

# Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Modesto, California

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

1. [13-90901](#)-E-12 ANDREW NAPIER MOTION TO MODIFY CHAPTER 12  
SAC-10 Scott A. CoBen PLAN  
9-18-14 [[257](#)]

**Tentative Ruling:** The Motion to Confirm Chapter 12 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2014. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion to Confirm is denied.

Andrew Napier ("Debtor") filed the instant Motion seeking confirmation of his Modified Chapter 12 Plan on September 18, 2014. Dckt. 257.

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

Debtors propose a 36 month plan with total monthly payments of \$110,500.00 by September 3, 2014 and then monthly payments of \$12,000.00 from September 25, 2014 through August 25, 2016. Debtors propose to pay the following debt through the plan:

1. All attorney fees shall be paid in full prior to any distribution to creditors other than Chapter 12 Trustee Administrative Expenses pursuant to statute;
2. Upon confirmation of the plan, the loan of Ally financial secured by a 2006 Chevy Silverado 2500 shall be reduced to \$500.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or \$10.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;
3. Upon confirmation of the plan, the loan of Bank of the West secured by Top Con GPS system shall be reduced to \$3,000.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or \$57.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;
4. Upon confirmation of the plan, the loan of CNH Capital America, LLC secured by the 2008 Ford TJ380 Tractor, Port laser tower and Prot Scraper shall be reduced to \$160,804.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 6 years or \$2,572.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;
5. Upon confirmation of the plan, the loan of Ervin Leasing secured by a JD 9500 Laser System shall be reduced to \$1,000.00 which is the value of the collateral and paid with interest at the rate of 4.75% per annum, amortized over 5 years or \$19.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied;
6. Upon confirmation of the plan, the secured claim of the Internal Revenue Service secured by the equity in all of Debtor's assets shall be paid in full without interest amortized over 5 years or \$359.00 per month. Payments shall be paid by the Trustee commencing on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by Debtor directly until the debt is satisfied;
7. Upon confirmation of the plan, the secured claim of Deere & Company secured by a 2007 John Deere 9520 Tractor shall be \$91,026.92 paid with interest at the rate of 4.75% per annum, amortized over 5 years or \$938.00 per month. Payments shall be paid by the Trustee commencing

on the 10th day of the month following confirmation of the plan. After the completion of the plan, payments shall be paid by the Debtor directly until the debt is satisfied. In addition to these payments, Debtor shall pay \$5,628.00 directly to Deere & Company by August 15, 2013 which shall be applied to the secured claim of Deere & Company. Debtor shall at all times maintain insurance on all of the equipment;

8. The claim of Mesa Leasing in the amount of \$72,661.00 secured by multiple pieces of equipment shall be paid in full as follows:
  - a. \$10,000.00 paid by August 1, 2013 directly by Debtor;
  - b. \$10,000.00 paid by September 1, 2013 directly by Debtor and the balance of the claim paid with interest at the rate of 4.75% per annum, amortized over 3 years or \$1,659.00 per month. Payments shall be paid by the Trustee commencing on the 10<sup>th</sup> day of the month following confirmation of the plan;
9. Debtor shall pay the sum of \$10,000.00 directly to NEADA. One payment of \$5,000.00 shall be received no later than July 24, 2013. The second payment of \$5,000.00 shall be received no later than August 7, 2013. This is no grace period for the receipt of these payments; (B) The balance of NEADA's claim in the amount of \$37,611.86 shall be paid in full within 36 months, at 4.75% interest, by monthly plan payments in the amount of \$1,139.70, commencing September 10, 2013 and continuing monthly thereafter until August 10, 2016; (C) NEADA shall have the right to inspect the Equipment (i.e. Used Model 1814 E John Deere Scrapper S/N T81814E050108, and a Used Model 1814E John Deere Scraper S/N T81814E050109) at 90 day intervals. NEADA may contact the Debtor directly to arrange for the inspection; (D) Debtor shall maintain adequate insurance on the Equipment at all times, naming NEADA as a loss payee in the amount of \$50,000.00; (E) NEADA has also filed a motion from relief from stay or, in the alternative, for adequate protection. Debtor agrees that the motion may be granted, but the relief stayed so long as Debtor remains in compliance with the terms of this Stipulation. If the Debtor defaults under any provision of this Stipulation, then NEADA shall send written notice of the default to Debtor and Debtor's counsel. If the default is not cured within 10 days of the date of the written notice, then NEADA may immediately exercise its rights under state law to repossess and sell the Equipment;
10. Unless the court orders otherwise, attorney fees for Debtor's counsel in the amount of \$10,000.00 are approved. \$5,000.00 was paid by the Debtor directly and the balance shall be paid by the Trustee as funds become available. Attorney fees shall be governed by the terms and conditions set forth in the "Rights and Responsibilities" form used by this court in Chapter 13 cases;
11. To the extent any preprinted section of the plan conflicts with the Additional Provisions set forth in Section 6.02, the Additional Provisions shall control the plan and the preprinted sections shall be of no force or effect;
12. John Bell shall act as a receiver with the following obligations:

- a. Collect payments from Debtor's customers;
  - b. Verify and ensure payment of Debtor's business expenses;
  - c. Pay plan payments to the Chapter 12 Trustee;
  - d. Pay Debtor any amounts remaining after payment of business expenses and plan payments;
  - e. Prepare and file any reports requested by the court of Chapter 12 Trustee;
  - f. Assume control and monitor all of Debtor's business activities;
13. There shall be no distributions to unsecured creditors until the end of the plan to ensure there is sufficient funds on hand to pay administrative expenses;
  14. In the event there is a default in plan payments, the Chapter 12 Trustee may send a letter advising Debtor and Debtor's counsel of a default. Should Debtor fail to cure this default within 10 calendar days, the Chapter 12 Trustee may file with the court a declaration describing the default and failure to cure and the court shall dismiss the case with a one year bar on future bankruptcy filings without any further notice or hearing.

#### **UNITED STATES TRUSTEE'S RESPONSE**

The United States Trustee ("UST") filed a response to the instant Motion on October 16, 2014. Dckt. 283. The UST first frames the proposed plan as (1) increasing the monthly payments to \$12,000.00 and (2) appointing John Bell as a "receiver." To these points, the UST states:

1. The appointment of a receiver may be contrary to 11 U.S.C. § 105(b), which prohibits the appointment of a receiver "in a case under this title." Therefore, the Modified Plan should be amended to provide for the appointment of Mr. Bell as a "financial manager" (albeit with the same duties currently specified in Additional Plan Provision No. 13).
2. In order to address the Modified Plan's compliance with 11 U.S.C. § 1229(a)(1), the Modified Plan should expressly state that the purpose of the modification is to increase the plan payments in order to repay the money spent by the Debtor on luxury items. The Modified Plan should also expressly state that the "financial manager" (Mr. Bell) is being appointed to ensure the feasibility of the Plan.
3. The Modified Plan should require the "financial manager" (Mr. Bell) to be bonded in the amount of \$20,000.00.

The U.S.Trustee requests that the court condition confirmation of the plan upon the Debtor making amendments to the Plan that address the above concerns.

#### **STIPULATION REGARDING FIRST MODIFIED CHAPTER 12 PLAN**

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

The UST and Debtor filed a stipulation concerning the proposed modified plan on October 17, 2014. Dckt. 287. The parties stipulated and agreed to the following:

1. John Bell shall be appointed to act as financial manager pursuant to the terms of the Modified Plan;
2. Additional Provision Number 13 to Section 6.02 of the Modified Plan shall be amended to read as follows:
  - a. "John Bell shall act as financial manager with the following obligations:
    - i. Collection payments from Debtor's customers;
    - ii. Verify and ensure payment of Debtor's business expenses;
    - iii. Pay plan payments to the Chapter 12 Trustee;
    - iv. Pay Debtor any amounts remaining after payment of business expenses and plan payments;
    - v. Prepare and file any reports requested by the court of Chapter 12 Trustee
    - vi. Assume control and monitor all of Debtor's business activities; and
    - vii. Obtain a bond in the amount of \$20,000.00 in favor of the United States, conditioned on the faithful performance of his duties under this Provision
3. An Additional Provision Number 16 shall be added to Section 6.02 of the Modified Plan, which provision shall read as follows:
4.
  - a. "The purpose of this First Modified Chapter 12 Plan is to increase monthly payments in order to repay the money spent by the Debtor on luxury items. Mr. Bell, the financial manger, is being appointed as such to facilitate the feasibility of the First Modified Chapter 12 Plan."
5. Facsimile or scanned copies of signatures on this Stipulation are acceptable, and facsimile or scanned copy of a signature on this Stipulation is deemed an original.
6. This Stipulation may be changed, modified or otherwise altered only by a writing executed by all parties hereto. Oral modifications are not permitted.
7. This Stipulation may be executed in counterparts, each of which is deemed an original, but when taken together shall constitute one and the same document.

#### **DISCUSSION**

Upon review of the proposed Chapter 12 Plan, as amended, the evidence in the form of the declaration of Debtor, the response of the UST, the stipulation between the UST and Debtor, and arguments of counsel, the court makes the following findings of fact and conclusions of law with respect to the motion to confirm the Chapter 12 Plan pursuant to 11 U.S.C. § 1225, analyzing each requirement individually.

- (1) the plan complies with the provisions of Chapter 12 of the Bankruptcy Code and with the other applicable provisions of this title, with the amendments proposed in the Stipulation, except as expressly stated below;
- (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
- (3) the plan has been proposed in good faith and not by any means forbidden by law in order to address Debtor's spending on luxury goods and to remedy that superfluous spending;
- (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of the Bankruptcy Code on such date;

The Debtor states in the Motion that all of Debtor's assets are fully encumbered. Absent a Federal Tax Lien, Debtor would have \$21,522 in unencumbered assets. Noting this, the Internal Revenue Service filed a secured claim in this amount. According to the Debtor, if the Debtor were to liquidate in Chapter 7, there would be nothing for the unsecured creditors because the assets are exempt, subject to a tax lien and unsecured creditors would be junior to a \$54,743.00 priority claim by the Internal Revenue Service.

- (5) with respect to each allowed secured claim provided for by the plan-
  - (A) the holder of such claim has accepted the plan;
  - (B)
    - (i) the plan provides that the holder of such claim retain the lien securing such claim; and
    - (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or
  - (C) the debtor surrenders the property securing such claim to such holder;
- (6) the debtor has not provided the court with evidence that he will be able to make all payments under the plan and to comply with the plan.

This court learned early on that "budgets" presented by plan proponents in Chapter 11, 12, and 13 cases were often comprised of the "necessary numbers" to generate the required plan payment. After several cases in which the "budgets" testified to under penalty of perjury by debtors and put forward by

they attorneys (subject to Fed. R. Bankr. P. 9011) turned out to be mere "make believe," the court has required plan proponents to provide evidence of how the numbers are generated and why they are credible. Generally this is shown through historical information concerning the operation of the business (which in Chapter 11 cases may include the monthly operating reports), with explanations as to what has changed to decrease expenses or increase income.

When this bankruptcy case was filed on May 9, 2013 the Debtor stated on Schedule I that the monthly income from the business was \$75,000.00 a month. Dckt. 1 at 32. On Schedule J the Debtors list business expenses of (\$69,900.00) to generate the \$5,100.00 of business income. *Id.* at 33. The Statement of Financial Affairs lists income from the business of \$916,476.00 (\$76,373 a month) in 2011, \$900,000.00 (\$75,000 a month) in 2012, and \$300,000.00 YTD as of petition date in 2013.

Now, in support of confirmation a year and a half later, Debtor state that the monthly business income is \$14,620.00 and business expenses are \$2,620.00 without providing how these new numbers have been reached. Dckt. 260, Exhibit A.

- (7) the debtor has paid all amounts that are required to be paid under domestic support obligation an that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation.

While the Debtor notes that there may be future support obligations due for Debtor's former spouse, at the time there is no award for domestic support obligations that is due.

## **RULING**

After review of the plan and analyzing each requirement under 11 U.S.C. § 1225(a), the court finds that the plan, after the amendments stipulated to by the UST and Debtor are made, does not comply with § 1225. The court is concerned with the new budget numbers presented to the court through the supplemental Schedules I and J, the new budget diverges from the original budget filed with the petition. As discussed in more detail, the "financial honesty" of this Debtor has been compromised by his diversion of monies.

The terms concerning Mr. Bell appears to have not been rectified through the stipulated amendment proposed by the UST and Debtor to ensure that the past bad acts of the Debtor concerning superfluous spending no longer takes place. The court agrees that the modified plan needed to state the purpose of the plan and step up in plan payments was to rectify Debtor's prior spending on luxury goods.

The proposed Plan merely provides that the "receiver" or "financial manager" shall have some limited powers to oversee the finances of the Debtor's business. However, the Debtor has demonstrated that he is incapable of handing such finances or being honest with the Chapter 12 Trustee, creditors, and the court. Merely changing the name of the fiduciary of the estate from "receiver" to "financial manager" does not change what that person needs to do on behalf of the bankruptcy estate - take over complete operation and control of the estate's business and finances.

The Debtor proposes a watered down, unreasonable "financial manager" which would in effect leave the Debtor with free reign to engage in further financial abuses, diversion of monies, and being free to go on gambling junkets to Las Vegas. In substance, the "financial manager" would be fed the information which the Debtor deemed appropriate about the business, be told about contracts entered into by the Debtor which the Debtor wanted to disclose, responsible for collecting the accounts receivable that the Debtor disclosed, "verify" that the Debtor was paying whatever expenses the Debtor disclosed he was paying, and paying the Debtor an undetermined amount left over each month after accounting for the income that the Debtor chose to disclose to the Trustee, after verifying that the Debtor paid the expenses which the Debtor chose to disclose to the "financial manager."

The proposed plan provides that the "financial manager" has the obligation to "assume control and monitor all of Debtor's business activities." The court does not know what this means, and how, if it is intended to mean that the "financial manager" shall take over control of and operate the business, how that differs from a "receiver" appointed pursuant to a confirmed plan.

The court also finds the Debtor's current financial information not to be credible. Since filing this case on May 9, 2013, Debtor has repeatedly stated under penalty of perjury that the true and accurate gross income each month is \$75,000.00. In his multiple statements this amount never varies. Debtor has now reduced the "necessary" expenses for the business from the prior stated \$67,280.00 a month (Schedule J, Dckt. 1) to the current \$60,380.00 (Supplemental Schedule J, Dckt. 267). These "necessary expenses" have now been "reduced" to allow the Debtor to make the higher plan payment which is required because of the monies he previously diverted. No explanation is provided as to how the Debtor could "reduce" such "necessary expenses," and it appears that these are made up numbers to generate the result the Debtor desires.

The Debtor also purports to have personal expenses of only \$2,620.00 a month. This includes payment of \$1,345.00 for his mortgage or insurance. There is no showing that the expenses which he chooses to list on Supplemental Schedule J are true and accurate. The Debtor lists monthly expenses of only,

- A. \$100 for electricity and heating;
- B. \$300 for food and housekeeping;
- C. \$100 for medical and dental expenses;
- D. \$300 for self employment taxes;

and the Debtor shows no expenses for the following:

- E. \$0.00 for home maintenance;
- F. \$0.00 for health insurance;
- G. \$0.00 for personal vehicle insurance;
- H. \$0.00 for health insurance;
- I. \$0.00 for income taxes



Supplemental Schedule J, Dckt. 267.

These expenses do not appear to be reasonable, but appear to document that the Debtor is not being truthful or accurate with this information.

The Business expenses include \$11,500.00 for "payroll," which the court interprets as necessary payments to persons other than the Debtor. No health insurance payments are made by the "business." There is a "business expense" of \$1,500 a month for "auto insurance."

Quite possibly the Debtor's actual personal expenses are hidden in the "business expenses." That is not proper.

Debtor has demonstrated that he is not capable of running the finances of the business, be responsible for the finances, handling any money of the business, and being responsible for the contracts and accounts receivable. The proposed "financial manager" appears to be little more than a "beard" by which the Debtor maintains all of the real financial information and the "financial manager" gets only what the Debtor chooses to disclose.

If the Debtor is not able to obtain a receiver under a confirmed plan who can take control of the business upon which the plan depends, he may want to convert the case to one under Chapter 11, have a Chapter 11 Trustee appointed, and have the Chapter 11 Trustee continue in that capacity under a confirmed plan until the plan is completed.

Therefore, the court finds that the Modified Plan does not comply with the requirements of 11 U.S.C. §§ 1222, 1223, 1225, and 1229, and the plan is not confirmed.

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

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

The Motion to Confirm the Modified Chapter 12 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.

2. [13-90901](#)-E-12 ANDREW NAPIER  
SAC-11 Scott A. CoBen

MOTION TO EMPLOY JOHN BELL AS  
RECEIVER  
9-18-14 [[262](#)]

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

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.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on September 18, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

**The Motion to Employ is denied without prejudice.**

Andrew Napier ("Debtor"), seeks to employ John Bell as financial manager and/or receiver. Debtor seeks the employment of counsel to assist the Debtor in:

- i. Collection payments from Debtor's customers;
- ii. Verify and ensure payment of Debtor's business expenses;
- iii. Pay plan payments to the Chapter 12 Trustee;
- iv. Pay Debtor any amounts remaining after payment of business expenses and plan payments;
- v. Prepare and file any reports requested by the court of Chapter 12 Trustee

- vi. Assume control and monitor all of Debtor's business activities; and
- vii. Obtain a bond in the amount of \$20,000.00 in favor of the United States, conditioned on the faithful performance of his duties under this Provision.

The Debtor argues that financial manager/receiver's appointment is necessary to ensure that luxury spending by the Debtor no longer takes place to the detriment of the estate and the creditors.

John Bell, a panel Chapter 7 Trustee, a Chapter 11 Trustee and financial manager, testifies that he will have oversight on Debtor's business and estate to ensure timely payment and compliance with the plan. Mr. Bell testifies he does not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

The Motion states that the Debtor, Mr. Bell, and the Chapter 12 Trustee have agreed that Mr. Bell should be compensated for his services by way of a direct payment from the Chapter 12 Trustee at the rate of \$2,000.00 per month for six months. Mr. Bell, Debtor, or the Trustee may move the court to modify this compensation should it be determined that it is inadequate or excessive in light of the amount of work required of Mr. Bell. At the conclusion of the six months, Mr. Bell shall move the court for additional compensation in a manner to reasonably compensate him for the services he will be rendering after these six months. The Debtor asserts that due to the uncertain nature of the amount of work that will be required of Mr. Bell, the Debtor, Mr. Bell and the Trustee have agreed that this approach would be appropriate under the circumstances.

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

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

After review of the Motion and accompanying pleadings, the Motion lists Mr. Bell's position as a receiver. While the stipulation made by the United States Trustee and Debtor re-title the position to "financial manager" in order to avoid any potential 11 U.S.C. § 105(b) concerns that precludes the court from appointing a receiver in lieu of a trustee, the mantra "a rose by any other name would smell as sweet" is appropriate.

In enacting the Bankruptcy Code, Congress restricted the appointment of receivers by the federal courts in bankruptcy cases. In 11 U.S.C. § 105(b), Congress provided, "(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title." However, this restriction has been interpreted to limit the federal court's power to use a receiver in lieu of appointing a trustee or examiner, and does not limit the appointment of a receiver as permitted by applicable law. Cases which are instructive on the proper exercise of the equitable powers by a federal judge to appoint a receiver include the following.

*In re Memorial Estates, Inc.*, 797 F.2d 516 (7th Cir. 1986),

The appointment of a receiver for the mortgaged property -- not for the bankrupt's estate as such -- is the appointment of a regular equity receiver and is therefore subject to section 1292(a)(2). Compare our discussion of the possible applicability of section 1292(b) to bankruptcy cases in *In re Riggsby*, supra, 745 F.2d at 1156-57...

The power cut off by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the bankrupt estate, that is, a receiver in lieu of a trustee. Thus in *In re Cash Currency Exchange*, supra, where we held that U.S.C. § 1292(a)(2) is limited to equity receivers, the order sought to be appealed was the order appointing the trustee in bankruptcy, and the appellant wanted us to deem the trustee a receiver for purposes of that section. Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver in a separate controversy between a creditor and the debtor or another creditor.

*Balakian v. Balakian*, 2008 U.S. Dist. LEXIS 121067, at \*49, (E.D. Cal. 2008)

Although 11 U.S.C. § 105(b) precludes appointment of a receiver 'in a case under this title,' Section 105(b) does not preclude appointment of a receiver in an adversary proceeding to foreclose a lien, see *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1133 (8th Cir.1998).

The appointment of a receiver to take possession of and compete a required transaction under the confirmed Chapter 12 Plan, would not appear to run afoul of 11 U.S.C. § 105(b).

However, there is no confirmed plan in this case. The court having dismissed the proposed plan on the October 30, 2014 hearing, the court cannot grant the appointment of a receiver. The fact that the terms of the alleged receivership seem to give the receiver only as much control and knowledge over the estate as what is offered by the Debtor, even if there was a confirmed plan that would avoid the § 105(b) issues, the receivership as contemplated by the Motion and plan are flatly unacceptable and non-confirmable. The court will not authorize the extra-ordinary appointment of a receiver, after a plan is confirmed, who will be at the mercy of disclosures from the Debtor. The reason the case is in its current posture is due to the negligence and bad faith of the Debtor so giving the Debtor any say or authority in the maintenance of the estate is not in the best interest of the estate, the creditors, or even the

Debtor himself.

Furthermore, there is no employment agreement outlining the terms of the representation and compensation for the court to review. Without documentation of the agreement, the court cannot determine the reasonableness of the fee arrangement. Furthermore, while the Debtor states there was an agreement that Mr. Bell would be paid from the chapter 12 Trustee, there does not appear to be any provision in the Plan about the compensation of Mr. Bell.

Because the Debtor has not provided an employment agreement and there has been no plan confirmed to allow the appointment of a receiver, the court cannot determine whether the scope and terms of employment are reasonable. Therefore, the motion is denied without prejudice.

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

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

The Motion to Employ filed by the 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 to Employ is denied without prejudice.

3. [14-91023-E-11](#) JOSEPH TEDESCO

**STATUS CONFERENCE RE: CHAPTER  
11 VOLUNTARY PETITION  
7-16-14 [[1](#)]**

Debtor's Atty: David C. Johnston

Notes:

Continued from 8/21/14

Operating Reports filed: 9/10/14, 10/15/14

**OCTOBER 30, 2014 STATUS CONFERENCE**

The Monthly Operating Report for September 2014, provides the following financial information"

A.	Total Cash Receipts.....	\$21,900
B.	Total Cash Disbursements.....	(\$20,350)
C.	Net Increase for September 2014.....	\$ 1,550

The September Monthly Operating Report does not provide the Cumulative

financial information from the commencement of the case. Dckt. 43. No cumulative information is shown on the August 2014 Monthly Operating Report. Dckt. 37. For the July 2014 Monthly Operating Report the Debtor provides only the currently monthly data (it being the first monthly operating report filed).

If taken as true and accurate, the September 2014 Monthly Operating Report states that the Debtor in Possession spent only \$247.00 for the entire month on personal expenses.

This is the Debtor's fourth Chapter 11 case since April 2010. No plan has been filed in this case. No Status Report for this Status Conference has been filed.

## **AUGUST 21, 2014 STATUS CONFERENCE**

### **Status Conference Summary**

Joseph Tedesco, the Debtor in Possession, ( $\Delta$ IP) has commenced and had dismissed or converted two prior Chapter 11 cases. In each of the two prior unsuccessful cases he was represented by the same counsel as proposed to represent him in the present Chapter 11 case. The first Chapter 11 case was filed on April 7, 2010, and dismissed on February 18, 2011. 10-91296. In determining that relief was proper, the court found,

"Since the filing of this case on April 7, 2010, debtor has not filed a plan or disclosure statement. The Debtor's failure to file necessary documents strongly suggests both that the debtor is not taking its obligations as a chapter 11 debtor-in-possession seriously and that the debtor has no intention of reorganizing in bankruptcy."

10-91296, Civil Minutes, Dckt. 146. The court elected to dismiss the case as requested by the Debtor, rather than convert it as argued by the Trustee, giving the Debtor a break.

Debtor immediately turned around and filed a second Chapter 11 bankruptcy case on March 3, 2011. 11-90779. In converting the second bankruptcy case to one under Chapter 7 (April 27, 2011), the court found that the Debtor was merely abusing the bankruptcy laws with filing the second case and not attempting to engage in a good faith, bona fide Chapter 11 reorganization. *Id.*, Civil Minutes, Dckt. 34.

### **August 21, 2014 Status Report - Filed August 8, 2014, Dckt. 18**

$\Delta$ IP states that the estate consists of a shopping center, duplex, small rental house, and a resort rental in Aptos, California. He further states that pre-petition the Debtor made the monthly payments on his loan, but has defaulted on property tax payments, which are calculated to be \$114,000.00 in default by the creditor.

$\Delta$ IP states that on or before September 30, 2014, the  $\Delta$ IP will file a Chapter 11 Plan.

In this Fourth Bankruptcy Case, Debtor and Counsel have filed the basic

pleadings (Schedules and Statement of Financial Affairs) and a Status Report (Dckt. 18). Schedule A lists four properties - commercial (\$2,500,000.00 value - \$1,998,713.00 debt), condo (\$625,000.00 value - \$447,583.00 debt), duplex (\$250,000.00 value - \$342,138.00 debt), and a small house (\$95,000.00 value - \$50,417.00 debt) owned by Debtor. Dckt. 16 at 3. On Schedule B owning personal property with a value of \$26,889.00. Of this \$10,000.00 is for household goods/personal effect, \$10,000.00 for back rent owed by tenants, \$5,000.00 for a 2005 Silverado (224,000 miles), \$1,329.00 in a business checking account, and \$560.00 in a personal checking account. *Id.* at 4-6.

On Schedule D Debtor lists several creditors with secured claims. These include Stanislaus County owed \$114,000.00 in property taxes on the commercial property and Westamerica Bank owed \$1,884,713.00 secured by the commercial property. No creditors are listed on Scheduled E (priority unsecured claims) or Schedule F (general unsecured claims).

On Schedule I, Debtor lists having \$23,800.00 in net monthly income from his business. *Id.* at 16. No list of business expenses is attached to Schedule I. Schedule J lists \$24,591.00 in total expenses, most of which appear to be business expenses. For personal expenses Debtor states under penalty of perjury the following:

A.	Rent/Mortgage.....	(\$ 650.00)
B.	Electricity.....	(\$ 0.00)
C.	Water/Sewer/Garbage.....	(\$ 0.00)
D.	Telephone/Cable/Internet.....	(\$ 0.00)
E.	Food/Housekeeping.....	(\$ 300.00)
F.	Clothing/Laundry.....	(\$ 200.00)
G.	Personal Care.....	(\$ 25.00)
H.	Medical/Dental.....	(\$ 65.00)
I.	Transportation.....	(\$ 300.00)
J.	Entertainment.....	(\$ 0.00)
K.	Health Insurance.....	(\$1,046.00)
L.	Vehicle Insurance.....	(\$ 60.00)

*Id.* at 17-18. All of the other expenses appear to be business expenses.

Based on these expenses, Debtor computes his Monthly Net Income to be \$21.00.

In his Status Report, Debtor while he has been able to stay current on the mortgage payments for his investment properties, he is \$114,000.00 in default on property taxes. Westamerica Bank asserted the default in the taxes (the senior lien) on the property securing its claim as a default and appears to have taken steps to foreclose. Debtor states that to avoid the "substantial expense of foreclosure proceedings" he commenced the Fourth Chapter 11 Case to confirm a plan to pay the delinquent property taxes.

For a Plan Debtor does not intend to sell any assets, but "reorganize." The Status Report does not identify what caused the default in the property taxes or how Debtor can pay the delinquent taxes and future taxes, in addition to the other expenses (person and business) which he states are all current as of the filing of the case.

On July 30, 2014, the Stanislaus Tax Collector filed a secured proof

of claim in the amount to \$88,823.69. Proof of Claim No. 1. The "Default Date" stated on the attachment to the Proof of Claim is June 30, 2010.

4. [12-93049](#)-E-11 MARK/ANGELA GARCIA

CONTINUED STATUS CONFERENCE RE:  
CHAPTER 11 VOLUNTARY PETITION  
11-30-12 [[1](#)]

Debtors' Atty: Mark J. Hannon

Notes:

Continued from 8/21/14  
Operating Reports filed: 9/13/14 [Jul, Aug]; 10/13/14  
Chapter 11 Status Conference Report of Debtors filed 10/20/14 [Dckt 401]  
Creditor Iain A. Macdonald's Status Conference Statement filed 10/23/14  
[Dckt 407]

#### **OCTOBER 30, 2014 STATUS CONFERENCE**

The Debtors report in their Status Conference Report that they believe that the Trustee is not actively working to prosecute a plan in this case. Further, they believe that their former attorney, Ian MacDonald is improperly asserting the absolute priority rule since this is an individual Chapter 11 case.

Ian MacDonald filed his Status Report, arguing that the Debtors do not contend that there is a feasible plan, but merely that they are prosecuting litigation to recover a claim arising from a bond they issued. He argues that the Trustee should either prosecute a plan or the case converted to one under Chapter 7. The gist of the Report is that while this creditor is willing to "play ball," the Debtors are locked in an adversary position. For the Debtors, they believe that this creditor is being unreasonable and trying to steer the case in a way that is detrimental to Debtors.

#### **AUGUST 21, 2014 STATUS CONFERENCE**

Counsel for the Trustee reported that, as new counsel, is working with the Trustee and parties to understand the dynamics of the case. The Trustee reports that the sale of the Inyo Avenue Property has not gone through because title is not in the name of the estate. Rather, the estate has a deed of trust against the property, with title being in the name of the Debtor's corporation, whose powers have been suspended.

Creditor MacDonald concurs with continuing the Status Conference and communications continue between the parties.



5. [13-91459](#)-E-11 LIMA BROTHERS DAIRY

CONTINUED STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
8-7-13 [[1](#)]

Debtor's Atty: Hagop T. Bedoyan

Notes:

Continued from 10/2/14 to be heard in conjunction with other matters on calendar.

Operating Report filed: 10/21/14

Notice of Withdrawal of Proof of Claim [creditor Frank Coelho & Sons, LP; claim number 8] filed 10/10/14

6. [13-91459](#)-E-11 LIMA BROTHERS DAIRY  
KDG-9

CONFIRMATION OF PLAN OF  
REORGANIZATION FILED BY DEBTOR  
6-12-14 [[258](#)]

**Final Ruling:** No appearance at the October 30, 2014 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-in-Possession, creditors, parties requesting special notice, and Office of the United States Trustee on August 7, 2014. By the court's calculation, 84 days' notice was provided. 28 days' notice is required.

The Motion for Confirmation of Plan of Reorganization Filed by Debtor has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<b>Confirmation of Plan of Reorganization Filed by Debtor is granted.</b>
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The Plan Proponent has complied with the Service and Filing Requirements for Confirmation:

<u>August 8, 2014</u>	Plan, Disclosure Statement, Disc Stmt Order, and Ballots Mailed
<u>September 8, 2104</u>	Last Day for Submitting Written Acceptances or Rejections
<u>September 8, 2014</u>	Last Day to File Objections to Confirmation
<u>September 29, 2014</u>	Last Day to File Replies to Objections, Tabulation of Ballots, Proof of Service

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Tabulation of Ballots:

<b>Class</b>	<b>Voting</b>	<b>Ballot Percentage Calculation</b>	<b>Claim Percentage Calculation</b>
1- Administrative Claims	For:0 Against:0		
2- Priority Tax Claims	For: 0 Against: 0		
<b>3- American AgCredit, PCA</b>	<b>For: 1 Against: 0</b>	100% for Confirmation	100% for Confirmation
4- American AgCredit, PCA - Feed Loan	For: 0 Against: 0		
<b>5 - American AgCredit, FLCA 2012 Loan</b>	<b>For: 1 Against: 0</b>	100% for Confirmation	100% for Confirmation
<b>6- American AgCredit, FLCA 2012 Loan</b>	<b>For: 1 Against: 0</b>	100% for Confirmation	100% for Confirmation
7 - Merced County Tax Collector Unimpaired	For: 0 Against: 0		
<b>8- Cargill, Inc.</b>	<b>For: 1 Against: 0</b>	100% for Confirmation	100% for Confirmation
9- Naeda Financial	For: 0 Against: 0		
<b>10- Stanislaus Farm Supply</b>	<b>For: 1 Against: 0</b>	100% for Confirmation	100% for Confirmation
11- Executory Contracts and Unexpired Leases	For: 0 Against: 0		
<b>12- Allowed General Unsecured Creditors</b>	<b>For: 11 Against: 0</b>	100% for Confirmation	100% for Confirmation
13- Partners in Debtor	For: 2 Against: 0	100% for Confirmation	100% for Confirmation
14- Debtor	For: 1 Against: 0	100% for Confirmation	100% for Confirmation

Declarations of Jose Lima, general partner of Debtor-in-Possession, (Dckt. 338) and Jacob Eaton, attorney at Klien, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, (Dckt. 339) filed in support of confirmation provides evidence of the compliance with the necessary elements for confirmation in 11 U.S.C.

§1129:

**CHAPTER 11 PLAN TERMS**

Creditor/Class	Treatment	
Class 1: Administrative Expenses	<b>Claim Amount</b>	
	<b>Impairment</b>	Unimpaired
	Class One Claims incurred through the Effective Date will be paid in cash on or before the Effective Date, or after Court order if necessary, unless such claimants agree to a different treatment. Those Claims payable after allowance by the Court will be paid within 20 days after such allowance is granted. Except as provided below, any application for approval of a Class One Claim arising prior to Confirmation of the Plan will be filed and served no later than thirty days after LIMA gives notice of said requirement to the affected creditors, except that application for allowance and payment of any Professional Fee Claims may be made at any time during the Term of the Plan.	
Class 2: Priority Claims	<b>Claim Amount</b>	\$3,232.00
	<b>Impairment</b>	Unimpaired
	The Class Two Claimant will be paid in full within 30 days of the Effective Date.	
Class 3: Secured Claim of American AG Credit, PCA Cow Loan	<b>Claim Amount</b>	\$2,447,515.48
	<b>Impairment</b>	impaired
	<p>Debtor and PCA will enter into the New Loan Documents which will effectively incorporate the Pre-Petition Loan Documents and will document the treatment of the Class Three Claim. Filipe and Joe are required to personally guarantee the New Loan Documents in connection with confirmation of the plan and execution of the New Loan Documents.</p> <p>The Reorganized Debtor will make monthly principal and interest payments to PCA on account of the Class Three Claim beginning on the twentieth day of the month following the Effective Date and continuing each month until the Class Three Claim is paid in full. The estimated amount of the initial payment is \$28,000.00 per month. Interest will accrue at a variable rate of interest.</p>	
Class 4: Secured claim of American AgCredit, PCA - Feed Loan	<b>Claim Amount</b>	\$113,612.66
	<b>Impairment</b>	Unimpaired

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	The Class Four Claim was paid in full after the Petition Date.	
Class 5: Secured Claim of American AgCredit, FLCA - 2010 Loan	<b>Claim Amount</b>	\$2,321,623.40
	<b>Impairment</b>	impaired
	<p>FLCA and the Reorganized Debtor will retain all rights and responsibilities set forth in the Pre-Petition Loan Documents, except that the Reorganized Debtor will replace LIMA as guarantor and the holder of personal property collateral. The Reorganized Debtor will execute a guarantee with respect to the Class Five Claim.</p> <p>The amount of the Allowed Class Five Claim will be \$2,321,623.40, plus non-default interest accrued but not paid on the Effective Date and reasonable costs including attorneys' fees and consultant expenses, as provided by the Pre-Petition Loan Documents, less any principal payments made toward the Class Five Claims.</p> <p>Interest will accrue at the rate provided by the Pre-Petition Loan Documents. The Reorganized Debtor will make fixed principal and interest payments to FLCA on account of the Class Five Claim in the estimated amount of \$16,593.16 per month based on the Pre-Petition Loan Documents. The monthly payment to FLCA shall be made by assignment from NFO, or other creamery to which the Reorganized Debtor may ship milk in the future, from the Reorganized Debtor's milk check.</p>	
Class 6: Claim of America AgCredit, FLCA - 2012 Loan	<b>Claim Amount</b>	\$933,681.15
	<b>Impairment</b>	Impaired

	<p>FLCA and the Reorganized Debtor will retain all rights and responsibilities set forth in the Pre-Petition Loan Documents, except that the Reorganized Debtor will replace LIMA as guarantor and the holder of personal property collateral. The Reorganized Debtor will execute a guarantee with respect to the Class Six Claim.</p> <p>The amount of the Allowed Class Six Claim will be \$933,681.15, plus non-default interest accrued but not paid on the Effective Date and reasonable costs including attorneys' fees and consultant expenses, as provided by the Pre-Petition Loan Documents, less any principal payments made toward the Class Six Claims.</p> <p>Interest will accrue at the rate provided by the Pre-Petition Loan Documents. The Reorganized Debtor will make fixed principal and interest payments to FLCA on account of the Class Six Claim in the amount of \$6,186.00 per month as required by the Pre-Petition Loan Documents. The monthly payment to FLCA shall be made by assignment from NFO, or other creamery to which the Reorganized Debtor may ship milk in the future, from the Reorganized Debtor's milk check.</p> <p>FLCA's liens shall extend to its collateral, in the same order of priority that existed on the Petition Date, after the assets of LIMA are contributed to the Reorganized Debtor. FLCA may file and record appropriate documents to perfect its liens.</p>	
Class 7: Claim of Merced County Tax Collector	<b>Claim Amount</b>	\$59,583.00
	<b>Impairment</b>	Unimpaired
	The Class Seven Claimant will retain its lien and the Class Seven Claim will be paid in full by the Reorganized Debtor within 30 days of the Effective Date. This payment will cure all arrears in the month-to-month lease for real property with the Brothers.	
Class 8: Claim of Cargill, Inc.	<b>Claim Amount</b>	\$823,221.45
	<b>Impairment</b>	Impaired

	<p>The amount of the Allowed Secured Class Eight Claim will be \$823,221.45 plus non-default interest accrued but not paid on the Effective Date and reasonable costs including attorneys' fees and consultant expenses, as provided by the pre-petition loan documents between Cargill and LIMA, less any principal payments made toward the Class Eight Claims.</p> <p>Interest will accrue at 5% per annum from and after the Petition Date. The Reorganized Debtor will make fixed principal and interest payments to Cargill on account of the Class Eight Claim in the amount of \$15,535.20 per month beginning on the twentieth day of the month following the Effective Date and continuing each month until the Class Eight Claim is paid in full. Payments are based on a standard principal and interest amortization of the Class Eight Claim over 60 months.</p>	
Class 9: Claim of Naeda Financial	<b>Claim Amount</b>	\$28,502.34
	<b>Impairment</b>	Impaired
	<p>The Class Nine Claimant will retain its lien against the manure pump and the Class Nine Claim will be paid according to the terms of its contract. Naeda and the Reorganized Debtor will retain all rights and responsibilities set forth in the pre-petition contract between Naeda and LIMA, except that the Reorganized Debtor will replace LIMA as the borrower and the owner of collateral. The Reorganized Debtor will make fixed principal and interest payments to Naeda on account of the Class Nine Claim in the amount of \$656.00 per month as required by the terms of its contract. Naeda will retain its purchase money security interest in the manure pump in the same order of priority that its lien existed on the Petition Date. The Class Nine Claimant will reconvey its security interest after the Class Nine Claim is paid in full.</p>	
Class 10: Claim of Stanislaus Farm Supply Co., Inc.	<b>Claim Amount</b>	\$263,951.87
	<b>Impairment</b>	Impaired
	<p>LIMA and Farm Supply entered and filed a stipulation regarding the value of Farm Supply's collateral that provides that the value of Farm Supply's interest in its collateral is \$0.00 because the Class Ten Claimant's lien is junior to the Class Three, Five, Six, and Eight Claims. Therefore, the amount of the Allowed Secured Class Ten Claim will be \$0.00. The Allowed Claim held by Farm Supply will be a general unsecured Class Twelve Claim. Farm's Supply's lien shall be invalid upon confirmation of the Plan.</p>	

Class 11: Executory Contract and Unexpired Leases	<b>Claim Amount</b>	
	<b>Impairment</b>	
	<p>LIMA was party to a Membership and Marketing Agreement with NFO on the Petition Date. LIMA ships the majority of its milk to NFO and NFO markets and sells LIMA's milk and pays LIMA for its milk under the Membership and Marketing Agreement. LIMA hereby assumes the Membership and Marketing Agreement with NFO. LIMA was and is party to a month-to-month agreement with the Brothers wherein it leases the Real Property owned by the Brothers on which it operates its dairy and grows crops in exchange for the payment of real property taxes, payment of debt service, irrigation assessments, and maintenance of the Real Property and all improvements on the Real Property. LIMA will be current on the payments required by the oral month-to-month lease upon payment of the Class 7 Claim as described herein. The Reorganized Debtor will assume the lease of the Real Property under the same terms. Any Unexpired Lease or Executory Contract that is not specifically treated herein is rejected to the extent other Unexpired Leases or Executory Contracts were existing on the Petition Date. Any general unsecured claims arising out of the rejection of executory contracts and unexpired leases by LIMA will be treated as a Class Eleven Claim.</p>	
Class 12: Allowed Claims of General Unsecured Creditors	<b>Claim Amount</b>	\$1,920,968.48
	<b>Impairment</b>	Impaired
	<p>Class Twelve Claimants will be paid 100% of their Allowed Claims over 60 months. The Reorganized Debtor will make payments totaling \$32,016.14 per month to the Class Twelve Claimants commencing on the 5th day of the month following the Effective Date, and continuing each month for 60 months, or until the Class Twelve Claims are paid in full.</p> <p>All Class Twelve Claimants will receive a pro-rata share of each distribution made by the Reorganized Debtor under this Plan based upon the amount of their Allowed Claims. Amounts recovered by LIMA or the Reorganized Debtor for any preference or fraudulent conveyance actions, after reduction for costs of recovery, will be paid to the Class Twelve Claimants on a pro-rata basis. This payment will be in addition to the payments described above if, at the time of the recovery, the Class Twelve Claimants have not been paid in full. LIMA or the Reorganized Debtor shall retain any recovery if, at the time of recovery, the Class Twelve Claimants have been paid in full.</p>	



Class 13: Interests of the Partners of LIMA	<b>Claim Amount</b>	
	<b>Impairment</b>	Unimpaired
	The Class Thirteen Claimants will retain their interests in LIMA. However, the Class Thirteen Claimants will cause LIMA to contribute its assets to the Reorganized Debtor which will be a consolidation of LIMA's assets and operations as well as P&M Dairy's assets and operations. The Reorganized Debtor will be a limited partnership named "Lima Brothers & Son Dairy, LP." The Reorganized Debtor will have three limited partners: (1) Filipe, holding a 37.125% ownership interest; (2) Joe, holding a 37.125% ownership interest, and (3) Phillip, Jr., holding a 24.7 5% ownership interest. The Reorganized Debtor shall have one general partner. The general partner will be a limited liability company that will own 1% of the Reorganized Debtor ("the LLC"). The members of the LLC will be (1) Filipe, holding a 37.5% membership interest; (2) Joe, holding a 37.5% membership, and (3) Phillip, Jr., holding a 25% membership interest.	
Class 14: Interest of LIMA	<b>Claim Amount</b>	
	<b>Impairment</b>	
	The Class Fourteen Claims are the claims or interests held by LIMA. LIMA will cause that the Reorganized Debtor be created in accordance with the terms of the Plan before the Effective Date. Upon the Effective Date, LIMA and P&M Dairy will contribute all of their assets to the Reorganized Debtor without further order of the Court. The Reorganized Debtor will assume the duties, obligations, and rights of LIMA including, but not limited to, those duties, obligations, and rights arising under the Plan and those duties, obligations, and rights arising under the Bankruptcy laws. The Reorganized Debtor will also take responsibility for the following business obligations of P&M Dairy, (1) the debt secured by a John Deere Swather owed to Pioneer Equipment in the amount of about \$13,000.00 payable in one installment in May 2015, and (2) the lease obligation associated with the lease of a Bobcat skidsteer loader, payable in the amount of about \$500.00 per month.	

**11 U.S.C. § 1129(a).**

1. The plan complies with the applicable provisions of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 5

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2. The proponent of the plan complies with the applicable provisions of the Bankruptcy Code.

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 6

3. The plan has been proposed in good faith and not by any means forbidden by law.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 14

4. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 15

5. (A) (I) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 16

6. Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 7

7. With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(I) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 701 et seq., on such date; or

(B) if section 1111(b)(2) of this title [11 USCS § 1111(b)(2)] applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 9, 10, 11

8. With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 18

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of the Bankruptcy Code, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 13

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of the Bankruptcy Code, each holder of a claim of such class will receive--

(I) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 13

(C) with respect to a claim of a kind specified in section 507(a)(8) of the Bankruptcy Code, the holder of such claim will receive on account of such claim regular installment payments in cash--

(I) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302,

or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

**Evidence:** Eaton Declaration, Dckt. 339, ¶ 13;

10. If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

**Evidence:** Tabulation of Ballots: Impaired Classes 3, 5, 6, 8, 10, and 12 voting to accept the Chapter 11 Plan.

11. Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 22, 23

12. All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 24

13. The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title [11 U.S.C. § 1114], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title [11 U.S.C. § 1114], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

**Evidence:** No Claims for retiree benefits.

14. If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

16. All transfers of property under the plan shall be made in accordance

with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 27

**11 U.S.C. § 1129(b)**

1. Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

2. For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(I) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (I) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

**Evidence:** Lima Declaration, Dckt. 338, ¶ 28, 29.

(B) With respect to a class of unsecured claims--

(I) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the

plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

**Evidence:** No objection asserted, new value provided.

(C) With respect to a class of interests--

(I) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

Evidence: No objection filed, new value provided.

## **CONCLUSION**

No opposition to the Plan has been filed by any party.

The proposed Chapter 11 Plan of Reorganization filed on June 12, 2014 (Dckt. 258), compiles with the requirements of 11 U.S.C. §§ 1129 and 1123. All classes of claims have voted at least more than 50% in number and 2/3 in dollar amount of the voting creditors to accept the Chapter 11 Plan. The proposed Chapter 11 Plan is confirmed.

Counsel for the Debtor-in-Possession shall prepare and lodge with the court an order confirming the Chapter 11 Plan, with a copy of such confirmed plan attached as an exhibit to the proposed order.

7. [13-91459](#)-E-11 LIMA BROTHERS DAIRY  
WJS-1

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
9-26-13 [[34](#)]

AMERICAN AGCREDIT, PCA VS.

**No Tentative Ruling:** The Motion for Relief from Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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)(2)(iii).**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on September 26, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. That requirement was met.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. The court has determined that oral argument will not be of assistance in resolving this matter. No oral argument will be presented and the court issues its ruling from the pleadings filed by the parties.

**The Motion for Relief from the Automatic Stay is XXXXXXXX**

American AgCredit, PCA ("Movant") seeks relief from the automatic stay with respect to an asset identified as the Dairy Herd and milk pool quota. The moving party has provided the Declarations of Teresa Rose, Eric Capron, and Steve Gallichio to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. Movant seeks relief pursuant to 11 U.S.C. § 362(d)(1), as cause exists because there is a potential for damage to the dairy herd from insufficient feed.

The Rose Declaration states that Debtor had borrowed total of \$2,561,128.14 from Movant. There have been post-petition payments received by milk check assignment, which may serve to decrease the total debt slightly.

The Capron Declaration states that Debtor had approximately 60 days of feed on hand on August 20, 2013. However, supplements needed to be purchased to generate feed mix with appropriate nutrition level (estimated cost of \$50,000). As of September 4, 2013, Debtor has failed to file a motion to appoint a broker to liquidate the herd.

The Gallichio Declaration states that he performed a Dairy Valuation. He found that additional feed will need to be purchased. Also, the Debtor did not have supplements such as oat hay, straw or corn stalks for supplements with alfalfa. There are 3,403 animals which he valued at \$2,880,500.

Movant argues that it has been in contact with Debtor's Counsel and understood that the herd would be sold, but no motion to sell has been brought forward and then the September 11, 2013 status report by the Debtor also stated that Debtor expected to employ a broker to sell its livestock. However, no such motion has been filed to date.

#### **PRIOR HEARINGS**

##### **Stipulation for Relief and Continued Hearing**

The parties stated on the record a stipulation to grant the Motion and modifies the automatic stay the hearing to modify the stay to allow Movant to exercise its rights in the "Dry Cows," "bred heifers," "open heifers," "bucket calves (0-6 months)." For this relief, the 14-day stay of enforcement is waived. The hearing is continued as to the balance of the motion and collateral to 10:00 a.m. on October 31, 2013.

No additional documents have been filed to date either arguing for or against further relief from the stay.

#### **DECEMBER 11, 2013 ORDER**

On December 11, 2013, the court continued the hearing on the motion for relief from the automatic stay. Dckt. 81.

#### **JANUARY 8, 2014 ORDER**

On January 8, 2014, the court ordered that the hearing on the Motion for Relief be continued until February 13, 2013, to be heard at 10:00 am. Dckt. No. 98. It was further ordered that any opposition to the Motion be filed on or before January 30, 2014, and that any reply to opposition to the Motion be filed on or before February 6, 2014.

#### **FEBRUARY 3, 2014 ORDER**

On February 3, 2014, the court ordered that the hearing on the Motion for Relief be continued until March 6, 2014 at 10:00 a.m., and trailed to be heard with the Chapter 11 Case Status Conference on the 3:30 p.m. calendar. Dckt. No. 136. It was further ordered that any opposition to the Motion be filed on or before February 20, 2014, and that any reply to opposition to the



Motion be filed on or before February 27, 2014.

Nothing has been filed to date in conjunction with this Motion for Relief to date.

#### **MARCH 6, 214 HEARING**

The court notes the Status Conference Statement states that the Debtor-in-Possession has requested that Ag Credit agree to continue the hearing on this motion 30 days to give the Debtor-in-Possession time to file a Plan and Disclosure Statement.

The parties filed a stipulation to continue the hearing to April 10, 2014.

#### **APRIL 10, 2014 HEARING**

The parties filed a stipulation to continue the hearing to May 22, 2014. Dckt. 190.

#### **MAY 22, 2014 HEARING**

The parties filed a stipulation to continue the hearing to June 12, 2014. Dckt. 232.

#### **JUNE 12, 2014 HEARING**

At the hearing the parties agreed to continue the hearing to 10:00 a.m. on July 24, 2014, to be heard in conjunction with the hearing on the proposed disclosure statement.

#### **JULY 22, 2014 HEARING**

At the hearing the parties agreed to continue the hearing to 2:30 p.m. on October 30, 2014 to be heard in conjunction with the confirmation hearing.

#### **DISCUSSION**

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

A bankruptcy court "shall" lift the automatic stay "for cause." 11 U.S.C. § 362(d)(1). "Cause" has no clear definition and is determined on a case-by-case basis. *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985). The party moving for relief from stay has initial burden of coming forward with prima facie evidence showing that cause exists for granting such relief. 11 U.S.C. § 362.

Here, XXXXXX

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 Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED XXXXXXXX**

No other or additional relief is granted.

8. [13-90465-E-7](#) **KIMBERLY VEGA**  
[14-9004](#)  
**MCGRANAHAN V. VEGA ET AL**

**PRE-TRIAL CONFERENCE RE:**  
**COMPLAINT**  
**1-29-14 [[1](#)]**

Plaintiff's Atty: Steven S. Altman  
Defendant's Atty:  
Pro Se [Kimberly Vega]  
Pro Se [Maria Rangel]  
Pro Se [Victor Vega]

Adv. Filed: 1/29/14  
Answer:  
3/3/14 [Kimberly Vega]  
6/26/14 [Maria Rangel]  
6/26/14 [Victor Vega]

Nature of Action:  
Approval of sale of property of estate and of a co-owner  
Declaratory judgment

Notes:

Scheduling Order-  
Initial disclosures by 4/15/14  
Close of discovery 8/22/14  
Dispositive motions heard by 10/2/14

Initial disclosures of Maria Rangel and Victor Vega by 7/16/14

[MR-1] Motion to Set Aside Clerk's Default filed 4/10/14 [Dckt 27]; Order denying filed 5/7/14 [Dckt 51]

[VV-1] Motion to Set Aside Clerk's Default filed 4/10/14 [Dckt 31]; Order denying filed 5/7/14 [Dckt 53]

[SSA-1] Ex Parte Application of Plaintiff for Extension of Time to Complete Entry of Default and Default Judgment Proceedings filed 4/11/14 [Dckt 35]; Order granting filed 4/13/14 [Dckt 40]

[SSA-1] Motion for Summary Judgment or Summary Adjudication of the Facts filed 5/15/14 [Dckt 57]; Order dismissing without prejudice filed 7/6/14 [Dckt 97]

[MR-2] Defendant Maria Rangel's Motion to Set Aside Default filed 6/11/14 [Dckt 69]; Order granting filed 7/6/14 [Dckt 93]

[VV-2] Defendant's Motion to Set Aside Default filed 6/11/14 [Dckt 69]; Order granting filed 7/6/14 [Dckt 95]

Answers to Complaint filed 6/26/14 by Maria Rangel and Victor Vega [Dckts 81 & 82]

Order Establishing Deadlines for Filing Specific Motions filed 7/8/14 [Dckt 99]

[SSA-2] Motion to Compel Answers to Requests for Admissions and/or Deem Requests for Admissions Admitted; for Production of Documents; for Exclusion of Evidence by Defendants and Reimbursement of Attorney Fees and Costs and Other Relief filed 9/9/14 [Dckt 112]; Order granting filed 10/7/14 [Dckt 119]

Plaintiff's Pre-Trial Statement filed 10/17/14 [Dckt 122]

9. [13-91189-E-11](#) MICHAEL/JUDY HOUSE  
[14-9025](#)  
HOUSE ET AL V. AMARAL

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

Plaintiff's Atty: Robert M. Yaspan  
Defendant's Atty: Michael B. Ijams

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

Nature of Action:  
Injunctive relief - imposition of stay  
Declaratory judgment

Notes:

Joint Rule 26 Discovery Plan fled 10/16/14 [Dckt 15]

#### **SUMMARY OF COMPLAINT**

The Complaint first seeks a declaration of the Plaintiff-Debtors' and the Defendant's respective rights concerning access to a roadway. The Second and Third Causes of Action assert claims for an easement for the roadway. The Fourth Cause of Action seeks to quiet title as to Plaintiff-Debtors' interest in the roadway. The Fifth Cause of Action alleges that Defendant has violated the automatic stay and seeks damages pursuant to 11 U.S.C. § 362(k) and civil contempt. The Sixth Cause of Action seeks injunctive relief to prohibit Defendant from interfering with Plaintiff-Debtors use of the roadway.

## **SUMMARY OF ANSWER**

In the Answer, the Defendant admits and denies specific allegations in the Complaint. Defendant also asserts four affirmative defenses.

## **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and 11 U.S.C. §§ 105 and 506; and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2 Dckt. 1. In his answer, Emanuel Amaral, Defendant, admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1,2, Dckt. 13. 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.

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 and 157(b), and 11 U.S.C. §§ 105 and 506; and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶¶ 1, 2 Dckt. 1. In his answer, Emanuel Amaral, Defendant, admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 1,2, Dckt. 13. To the extent that any issues in this Adversary Proceeding are related to proceedings, 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 claims and issues 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 -----, 2014.
- d. Non-Expert Discovery closes, including the hearing of all discovery motions, on January 16, 2015
- e. Non-Expert Discovery closes, including the hearing of all discovery motions, on February 20 16, 2015.
- f. Dispositive Motions shall be heard before March 27, 2015.
- g. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at 2:30 p.m. on April 30, 2015.