 34]

[RLC-4] Motion for Sale of Assets filed 9/30/14 [Dckt 28], set for hearing  
10/23/14 at 10:30 a.m.

#### OCTOBER 15, 2014 STATUS CONFERENCE

In light of the proposed sale of assets and the Debtor in Possession failing  
to file a Status Conference Report, the court continues the Status Conference.

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 Status Conference in this Chapter 11 case  
was scheduled for October 15, 2014. As of the  
court's October 12, 2014 review of the Docket,  
no Status Conference Report was filed by the  
Debtor in Possession. The court's Scheduling  
Order in this case requires Debtor in Possession  
of file and serve the Status Report on or before  
October 3, 2014. The Debtor in Possession has  
filed a motion to sell assets which is set for  
hearing at 10:30 a.m. on October 23, 2014. Upon  
review of the files in this case, the pending  
motion to sell assets, the failure of Debtor in  
Possession to file a Chapter 11 Status  
Conference Report, and good cause appearing,

October 15, 2014 at 2:30 p.m.

- Page 12 of 49 -

**IT IS ORDERED** that the Status Conference is continued to 10:30 a.m. on October 23, 2014.

**IT IS FURTHER ORDERED** that the Debtor in Possession shall file and serve on the U.S. Trustee, all creditors with secured claims, the creditors holding the twenty largest unsecured claims, and any person requesting notice in this Case the Chapter 11 Status Report on or before October 11, 2014. The court's Scheduling Order, Dckt. 7, remains in full force and effect.

9. [10-53637](#)-E-13 G./KATHLEEN ULBERG  
[11-2122](#)  
ULBERG, JR. ET AL V. BANK OF  
AMERICA, N.A. ET AL

CONTINUED STATUS CONFERENCE RE:  
AMENDED COMPLAINT  
3-15-11 [[11](#)]

Plaintiffs' Atty: John G. Downing

Defendants' Atty:

Adam N. Barasch [Bank of America, N.A.]

Scott A. CoBen [Pacific Crest Partners, Inc.; John Mudgett]

unknown [Recontrust Company, N.A.]

Adv. Filed: 2/22/11

Amd Cmplt Filed: 3/15/11

Answer: 5/10/11 [Pacific Crest Partners, Inc.; John Mudgett]

Counterclaim: 5/10/11

Answer: none

Nature of Action:

Recovery of money/property - other

Injunctive relief - other

Declaratory judgment

<b>No Tentative Ruling:</b>
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Notes:

Continued from 9/10/14

**OCTOBER 15, 2014 STATUS CONFERENCE**

10. [12-36944-E-13](#) EDA URRIZA  
[14-2227](#)

STATUS CONFERENCE RE: COMPLAINT  
8-7-14 [[6](#)]

URRIZA V. AMERICA'S SERVICING  
COMPANY ET AL

Plaintiff's Atty: Peter L. Cianchetta  
Defendant's Atty: unknown

Adv. Filed: 8/6/14  
Amd Cmplt Filed: 8/7/14  
Reissued Summons: 8/8/14

Answer: none

Nature of Action:  
Declaratory judgment  
Other (e.g. other actions that would have been brought in state court if  
unrelated to bankruptcy case)

Notes:

**OCTOBER 15, 2014 STATUS CONFERENCE**

In this Complaint Plaintiffs allege that the Proof of Claim filed in this case cannot be relied upon and is objected to by Plaintiffs. Other causes of action are for (3) Violation of Rosenthal Act, (4) Breach of Contract, (5) Conversion, (6) Attorneys' Fees, and (7) Failure to pay an attorneys fees award (Federal Rule of Civil Procedure 70(e) contempt).

11. [11-27845-E-11](#) IVAN/MARETTA LEE  
[14-2060](#)  
LEE ET AL V. SELECT PORTFOLIO  
SERVICING, INC. ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
2-20-14 [[1](#)]

Plaintiff's Atty: Raymond E. Willis  
Defendant's Atty:  
Sanford Shatz [Select Portfolio Servicing, Inc.]  
Adam N. Barasch [Bank of America, N.A.]

Adv. Filed: 2/20/14  
Answer: none

Nature of Action:  
Injunctive relief - other  
Declaratory judgment

Notes:

Continued from 9/10/14

**OCTOBER 15, 2014 STATUS CONFERENCE**

In the Continued Status Conference Statement Plaintiffs Report,

- A. Settlement has been reached with Bank of America, N.A. The Settlement and Release has been executed and will be filed with the court.
- B. No settlement has been reached between the Plaintiffs and Select Portfolio Servicing, Inc.

12. [14-27045-E-13](#) HARINDER SINGH  
[14-2237](#)  
SACRAMENTO SIKH SOCIETY  
BRADSHAW TEMPLE V. SINGH

STATUS CONFERENCE RE: COMPLAINT  
8-13-14 [[1](#)]

Plaintiff's Atty: Peter J. Pullen  
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 8/13/14  
Answer: 9/12/14

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud

Notes:

#### **SUMMARY OF COMPLAINT**

The Complaint seeks to have a state court judgment in the amount of \$419,021.22 to be determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

#### **SUMMARY OF ANSWER**

Defendant-Debtor has filed a answer generally denying the allegations in the Complaint in pro se, using local form EDC 3-101(11/98). Defendant-Debtor checked both of the two alternative general denials, in one denying all of the allegations and the other admitting being indebted to Plaintiff.

#### **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 151, and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶ 1, Dckt. 1. In his answer, Defendant-Debtor does not deny the allegations of jurisdiction and this being a core proceeding. To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

Though no Substitution of Attorney was filed, Peter G. Macaluso filed the Defendant-Debtors Status Conference Report and Discovery Plan. Dckt. 12.

#### **DISCOVERY EXPLAINED BY PARTIES**

At the hearing the parties provided the court with the following discovery they anticipate in this Adversary Proceeding:

I. Plaintiff



II. Defendant

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- a. The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, 151, and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Complaint ¶ 1, Dckt. 1. In his answer, Defendant-Debtor does not deny the allegations of jurisdiction and this being a core proceeding. To the extent that any issues in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.
- b. Initial Disclosures shall be made on or before -----, **2014**.
- c. Expert Witnesses shall be disclosed on or before -----, 2013, and Expert Witness Reports, if any, shall be exchanged on or before -----, 201x.
- d. Discovery closes, including the hearing of all discovery motions, on -----, 201x.
- e. Dispositive Motions shall be heard before -----, 201x.
- f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ----- p.m. on -----, 201x.

13. [14-27045](#)-E-13 HARINDER SINGH  
DMA-1

STATUS CONFERENCE RE: MOTION TO  
AVOID LIEN OF SACRAMENTO SIKH  
SOCIETY BRADSHAW TEMPLE  
8-2-14 [[15](#)]

Plaintiff's Atty: David M. Alden

Notes:

Order Staying Proceedings on Motion to Avoid Judgment Lien and Setting Status Conference filed 9/12/14 [Dckt 55]

#### OCTOBER 15, 2014 STATUS CONFERENCE

This Motion requests an order avoiding the judicial lien of Sacramento Sikh Society ("Creditor") against property of Harinder Singh ("Debtor") commonly known as 9012 Sand Field Court, Sacramento, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$419,021.22. FN. 1. An abstract of judgment was recorded with Sacramento County on January 21, 2010, which encumbers the Property.

-----  
FN.1.

Debtor's Motion to Avoid Lien states that the judgment lien in favor of Creditor is \$85,629.51. The Abstract of Judgment offered in support of the Motion states that the judgment is \$419,021.22. Exh. B, Dckt. 18. Debtor did not explain the discrepancy between these values, nor is there any support for this value in the record.  
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Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$93,333.00 as of the date of the petition. The unavoidable consensual liens total \$182,962.51 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$100,000.00 on Schedule C.

#### OPPOSITION

Creditor filed opposition to this Motion. Creditor asserts first that Debtor values his interest in the Property as a one-third interest, though as a joint tenant with Debtor's father and wife, his interest is undivided. Creditor also notes that Debtor listed the total bank liens on the property as encumbering his proportionate interest. Creditor also alleges that the total value of the Property is \$324,000.00, which, when the total consensual liens are deducted, may leave equity for this lien. Creditor states that because Debtor and his wife are separated, Debtor is only eligible to exempt \$75,000.00 in his homestead. Creditor additionally argues that as presumably community property, the Property is subject to liens as a whole, regardless of the proportionate interest of the Debtor.

Debtor filed a response to Creditor, explaining his valuation of the property as a one-third interest at \$93,333.00. Debtor provided a copy of the Grant Deed that shows Debtor as a joint tenant with his father and wife.

## DISCUSSION

Debtor's valuation of the Property does not properly represent the total fair market value of the property, but only a one-third interest. The value Debtor uses could be discounted for a fractional interest, a post-sale value, or a third of the total fair market value.

However, even assuming that the Creditor's alleged value is correct, there would be no equity in the Property for Creditor's judgment lien. If the Property is worth \$324,000.00, Bank of America, N.A.'s first deed of trust in the amount of \$87,400.20 must first be subtracted from the total value of the Property. The loan agreement between Bank of America and Debtor and his wife was signed on July 29, 2003, shortly before the Grant Deed was recorded conveying the Property from Debtor and his wife, as joint tenants, to Debtor, his wife, and his father as joint tenants on August 11, 2003. Claim 4; Dckt. 53. This leaves \$236,599.80. A one-third interest now is \$78,866.60. Tri Counties Bank's deed of trust in the amount of \$89,617.03, for Debtor and his wife, must then be subtracted. This lien agreement was signed on September 2, 2004. Claim 3. Because only two of the three joint tenants consented to this lien, it encumbers only two-thirds of the property (a value of \$157,733.20). This leaves \$68,116.17 in equity for both Debtor and his wife. Thus, Debtor's one-third interest, with his proportionate shares of the consensual liens is \$34,058.08. Even if Debtor's maximum homestead exemption is only \$75,000.00, the remaining value can be fully exempted, leaving no equity for the Creditor.

<u>STEPS</u>	<u>VALUE</u>
<u>Value of Property</u>	<u>\$324,000.00</u>
Subtracting Bank of America's First Deed of Trust	(\$87,400.00)
	<b>\$236,599.80</b>
2/3 Value of Property for Debtor and His Wife's Interest	\$236,500.80 x 2/3 interest = \$157,733.20
Subtracting Tri Counties Bank Second Deed of Trust, held in Debtor and his wife's names	(\$89,617.03)
	<b>\$68,116.17</b>
Debtor's 1/3 Interest in Property Minus First and Second Deeds of Trust	\$68,116.17 x 1/3 interest = \$34,058.08
Subtracting Homestead Exemption (assuming the lesser \$75,000.00 permitted)	(\$75,000.00)
<u>Remaining Equity for Debtor</u>	(\$40,941.92) FN.2.

-----  
FN.2. This computation is based on the interests of Debtor and the non-debtor spouse not being community property. Even if community property, a \$75,000.00 homestead exemption would exhaust the value of the property.  
-----

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

The court notes that an adversary proceeding is currently pending between Creditor and Debtor to determine the dischargeability of the debt secured by the lien at issue here under 11 U.S.C. § 523. Adversary Proceeding No. 2014-02237. Bankruptcy courts have held that the decisions over whether a lien is avoidable under 11 U.S.C. § 522(f) and whether a debt is dischargeable under 11 U.S.C. § 523(a) are separate and unaffected by each other. *See In re Slater*, 188 B.R. 852, 857 (Bankr. E.D. Wash. 1995) (stating that Congress intended to allow the avoidance of judicial liens on exempt property even when secured by non-dischargeable debts, as long as the debt is not specifically mentioned in 11 U.S.C. § 552(c)); *In re Ash*, 166 B.R. 202, 204 (Bankr. D. Conn. 1994). At least one court has held the opposite, stating that judgment liens securing otherwise nondischargeable debts are unavoidable. *In re Coffman*, 52 B.R. 667, 670 (Bankr. D. Md. 1985).

In the Ninth Circuit, the Bankruptcy Appellate Panel has discussed whether liens securing nondischargeable debts are avoidable. *S&C Home Loans v. Farr (In re Farr)*, 278 B.R. 171, 181 (B.A.P. 9th Cir. 2002). The Panel agreed with the Third Circuit Court of Appeal's determination that such liens are avoidable under section 522(f) if the lien impairs a debtor's exemption. *Id.* (citing *Walters v. U.S. Nat'l Bank in Johnstown*, 879 F.2d 95, 97-98 (3d Cir. 1989)).

Some cases have relied upon Section 522(c) for the proposition that judgment liens may be avoided for some nondischargeable debts. 11 U.S.C. § 522(c) states, with respect to liens,

"(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except-

...

(2) a debt secured by a lien that is--

(A) (i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;...."

For a judicial lien to be avoided under 11 U.S.C. § 522(f), the

Bankruptcy Court provides,

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the **debtor may avoid** the fixing of a **lien** on an interest of the debtor in property **to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section**, if such lien is-

(A) a **judicial lien**, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5);...

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(I) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens....

11 U.S.C. § 522(f).

Though Congress has established a simple statutory formula to determine whether exemption is impaired and lists only 11 U.S.C. § 523(a)(5), one has to question why a lien for a nondischargeable debt would be avoided, and then the next day a new judgment lien recorded for the nondischargeable debt. There is no advantage to the Debtor, as the Debtor's California exemption protected from the judgment lien continues to be in full force and effect whether it is the pre-petition lien or the post-petition re-recorded judgment lien.

The parties have not addressed this issue for the court. The court will not conduct the research and structure the arguments for the parties. The court also will not blindly avoid liens for what may be a nondischargeable debt based on a pre-petition state court judgment. Before causing the parties to incur the cost and expense of litigating this issue, the court stays the proceedings in this Contested Matter until the Adversary Proceeding to determine whether the debt secured by the judicial lien is nondischargeable.

14. [12-36884-E-7](#) JENNY PETTENGILL

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
9-19-12 [[1](#)]

Debtor's Atty: Richard A. Hall

Notes:

Continued from 9/25/14

[HL-3] Order Granting Trustee's Motion for Turnover of Property filed 9/26/14 [Dckt 224], deadline set for 10/15/14 on or before noon.

15. [14-29284-E-11](#) CHARLES MILLS

STATUS CONFERENCE RE: VOLUNTARY  
PETITION  
9-17-14 [[1](#)]

Debtor's Atty: Lucas B. Garcia

Notes:

[LBG-2] Motion for Order Extending Time to File Schedules, Statements, and Other Necessary Documents filed 9/30/14 [Dckt 24]; Order granting filed 10/1/14 [Dckt 29]

#### STATUS CONFERENCE SUMMARY

#### OCTOBER 15, 2014 STATUS CONFERENCE

The court has extended the time for Debtor to file the Schedules in this case to October 15, 2014. Order, Dckt. 29.

In his Status Report the Charles Mills, the Debtor in Possession, describes the case as one in which the estate has a home with substantial equity that he seeks to sell. The following Motion as pending in this court:

- I. Motion to employ Luke Garcia as counsel for the Debtor in Possession. Dckt. 46.
- II. Motion to employ Mimi Nassif as the Realtor (real estate broker) to

October 15, 2014 at 2:30 p.m.

- Page 22 of 49 -

market and sell the 201 Rua Esperanza Property. The agreement provides for a maximum 5% commission for the Realtor.

III. Motion to Sell real property commonly known as 201 Rua Esperanza, Lincoln, California. Dckt. 41. The real estate agent for the Debtor in Possession (application pending) has produced an offer which has the following basic terms:

A. Sales Price

1. Real Property.....\$2,600,000.00
2. All Furnishing and Contents.....\$ 300,000.00

B. Purchaser is identified as Randy Renfro.

C. Debtor in Possession will vacate and move into the 9285 Pinehurst Drive Property, which was formerly a rental property, but is now vacant.

D. The Property is subject to the following liens and costs (estimated not to exceed amounts):

1. First Deed of Trust (Lackey).....(\$1,550,000.00)
2. Second Deed of Trust (Bleeker).....(\$ 200,000.00)
3. Lien for HOA Dues.....(\$ 10,000.00)
4. Real Estate Commission.....(\$ 130,000.00)
5. Closing Costs.....(\$ 6,000.00)
6. Buyer Repair Credits to Escrow.....(\$ 10,000.00)

E. The Debtor in Possession projects that there will be \$994,000.00 in net proceeds (without allowance made for state and federal taxes).

F. Debtor in Possession estimates that there is only (\$150,000.00) in general unsecured claims.

G. Debtor in Possession is seeking to be authorized to use \$50,000.00 of the sales proceeds to repair the 9285 Pinehurst Drive Property and purchase furnishings.

16. [13-27293-E-7](#) CHRISTOPHER/TANA CROSBY  
[13-2306](#)  
SANDOVAL ET AL V. CROSBY

STATUS CONFERENCE RE: AMENDED  
COMPLAINT  
9-12-14 [[42](#)]

Plaintiff's Atty: Sean Gavin  
Defendant's Atty: Stephen C. Ruehmann

Adv. Filed: 9/30/13  
Answer: 11/1/13

Amd Cmplt Filed: 9/12/14  
Answer: none

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - willful and malicious injury  
Declaratory judgment

The Status Conference is continued to xxxxxxxxxxxxxxxxxxxx
--

Notes:

Pretrial Conference continued from 8/28/14 to determine if any further discovery is proper.

[SCR-3] Order granting in part and denying in part Motion for Summary Judgment filed 8/29/14 [Dckt 41]

Amended Complaint with jury demand filed 9/12/14 [Dckt 42]

Consent Order Granting Substitution of Attorney filed 9/17/14 [Dckt 43]

#### OCTOBER 15, 2014 STATUS CONFERENCE

On September 12, 2015 an Amended Complaint was filed. Dckt. 42. No certificate of service has been filed.



17. [13-32494-E-13](#) THEODORE/MOLLY MCQUEEN  
[14-2004](#)  
G & K HEAVEN'S BEST, INC. V.  
MCQUEEN ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-4-14 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: C. Anthony Hughes

Adv. Filed: 1/4/14  
Answer: 2/5/14

Crossclaim Filed: 2/5/14  
Answer: 2/24/14

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - willful and malicious injury

No Tentative Ruling:
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Notes:

Continued from 7/9/14 to allow the prosecution of amended Chapter 13 Plan as provided in the Stipulation which resolved Creditor Defendant's claim and plan treatment.

Plaintiffs' Third Status Conference Statement filed 10/6/14 [Dckt 50]

#### OCTOBER 15, 2014 STATUS CONFERENCE

Plaintiff's Third Status Conference Report (Dckt. 50) advises the court that the valuation of Plaintiff's claim has been determined pursuant to the Stipulation of the Parties and Order of the court (Dckt. 132).

18. [13-32494-E-13](#) THEODORE/MOLLY MCQUEEN  
[14-2027](#)  
MCQUEEN ET AL V. G & K  
HEAVEN'S BEST, INC.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-21-14 [[1](#)]

Plaintiff's Atty: C. Anthony Hughes  
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 1/21/14  
Answer: 2/17/14

Nature of Action:  
Validity, priority or extent of lien or other interest in property  
Recovery of money/property - preference

<b>No Tentative Ruling:</b>
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Notes:

Continued from 7/9/14 to allow the prosecution of amended Chapter 13 Plan as provided in the Stipulation which resolved Creditor Defendant's claim and plan treatment.

Defendant's Third Status Conference Statement filed 10/6/14 [Dckt 45]

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

Defendant's Third Status Conference Report (Dckt. 50) advises the court that the valuation of Plaintiff's claim has been determined pursuant to the Stipulation of the Parties and Order of the court (Dckt. 132).

19. [09-26694-E-13](#) MATHEW/CHARLOTTE CERVENKA  
[14-2221](#)  
CERVENKA ET AL V.  
CITIMORTGAGE, INC.

STATUS CONFERENCE RE: COMPLAINT  
7-30-14 [[1](#)]

Plaintiff's Atty: David M. Brady  
Defendant's Atty: unknown

Adv. Filed: 7/30/14  
Answer: none

Nature of Action:  
Validity, priority or extent of lien or other interest in property  
Other (e.g. other actions that would have been brought in state court if  
unrelated to bankruptcy case)

<b>No Tentative Ruling:</b>
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Notes:

Stipulation to Extend Deadline to Respond to Complaint to Determine Value and  
Extent of Lien; and for Monetary Damages filed 9/8/14 [Dckt 3]; Order granting  
filed 9/9/14 [Dckt 10]

#### **OCTOBER 15, 2014 STATUS CONFERENCE**

The court, pursuant to the Stipulation of the Parties, extended the time  
for Defendant CitiMortgage, Inc. to respond to the Complaint to September 29,  
2014. As of the Court's October 12, 2014, review of the Docket, no answer or  
other responsive pleading has been filed.

In the Complaint the Plaintiff-Debtor seeks to have the CitiMortgage,  
Inc.'s lien determined void, the claim secured by it having been valued  
pursuant to 11 U.S.C. § 506(a) and such valued claim having been provided for  
in the Debtor's confirmed and completed Chapter 13 Plan.

20. [14-28780](#)-E-13 CASEY WADE  
Pro se

MOTION FOR EMERGENCY STAY AND  
FOR DAMAGES  
10-8-14 [[25](#)]

**Tentative Ruling:** The Motion for Emergency Stay and for Damages was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(3).**

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Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 8, 2014. By the court's calculation, 7 days' notice was provided.

The Motion for Emergency Stay and for Damages was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

<b>The Motion for Emergency Stay and for Damages is denied.</b>
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On October 8, 2014, Casey Wade, the Chapter 13 Debtor in the above captioned case, ("Debtor" or "Mr. Wade") filed a pleading titled "Notice of Motion and Motion for Emergency Stay and Motion for Damages for Willful Violation of Stay and Request for Punitive [sic] Damages Based on Emotional Distress Pursuant to Title 11 Section 362(k)." Dckt. 25. Page 9 of this Document is titled "Declaration in Support," with page 13 containing a signature block for Casey Wade and the following attestation, "The above is true and correct to the best of affiant knowledge, by my hand below." No certificate of service for this Motion and Declaration has been filed.

## OVERVIEW OF BANKRUPTCY FILINGS

### CURRENT BANKRUPTCY CASE

The current bankruptcy case was filed on August 29, 2014 by Debtor. The Petition, Schedules, Statement of Financial Affairs, and Form 22C (Statement of Current Monthly Income) were filed on August 20, 2014. Dckt. 1. The Schedules filed by Debtor state the following:

- a. Schedule A, Real Property.....None
- b. Schedule B, Personal Property.....\$200  
(Only listed asset, \$200 for "normal street clothes")
- c. Schedule C, Exemptions.....None
- d. Schedule D, Secured Claims.....None
- e. Schedule E, Priority Unsecured Claims....None
- f. Schedule F, General Unsecured Claims.....Blank
- g. Schedule G, Executory Contracts/Leases...None
- h. Schedule H, Co-Debtors.....Blank
- i. Schedule I, Income.....Blank
- j. Schedule J, Expenses.....(\$1,625.00)
  - i. Rent/Mortgage.....(\$900)
  - ii. Electricity/Heat.....(\$250)
  - iii. Phone.....(\$ 75)
  - iv. Food/Housekeeping....(\$100)
  - v. Clothing/Laundry.....(\$ 25)
  - vi. Personal Care.....(\$ 25)
  - vii. Medical/Dental.....(\$ 50)
  - viii. Transportation.....(\$175)
  - ix. Entertainment.....(\$ 25)
  - x. Vehicle Insurance....(\$ 50)

The Statement of Financial Affairs is blank with respect to income (Questions 1 and 2) and responds to all other Questions "None."

Form 22C, Part I, requires Debtor to state actual average income for

October 15, 2014 at 2:30 p.m.

the six month period prior to the commencement of the bankruptcy case. The information provided is either \$0.00 or the field is left blank.

Debtor filed on August 29, 2014, a Chapter 13 Plan in this case. Dckt. 7. The Plan form is blank, with the exception that it is signed by Debtor.

Debtor filed a Verification of Master Address List on August 29, 2014. Dckt. 3. The following persons are listed on this list:

- A. Dignity Health Medical Foundation  
417 Bridge Street  
Danville, CA 24541
- B. Progressive Financial Services, Inc.  
Dept. - PRO  
1209 4<sup>TH</sup> Ave. South  
Nashville, TN 37210
- C. Thomas M. Hogan, Attorney at Law  
942 Enterprise Drive, Suite B  
Sacramento, CA 95825
- D. Mercy Imaging Center  
PO BOX 742016  
Los Angeles, CA 90074
- E. Colin Stevens  
2044 Mercury Way  
Sacramento, CA 95864
- F. Rana Stevens  
2044 Mercury Way  
Sacramento, CA 95864
- G. NCO Financial Systems, Inc.  
9180 West Barnes Drive  
Boise, Id. 83709
- H. CA Emer Phys Med Grp  
PO BOX 582663  
Modesto, CA 95358
- I. Malcolm & Cisneros, A Law Corp.  
Household Finance Corp. of California  
2112 Business Center Drive  
Irvine, CA 92612

This is the address list used by the Bankruptcy Noticing Center used in sending out the Notice of the Bankruptcy Case having been filed and Notice of First Meeting of Creditors. Dckt. 12.

The Trustee's Report of the October 2, 2014 First Meeting of Creditors states that the Debtor did not appear and the meeting has been continued to 10:30 a.m. on December 4, 2014. October 6, 2014 Docket Entry.

The Chapter 13 Trustee filed a Motion to Dismiss this Chapter 13 case on October 8, 2014. Dckt. 21. The hearing on that Motion is set for 10:00 a.m. on November 12, 2014. The grounds stated in the Motion include: (1) Debtor failing to make any plan payments; (2) Debtor failing to appear at the First Meeting of Creditors; (3) Debtor failing to provide copies of tax returns; (4) Debtor failing to provide copies of employer payment advices, and (5) Debtor failing to pay the require filing fee installments to date. (As to this last item, the court notes an October 8, 2014 docket entry showing that a \$77.00 filing fee installment payment was made that date.)

The Trustee has also filed an objection to confirmation of the proposed plan. Dckt. 17. The grounds for the objection are: (1) Debtor's failure to appear at the First Meeting of Creditors; (2) Debtor failing to provide tax documents; (3) Debtor failing to provide copies of employer payment advices; (4) the Plan and Schedules not being properly completed, with the entire plan being blank; and (5) Debtor failing to make any plan payments.

**PRIOR BANKRUPTCY CASES DISMISSED WITHIN ONE-YEAR  
PRECEDING THE COMMENCEMENT OF CURRENT BANKRUPTCY CASE**

Debtor filed a prior Chapter 13 case on June 27, 2014, which was dismissed on July 15, 2014 for failure to timely file documents. Case No. 14-26696, Order Dismissing, Dckt. 11.

Debtor than filed a Chapter 7 case on August 1, 2014. Case. No. 14-27903. Like the previous Chapter 13 case, the Chapter 7 case was dismissed on August 19, 2014 for once again failing to timely file documents. Case No. 14-27903, Order Dismissing, Dckt. 14. FN.1.

-----  
FN.1. The court's docket and file system did not associate the Chapter 7 case with the Current and Prior Chapter 13 cases. The court is conducting a review to determine why the Chapter 7 case filed by Debtor, which uses the same Tax ID number, was not linked to the other cases.  
-----

The Debtor failed to reference this first bankruptcy within a mere two month period in the instant motion nor in any of the pleadings and documents filed in connection with the instant case.

**REVIEW OF MOTION**

From the Motion (Dckt. 25) the court summarizes the specific contentions made by Debtor, appearing in *pro se*, as to an alleged violation of the Automatic stay,

- A. On or about May 30, 2014, an Unlawful Detainer Complaint was filed in the California Superior Court, Sacramento County ("Unlawful Detainer").
- B. The Plaintiffs in the Unlawful Detainer Action are Colin Stevens and Rana Stevens ("Landlords"), and their attorney is Thomas M. Hogan.
- C. The Unlawful Detainer Action relates to a duplex located at 4703 Large Oak Court, Sacramento, California. Debtor asserts

that he is a tenant of those premises.

- D. A written contract signed on February 3, 2014 by Debtor and Landlords, "is a lien" on any judgment which Debtor obtains in an unrelated state court action in which he asserts claims arising out of an automobile accident.
- E. In May or June 2014, Debtor filed for bankruptcy "[n]ot to delay eviction but for an equitable distribution to all creditors any and all monies owed by debtor." (This appears to reference the June 27, 2014 filing, Case no. 14-26696.)
- F. On September 2, 2014, Landlords obtained a judgment against the Debtor (apparently in the Unlawful Detainer Action).
- G. Landlords have obtained an ex parte writ of possession, through which Debtor and his family will be evicted from the 4703 Large Oak Property on October 9, 2014.

It is asserted that the September 2, 2014 Judgment in the Unlawful Detainer Action was obtained while the automatic stay was in full force and effect - the bankruptcy case having been filed on August 29, 2014 and the Automatic stay not terminating until September 28, 2014.

Debtor is not asking the court to issue an order saying that it is enforcing the automatic stay, which is effective without any such order. Rather, Debtor is contending that: (1) Landlords obtained the judgment for possession in violation of the stay; (2) the stay has terminated prospectively by operation of law (11 U.S.C. § 362(d)(3)(A)); (3) the September 2, 2014 judgment for possession is void, having been obtained in violation of the automatic stay; (4) Landlords are now attempting to use the void judgment, obtained in violation of the automatic stay, to obtain a writ of possession; (5) the Landlord's prior violation of the stay is being perpetuated by Landlord's actions in using the void judgment; and (6) Landlord's continued use of the void judgment is a continuing willful and intentional violation of the Automatic stay. Pursuant to 11 U.S.C. § 362(k) and the inherent powers of this court to enforce federal law sanctions may be awarded for violation of the Automatic stay.

Therefore, Debtor seeks an "Emergency Stay," without defining what exactly is to be stayed, and then damages for Landlords acting in violation of the Automatic stay while it was in effect.

#### **ORDER FOR HEARING ON EMERGENCY MOTION AND STATUS CONFERENCE**

On October 8, 2014, the court issued an Order for Hearing on Emergency Motion and Status Conference. Dckt. 27. The court ordered that an initial hearing will be conducted on the Motion for Emergency Stay and for Damages filed by Debtor at 2:30 p.m. on October 15, 2014.

#### **COLIN AND RANA STEVENS' OPPOSITION**

On October 13, 2014, Colin and Rana Stevens (the "Stevens") filed opposition to the instant motion. Dckt. 29. In support of their opposition, the Stevens first discuss the case history, including the total of three



bankruptcies filed since June 28, 2014, two of which were dismissed prior to the instant Chapter 13 case. After laying out the case history, the Stevens assert that there can be no stay violation because there was no stay in effect at the time of judgment in the Unlawful Detainer Action.

Specifically, the Stevens argue that the Debtor improperly relies on 11 U.S.C. § 362(c)(3) for support that a 30 day stay took effect upon the filing of this case. The Stevens argue that since there have been 2 previous cases filed within one year of the instant case, it is actually 11 U.S.C. § 362(c)(4) that controls the length of the automatic stay for the Debtor. Because the first Chapter 13 case by the Debtor was filed on June 28, 2014 and the second Chapter 7 case was filed on August 1, 2014, both cases were filed within two months of the instant case and, thus, under § 362(c)(4), there was no stay in effect at the time Debtor filed the instant case on August 29, 2014.

The Stevens also argue that the Debtor filed the instant case in bad faith, namely because of the two prior cases filed and dismissed within the past year. The Stevens also argue that the instant case is in bad faith because the previous two cases were dismissed for failing to timely file required documents and also the petition and schedules in the instant case are incomplete. For instance, the Stevens highlight that the Debtor does not list the "car verses car accident civil complaint wherein Mr. Wade is the Plaintiff," on any documents in the instant case but instead merely cites to it in the instant motion. The Stevens also point out that the Debtor has filed the three cases using an employer identification number yet none of the petitions or documents filed in connection with those cases listed interests in any businesses. The Stevens also lists some previous filled cases under the name of "Wade Adam Casey" from 2003 which appeared to follow the same pattern the Debtor is utilizing in the instant case.

Lastly, the Stevens request that the court remand the adversary proceeding to the state court. In response to the "Motion for Removal From State Court Civil Action to Federal Bankruptcy Court; Pursuant Title 28 U.S.C. Section 1432(a) and Bankruptcy Rule 9027" filed by the Debtor on October 8, 2014 (Dckt. 26), the Stevens argue that since the Debtor is unable to rebut the presumption of bad faith filing due to the prior two cases within a year of filing the instant case and the fact that there has been no violation of the stay under 11 U.S.C. § 362(c)(4), the court should be remanded *sua sponte* by the court to state court.

In conclusion, the Stevens request that the instant motion is denied, the court issues an order confirming that no automatic stay is in effect, and for an order remanding the adversary proceeding to state court.

#### **APPLICABLE LAW**

#### **AUTOMATIC STAY VIOLATION AND CONTEMPT**

The scope of the automatic stay is limited when a debtor has filed one or more cases that were dismissed in the past year of filing an additional bankruptcy case. The length of the automatic stay for these repeat fillers depends upon how many previous cases within that year period were filed and dismissed. U.S.C. § 362(c)(4) specifies the scope of the automatic stay when 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed." If there have been 2 or more pending cases within the

pending year "the stay under subsection (a) shall not go into effect upon the filing of the later case; and (ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect." 11 U.S.C. § 362(c)(4).

The automatic stay imposes an affirmative duty on compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151-52 (9th Cir. 1996). The burden lies on the person who violated the automatic stay, even if unknowingly, to discontinue the acts and remedy the violation. *Sternberg v. Johnson*, 595 F.3d 937, 944 (9th Cir. 2010); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002) (addressing the obligation to discontinue post-petition collection proceedings).

Acts taken in violation of the Automatic stay are void, not merely voidable. As stated by the Ninth Circuit Court of Appeals in *Far Out Productions, Inc. v. Oskar et al*, 247 R.3d 986, 994-995 (9th Cir. 2001):

More importantly, the Florida judgment cannot be binding on the appellees as a matter of federal bankruptcy law. When a debtor files for bankruptcy, subject to certain exceptions not present here, section 362(a) of the Bankruptcy Code automatically stays any other judicial proceeding involving the debtor. See 11 U.S.C. § 362(a)(1). The automatic stay provision of the Bankruptcy Code "plays a vital role in bankruptcy. It is designed to protect debtors from all collection efforts while they attempt to regain their financial footing." *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992) (describing the automatic stay as "one of the fundamental debtor protections provided by the bankruptcy laws"). The provision provides stability and certainty to both the debtor and creditors who might otherwise be tempted to bring independent actions to obtain default judgments. See *id.* at 571-72.

In fact, the automatic stay provision is so central to the functioning of the bankruptcy system that this circuit regards judgments obtained in violation of the provision as void rather than merely voidable on the motion of the debtor. See *id.* at 571. Courts regularly void state court default judgments against debtors when the judgments are obtained in violation of the automatic stay provision, even where the debtor filed for bankruptcy in the midst of the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861 (7th Cir. 1999); *In re Graves*, 33 F.3d 242, 247 (3d Cir. 1994).

Such acts are void, even if done without knowledge of the stay.

Creditors and lessors are not left powerless with respect to the automatic stay. They may seek to modify or terminate the automatic stay with respect to prospective actions. 11 U.S.C. § 362(d). In addition to prospective relief, a party in interest may seek, and the court may order, that the automatic stay be annulled to make an act taken in violation of the stay not void. *Aheong v. Melon Mortgage Co., (In re Aheong)*, 276 B.R. 233, 250-251 (B.A.P. 9th Cir. 2002). Additional provisions protect the rights of a lessor

or residential property under specific circumstances, providing that if a judgment for possession is obtained prior to the filing of the bankruptcy case. 11 U.S.C. § 362(b)(22).

A request for an order of contempt by the Debtor, United States Trustee or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283-85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to wilful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (an Congressionally created injunction) pursuant to its inherent power as a federal court. *Steinberg v. Johnston*, 595 F.3d 937, 946, (9th Cir. 2009). FN.2.

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FN.2. Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.  
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Attorneys' fees may only be recovered for work involved in bringing about an end to the stay violation, not for pursuing an award of damages. *Sternberg v. Johnston, id.*, 947-48 (9th Cir. 2011) ("[P]roven injury is the injury resulting from the stay violation itself. Once the violation has ended, any fees the debtor incurs after that point in pursuit of a damage award would not be to compensate for 'actual damages' under § 362(k)(1)."), *cert. denied*, 2011 U.S. LEXIS 6502 (2011). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

## **INJUNCTIVE RELIEF**

Under Fed. R. Bankr. P. 7001(7), "a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief," must be filed as an adversary proceeding. If not provided for under the exceptions of Rule 7001(7), a request for injunctive relief from this court must be through an adversary proceeding.

## **DISCUSSION**

Upon review of the motion, the Debtor's history in the bankruptcy courts, the non-disclosure of the second bankruptcy case which was dismissed during the one-year period preceding the current case, and the Stevens'

opposition, the court agrees with the Stevens that no automatic stay has been in effect since Debtor filed this instant bankruptcy case on August 29, 2014 under 11 U.S.C. § 362(c)(4).

In Debtor's motion, Debtor only references the previous Chapter 7 case filed on August 1, 2014 and dismissed on August 19, 2014. To the court, this appears to be a purposeful act by the Debtor to mislead the court in believing that Debtor's instant case falls under 11 U.S.C. § 362(c)(3), instead of 11 U.S.C. § 362(c)(4). While Debtor references multiple times that "Debtor Casey Wade filed bankruptcy in good faith so that all of debtors many creditors could receive equal treatment as to payment," the court is not convinced that this was Debtor's true intention.

In the past two months, the Debtor has filed three bankruptcy cases. The Debtor filed a Chapter 13 case on June 28, 2014 (Case No. 14-26696) which was dismissed on July 15, 2014 for failure to timely file documents. The Debtor then filed a Chapter 7 case on August 1, 2014 (Case No. 14-27903) which was dismissed on August 19, 2014 for failure to timely file documents. Finally, Debtor filed the instant Chapter 13 case on August 29, 2014 (Case No. 14-28780). The plain language of 11 U.S.C. § 362(c)(4) states that no automatic stay was in effect at the time of filing the instant Chapter 13 case because the Debtor had 2 pending cases "pending within the previous year but were dismissed."

While the Debtor appears to argue (without ever citing to the relevant Code section) that he only has one prior case within the past year that was dismissed, a simple search on PACER reveals that there are in fact two prior cases that were dismissed within the past year. Once the Debtor hit his second case, the protections of the automatic stay were no longer available to the Debtor.

The court is uncertain whether the Debtor was hoping that the court nor the Stevens would review the Debtor's previous bankruptcy filing or whether he believed the court would summarily grant the relief sought merely based on the "Emergency" motion filed by the Debtor. Either way, the Debtor's ploy to get the court to affirm the existence of an automatic stay that in fact never existed at the time Debtor filed the instant, third bankruptcy case has failed.

While the court does agree that the 2003 cases filed by "Wade Adams Casey" bares a curiously similar scheme as to the one the Debtor is currently attempting to execute, for purposes of this instant motion, it is too speculative and there are independent grounds in which the court can deny the instant motion.

Therefore, pursuant to 11 U.S.C. §362(c)(4)(A), no automatic stay went into effect when the current bankruptcy stay was filed. Congress has statutorily decreed that there is no automatic stay in this case. While the court may, upon proper motion impose a stay pursuant to 11 U.S.C. § 362(c)(4)(B), such relief has not been requested and, based on the evidence presented, such relief is not warranted.

The court also takes the Debtor at his word, that Debtor filed for bankruptcy "[n]ot to delay eviction but for an equitable distribution to all creditors any and all monies owed by debtor." Motion for Emergency Stay and Damages, Dckt. 25. Taken at face value, Debtor is not seeking to delay the

eviction ordered by the state court.

In the Motion, Debtor also places blame on the State Court, asserting that he was unprepared to defend the unlawful detainer action because the state court (not identifying whether it was a judge or staff member) told the Debtor that "he could not file any document(s) because he had a stay, nor would any money for jury trial be accepted due to his current status, that a stay was in effect." It is surprising to hear that a state court person would refuse to file documents based on that state court person's interpretation and application of federal law. Secondly, if there is an issue concerning the state court proceeding, that it for the state court judge to address in light of 11 U.S.C. § 362(c)(4)(A) preventing an automatic stay from arising in this case.

If Debtor believes that there is a good faith basis for the imposition of the automatic stay pursuant to 11 U.S.C. § 362(c)(4)(B), he may file the appropriate motion, which shall be supported by sufficient evidence.

The Motion For Extension of Stay pursuant to 11 U.S.C. § 362(c)(3) and for Damages pursuant to 11 U.S.C. § 362(k) is denied. This is without prejudice to Debtor seeking relief pursuant to 11 U.S.C. § 362(c)(4)(B) or injunctive relief as may be proper through an adversary proceeding.

The court does not address the request for the court to *sua sponte* remand the state court action which has been removed to this court. The "Motion for Removal" does not include a copy of the state court action and pleadings therein. However, it does make reference to it being an unlawful detainer proceeding with the Stevens. This appears to be the state court action for which Debtor asserted that the obtaining of a judgment by Stevens violated the automatic stay.

Removal of state court actions regards claims "related to" bankruptcy cases is governed by 28 U.S.C. § 1452. Any party, the Debtor in this situation, may remove the action to federal court (bankruptcy court in this situation). 11 U.S.C. § 1452(a). The court's decision to remand, or not remand, "is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title [28 U.S.C. § 158(d), 1291, or 1292] or by the Supreme Court of the United States under section 1254 of this title [28 U.S.C. § 1254]." 28 U.S.C. § 1452(b).

Federal Rule of Bankruptcy Procedure 9027 provides the procedure for the removal process. The notice of removal is filed with the bankruptcy court. Removal is effective upon filing of the notice with the bankruptcy court. Fed. R. Bankr. P. 9027(c). A motion for remand is governed by Federal Rule of Bankruptcy Procedure 9014.

Several court have concluded that the bankruptcy judge has the power, and some would say responsibility, to consider *sua sponte* whether remand is appropriate. *Roberts v. Bisno (In re Bisno)*, 433 B.R. 753, 758 (Bankr. C.D. Cal. 2010). In light of the broad grant of federal court jurisdiction for matters relating to bankruptcy cases (28 U.S.C. § 1334) and the Constitutional "case or controversy" requirements for federal judges exercising federal judicial power (U.S. Constitution Art. III, Sec. 2), it is incumbent on the court to insure that federal judicial power may properly be exercised.

Though this may be raised *sua sponte*, the party who removed the case does get his or her "day in court" on the issue. Due Process permits nothing less.

Therefore, the court shall issue a scheduling order for a hearing on a motion to remand, if Stevens so elects to file a motion to remand:

- A. Motion to Remand filed and served on or before October 20, 2014.
- B. Opposition to Remand filed and served on or before October 27, 2014.
- C. Reply, if any, to Opposition filed and served on or before October 31.
- D. Hearing on Motion to Remand to be conducted at 1:30 p.m. on November 4, 2014.

This scheduling order is without prejudice to the rights of Colin and Rana Stevens to set a motion to remand as permitted by law and pursuant to the law and motion provisions of Local Bankruptcy Rule 9014-1.

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

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

The Motion for Emergency Stay and for Damages filed by 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 the Motion for Emergency Stay and for Damages is denied. This denial is without prejudice to the Debtor seeking relief pursuant to 11 U.S.C. § 362(c)(4)(B) or injunctive relief as may be proper through an adversary proceeding.

#### **Chambers Prepared Order**

The court shall issue a separate order in Adversary Proceeding 14-2292 in substantially the following form:

The court was been presented with a Motion For Emergency Stay and for Damages pursuant to 11 U.S.C. § 362(k) filed by the removing Defendant-Debtor in this Adversary Proceeding in his Chapter 13 Bankruptcy case (No. 14-28780. Colin and Rana Stevens, the Plaintiffs in the removed civil matter filed an opposition to the Motion for Emergency Stay and Damages. The opposition included directing the court to two prior bankruptcy cases which were pending and dismissed within the one-year period preceding the filing of Case No.

14-28780.

The court denied the Motion, determining that the provisions of 11 U.S.C. § 362(c)(4)(A) precluded an automatic stay from going into effect in Case No. 14-28780, and therefore there was no stay to be violated. Additionally, no request was made for the granting of relief pursuant to 11 U.S.C. § 362(c)(4)(B). The court also concluded that insufficient grounds were presented in the Motion and evidence asserting a violation of the stay which was alleged to be in effect for twenty-nine days pursuant to 11 U.S.C. § 362(c)(3)(A) were not sufficient for relief under 11 U.S.C. § 362(c)(4)(B).

Therefore, upon review of the Notice of Remand for this Adversary Proceeding, the allegations of Debtor in the Motion for Emergency Stay and Damages, the Opposition filed by Colin and Rana Stevens, the request for this court to *sua sponte* remand the civil matter removed back to the state court, and the files in this case, and good cause appearing,

**IT IS ORDERED** that a motion to remand may be filed on the following schedule by Colin and Rana Stevens, the non-removing parties to this Adversary Proceeding:

- A. Motion to Remand filed and served on or before October 20, 2014.
- B. Opposition to Remand filed and served on or before October 27, 2014.
- C. Reply, if any, to Opposition filed and served on or before October 31.
- D. Hearing on Motion to Remand to be conducted at 1:30 p.m. on November 4, 2014.

This order is without prejudice to the rights of Colin and Rana Stevens to set a motion to remand as permitted by law and pursuant to the law and motion provisions of Local Bankruptcy Rule 9014-1.

21. [13-34223](#)-E-13 NAOMI LEBUS  
[14-2049](#) RHS-2  
LEBUS V. S.B.S. TRUST NETWORK  
ET AL

ORDER TO SHOW CAUSE FAILURE OF  
REPRESENTATION OF CLIENT  
9-26-14 [[54](#)]

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

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The Order to Show Cause was served by the Clerk of the Court on Naomi LeBus ("Plaintiff-Debtor"), William Abbott ("Abbott"), Trustee, and other parties in interest on October 1, 2014. The court computes that 14 days' notice has been provided.

The court's decision is to discharge the Order to Show Cause and approve the Substitution of Counsel, allowing William F. Abbott to withdraw as counsel of record for Plaintiff-Debtor and substitute in his place Naomi LeBus, in *propria persona*.

The court issued an Order to Show Cause for Failure of Representation of Client and Order to Appear on September 26, 2014. Dckt. 54. William Abbott ("Counsel") and Naomi LeBus ("Plaintiff-Debtor") are to appear before the court and show cause why the court should not issue sanctions and referrals against Debtor's Counsel.

#### BACKGROUND

The instant Adversary Proceeding was commenced by Plaintiff-Debtor, in *pro se*, on February 6, 2014. Defendant First Bank, dba First Bank Mortgage, filed a Motion to Dismiss the Complaint for failure to state a claim. Motion to Dismiss, Dckt. 7. On April 15, 2014, a Substitution of Attorney was filed by which Counsel (CSB #121285) was substituted in as counsel of record for the Plaintiff-Debtor. Dckt. 12. At the April 16, 2014 Status Conference, the court noted that the "Motion to Dismiss" did not comply with the basic pleading requirements of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 (no motion was filed, merely supporting pleadings). Defendant's Motion to Dismiss was denied without prejudice.

A second Motion to Dismiss was filed by First Bank on May 30, 2014. Dckt. 19. On June 20, 2014, Counsel filed a First Amended Complaint for Plaintiff-Debtor. Dckt. 29. This was untimely, as the court had granted an extension of time for Defendant to respond based on the representations of Counsel that a first amended complaint would be filed shortly thereafter. Civil Minutes, Dckt. 34.

The Plaintiff-Debtor had previously filed her voluntary Chapter 13 case on November 5, 2013, in *pro se*. Case No. 13-34223. On April 15, 2014, a



Substitution of Attorney was filed by which Counsel became the Plaintiff-Debtor's attorney of record in the Chapter 13 case. On July 14, 2014, the bankruptcy court entered an order dismissing the Chapter 13 case. Order, 13-34223 Dckt. 73. The grounds for the dismissal included the Plaintiff-Debtor not prosecuting the Chapter 13 case in good faith and the court concluding that the case had been filed merely as a device to obtain the benefits of the automatic stay without fulfilling the basic obligations of a debtor in a Chapter 13 case. The court's findings included the following:

A review of the Motion to Confirm First Amended Plan, shows the Debtor has not complied with Federal Rule of Bankruptcy Procedure 9013, as it fails to state with particularity the grounds for relief.

Furthermore, Debtors have failed to meet their burden of proving the requirements of confirmation. See *Amfac Distribution Corp. v. Wolff* (In re Wolff), 22 B.R. 510, 512 (9th Cir. B.A.P. 1982) (holding that the proponent of a Chapter 13 plan has the burden of proof as to confirmation). Such evidence, typically in the form of a Debtor's Declaration proving the elements of 11 U.S.C. §1325(a), is required. See Local Bankr. R. 9014-1(d)(6).

Additionally, the court has reviewed the First Amended Plan filed on April 16, 2014. There appear to be several issues that render the plan unconfirmable. First, it appears Debtor does not properly fund the plan. Debtor provides that plan payments will total \$187.29 in Section 1.01 of the proposed plan. However, Debtor provides for First Bank Mortgage in the amounts of \$1,800 and \$700 for a total of \$2,500 to be paid through the plan. Debtor also lists in Class 5 a priority tax claim to the IRS for \$4,444.52. Debtor does not provide sufficient plan payment to provide for the payments to the listed Creditors.

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Debtor also fails to list any attorneys' fees in the plan. The court notes that Debtor retained Counsel, William F. Abbott on April 15, 2014.

The proposed plan does not appear to be an actual plan, but rather a form that has been filling [sic] in that does not make logical sense. It does not appear that Debtor made a good faith effort to propose a feasible plan.

A review of the Debtor's Schedules also shows some major discrepancies. For instance, in Debtor's Schedule J, Debtor fails to list any amounts for telephone, home maintenance, clothing, laundry and dry cleaning, medical and dental expenses, recreation/ entertainment, any homeowner's insurance, or any taxes. Schedule J,

Dckt. 11. These do not appear realistic for a household of three (Debtor and two small minors). Rather than an accurate statement of expenses, this appears to be a fabrication to support minimal payments under a plan.

Case No. 13-34223, Dckt. 71.

Following the dismissal of the Chapter 13 case, the court issued an Order to Show Cause in this Adversary Proceeding as to why it should not abstain from conducting any further proceedings. Dckt. 37. A hearing was conducted on August 26, 2014, for the Order to Show Cause. The court determined that because the Chapter 13 case had been dismissed, it was not appropriate for the court to exercise its jurisdiction in the proceeding. Further, the court concluded that the claims in the Adversary Proceeding were not "related to" the bankruptcy case. Civil Minutes, Dckt. 43. Given this, the bankruptcy court determined that abstention pursuant to 28 U.S.C. § 1334(c)(1) was appropriate.

The court's order abstaining from conducting any further proceedings in this Adversary Proceeding was entered on August 29, 2014. Dckt. 45.

#### **SEPTEMBER 17, 2014 SUBSTITUTION OF ATTORNEY**

On September 17, 2014, the Plaintiff-Debtor filed a pleading titled "Substitution of Attorneys." Dckt. 46. This pleading is signed only by "Naomi LeBus, In Pro Se." No declaration or other evidence is filed in support of the Substitution of Attorneys. However, it does include the following sentence:

Where as Mr. Abbott has failed to contact or follow up with the Plaintiff since Before the August 26, 2014 Hearing Date.

Id. An identical "Substitution of Attorneys" has been filed in the Plaintiff-Debtor's dismissed Chapter 13 case. 13-34223 Dckt. 83.

#### **ORDER TO SHOW CAUSE**

Counsel, who was record in both the Plaintiff-Debtor's dismissed Chapter 13 case and this Adversary Proceeding, was ordered to appear before the court on October 15, 2014 and show cause why the court should not issue the sanctions and referrals for attempting to withdraw from the case without authorization. The sanctions and referrals may include:

- a. Corrective sanctions in the amount of fees paid by Naomi LeBus for serving as her attorney of record in this Adversary Proceeding and the Chapter 13 case;
- b. Reporting to the State Bar of California the abandonment of the Plaintiff-Debtor by counsel in this Adversary Proceeding;
- c. Referral of this matter to the United States District Court for review and issuance of corrective and punitive sanctions which may include, but not be limited to, suspension from the practice of law in the Eastern District of California for a

October 15, 2014 at 2:30 p.m.

period of not less than one year, issuance of monetary sanctions of not less than \$5,000.00, and the filing of a request for investigation and disciplinary action with the State Bar of California.

#### **OCTOBER 8, 2014 SUBSTITUTION OF ATTORNEY**

On October 8, 2014, the Plaintiff-Debtor, through Counsel, filed a pleading titled "Substitution of Attorneys." Dckt. 61. This pleading is signed by both Plaintiff-Debtor and Counsel and states that Plaintiff-Debtor substitutes herself, in *pro se*, in the place of Counsel. No declaration or other evidence is filed in support of the Substitution of Attorneys nor was the pleading filed with a motion. This Substitution was not filed in response to the instant Order to Show Cause, but was filed independently in the Plaintiff-Debtor's Adversary Proceeding on the last day responses to this Order could be submitted.

#### **COUNSEL'S DECLARATION IN RESPONSE**

On October 8, 2014, Counsel filed a declaration and supporting exhibits in response to this Order to Show Cause. Dckt. 62. In his declaration, Counsel states that he was fired as Plaintiff-Debtor's counsel on July 11, 2014 via email. Dckt. 63, Exh. A. Though Plaintiff-Debtor has not told Counsel precisely why he was fired, Counsel believes it is because he would not agree to sign and file pleadings prepared by non-attorneys, as requested by Plaintiff-Debtor.

This postulation is supported by Plaintiff-Debtor's email to Counsel, in which she states that because Counsel is "not willing to work with the people that are winning these cases and [he] refused to reply to [Plaintiff-Debtor's] email with regard to my expressed wishes in what I want from my attorney," she no longer wishes to work with him. Dckt. 63, Exh. A. Counsel did not oppose the prior Order to Show Cause regarding Abstention because he had been fired and he believed there was no legal basis to oppose the abstention.

Counsel further states that he initially believed that Plaintiff-Debtor's Substitution of Attorney filed September 17, 2014 was sufficient to remove him as counsel of record. In a case in the Northern District that Counsel was involved in, the debtor's consent was all that was needed to for that debtor to change attorneys. *In re William Coleman and Dione Coleman*, Case No. 11-70568-WJL-13. Before this Order to Show Cause was issued, Counsel sent another Substitution of Attorney document to Plaintiff-Debtor, so that both she and Counsel could sign off on it. Dckt, 64, Exh. B. Plaintiff-Debtor did not return this document until after the instant Order to Show Cause had been issued. Dckts. 65 and 66, Exhs. C and D. FN.1.

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FN.1. This conclusion that the filing of a substitution was proper in the Northern District of California therefore it was reasonable to think that it was proper in the Eastern District of California is flawed on several levels. First, a critical distinction between the Northern District Case cited by Counsel and the instant Adversary Proceeding is that another attorney replaced Counsel - that debtor was not left in *propria persona* in the Northern District Case. Additionally the Northern District Bankruptcy Rules (Rule 1001-2(a)) incorporates Northern District Court Civil Rule 11-5 governing withdrawal from a case. Rule 11-5(a) provides that withdrawal from an action by counsel is not permitted until ordered by the court.

Further, the Local Rules of the federal courts in the Northern District of California do not govern attorneys practicing in the Eastern District of California.

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Additionally, Counsel states that he was out of California in early October, then alleges he had difficulty retrieving his ECF login information. This caused the delay in filing both the response and the Substitution document (which had been signed by September 30, 2014) until the last day on which responses could be filed to this Order to Show Cause.

## **APPLICABLE RULES**

### **A. RULES GOVERNING SUBSTITUTION OF ATTORNEY**

The appearance of counsel and representation of clients by attorneys in bankruptcy cases are first governed by Local Bankruptcy Rule 2017-1. Additionally, Local District Court Rule 180 (Attorneys) is also incorporated into the Local Bankruptcy Rules. L.B.R. 2001(c).

Local Bankruptcy Rule 2017-1(e) provides that an attorney of record may not withdraw leaving a client in *propria persona* without leave of court, for which noticed motion is required that is served on all other parties who have appeared. In addition, withdrawal of an attorney of record is governed by the Rules of Professional Conduct of the State Bar of California. *Id.* The duties of the attorney to the client shall continue until relieved by order of the court. *Id.*

Though not expressly incorporated into the Local Bankruptcy Rules, District Court Local Rule 182 addresses the appearances of attorneys and their duties to clients. Local Bankruptcy Rule 2017-1(e) is a parallel provision of District Court Local Rule 182(e). An attorney may not leave a client in *propria persona* without leave of the court.

The California State Bar Rules of Professional Conduct also address the obligations of an attorney in withdrawing from representing the client. California Rules of Professional Conduct 3-700(A) provides the general requirements for an attorney terminating the representation with a client:

#### **Rule 3-700 Termination of Employment**

##### **(A) In General.**

**(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.**

**(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with**

applicable laws and rules.

*Id.* [emphasis added]. Rule 3-700 goes on to list the circumstances under which an attorney can voluntarily withdraw from representing a client:

(C) Permissive Withdrawal. If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

*Id.* California Rule of Professional Conduct 3-110 states the basic rules for

an attorney providing legal services to a client.

Rule 3-110 Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Taken at face value, Plaintiff-Debtor asserts (subject to the strictures of Federal Rule of Bankruptcy Procedure 9011) that she has been abandoned by her attorney and he is not representing her for a bankruptcy case and adversary proceeding for which he is the attorney of record. However, as with many situations, what appears at face value may well not be the conclusion reached when all of the persons involved provide all of the information required.

B. IMPOSITION OF CORRECTIVE SANCTIONS

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

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

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

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

#### **DISTRICT COURT ORDER ON SUBSTITUTION OF ATTORNEY**

The United States District Court, in Case No. 14-02165, in connection with the Motion to Withdraw the Reference to this bankruptcy court issued an order on the Substitution of Attorney executed by counsel and Plaintiff-Debtor and filed in that court. That ruling, consistent with the Order to Show Cause issued by this court, states that pursuant to Local District Court Rule 182(d) an attorney may not withdraw from representation of a party if leaving the client in *propria persona* without leave of the court. 14-02165 October 10, 2014 Minute Order.

#### **DISCUSSION**

The court has reviewed the "Substitutions of Attorney" filed by the Plaintiff-Debtor in this Adversary Proceeding and her Chapter 13 case 13-34223, which she had filed "in pro se" on September 17, 2014. The "Substitutions of Attorneys" state that Plaintiff-Debtor is filing the "Substitutions of Attorneys" in *pro se* because Counsel has failed to communicate with her since before August 26, 2014.

Counsel and Plaintiff-Debtor filed an additional "Substitution of Attorney" pleading on October 8, 2014, which the court construes to be a "motion" to grant Counsel permission to withdraw and allow Plaintiff-Debtor to prosecute her claim in *propria persona*. Though Local Bankruptcy Rule 2017-1 requires a noticed motion served on all parties before a court will grant leave for an attorney to withdraw and his or her client to continue in *pro se* the court waives the requirement in light of the existing order for the court to abstain pursuant to 28 U.S.C. § 1334(c)(1).

#### **Additional Information Provided By Counsel.**

Counsel's declaration directly responds to the Order to Show Cause, explaining that there has been a disagreement between the Plaintiff-Debtor and Counsel on the prosecution of the case that Counsel believes he cannot proceed with the representation. See California Rule of Professional Conduct 3-700(C).

This information is summarized as follows. Plaintiff-Debtor notified Counsel he was terminated. This followed instruction from Plaintiff-Debtor to use materials prepared by Plaintiff-Debtor or other third-parties. The communications between Plaintiff-Debtor and Counsel (properly redacted) indicates that Plaintiff-Debtor has "materials" from "people that are winning these cases" and wanted Counsel to use such materials without regard to Counsel's own professional determination of the validity of such materials.

This litigation is not at a critical point, with the Bankruptcy Judge having issued an order to abstain from conducting any further proceedings pursuant to 28 U.S.C. § 1334(c)(1), having determined that there lacked an appropriate basis for exercising federal court jurisdiction pursuant to the

bankruptcy grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334(a) and (b) in light of the Plaintiff-Debtor's bankruptcy case having been dismissed and there be no issues in this Adversary Proceeding "arising under the Bankruptcy Code" or "arising in the bankruptcy case." Order and Civil Minutes, Dckts. 45, 43. The court has not adjudicated rights of the Plaintiff-Debtor and she is free to commence such actions in the California Superior Court (state court of general jurisdiction) or in the United States District Court (if a claim is stated which meets the "case or controversy" requirement of the United States Constitution, Article III, Section 2, for a federal court to exercise the federal judicial power.

As stated by the California District Court of Appeal in *Ramirez v. Sturdevant*, 21, Cal. App. 4th 904, 915 (1994), review denied, 1994 Cal. LEXIS 2064 (1994). See discussion of permitted withdraw of counsel in *McClintic v. United States Postal Service*, 2014 U.S. Dist. LEXIS 2152 (E.D. Cal. 2014). Plaintiff-Debtor may elect to represent herself. She may elect to take advice from attorneys and non-attorneys (the court expressing no opinion on whether such "advice" by non-attorneys is legal under California law), or she may elect to conduct her own research, develop her own theories, and have her case live or die on such other advice and self-developed strategies.

While this substitution has not proceeded on the track which one expects from a California attorney, there is no reason to further perpetuate an attorney-client relationship which the client has terminated and for which Counsel does not believe he can continue with such representation.

The court approves the Substitution of Counsel filed in this Adversary Proceeding, Dckt. 61, and having been approved, by which William F. Abbott is authorized to withdraw as counsel for Naomi LeBus, the Plaintiff-Debtor in this Adversary Proceeding. Naomi LeBus is substituted in as representing herself in *propria persona*.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions imposed. By separate order the court shall approve the substitution of Naomi LeBus, in *propria persona*, in the place of William F. Abbott, who is authorized to withdraw as counsel for Ms. LeBus in this Adversary Proceeding.

#### **ORDER AUTHORIZING SUBSTITUTION OF COUNSEL**

The court shall issue a separate order in substantially the following form:

A Substitution of Attorney (Dckt. 61) having been filed

October 15, 2014 at 2:30 p.m.

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by Naomi LeBus, the Plaintiff-Debtor, and William F. Abbott, her counsel of record; the court having considered the in *propria persona* substitution in connection with an Order to Show Cause (DCN: RHS-2) issued in this Adversary Proceeding; the court's findings of fact and conclusions of law for approving this Substitution are stated in the Civil Minutes for the October 15, 2014 hearing on the Order to Show Cause; the court concluding that the withdraw of William F. Abbott will not prejudice the Plaintiff-Debtor; the court having issued an order to abstain from any further proceedings on the claims in this Adversary Proceeding (Dckt. 45); and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Substitution of Counsel filed in this Adversary Proceeding, Dckt. 61, executed by Naomi LeBus, the Plaintiff-Debtor, and William F. Abbott, her heretofore attorney of record is approved.

**IT IS FURTHER ORDERED** that pursuant to the Stipulation and this Order, William F. Abbott has withdrawn as counsel for Plaintiff-Debtor, and Naomi LeBus is substituted in *propria persona* in his place.