UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 4, 2013 at 1:30 p.m.

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1. 12-35521-E-13 CHRISTOPHER DEAN
13-2289 PD-1
DEAN V. COLLEGE GREENS EAST HOMEOWNER ET AL

MOTION FOR DISCRETIONARY ABSTENTION AND/OR MOTION TO DISMISS ADVERSARY PROCEEDING
10-15-13 [13]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 15, 2013. By the court's calculation, 60 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion to Dismiss and deny the Motion to Abstain. 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:

INTRODUCTION

Defendants Cenlar FSB ("Cenlar") and San Francisco Fire Credit Union ("SFFCU") (collectively "Defendants") move pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order of this court abstaining from hearing this action or dismissing all claims alleged against Defendants in the Adversary Complaint filed by Plaintiff Christopher D. Dean ("Plaintiff-Debtor") for failure to state a claim upon which relief can be granted.

BACKGROUND AS PRESENTED BY THE PARTIES

On or about January 12, 2005, Plaintiff-Debtor obtained a mortgage loan (the "loan") from SFFCU with the principal amount of $312,000.00, secured by a Deed of Trust encumbering the Property (the Property refers to the Debtors' residence at 2718 Adriatic Way, Sacramento, California). Cenlar has the contractual right to service the Loan on SFFCU's behalf. College Greens is the homeowners' association for the Property and Eugene Burger Management Corp. ("EBMC") acts as College Greens' agent.

As a result of Plaintiff-Debtor's default on January 7, 2009, College Greens recorded a Notice of Lien Assessment to be recorded against the Property. On March 1, 2010, College Greens, through its trustee, recorded a Notice of Default and Election to Sell ("NOD") against the Property. On November 15, 2011, College Greens, through its foreclosure trustee, recorded a Notice of Trustee's Sale ("NOTS") to be recorded against the Property. The NOTS noticed the interested party that the Property would be sold at a public auction on January 11, 2012. On January 11, 2012, the Property was sold to College Greens at a public auction and the sale was completed through a the recordation of a Trustee's Deed Upon Sale on July 6, 2012.

On August 24, 2012, Plaintiff-Debtor filed a voluntary petition for relief pursuant to Chapter 13 of Title 11 of 11 U.S.C. § 101, *et seq*. Plaintiff-Debtor identified SFFCU as a secured creditor in his bankruptcy schedules. Plaintiff-Debtor did not identify College Greens in his schedules and did not disclose that the Property was sold at a pre-petition foreclosure sale.

On October 10, 2012, SFFCU filed a Proof of Claim in Plaintiff-Debtor's bankruptcy case on account of the Loan. On May 6, 2013, **College Greens filed three Proofs of Claim, reflecting that Plaintiff-Debtor was delinquent on $5,954.54 in homeowners' association dues owing to College Greens.** On September 12, 2013, Plaintiff-Debtor commenced this action by filing the Complaint (*See* RJN, Exhibit G, Dkt. No. 1).

CREDITORS' MOTION

Abstention

The Creditors allege that this Court's exercise of its discretion to abstain from hearing this case will have minimal impact on the administration of Plaintiff-Debtor's bankruptcy case since Plaintiff-Debtor filed his bankruptcy after the foreclosure sale that gives rise to all of his claims. By filing his bankruptcy case, Plaintiff-Debtor was able to obtain an injunction (i.e., the automatic stay) without having to establish any of the elements for obtaining an injunction under state or federal law. Given the timing of Plaintiff-Debtor's bankruptcy filing in relation to the accrual of his claims, Plaintiff-Debtor appears to be forum shopping.

The Creditors further allege that Plaintiff-Debtor's reorganization depends on the resolution of the claims asserted in the Complaint, and all of the claims in the Complaint are based purely on state law. Therefore, Plaintiff-Debtor's claims would exist irrespective of his bankruptcy case and the Plaintiff-Debtor's claims at best fall within the Court's "related" jurisdiction. Accordingly, the Creditors assert that the Court's exercise of its discretion to abstain from hearing this action will promote judicial economy and preserve the Court's valuable resources. Further, requiring Plaintiff-Debtor to prosecute his claims in an alternative forum will not adversely affect his efforts to reorganize since reorganization will have to wait for the resolution of the Complaint, regardless of the forum in which it is litigated.

In this case, the Plaintiff-Debtor is currently in a Chapter 13 bankruptcy case pending before this court. Bankr. E.D. Cal. No. 12-35521-E-13, in which Defendant SFFCU has filed a Proof of Claim on account of the loan that

is the subject of this property dispute. The court finds that these claims fall within the court's jurisdiction and that the resolution of these claims in this court is in the best interests of all of the parties. Determining the property rights of the Plaintiff-Debtor in this court will be more efficient in the administration of the estate.

Failure to State a Claim

Plaintiff-Debtor alleges that there were procedural irregularities with College Greens' foreclosure sale pursuant to California Civil Code § 1367. As a result of these alleged irregularities, the Plaintiff-Debtor alleges that he is entitled to a judgment setting aside the foreclosure sale. Defendants respond that Defendants did not conduct the foreclosure sale at issue and are not required to comply with section 1367. Defendants further allege that to set aside a foreclosure, a plaintiff must generally establish that he tendered the amount of the secured indebtedness or was excused from tendering. *See Multani v. Witkin & Neal*, 215 Cal. App. 4th 1428, 1454, 155 Cal. Rptr.3d 892, 912 (2013). The Complaint is devoid of any factual allegations establishing that Plaintiff-Debtor is willing or able to tender the amount of his indebtedness, nor does the Complaint establish any of the recognized exceptions to the tender rule. *See Multani*, 215 Cal. App. 4th at 1454-55, 155 Cal. Rptr. 3d at 912 (identifying exceptions to tender rule where: (1) the validity of the underlying debt is in dispute; (2) the plaintiff has a counter-claim or setoff against the foreclosing party; (3) it would be inequitable to apply the tender rule; or (4) the trustee's deed is void on its face). Further, Creditor argues that there are no allegations in the Complaint questioning the trustee's deed. Therefore, Plaintiff-Debtor's claim or violation of section 1367 should be dismissed.

Defendants ask the court to decline Plaintiff-Debtor's request for a declaratory judgment. A court should determine whether the judgment "will serve a useful purpose in clarifying and settling the legal relationships in issue" and whether it "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). Plaintiff-Debtor contends that he is entitled to a judicial determination of the parties' respective rights, since there is a dispute as to ownership rights to the Property. Defendants responds that Plaintiff-Debtor does not dispute that SFFCU holds a first priority lien, and Plaintiff-Debtor's request for the declaratory judgment is an extension of his first claim against College Greens and EBMC. Because an adequate remedy exists under Plaintiff-Debtor's claim for relief under the violation of section 1367, Plaintiff-Debtor is not entitled to declaratory relief. *See Mangindin v. Washington Mut. Bank*, 637 F.Supp. 2d 700, 707 (N.D. Cal 2009) (citation omitted) (A claim for declaratory relief is unnecessary where an adequate remedy exists under some other cause of action). Moreover, Plaintiff-Debtor does not plead sufficient facts to establish that declaratory relief will serve a useful purpose in clarifying or settling the legal relationship between himself and Defendants since there is no dispute that SFFCU is the holder of a first priority lien against the property. Regarding Defendants College Greens and EBMC, Plaintiff-Debtor's declaratory fails because he has not alleged that he is willing or able to tender the outstanding assessment on the Property. For the above reasons, Defendants contend that Plaintiff-Debtor's claim for declaratory relief should be dismissed.

Defendants assert that Plaintiff-Debtor's claim for breach of contract fails since Plaintiff-Debtor cannot establish that Defendants breached any provision of the Note or the Deed of Trust. Under California law, the elements of a claim for breach of contract are: (1) the existence of a contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. First Commercial Mortgage Co. v. Reece, 89 Cal. App.4th 731, 745, 108 Cal.Rptr.2d 23 (2001). "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." Levy v. State Farm Mut. Auto. Ins. Co., 150 Cal. App. 4th 1, 5 (2007).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an opposition requesting that the Court not abstain. Plaintiff-Debtor contends that his bankruptcy case was filed as a Chapter 13 to save the home, and the Defendants have participated continually throughout the case, and have not remedied the falsehoods brought by the Defendants. It would be unjust and have material consequences on this Chapter 13 case since the Plaintiff-Debtor is still out of possession of a home in which a loan modification has been approved by this court.

Plaintiff-Debtor further asserts that the Homeowner's Association has agreed to restore title to Plaintiff-Debtor, and Plaintiff-Debtor has agreed to dismiss the complaint as to the Homeowner's Association, leaving the remainder of the complaint between this Defendant and the Plaintiff-Debtor.

In defending the request for Declaratory Relief, Plaintiff-Debtor contends that there is actual controversy exists between Plaintiff-Debtor and Defendants since there is a dispute as to possession of the property, on-going and future payments, and the Court approved loan modification. Therefore, Plaintiff-Debtor desires a judicial determination of their rights and obligation, including an order enforcing the loan modification, and waiver of payments when the Plaintiff-Debtor was out of possession.

DISCUSSION

Request for Abstention

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. *See* 28 U.S.C. § 1334(c).

As provided in 28 U.S.C. § 1334(c)(1),

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction created by Congress and limited by the United States Constitution. *See Stern v. Marshall*, 564 U.S. _____ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. *See Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

Here, the Plaintiff-Debtor is asserting non-bankruptcy code claims, non-bankruptcy case claims, and claims which are not related to the bankruptcy case. Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
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> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo,* 82 F.2d 121, 121-122 (9th Cir. 1936),

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

As cited by Defendants, "[A]bstention implicates the question of whether the bankruptcy court should exercise jurisdiction, not whether the

court has jurisdiction... The act of abstaining presumes that proper jurisdiction otherwise exists." *Krasnoff v. Marchack (In re Gen. Carriers Corp.)*, 258 B.R. 181, 189-90 (9th Cir. BAP 2001) (citation omitted). The Ninth Circuit has identified the following factors in deciding whether to abstain from a Title 11 proceeding:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6)the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of [the bankruptcy court's] docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of nondebtor parties.

In re Jones, 410 B.R. 632, 640-41 (Bankr. D. Idaho 2009)(citing *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir.1990) (quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex.1987)). Rule 5011 of the Federal Rules of Bankruptcy Procedure requires a request for the exercise of discretionary abstention to be brought by motion. See Fed. R. Bankr. P. 5011(b).

After reviewing the parties arguments, evidence presented, and the Chapter 13 files for the Plaintiff-Debtor, the court will not abstain from hearing the adversary proceeding. The Chapter 13 Plan does make provision for the payment of Defendant's claim and the determination of the issues in this Adversary Proceeding are necessary for the administration of the Chapter 13 case and proposed Plan. No assertion has been made, and given the substantial delay in adjudicating civil cases in the state court, this court abstaining to exercise the federal court jurisdiction established by Congress would effectively doom any attempt by the Plaintiff-Debtor to prosecute the Chapter 13 case in the 60 month maximum period provided under the Bankruptcy Code.

Motion to Dismiss

The court further finds that Defendant's Motion to Dismiss the Complaint as to Defendant for the failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is warranted.

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the

speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal, 129* S.Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

Claim for Violation of California Civil Code § 1367

First, regarding Plaintiff-Debtor's first claim for violation of California Civil Code § 1367, moving Defendant is not the relevant party from which relief can be sought. Violation of California Civil Code § 1367 speaks to the party conducting the foreclosure and Plaintiff-Debtor alleges several procedural irregularities with the homeowner association's foreclosure sale. Here, it is undisputed that the Home Owners Association, College Greens East Homeowners Association is the party that conducted the foreclosure, not Defendant SFFCU.

Though Plaintiff-Debtor's First Cause of Action does not have a subheading identifying which of the multiple defendants against whom the claim for violation of the Civil Code section is alleged, the only person named is College Greens East. The Defendants are not named in this Cause of Action for Violation of California Civil Code § 1367.

Not being named, the court denies the Motion to Dismiss this cause of action. The court's order denying this part of the Motion shall expressly state that no claims under this Cause of Action were stated against either of the Defendants.

Claim for Breach of Contract

As to the breach of contract claim, the Plaintiff-Debtor has not alleged sufficient facts to support the claim against Defendants. The main allegations are against the homeowners association in the foreclosure sale and the consequences arising therefrom. Plaintiff-Debtor only states that Defendant failed to protect the property from College Greens' foreclosure without alleging sufficient facts to support this contention. Plaintiff-Debtor does not cite to any specific provision of the Deed of Trust to support his breach of contract claim.

Plaintiff-Debtor only generally alleges that Defendant breached some unspecified provisions of the contract by allowing College Greens to foreclose the Property. This allegation is insufficient to state a claim for breach of contract. Furthermore, there appear to be no provisions under the Deed of Trust requiring SFFCU or Cenlar to protect Plaintiff-Debtor from a foreclosure by a homeowners association.

In his Opposition to this Motion, the Plaintiff-Debtor alludes to the Proof of Claim and Objection to Confirmation of the Plan not being consistent with the loan modification entered into between the Plaintiff-Debtor and SFFCU. Opposition, 12-35521 Dckt. 32. (Claim asserting a pre-petition arrearage and escrow arrearage.) The Proof of Claim stating the arrearage was filed on October 10, 2012. 12-35521 Proof of Claim No. 4. The Notice of Mortgage Payment Change was filed on November 12, 2012. The Objection to Confirmation by SFFCU was filed on October 2, 2012. 12-35521 Dckt. 15.

The court's order approving the Loan Modification with SFFCU was filed on March 6, 2013. 12-35521 Dckt. 70. All of the events referenced in the Opposition filed by the Plaintiff-Debtor (which are not stated in the Complaint) occurred prior to there being a loan modification approved by the court.

If there is an actual dispute between the Plaintiff-Debtor and SFFCU, then it could possibly be addressed by or through (1) the confirmation hearing at which the court determines if the SFFCU claim is properly provided for in the plan, (2) an objection to the claim, or (3) an adversary proceeding in which there is a claim asserted that SFFCU has and is breaching the contract as amended by the court approved loan modification.

The Plaintiff-Debtor fails to plead a claim for breach of contract by the Defendants. The Motion is granted. Because no controversy may exist or, in light of the settlement reported by the Plaintiff-Debtor and College Greens East, Dckt. 34, the controversy may be resolved through the Chapter 13 Plan confirmation process, the court does not grant leave to amend at this time. If such a controversy exists and the Plaintiff-Debtor concludes that it would not likely be resolved through the confirmation or objection to claim process, Plaintiff-Debtor may seek leave to file a first amended complaint – which leave will be freely granted by the court. The court requiring a motion for leave to file a first amended complaint is done to manage this Adversary Proceeding

litigation and not have the Plaintiff-Debtor feel compelled to file an amended complaint or it being argued they waived such right, and setting off a new round of possibly unnecessary motions in this Adversary Proceeding.

Claim for Declaratory Relief

As to the last claim for declaratory relief, Plaintiff-Debtor has failed to state a valid claim against Defendants. Plaintiff-Debtor seeks general declaratory relief as to the subject real property because there is a dispute as to the ownership of the subject real property. However, there does not appear to be a dispute with Defendants San Francisco Fire Credit Union or Cenlar as the holder of a Deed of Trust against the subject property, but with College Greens East Homeowner's Association which asserts to have foreclosed on and sold the subject property.

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

FN.1. 28 U.S.C. §2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a

controversy in which the litigation may not yet require the award of damages. *Id.*

As there has not been pleaded a dispute between the rights of Plaintiff-Debtor and these Defendants, there is not a basis for the court to adjudicate the rights and interests of the Plaintiff-Debtor and the Defendants. If such a controversy exists and the Plaintiff-Debtor concludes that it would not likely be resolved through the confirmation or objection to claim process, Plaintiff-Debtor may seek leave to file a first amended complaint – which leave will be freely granted by the court. The court requiring a motion for leave to file a first amended complaint is done to manage this Adversary Proceeding litigation and not have the Plaintiff-Debtor feel compelled to file an amended complaint or it being argued they waived such right, and setting off a new round of possibly unnecessary motions in this Adversary Proceeding.

Based on the foregoing, the Motion to Dismiss is granted and the causes of action in the adversary complaint filed by Plaintiff is dismissed as to Defendants Cenlar FSB and San Francisco Fire Credit Union.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by Defendants Cenlar FSB and San Francisco Fire Credit Union 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 Dismiss is granted and the causes of action denominated as "2. Declaratory Relief" and "3. Breach of Contract" in the Complaint filed by Plaintiff-Debtor in this Adversary Proceeding are dismissed without prejudice as to Defendants Cenlar FSB and San Francisco Fire Credit Union.
>
> **IT IS FURTHER ORDERED** that the Motion is denied as to the cause of action denominated as "1. Violation of C.C.C. § 1367)," the court having determined that Cenlar FSB and San Francisco Fire Credit Union are not named as defendants in that cause of action.
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> **IT IS FURTHER ORDERED** that if the Plaintiff-Debtor determines that the filing of an amended complaint is appropriate, a motion for leave to file an amended complaint shall be filed and served in this Adversary Proceeding on or before March 3, 2014.
>
> **IT IS FURTHER ORDERED** that the Motion to Abstain pursuant to 28 U.S.C. § 1334(c)(1) is denied.

2. 12-35521-E-13 CHRISTOPHER DEAN
13-2289 SC-1
DEAN V. COLLEGE GREENS EAST HOMEOWNER ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING
10-21-13 [20]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-Plaintiff and Debtor-Plaintiff's Attorney on October 21, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Dismiss Adversary Proceeding 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 court's decision is to continue the hearing on the Motion to Dismiss Adversary Proceeding to 2:30 p.m. on March 19, 2014. No appearance at the December 4, 2013 hearing is required.

Defendants College Greens East Homeowner's Association, Inc. and Eugene Burger Management Corporation move for an order dismissing the adversary complaint filed September 12, 2013 by Plaintiff Christopher D. Dean for failure to state a claim upon which relief may be granted.

Debtor-Plaintiff filed a reply to the Motion to Dismiss stating that both parties have agreed to a dismissal of this case, with certain conditions. Debtor-Plaintiff requests that the Motion to Dismiss be continued so the parties can prepare and file the stipulation.

On November 27, 2013, the parties filed the Notice of Pending Settlement and Stipulation Continuing Motion to Dismiss. The Stipulation agrees to a ninety day continuance of the Motion to Dismiss.

Based on the Debtor-Plaintiff reply, the court continues the hearing to 2:30 p.m. on March 27, 2014. The court shall continue the January 8, 2014 Status Conference to March 27, 2014, to afford the Plaintiff-Debtor the opportunity to consummate the reported settlement in this Adversary Proceeding and prosecute his Chapter 13 Plan, as well as determine if an amended complaint should be filed. See Civil Minutes from December 4, 2013 hearing on motion to dismiss filed by Cenlar FSB and San Francisco Fire Credit Union, DCN: PD-1.

The court shall issue an order (not minute order for this contested matter) to continue the Status Conference substantially in the following form holding that:

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

The Motion to Dismiss filed by Defendants having been presented to the court, the court having ordered that the hearing be continued to 2:30 p.m. on March 27, 2014, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Status Conference in this Adversary Proceeding is continued to 2:30 p.m. on March 19, 2014.

3. 11-27845-E-11 IVAN/MARETTA LEE
REW-20 Raymond E. Willis

CONTINUED MOTION TO EXTEND AUTOMATIC STAY AND/OR MOTION FOR INJUNCTIVE RELIEF
10-16-13 [325]

CONT. FROM 11-19-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Sacramento County Tax Collector and Office of the United States Trustee on October 16, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Extend Automatic Stay 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 Motion to Extend Automatic Stay is denied without prejudice. 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:

DECEMBER 4, 2013 HEARING

The court continued the hearing on this Motion and ordered that counsel for Sacramento County appear for a post-confirmation status conference at the continued hearing. It appears from the Motion that some confusion may have existed with the County concerning the effect of confirmation of a Chapter 11 Plan and the post-confirmation administrative closing of the file.

PRIOR HEARING

Ivan and Maretta Lee, the Plan Administrators under the confirmed Chapter 11 Plan move for "extension" of the automatic stay and an injunction against the County of Sacramento from selling their residence located at 8678

Butterbrickle Court, Elk Grove, California in violation of the Confirmed Chapter 11 Plan. In the Motion, Dckt. 324, the Plan Administrators state with particularity (Fed. R. Bankr. P. 9013) the following grounds upon which the requested relief is based.

A. Plan Administrators seek to have the court enjoin Sacramento County from selling the 8678 Butterbrickle Court Property.

B. The Debtors in Possession (predecessor in interest to the Debtors and Plan Administrators) entered into a Stipulation for the payment of the County's claim on the following terms:

1. Commencing the month after the effective date and continuing for 60 months thereafter, the Debtors shall pay through the Chapter 11 Plan $252.00 a month, which amortizes payment of the County's claim in full with 18% interest.

2. The terms of the Stipulation were incorporated into the Chapter 11 Plan. The Chapter 11 Plan was confirmed by an order of the court filed on May 4, 2013. Dckt. 283.

a. The Effective Date of the Plan is defined in the Chapter 11 Plan as follows: "'Effective Date' means the date the Plan is confirmed by the court." Chapter 11 Plan, attached as Exhibit A to the order confirming the Plan.

b. The Chapter 11 Plan, Article 4, Paragraph 2f provide the following treatment for the Sacramento County secured claim.

> "2f. Sacramento County Tax Collector, 8678 Butterbrickle Ct., Sacramento, CA Debtor will pay the entire amount contractually due by making all post-confirmation payments, and by paying all pre-confirmation arrears at 18% interest in monthly payments of $252.00/month. Payments shall commence on the I st day of the month following the month which is the Effective Date of the Plan and continuing for 60 months thereafter."

c. The effective date of the Plan being May 4, 2013, the month following the effective date is June 2013.

3. Having been confirmed, the Chapter 11 Plan is the bonding contract modifying the debt owed to the County.

4. The County issued a Notice of Delinquent Prior Year Secured Taxes, dated August 23, 2013, stating that it intended to sell the 8678 Butterbrickle Property. Exhibit 1, Dckt. 329.

5. The County has scheduled a sale of the 8678 Butterbrickle Property for February 24, 2013.

6. Sacramento County has demanded payment in full of the $16,510.60 pre-petition claim which is provided for in the Plan.

7. The Debtors commended making the $252.00 a month payments to the County in October 2013. For the "arrearage" in plan payments, the Debtors state that they will now make an additional payment of $100.00 a month.

8. It is alleged that the County has asserted that if there is not an "active" bankruptcy case, the "statue" requires that the property be sold by the County.

9. The County asserts that since the Plan has been confirmed and the Plan (Administratively) closed, it is not bound by the terms of the confirmed Chapter 11 Plan.

10. The Debtors believe that the "most equitable" action is for the "automatic stay" to be extended if the case is "closed."

The Points and Authorities filed by the Plan Administrators, Dckt. 328, provides the following to the court,

a. The automatic stay can be "extended" post-confirmation if the case is administratively closed, citing to In re Mendez, 464 B.R. 463 (Bankr. C.D. Mass 2011).

b. Authorities that confirmation of a Plan becomes a "binding contract" between the Debtors and Creditors.

c. Authorities supporting the asserting that an injunction should be issued to prevent County from violating the Chapter 11 Plan.

The Plan Administrators have filed several exhibits in support of the Motion. Exhibit 3 is the letter from Sacramento County responding to the Plan Administrators' counsel asserting that the County's threat to sell the Butterbrickle Property is in violation of the confirmed Chapter 11 Plan. Exhibits, Dckt. 329.

The County's letter, Exhibit 3, states in pertinent part,

A. "Pursuant to Revenue and Taxation Code at 12:01 a.m. on July I all tax-defaulted property that is five years or more delinquent (three years or more in the case of a nuisance abatement lien) will become subject to the power to sell unless the property taxes are redeemed, or an installment plan of redemption is initiated."

B. "The installment plan of redemption refers to installment plans described in Revenue and Taxation Code Article 2, code sections

4216 through 4226. Properties become subject to the power to sell, regardless of the confirmed bankruptcy plan or the bankruptcy stay."

C. "Code Section 3692 [California Revenue and Tax Code] governs time limitations when property must be offered for sale. The code states, 'The tax collector shall attempt to sell tax-defaulted property as provided in this chapter within four years of the time that the property becomes subject to sale for nonpayment of taxes unless by other provision of law the property is not subject to sale.' When property is included in an active bankruptcy case, in compliance with the stay, it will not be offered for tax sale."

D. "Although a property may be included in a confirmed bankruptcy plan, if the bankruptcy case is no longer active, then the property is no longer protected by the bankruptcy stay."

E. "Sacramento County will accept the payments as described in the confirmed bankruptcy plan; however, if the property is not in an active bankruptcy case the statute requires the property to be offered for sale within four years of becoming subject to sale."

F. "The referenced property is statutorily required to be offered for sale before June 30, 2016."

G. "Because bankruptcy case number 11-27845-E-ll filed March 30, 2011, and closed January 4, 2013, was re-opened on September 17,2013, it is in an active case and the property will not be offered at tax sale."

This letter appears to manifest a fundamental misunderstanding of the effect of confirmation of a Chapter 11 Plan, the administrative closing of a Chapter 11 case while a confirmed plan is being confirmed, the final closing of a Chapter 11 case for the entry of a final decree, the dismissal of a Chapter 11 case when a debtor or trustee cannot prosecute the case, and the supremacy clause of the United States Constitution, Article VI, Paragraph 2, which provides,

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This applies even to a State's exercise of the "police power." *Morris v. Jones*, 329 U.S. 545 (1947), reh den 330 U.S. 854 (1947) ("We have no doubt that it may do so except as such procedure collides with the federal Constitution or an Act of Congress. See B*roderick v. Rosner*, 294 U.S. 629. But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause. Article VI, Clause 2.")

Though the County of Sacramento appears to manifest a fundamental misunderstanding of Chapter 11 bankruptcy cases and the Bankruptcy Code as

enacted by Congress pursuant to Article 1, Section 8, Clause 4, a review of the Motion discloses several problems which preclude granting the relief requested pursuant to this Motion.

First, the then Debtors-in-Possession confirmed their Chapter 11 plan in this case on May 4, 2013. Dckt. 283. With respect to the Butterbrickle Property and any post-confirmation stay or injunction, the confirmed Chapter 11 Plan includes the following provisions [emphasis added].

d. "Discharge Injunction. Except as specifically provided in the Plan to the contrary, the satisfaction, **release and discharge set forth in this Article shall also operate as an injunction** prohibiting and enjoining the commencement or continuation of any action, the employment of process or any act to collect, recover from or offset any Claim against or Interest in the Debtor by any Entity." Plan Article 9, ¶B.

e. "Plan Creates New Obligations. The **obligations to creditors that Debtor undertakes in the confirmed Plan replace those obligations to creditors that existed prior to the effective Date of the Plan**. Debtor's obligations under the **confirmed Plan constitute binding contractual promises** that, if not satisfied through performance of the Plan, create a basis for an action for breach of contract under California law. To the extent that a creditor retains a lien under the Plan, that creditor retains all rights provided by such lien under applicable non-Bankruptcy law. Plan Article 13, ¶B.

f. "Vesting. **On the Effective Date, all property of the estates shall vest in the Reorganized Debtor** pursuant to Section 1141 (b) of the Bankruptcy Code, provided that the vesting of said property shall be without prejudice and shall not act as a bar to a post confirmation motion to convert this case to one under Chapter 7 of Title 11 by the United States Trustee or any other party in interest on any appropriate grounds, and upon the granting of such motion the Plan shall terminate and the Chapter 7 estate shall consist of all remaining property of the Chapter 11 estate not already administered. Such remaining property shall be administered by the Chapter 7 Trustee as prescribed in Chapter 7 of the Bankruptcy Code. The Reorganized Debtor reserves the right to oppose any such motion." Plan Article 14, ¶ D.

g. "Final Decree. **After the estate is fully administered**, the **Reorganized Debtor shall file an Application for a Final Decree**, and shall serve the Application on the United States Trustee. The form of the proposed order granting the Application shall be approved by the United States Trustee prior to the submission of the Order to the Court, and **the approval of the United States Trustee shall be a condition precedent to the entering of the Final Decree closing the case**." Article 14, ¶E.

h. "Jurisdiction. **Until the Reorganization Case is closed**, the Bankruptcy Court and the District Court, to the extent required

under the Bankruptcy Code, shall retain the fullest and most extensive jurisdiction that is permissible, including that necessary to ensure that the purposes and intent of the Plan are carried out. Except as otherwise provided in the Plan, the **Bankruptcy Court shall retain jurisdiction to hear and determine all Claims against and Interests in the Debtor**, to approve sales of assets and to adjudicate and enforce any actions, and all other causes of action which may exist on behalf of the Debtor. Nothing contained herein shall prevent the Debtor from taking such action as may be necessary in the enforcement of any action, or other cause of action which the Debtor has or may have." Plan Article 15, ¶B.

i. "Specific Purposes. In addition to the foregoing, the **Bankruptcy Court shall retain jurisdiction** for the following specific purposes after Confirmation of the Plan:
...

4. **to enforce and interpret the terms and conditions of the Plan**;

5. to **enter such orders or judgments**, including, but not limited to, **injunctions (I) as are necessary to enforce the title, rights and powers of the Debtor** and (ii) as are necessary to enable holders of Claims to their rights against any Entity that may be liable therefore pursuant to applicable law or otherwise, including, but not limited to, court orders;

6. **to hear and determine any motions or contested matters involving taxes**, tax refunds, tax attributes, tax benefits and similar or related matters with respect to the Debtor arising on or prior to the Effective Date, arising on account of transactions contemplated by the Plan, or relating to the period of administration of the Reorganization Case;..

Article 15, ¶¶ **B,** D.

The automatic stay is itself "automatically terminated" upon specific events as provided in 11 U.S.C. § 362(c). These include:

"(c) Except as provided in subsections (d), (e), (f), and (h) of this section–

(1) the stay of an act against property of the estate under subsection (a) of **this section continues until such property is no longer property of the estate**;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of–

(A) the time the case is closed;

> (B) the time the case is dismissed; or
> (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied."

11 U.S.C. § 362(c) [emphasis added].

Congress has provided limited circumstances in which the court may "reimpose" or "impose" the "automatic stay." The concept of the court having to "impose" or "reimpose" is antithetical to it being an "automatic" stay. The court may extend the automatic stay in a second bankruptcy case filed within a year of the dismissal of a prior case pursuant to 11 U.S.C. § 362(c)(2)(B). Additionally, the court may "impose" the "automatic stay" pursuant to 11 U.S.C. § 362(c)(3)(B) in a bankruptcy case filed within one year of the dismissal of two or more prior bankruptcy cases. Neither of these provisions apply to the post-confirmation requested pursuant to the present Motion.

If the Plan Administrators belief that injunctive relief is proper (an order prohibiting Sacramento County from enforcing its lien rights) then it must request such relief from this court through an Adversary Proceeding. Federal Rule of Bankruptcy Procedure 7001(7).

Continued Hearing to Conduct Confirmation Status Conference

Though the relief requested cannot be granted though the procedure used and form requested (reinstate automatic stay), significant issues have been raised. While the County of Sacramento may believe that it is acting in good faith, violations of the Plan and violating the confirmation order can have serious (and expensive) consequences.

Believing that all parties are attempting to act in good faith, the court continued the hearing to conduct a post-confirmation status conference.

The court ordered that the Sacramento County Counsel appear, though such counsel with knowledge of bankruptcy as the County Counsel deems appropriate, to advise the court of the basis for Sacramento County asserting that the confirmed Chapter 11 Plan and Confirmation Order of this court are without force and effect.

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 Extend Automatic Stay filed by Debtors-in-Possession 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 hearing on the Motion is denied without prejudice.

4. 08-23963-E-13 ERNEST THOMPSON — **AMENDED MOTION TO SET ASIDE**
11-2677 JPC-1 — **DEFAULT AND VACATE JUDGMENT**
THOMPSON V. STANDLEY ET AL — **10-28-13 [75]**
ADV. CLOSED 12/3/12

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Jon S. Sargetis and Mark A. Wolff on October 28, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Set Aside Default and Vacate Judgment 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 court's tentative decision is to deny the Motion to Set Aside Default and Vacate Judgment. 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:

Defendant James P. Chandler ("Chandler") moves this court for an order setting aside the default previously entered against him in this action and to vacate the default judgment entered in this proceeding.

PROCEDURAL ISSUES

Docket Control Number

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l). The court does not deny the motion on this ground.

Pleading with Particularity

In Adversary Proceedings Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states,

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

For the present motion, Movant fails to plead with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007. The grounds stated with particularity in the Amended Motion, Dckt. 75, are,

A. Defendant Sandy Standley was not listed as a creditor when Plaintiff-Debtor commenced his bankruptcy case on March 31, 2008.

B. No notice was given to Standley or Chandler of the filing of the bankruptcy case by Plaintiff-Debtor.

C. Plaintiff-Debtor's Chapter 13 Plan was confirmed on June 25, 2008.

D. Standley (represented by Chandler) filed a complaint in the Sonoma County Superior Court on October 14, 2009 ("Sonoma Action").

E. Plaintiff-Debtor's claims asserted in the Complaint arose as of August 19, 2009 (without stating why or how they arose).

F. On January 29, 2010, Plaintiff-Debtor filed a notice of automatic stay in the Sonoma Action.

G. After "researching the law relating to 11 USC § 362," Chandler filed a "Notice of Termination of Stay" in August 2010.

H. In October 2010, the Plaintiff-Debtor "amended his bankruptcy" to add Standley's claim.

I. The court granted the motion to amend the bankruptcy to add Standly's claim despite the fact that it arose after the filing of the bankruptcy case.

J. The Plaintiff-Debtor did not comply with the "safe-harbor" provision of California Code of Civil Procedure § 128.7 or Federal Rule of Bankruptcy Procedure 9011.

K. On June 22, 2012, the default of Chandler was entered.

L. On November 16, 2012, a default judgment was entered against Chandler.

The present Motion to Vacate was filed on October 28, 2013.

Chandler makes the following legal arguments as part of his Motion.

A. The summons and complaint were not served pursuant to Federal Rule of Bankruptcy Procedure 7004;

B. Plaintiff's claims are based on extrinsic fraud on this court;

C. Plaintiff's claims are fraudulent;

D. This court has no jurisdiction to issue punitive sanctions;

E. This court did not have jurisdiction to issue sanctions under Rule 9011 because Plaintiff failed to comply with the "the requirement of the Rule;"

F. This court did not have jurisdiction to issue sanctions under CCP § 128.7 because Plaintiff failed to comply with "the requirement of the statute;" and

G. The filing of the Notice Termination of Stay did not constitute a violation of the automatic stay.

Motion, Dckt. 75.

The Motion states that it is supported by a Memorandum of Points and Authorities and the Declaration of Chandler. No Memorandum or Declaration have been filed by Chandler.

Reply Filed by Chandler

Though not providing the court with any supporting pleadings, Chandler filed an extensive Reply to the Opposition filed by the Plaintiff-Debtor. Reply, Dckt. 81. No evidence is provided in support of the Reply.

This Reply asserts the following,

A. Personal service on Chandler was required pursuant to Federal Rule of Bankruptcy Procedure 7004(a)(1), which incorporates the provisions of Federal Rule of Civil Procedure 4(c)(1). It is asserted that Federal Rule of Bankruptcy Procedure 7004(b) does not refer to services of a summons and complaint, but only to "service in general terms." Chandler directs the court to the decision in *In the Matter of Teknek, LLC*, 512 F.3d 342, 345 (7th Cir. 2007), without citing any specific portion of the decision.

B. Chandler asserts that "Chandler notified the state court that this Bankruptcy Court had asserted jurisdiction over Standley's

post-petition claims in February 2011 and thereafter took no action to collect against [Plaintiff-Debtor]."

C. Chandler did not attempt to obtain any order or judgment against the Plaintiff-Debtor in the Sonoma County Action.

D. The non-punitive damages in this Adversary Proceeding are for nothing more than the attorneys' fees and costs of Plaintiff-Debtor's counsel in this Adversary Proceeding.

E. Chandler makes reference to a "motion" which established that Standley's claims against the Plaintiff-Debtor were never subject to the provisions of 11 U.S.C. § 362(a). (Chandler does not direct the court to which motion and any order thereon which makes such a determination.)

F. Chandler asserts that there is no "theory of law in California under which Standley could have brought suit against Thompson prior to suffering actual damages...." (No legal authority is provided by Chandler as to what constitutes a bankruptcy claim, whether a cause of action must have "accrued" under state law, and whether the claim must be "ripe" sufficient for the creditor to commence an action in state court.)

G. Plaintiff-Debtor failed to comply with California Code of Civil Procedure § 128.7. (Plaintiff-Debtor adds to the confusion by having included a discussion in his opposition as to why Plaintiff-Debtor may have a claim under California Code of Civil Procedure § 128.7 in the Sonoma County Action.)

H. Because the Complaint in the Adversary Proceeding does not allege that Standley and Chandler had not requested the entry of a default or default judgment, it fails to state a claim for violation of 11 U.S.C. § 362(a).

The court considers this Reply in ruling on Chandler's Motion.

OPPOSITION

The Plaintiff-Debtor filed an Opposition addressing the grounds stated in the Motion. These responses are summarized as follows:

A. The Summons and Complaint were properly served on Chandler, Standley, and the Northern California Law Center, citing the court to the Proof of Service filed in this Adversary Proceeding. Exhibit A, Dckt. 79. (Proof of Service filed on October 19, 2012, Dckt. 7.)

1. Chandler was served by First Class Mail sent to the address of his law office. Though not stated in the Motion, this response makes reference to a assertion by Chandler that he must be "personally served," while not disputing that the summons and complaint were sent by First Class mail to Chandler at his law office.

2. It is also stated by Plaintiff-Debtor that Chandler did not previously dispute service, having elected to make an appear in this Adversary Proceeding to file a Motion to Dismiss the Complaint or Grant Summary Judgment for Standley, Chandler, and the Northern California Law Center. Dckt. 14.

B. Chandler continues to ignore that requesting the entry of default against the Plaintiff-Defendant in the Sonoma County Action violates the automatic stay.

1. Standley's pre-petition claim was not known by Plaintiff-Debtor when the bankruptcy case was filed.

2. When the Plaintiff-Debtor learned of the claim, Chandler and Standly were notified of the Plaintiff-Debtor's bankruptcy case.

3. With knowledge of the Chapter 13 bankruptcy case, Chandler and Standley continued to attempt to enforce Standley's claim against the Plaintiff-Debtor.

4. Chandler, with knowledge of the Chapter 13 bankruptcy case and based on his personal research, decided to file the "Notice of Termination or Modification of Stay" in the Sonoma Action.

5. On October 25, 2010, the Plaintiff-Debtor filed a proof of Claim for Standley, who had failed to do so.

6. Chandler asserts that his Notice of Termination or Modification of Stay and the Sonoma County Action prosecution do not violate the automatic stay based on the statement in the Case Management Statement prepared by Chandler in the Sonoma County Action that, "Plaintiffs claims against Defendant E. Jeffrey Thompson must be pursued through an adversarial proceeding the the [sic.] bankruptcy court." Exhibit C, Dckt. 79 at 20.

7. However, in the same Case Management Conference Statement, Chandler advises the State Court that "Def. Thompson has asserted that his 2008 bankruptcy as protection. [sic.] No stay in place." *Id.* at 19.

8. Despite Chandler's contention that he did not violate the stay,

a. Chandler filed the Notice of Termination or Modification of the Automatic in the Sonoma County Action;

b. Chandler stated in the Case Management Conference Statement that there was no stay from the Plaintiff-Debtor's bankruptcy case;

c. Chandler filed on January 9, 2012, a motion for entry of default judgment against the Plaintiff-Debtor in the Sonoma County Action.

9. The Plaintiff-Debtor has not sought relief pursuant to California Code of Civil Procedure § 128.7 or Federal Rule of Bankruptcy Procedure 9011.

10. The Plaintiff-Debtor provided Chandler with notice of the bankruptcy case, including;

a. Letter from Plaintiff-Debtor's counsel to Chandler dated August 12, 2010; and

b. Letter from Plaintiff-Debtor's counsel to Chandler dated March 1, 2011.

DISCUSSION

A motion to vacate a judgment issued by the bankruptcy court is governed by Federal Rule of Civil Procedure 60(b), as made applicable in this case by Federal Rule of Bankruptcy Procedure 9024, which incorporates minor modifications that do not apply here. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying in prospectively is no longer equitable; or

(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principles when applying Rule 60(b)Fed. R. Civ. P. 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3rd ed. 1998). A precondition to the granting of such relief is that the movant show that he or she has a meritious claim or defense. See 12-60 Moore's Federal Practice Civil § 60.24; *Brandt v. American Bankers Insurance Company of Florida,* 653 F.3d 1108, 111 (9th Cir. 2011); *Falk v. Allen*, 739 F.2d 461, 462(9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a default judgment under Rule 60(b): (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default. See *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir. 1983) ("Gross"); see also *United Coin Meter*

v. Seaboard Coastline R.R., 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test).")

Additionally, the Ninth Circuit Court of Appeals has instructed in *Aurich American Insurance Company v. International Fibercom, Inc. (In re International Fibercom, Inc.*) 503 F.3d 933, 941. (9th Cir. 2007).,

> We have stated in the past that Rule 60(b)(6) should be "liberally applied," *Hammer*, 940 F.2d at 525, "to accomplish justice." *Yanow v. Weyerhaeuser S.S. Co.*, 274 F.2d 274, 284 (9th Cir. 1959) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)). At the same time, "[j]udgments are not often set aside under Rule 60(b)(6)." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). Rather, Rule 60(b)(6) should be "'used sparingly as an equitable remedy to prevent manifest injustice' and 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). Accordingly, a party who moves for such relief "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion." *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

In addition Chandler requests relief pursuant to Federal Rule of Civil Procedure 60(d) and Federal Rule of Bankruptcy Procedure 9020, which provide,

> (d) Other Powers to Grant Relief. This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
>
> (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
>
> (3) set aside a judgment for fraud on the court.

While Chandler provides a list of reasons he believes the court did not have jurisdiction, he fails to provide the court with a clear statement of the grounds asserted, legal authorities supporting it, and evidence. Thus, it appears that Chandler's litigation strategy is to hit the court with a series of allegations and contentions, and then have the court assemble the law and evidence to support the contentions.

Review of Rule 60(b) Grounds

First, Federal Rule of Civil Procedure 60(c) requires that any motion brought for relief under Rule 60(b) must be made within a reasonable time, and for relief under based on (1) Mistake, inadvertence, surprise, or excusable neglect; (2) Newly discovered evidence that, with reasonable diligence, could

not have been discovered in time to move for a new trial under Rule 59(b); or (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; the motion must be brought no more than one-year after the entry of the judgment. As addressed by the Ninth Circuit Court of Appeals,

> Rule 60(b) requires that reconsideration under the catch-all provision be requested "within a reasonable time." Fed. R. Civ. P. 60(b). What qualifies as a reasonable time "'depends on the facts of each case.'" *United States v. Wyle (In re Pac. Far East Lines, Inc.)*, 889 F.2d 242, 249 (9th Cir. 1989) (quoting *United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985)). The relevant facts may include the length and circumstances of the delay and the possibility of prejudice to the opposing party. *Id.*; *Holtzman*, 762 F.2d at 725. Thus, relief under Rule 60(b) should only be granted where the moving party is able to demonstrate "that circumstances beyond its control prevented timely action to protect its interests." *Alpine Land & Reservoir*, 984 F.2d at 1049.

Aurich American Insurance Company v. International Fibercom, Inc., Id. at *945*.

Chandler filed the present Motion on October 28, 2013, which was 343 days after the November 20, 2012 entry of the judgment. While within one year, no showing has been offered by Chandler why this is a reasonable amount of time. Merely because the Federal Rule of Civil Procedure set a per se rule that any time after one-year is not reasonable does not grant a party the right to wait until one year to prosecute a good faith motion for relief under Rule 60(b). It is clear that the grounds being asserted were known not only at the time of the hearing on the motion for entry of default judgment, but when the default was entered, when the time to file an answer expired, and when the motion to dismiss or for summary judgment was denied.

No basis is given for why Chandler could not have filed an answer, could not have filed a motion to set aside the default so he could file an answer, could not have responded to the motion for entry of a default, or could not have promptly filed a motion to vacate the judgment after it was entered on November 20, 2012. Rather, it appears that the delay in filing the present motion is part of a litigation strategy to delay and cause the Plaintiff-Debtor to incur otherwise unnecessary cost and expense while Chandler attempts to manipulate the legal process.

The Motion is denied, as a separate and independent grounds from the merits of the Motion, as not being filed within a reasonable time as required by Federal Rule of Civil Procedure 60(c)(1) and Federal Rule of Bankruptcy Procedure 9024. No reason has been given as to why Chandler has let this judgment against him sit for 343 days before filing a motion seeking this relief.

Consideration of the Motion

The first contention asserted by Chandler is that he was not properly served with the Summons and Complaint since they were sent to him by First Class Mail. There is no dispute that he received the Summons and Complaint, nor is there any dispute that he voluntarily filed a motion to dismiss or in

the alternative motion for summary judgment against the Plaintiff-Debtor in this Adversary Proceeding.

Beginning with the contention that personal service of the Summons and Complaint in this Adversary Proceeding is required pursuant to Federal Rule of Civil Procedure 4(c), the unsupported argument is rejected by this court. While it is true, that a complaint and summons for a federal district court action must be served pursuant to Federal Rule of Civil Procedure 4(c) and (e), personal service or as permitted by state law, this action is not pending in the district court or governed directly by Federal Rule of Civil Procedure 4. Rather, this action has been filed in the bankruptcy court, and the service requirements governing the Summons and Complaint are set forth in the Federal Rules of Bankruptcy Procedure.

Federal Rule of Bankruptcy Procedure 7004, titled "Process, Service of Summons, Complaint," specifies several different methods of service in Adversary Proceedings. Rule 7004(a) provides that Federal Rule of Civil Procedure 4(a), (b), (c)(1), (d)(1), (e)-(j), (l) and (m) apply in adversary proceedings. Rule 4(e) provides that service of the summons and complaint in the federal action on an individual within a judicial district of the United States may be made as permitted for serving a summons in the state court of general jurisdiction within that federal district.

Federal Rule of Bankruptcy Procedure 7004(b) provides that in addition to the permitted service methods specified in Rule 4(e)-(j) for service of summons and complaints, service may be made by First Class Mail. FN.1. This is not a generic reference to service of some unidentified documents, but the Rule specifically reference service of the summons and complaint.

> (b) **Service by first class mail**. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., **service may be made within the United States by first class mail postage prepaid as follows**:
>
> (1) Upon **an individual** other than an infant or incompetent, **by mailing a copy of the summons and complaint to** the individual's dwelling house or usual place of abode or to **the place where the individual regularly conducts a business or profession**.

Federal Rule of Bankruptcy Procedure 7004(a)(1). Paragraphs (a)(2) - (10) expressly provide for service of the summons and complaint by mail on: (2) the representative of an infant or an incompetent person; (3) the officer, managing or general agent, or agent for service of process of a domestic or foreign corporation, partnership, unincorporated association; (4)and (5) the office of the United States attorney, the Attorney General of the United States at Washington, District of Columbia, and any officer or agency for the United States; (6) person or office upon whom process is prescribed to be served by the law of the state in which service for a state or municipal corporation or other governmental organization; (7) as prescribed to be served by any statute of the United States or by the law of the state in which service is made for a person identified paragraphs (1) or (3); (8) an agent authorized by appointment or by law to receive service of process; (9) after a petition has been closed

on the debtor; and (10) an office of the United States trustee or another place designated by the United States trustee in the district.

FN.1. The other provisions of Federal Rule of Civil Procedure 4(f)-(j), which are not applicable to this motion, relate to service of the summons and complaint on an individual in a foreign country; minor or incompetent person; corporation, partnership, or association; the United States and its agencies, corporations, officers, or employees, and a foreign, state, or local government. The Rule is clear that these provisions relate to the service of the summons and complaint, and not a "generic service" rule as postulated by Chandler.

A review of the respected Collier on Bankruptcy treatise quickly discloses the following, "[s]ervice by mail under Bankruptcy Rule 7004(b) is an alternative means to personal service or service pursuant to state law. If service is made by mail, there is no requirement that a receipt or acknowledgment of service be obtained from the defendant." Collier on Bankruptcy, Sixteenth Edition, ¶ 7004.03. Collier cites to a Seventh Circuit case, *Bak v. Vincze (In re Vincze)*, 230 F.3d 297, 299 (2000), holding,

> "Rule 7004's allowance for service by mail offers constitutionally adequate notice of suit. See *In re Park Nursing Ctr. Inc.*, 766 F.2d 261, 263-64 (6th Cir. 1985) (approving constitutionality of Rule 704(c), the predecessor to Rule 7004(b)); see also *Greene v. Lindsey*, 456 U.S. 444, 455, 72 L. Ed. 2d 249, 102 S. Ct. 1874 (1982) (in housing repossession action where "personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings").

Chandler directs the court to read *In the Matter of Teknek, LLC*, 512 F.3d 342, (7th Cir. 2007), and divine what portion of this supports the contention that personal service is required for a summons and complaint under Federal Rule of Bankruptcy Procedure 7004. Looking to the page cited by Chandler, the court notes the following discussion by the Court of Appeals.

> The other potential reason could be that Hamilton is a party to an adversary proceeding commenced by the Trustee in February 2006, three months after her initial refusal to provide the key. **Hamilton was served with process in Scotland (her home)** on February 20, 2006, the day before the bankruptcy court held its hearing on the motion to hold her in contempt. Service in Scotland the day before a hearing in Chicago would not supply sufficient notice--and at all events the summons served on Hamilton did not mention the contempt.
>
> ...
>
> A motion to hold someone in contempt of court on account of acts done or omitted in a core proceeding initiates a "contested matter" in the bankruptcy. Bankruptcy Rule 9014(b) provides that a motion initiating a contested matter "shall be

> served in the manner provided for service of a summons and complaint by Rule 7004." That rule in turn requires personal service. **When service must occur in a foreign nation, Fed. R. Civ. P. 4(f), incorporated by Rule 7004(a), governs. International treaties and conventions, such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, must be followed; service by mail is not allowed...** Systems Division does not contend that it complied with Rules 9014 and 7004. Instead it contends, and the district court held, that Hamilton voluntarily submitted to the court's jurisdiction when she did not raise the lack of service at the contempt hearing before the bankruptcy judge...

Id. at 345-346. While not disclosed by Chandler, it is clear in the holding that service in the contested matter (for which no summons and complaint is required, though the same service rules apply) was defective because the respondent party was served in a foreign country, not in a judicial district in the United States. No provision is made in Federal Rule of Bankruptcy Procedure 7004(b) for service by First Class Mail on someone in a foreign country.

The contention that service on Chandler was defective is rejected and the Motion is denied on this basis.

Grounds for Entry of Default Judgment

In this court, a plaintiff is not given a default judgment merely because a party fails to respond. Though permitted under Federal Rule of Civil Procedure 55(b)(2) to accept the well pleaded facts and allegations stated with particularity in the complaint as true, this court requires plaintiffs to present evidence to substantiate the truth of the allegations, damages, and claims being asserted. Only after the court determines that proper legal and factual grounds exist and are substantiated by evidence, is a default judgment granted.

In this Adversary Proceeding the default of Chandler was entered by the Clerk of the Court on June 22, 2012. Dckt. 46. On August 20, 2012, Plaintiff-Debtor filed his Motion for Entry of Default Judgment. Dckt. 53. The Motion for Entry of Default Judgment was supported by the Declaration of Mark Wolff (counsel for Plaintiff-Debtor in this Adversary Proceeding and the Chapter 13 case), Dckt. 55; Declaration of the Plaintiff-Debtor, Dckt. 56, and the following Exhibits, Dckt. 57,

A. First Memorandum to Unsecured Creditor James P. Chandler

1. This correspondence from counsel for Plaintiff-Debtor to Chandler is dated January 13, 2010. It discloses that the bankruptcy case was filed in 2008, asserts the automatic stay as to the Sonoma County Action, and requests that the Plaintiff-Debtor be dismissed from the Sonoma County Action. Enclosed with the correspondence are copies of the bankruptcy petition, Chapter 13 Plan, Notice of Commencement of Case, and a bankruptcy claim form.

B. First Memorandum to Unsecured Creditor Sandy Standley

1. This correspondence is from counsel for the Plaintiff-Debtor to Sandy Standley directly and is dated January 13, 2010. It contains the same information and enclosures as were sent to Chandler.

C. Notice of Bankruptcy Filing

1. This notice of bankruptcy filing was made by the Plaintiff-Debtor in the Sonoma County Action, which was filed on February 16, 2010. It identifies the bankruptcy court, case number, and bankruptcy judge.

D. Notice of Termination or Modification of Stay

1. This notice was filed on July 26, 2010 in the Sonoma County Action is signed by Chandler under penalty of perjury. This Notice states,

   a. Chandler is the attorney for Standley;

   b. "[Plaintiff-Defendant] has asserted that his 2008 bankruptcy should preclude this action, upon further research, no bankruptcy stay currently in place." [Notice does not reference any Bankruptcy Code section, case law, or other basis for the statement that no bankruptcy stay is "in place."]

   c. "The stay has been vacated, is no longer in effect, or has been modified with regard to all parties."

E. Correspondence from counsel for the Plaintiff-Debtor to Chandler dated August 12, 2010.

1. In it counsel references Chandler continuing to prosecute the Sonoma County Action against Plaintiff-Debtor, including the filing of an amended complaint. Further, counsel for the Plaintiff-Debtor references the Notice of Termination or Modification of Stay, stating that the stay remains in full force and effect.

   The correspondence also notifies Chandler of the damages provisions of 11 U.S.C. § 362(k)(1), including costs, attorneys' fees, and punitive damages.

   With respect to the Sonoma County Action, the correspondence references California Code of Civil Procedure § 128.7 as a grounds sanctions in the Sonoma County Action.

F. Billing Statement from Fiskin Slater LLP

G. Case Management Statement filed on February 2, 2011 in the Sonoma County Action.

1. It states that the complaint was filed by Standley on July 1, 2008. [The Plaintiff-Debtor commenced his Chapter 13 case on March 31, 2008.]

2. The bankruptcy case for the Plaintiff-Debtor is referenced, with Chandler advising the State Court, "Def. Thompson has asserted that his 2008 bankruptcy as protection. No stay is in place."

H. Letter to James P. Chandler dated March 1, 2011

1. This correspondence from counsel for Plaintiff-Debtor to Chandler again makes demand that Chandler cease in the prosecution of the Sonoma County Action and misstating to the State Court that there is no stay pursuant to 11 U.S.C. § 362(a). This correspondence is similar to the August 12, 2010 correspondence sent from counsel for the Plaintiff-Debtor to Chandler.

I. Request for Entry of Default of E. Jeffery Thompson [Plaintiff-Debtor]

1. On January 2, 2012, Chandler filed a request for entry of the default of the Plaintiff-Debtor in the Sonoma County Action.

J. Declaration of James P. Chandler in Support of Motion for Entry of the Default Judgement of Plaintiff-Debtor, Filed May 18, 2012 in the Sonoma County Action.

1. In the declaration Chandler states under penalty of perjury,

a. The default of Plaintiff-Debtor was entered by the state court on January 4, 2012.

b. "[Standley] seeks a default judgment for declaratory/injunctive relief only."

K. Declaration of Sandy Standley

L. Memorandum of Points and Authorities in Support of Motion for Entry of Default Judgment, Filed May 18, 2012.

1. Standley seeks a determination that the Plaintiff-Debtor committed fraud.

2. Standley seeks to vacate the non-judicial foreclosure sale.

M. Request for Court Judgment, Filed May 18, 2012.

1. Requests only injunctive relief.

The court made extensive findings of fact and conclusions of law in ruling on the Motion for Entry of Default Judgment. A copy of the Civil Minutes for the September 27, 2012 hearing on the Motion for Entry of Default Judgment, Dckt. 60, are attached as Addendum A to this ruling.

Other than stating that Standley's claim against the Plaintiff-Debtor arose after the commencement of the bankruptcy case, Chandler presents no legal authority or evidence in support of such contention. He merely argues that Standley could not file suit until July 8, 2008, which was just three months and eight days after the Plaintiff-Debtor commenced his Chapter 13 case.

First, common legal sense tells one that the July 8, 2008 lawsuit was not filed on the very first day that Standley's rights against the Plaintiff-Debtor arose. Second, Chandler provides no legal analysis of what constitutes a claim in a bankruptcy case. Rather, his Motion and Reply on long on conjecture and short on the law.

Consideration of this contention begins with the Bankruptcy Code statutory definition of a claim.

> (5) The term "claim" means–
>
> > (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> >
> > (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). A "debt" is defined by the Bankruptcy Code, stating, "The term "debt" means liability on a claim." 11 U.S.C. § 101(12).

As is well established, the "claim" arises when the underlying conduct upon which the debt is based occurred, not when the cause of action accrued or when the creditor subsequently sought to enforce the obligation. *Watson v. Parker (In re Parker)*, 313 F.3d 1267 (10th Cir. 2002), cert. den., 540 U.S. 965 (2003); *In re Cool Fuel*, 210 F.3d 999, 1006, (9th Cir. 2000), holding,

> The bankruptcy court has jurisdiction to consider the Board's claim. It is well-established that a claim is ripe as an allowable claim in a bankruptcy proceeding even if it is a cause of action that has not yet accrued. See *In re Jensen*, 995 F.2d 925, 929 (9th Cir. 1993); *In re Remington Rand Corp.*, 836 F.2d 825, 831-32 (3d Cir. 1988) (holding that government claim was allowable in bankruptcy proceeding even though claim had not accrued under the Contract Disputes Act of 1978); 11 U.S.C. § 101(5)(A) (defining "claim" as any "right to payment," even if it is "contingent" or "unmatured"); 11 U.S.C. § 502(b)(1) (stating that bankruptcy court "shall determine the amount of [a] claim . . . and allow such claims . . . except to the extent that . . . such claim is

> unenforceable against the debtor. . . for a reason other than because such claim is contingent or unmatured"); see generally Lawrence P. King, 1 Collier Bankruptcy Manual Par. 101.05[1] at 101-9 & nn. 9,11 (3d ed. 1999) (noting that an allowable claim includes "a cause of action or right to payment that has not yet accrued or become cognizable").

A claim exists for purposes of the bankruptcy case when "[a] claimant can fairly or reasonably contemplate the claim's existence even if a cause of action has not yet accrued under nonbankruptcy law." *SNTL Corp. v. Centre Insurance Company*, 571 F.3d 826, 839, (9th Cir. 2009), citing *In re Cool Fuel*.

Chandler's basic premise that there could not be a pre-petition claim subject to the automatic stay because Standley did not file suit until July 8, 2008 is without merit. Chandler offers no showing that the conduct and events upon which the claim is based occurred in the three month period after the commencement of the bankruptcy case and the filing of the Sonoma County Action. It is also contrary to the evidence presented in support of the Motion for Entry of Default Judgment in this Adversary Proceeding. The Plaintiff-Debtor testified that his dealings with Standley took place in 2007, and he had no dealings with her after she purchased the real property in 2007. Dckt. 56. Additionally, the Standley declaration, Exhibit K, Dckt. 57 at 54, states under penalty of perjury that in March 2007, Stanley engaged in the transaction involving the Plaintiff-Debtor. She states that at some later, unidentified date, she discovered that the loan terms were different than what she though she was obtaining in the 2007 transaction involving the Plaintiff-Debtor. The contention that the conduct upon which Stanley's claim is based, the alleged misrepresentations by the Plaintiff-Debtor, occurred in 2007 is repeated in the Points and Authorities filed by Stanley in support of the default judgment in the Sonoma County Action. Exhibit L to Motion for Entry of Default Judgment in this Adversary Proceeding, Dckt. 57.

It is also asserted by Chandler that this court could not properly grant the relief requested and impose sanctions, including punitive damages, because (1) the Plaintiff-Debtor failed to comply with the "safe harbor" notice requirements of California Code of Civil Procedure § 128.7 and Federal Rule of Bankruptcy Procedure 9011, and (2) a bankruptcy judge cannot issue punitive sanctions. These arguments also miss the mark for very fundamental reasons.

First, the Plaintiff-Debtor has not sought an award of sanctions from this court pursuant to California Code of Civil Procedure § 128.7 or Federal Rule of Bankruptcy Procedure 9011. The compensatory and punitive damages were sought pursuant to the statutory rights created by Congress in 11 U.S.C. § 362(k). While Chandler attempts to change the nature of the Adversary Proceeding to one for sanctions, the only relief granted by the court is for the damages provided in 11 U.S.C. § 362(k). September 9, 2012 Civil Minutes for hearing on Motion for Entry of Default Judgment, Dckt. 60, Addendum A hereto.

The federal statutory rights created by Congress as part of enforcing the automatic stay provisions of 11 U.S.C. § 362(a), include the following,

> (k) (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs

> and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
>
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor [personal property secured claim for which a notice of intention is required or the automatic stay terminates], the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

11 U.S.C. § 362(k). No right to an "automatic stay" existed at common law and no right to damages exists but for Congress creating such rights as part of the Bankruptcy Code. See *Sternberg v. Johnson*, 595 F.3d 937 (9th Cir. 2009), October 22, 2009 Amended; February 8, 2010 Second Amended, FN.3, noting that the award of attorneys' fees in that case was based on the statute, 11 U.S.C. § 362(k), and not the civil contempt or inherent contempt power of the bankruptcy court. The bankruptcy judge properly granted relief under the statutory rights created by Congress.

The court in *Sternberg* also addressed the duty of a creditor and counsel to comply with the automatic stay and affirmatively correct violations which may have inadvertently occurred, once the attorney or creditor become aware of the violations.

> Sternberg argues that he was "compelled" to do this because the order was not completely invalid and Johnston had requested that it be vacated in its entirety. This misses the point. What Sternberg was compelled to do was comply with the automatic stay. See, e.g., *Eskanos*, 309 F.3d at 1212-14. The state court order was in violation of the stay because, as the courts below concluded, it ordered Johnston to pay arrears or go to jail without focusing on Johnston's non-estate property. See *Johnston II*, 321 B.R. at 275-80; *Johnston I*, 308 B.R. at 478, 480; see also 11 U.S.C. § 362. Sternberg recognized this but did not say anything to the appellate court because he did not think it was his duty "to practice law on [Johnston's] behalf." That did not, however, authorize him to act in violation of the automatic stay.
>
> To comply with his "affirmative duty" under the automatic stay, Sternberg needed to do what he could to relieve the violation. He could not simply rely on the normal adversarial process. See *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 615-16 (9th Cir. 1993) (holding that parties who attempted to exempt a debtor from their unlawful detainer action with a unilateral stipulation still violated the automatic stay because "the stipulation might not [have] accomplish[ed] its intended purpose" and thus the parties "could have, and should have, pursued the orthodox remedy: relief from the automatic stay"). At a minimum, he had an obligation to alert the state appellate court to the conflicts between the order and the automatic stay. As we have explained before, "[t]he automatic stay is intended to give the debtor a breathing spell from his creditors." *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 226 (9th Cir. 1989) (internal quotation

> marks omitted). The state court order intruded upon Johnston's "breathing spell." Sternberg did not act to try to fix that problem.
>
> Sternberg also argues a variety of facts that implicitly challenge the willfulness of his violation. The thrust of his argument is that because Johnston never specifically requested that Sternberg seek to modify the order, and because Stern-berg never sought to collect on the order, Sternberg did not willfully violate the stay. Sternberg also appears to argue that because he believed that he was always proceeding within the domestic support exemptions, he could not have committed a willful violation.
>
> Johnston was not required to ask Sternberg to modify the order for Sternberg's violation to be willful. See *In re Del Mission Ltd.*, 98 F.3d at 1151-52 (concluding that the retention of taxes was a violation of the stay even though the debtor never requested their return). Likewise, Sternberg needed neither to make some collection effort nor to know that his actions were unlawful for his violation to be willful. See *Eskanos*, 309 F.3d at 1214-15 (rejecting the law firm's assertion that something more than maintaining an active collection action was needed to violate the stay); *In re Goodman*, 991 F.2d at 618 ("Whether the [defendant] believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' . . . ." (internal quotation marks omitted)). All that is required is that Sternberg "knew of the automatic stay, and [his] actions in violation of the stay were intentional." *Eskanos*, 309 F.3d at 1215. Both of these elements were satisfied here.

Sternberg v. Johnson, *Id.* at 944-945.

As did Sternberg, Chandler plunged ahead with his actions in violation of the automatic stay. In addition to having been notified, the evidence presented showed that Chandler intentionally notified the state court that there was no automatic stay. There is no contention that this notice was mistakenly filed with the State Court. Rather, there is an oblique argument by Chandler that he filed it based on some legal research he conducted. That research is not disclosed to the court.

The Plaintiff-Debtor requested actual damages of $3,309.24, attorneys' fees and costs of $9,483.47, and punitive damages of $50,000.00. The court awarded $3,309.24 in actual damages (lost wages, emotional distress, loss of sleep), $8,674.00 in legal fees and $822.63 in costs as statutory damages, and $10,000.00 in punitive damages. As addressed by the Fifth Circuit Court of Appeals in *Young v. Repine (In re Repine)*, 536 F.3d 512, 521 (5th Cir. 2008), affirming the bankruptcy court, 11 U.S.C. § 362(k) is the statutory basis for an award of attorneys' fees for violating the automatic stay.

In awarding damages under 11 U.S.C. § 362(k) the court was not ordering the payment of punitive sanctions, but damages established by Congress under the Bankruptcy Code. The Ninth Circuit Court of Appeals has established the two very different basis by which a bankruptcy judge issues rulings based

on the Bankruptcy Code, or orders the payment of sanctions pursuant to the inherent power of the court and Federal Rule of Bankruptcy Procedure 9011. This court has did not and has not ordered the payment of any sanctions.

In continuing the laundry list of contentions by Chandler, the court has no evidence of extrinsic fraud having been perpetrated on the court. It appears that the "extrinsic fraud" is Chandler's argument that Stanley's claim arising out of the 2007 transaction is a post-petition claim, not a pre-petition claim as asserted by the Plaintiff-Debtor. As stated above, there is no evidence or legal basis presented to support Chandler's contention that since Stanley filed the Sonoma County Action three months after the bankruptcy case was filed, then it has to be a post-petition claim.

Interestingly, Chandler makes no attempt to identify what constitutes "fraud" which could be grounds under Rule 60(b) for relief. MOORE'S FEDERAL PRACTICE, CIVIL § 60.42, provides the following explanation of fraud for purposes of this Rule,

> Rule 60(b)(3) expressly states that a party may be relieved from a judgment on the basis of fraud, regardless of whether the fraud could be classified as "intrinsic" or "extrinsic." Pursuant to this rule, judgments have been set aside on a wide variety of alleged frauds, such as allegations that adverse parties failed to properly respond to discovery requests, thus preventing opposing parties from adequately preparing for trial, to claims that evidence presented at the trial itself consisted of perjured testimony 6 or false documents. The fact that the types of fraud meriting relief from a final judgment embrace both conduct outside of the courtroom before trial, and the presentation of perjured testimony at trial, means that the courts are honoring the specification of Rule 60(b)(3) itself: fraud is a ground for relief irrespective of whether the fraud would have qualified as "intrinsic" or "extrinsic" under pre-Rule practice. Under Rule 60(b)(3), perjury at trial may, in appropriate circumstances, be a ground for relief even though perjury at trial was the classic example of "intrinsic" fraud for which, before Rule 60(b)(3), there could be no relief.
>
> The Sixth Circuit has adopted the following general definition of fraud for purposes of evaluating Rule 60(b)(3) motions: "Fraud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment." A party seeking relief under Rule 60(b)(3) need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather need only show that the adverse party's conduct was fraudulent under this general common-law understanding.
> ...
>
> The moving party has the burden of proving fraud or misrepresentation by clear and convincing evidence. The First Circuit, however, has held that if the moving party shows

> enough evidence to establish a "colorable" claim of fraud, the trial court has discretion to allow preliminary discovery and evidentiary proceedings to uncover further evidence of fraud. Thus, the First Circuit has rejected a "smoking gun" test, under which no preliminary discovery or evidentiary hearing would be allowed unless the party seeking relief first produced evidence that the adverse party had acted with intent to perpetrate a fraud.
>
> The Seventh Circuit has questioned, in dictum, whether the clear-and-convincing-evidence standard of proof applies when the misconduct alleged as a basis for relief under Rule 60(b)(3) is nonfraudulent witness tampering. The court also remarked that, even when fraud is alleged as the basis for relief, it is unclear why Rule 60(b)(3) should be thought to set a higher standard of proof than most federal fraud laws, which generally require proof by a preponderance of the evidence, not by clear and convincing evidence.

At best, the "fraud" is Plaintiff-Debtor's contention that the conduct from the July 2007 transaction is the basis for the claim, and therefore it is a pre-petition claim. Merely because Chandler disputes that contention does not render the argument and evidence (which is undisputed that the transaction occurred in 2007) is the basis for a pre-petition claim.

Chandler, having the benefit of the court winding its way through his arguments, conducting the legal research which Chandler should have, and divining the legal basis for the legal conclusions stated by Chandler, does not prevail on this Motion. He fails to show grounds upon which relief should be granted pursuant to Federal Rule of Civil Procedure 60(b). Chandler ignores the requirements of 11 U.S.C. § 362(a), apparently based on his personal interpretation of the law and a "I really didn't do anything too bad by continuing the litigation against the Plaintiff-Debtor." He seems to believe that seeking a judgment for a portion of the Sonoma County Action against the Plaintiff-Defendant in which there is a determination that the Plaintiff-Debtor committed fraud for Stanley's claim does not violate the stay. He is clearly wrong.

With respect to Federal Rule of Civil Procedure 60(d), Chandler leaves the court in the dark as to how and why he asserts that this paragraph is a basis for relief. This is not an independent action, which existed prior to the enactment of Rule 60, for relief from the judgment. Fed. R. Civ. P. 60(d)(1). Further, Chandler is not seeking relief from the enforcement of a judgment lien as a theretofore absent defendant under 28 U.S.C. § 1655. Fed. R. Civ. P. 60(d)(2). Finally, as addressed above, there has been no showing of fraud having been committed on the court. Fed. R. Civ. P. 60(d)(3).

The court entered the default judgment after noticed hearing and presentation of evidence. No opposition was filed to the Motion for Entry of Default Judgment in this Adversary Proceeding by Chandler. No Motion to Vacate the entry of Chandler's default was filed. No answer was filed to the Complaint after the court denied Chandler's Motion to Dismiss or for Summary Judgment. The default judgment was entered only for damages consisting of actual (wages, emotional distress, attorneys' fees, costs) and punitive damages

pursuant to 11 U.S.C. § 362(k). The court did not order any compensatory, corrective, or punitive sanctions against Chandler.

The Motion to Vacate the Judgment in this Adversary Proceeding is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Set Aside Default and Vacate Judgment filed by Defendant James Chandler 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.

5. 13-29769-E-13 JOHN JAMES
13-2331
THOMAS V. JAMES, II

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-5-13 [7]

Tentative Ruling: The court issued an order to show cause based on Creditor's failure to pay the required fees in this case ($293.00 due on October 28, 2013). The court docket reflects that the Creditor still has not paid the fees upon which the Order to Show Cause was based.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

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 sustained, no sanctions are issued pursuant thereto, and the case is dismissed.

6. 10-23577-E-11 GLORIA FREEMAN
RHS-1 Pro Se

CONTINUED STATUS CONFERENCE RE: ORDER RE: ABILITY OF LAURENCE FREEMAN TO PARTICIPATE IN BANKRUPTCY COURT PROCEEDINGS AND APPEARANCE OF INDEPENDENT COUNSEL RE: CHAPTER 11 VOLUNTARY PETITION
9-12-13 [1044]

Debtor's Atty: Pro Se

Notes:

Continued from 11/7/13 pursuant to order filed 11/4/13 [Dckt 1209]:
1) On or before 11/12/13 Laurence Freeman to notify court of the location of the tax refund proceeds.

2) On or before 11/12/13 Laurence Freeman to advise the court whether he has elected to have a personal representative appointed or to proceed with an evidentiary hearing for the court to determine whether a personal representative needs to be appointed.

3) On or before 11/21/13 Placer County Adult Protective Services to provide in file and serve disclosures and information requested by the court.

Physician's Response Letter Regarding Laurence H. Freeman filed 11/5/13 [Dckt 1211]

Declaration of Laurence Henry Freeman [re tax refund] filed 11/12/13 [Dckt 1219]

Declaration of Gloria Freeman in Regards to IRS Check in the Estate of Gloria Freeman filed 11/14/13 [Dckt 1224]

Notice of Filing of Information Pursuant to Court Order filed 11/20/13 by Placer County Adult Protective Services [Dckt 1231]

7. 10-23577-E-11 GLORIA FREEMAN
WFH-37 Pro Se

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF FLEMMER ASSOCIATES, LLP FOR FLEMMER ASSOCIATES, LLP, ACCOUNTANT(S), FEES: $5,912.50, EXPENSES: $0.00
10-10-13 [1119]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (pro se), Chapter 11 Trustee, all creditors, and Office of the United States Trustee on October 10, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Final Application for Fees 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 court's tentative decision is to grant the Final Application for Fees. 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:

FEES REQUESTED

David D. Flemmer, Trustee for the Estate, makes a Final Request for the Allowance of Fees and Expenses for Flemmer Associates, LLP, as accountants to the Trustee in this case. The period for which the fees are requested is for the period June 14, 2012 through August 7, 2013. The order of the court approving employment of counsel was entered on February 4, 2011.

Description of Services for Which Fees Are Requested

Tax Preparing 2010: Accountant spent 5.25 hours in this category for total fees of $1,443.75. Accountant describes tasks performed as preparing 2010 tax.

Tax Preparing 2011: Accountant spent 5.25 hours in this category for total fees of $1,443.75. Accountant describes tasks performed as preparing 2011 tax.

IRS Correspondence and Research: Accountant spent 1.4 hours in this category for total fees of $385. Accountant describes tasks performed as writing a letter to IRS regarding Debtor's overdue taxes as a result of trust fund liabilities and the refund that has been applied to the overdue taxes. Accountant research trust fund penalties and responded to the IRS.

Correspondence with Debtor: Accountant spent 3.55 hours in this category for total fees of $976.25. Accountant describes tasks performed as communicating wit the Debtor to obtain information necessary to file tax returns.

Fee Application: Accountant spent .5 hours in this category for total fees of $137.50. Accountant describes tasks performed as preparing fee application.

OPPOSITION BY DEBTOR

Debtor filed two oppositions to the Motion for Compensation (Dckt. 1158, 1183), which essentially raise the same three issues.

First, Debtor contends that Movant and Accountants are not disinterested parties due to conflicts with Parasec and MCLEZ, a competitor of Ulrich, Nash and Gump. Debtor contends that the Trustee and Lynn Conner admit to the conflicts of interest and that they did not disclose the conflict in their application. The Debtor provides several arguments as to the disinterestedness of the Trustee, rather than the accountants hired by the Trustee. This court will address these contentions below.

Second, Debtor contends that the Trustee took $300,000.00 from Mr. Freeman while he was not competent. First and foremost, these allegations are against the Trustee, not the accountants for the trustee, for which this application pertains. Additionally, the court is currently addressing the competency of Laurence Freeman in ongoing Status Conferences. In these proceedings, the court has clearly laid out its concerns in potential abuse by Gloria Freeman.

On September 12, 2013, the court issued an Order for Status Conference on Ability of Laurence Freeman to Participate in Bankruptcy Court Proceedings and Appearance of Independent Counsel. Order, Dckt. 1044. The court made the following observations in issuing the order:

> While serving as the debtor in possession in this Chapter 11 bankruptcy case, Gloria Freeman, represented by W. Austin Cooper, commenced an adversary proceeding (Adv. 10-2536) against Laurence Freeman ("Gloria v. Laurence Adversary"). The complaint and other pleadings filed by Gloria Freeman as Debtor in Possession and W. Austin Cooper raised significant issues whether Laurence Freeman was and is mentally and medically physically able to participate in this bankruptcy case and related adversary proceedings.
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> In the Gloria v. Laurence Adversary, Gloria Freeman, as Debtor in Possession, stated under penalty of perjury (in the verified complaint and declarations) and alleged in pleadings W. Austin Cooper presented to the court (subject to Federal Rule of Bankruptcy Procedure 9011) that Laurence Freeman lacked the mental capacity to grant a power of attorney, operate his business, and handle his finances, and was subject to undue influence by other persons due to having suffered from a series of strokes. Further, that due to the strokes

> and lack of mental capacity, Laurence Freeman lacked the capacity to understand his business and financial affairs.
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> Gloria Freeman contended that property which Laurence Freeman asserted was his separate property was actually community property in which Gloria Freeman had an interest. Gloria Freeman contended that all of such property was property of the Gloria Freeman bankruptcy estate and subject to the control of Gloria Freeman as the Debtor in Possession. 11 U.S.C. § 541(a)(2). In her declaration seeking a preliminary injunction Gloria Freeman's testimony under penalty of perjury includes: (1) The business Ulrich, Nash & Gump was started with $20,000.00 that she provided to Laurence Freeman; (2) real property was donated by Laurence Freeman to a church, which Gloria Freeman did not consent to (asserted to be community property); (3) Laurence Freeman became incapacitated in 2010 after a series of strokes; (4) Laurence Freeman was not able to perform the business functions in the operation of Ulrich, Nash & Gump (allowing professional certifications to lapse); (5) Laurence Freeman lacked the mental capacity to execute powers of attorney; (6) in 2010 Gloria Freeman sought to be appointed as the conservator for Laurence Freeman due to his lack of mental capacity; and (7) Laurence Freeman failed to pay the business insurance premiums. Through the preliminary injunction Gloria Freeman sought to have this court put her in control of Ulrich, Nash & Gump. Declaration, 10-2536 Dckt. 18.

Dckt. 1044. The court identified the following significant legal and ethical concerns with the conduct of Gloria Freeman and her attorney, W. Austin Cooper.

1. While representing Gloria Freeman, as the debtor in possession (fiduciary to the bankruptcy estate prior to a successor trustee being appointed), W. Austin Cooper and Gloria Freeman asserted that Laurence Freeman, was mentally incompetent. These contentions continued until Gloria Freeman was removed as Debtor in Possession. W. Austin Cooper, as counsel for Gloria Freeman, then met with Laurence Freeman outside the presence of his counsel in the Gloria v. Laurence Adversary. From Mr. Cooper's office, Laurence Freeman terminated his independent counsel in the adversary proceeding.

2. After receiving Laurence Freeman's call, stated to have been made from W. Austin Cooper's office, George C. Hollister filed a motion to withdraw as counsel for Laurence Freemen the Gloria v. Laurence Adversary. Mr. Hollister filed a Motion and Declaration that are raised concerns that Mr. Freeman was being manipulated by the Debtor and/or her legal counsel, Austin Cooper.

3. Subsequently, W. Austin Cooper attempted to represent Laurence Freeman in an adversary proceeding in this court to sue the Chapter 11 Trustee who is the successor to Gloria Freeman, the former Debtor in Possession. This lawsuit relates to the adversary proceeding which W. Austin Cooper, as the attorney Gloria Freeman, as debtor in possession, sued Laurence Freeman claiming that he was incompetent and that his separate property was community property which was part of

the Gloria Freeman bankruptcy estate. This adversary proceeding filed by Mr. Cooper for Laurence Freeman is *Freeman v. Flemmer*, Adversary Proceeding 13-02027 ("*Laurence v. Successor Trustee*").

4. W. Austin Cooper is defending claims by the Chapter 11 Trustee in this bankruptcy case and the Chapter 11 Trustee in the Staff USA bankruptcy case (Bankr. E.D. Cal. 11-48050) to recover monies he was paid by Staff USA for work done post-petition for the Debtor in Possession. These payments were made from Staff USA prior to the commencement of its Chapter 11 case and while Gloria Freeman was in control of that company. W. Austin Cooper has not been authorized by the court (and he did not apply) pursuant to 11 U.S.C. § 327 to be counsel for either the Debtor in Possession in this case or the Debtor in Possession in the Staff USA case.

5. Gloria Freeman has and does assert that Laurence Freeman is not mentally competent to handle his business, financial, or legal affairs. Troubling is how the assertions that Laurence Freeman is subject to undue influence became a non-concern once W. Austin Cooper began appearing as Laurence Freeman's attorney and now that Gloria Freeman is preparing pleadings for Laurence Freeman to sign which are being filed in this court. At that point the Gloria Freeman (who was no longer the Debtor in Possession) and W. Austin Cooper became "allied" with Laurence Freeman, claiming that he clearly was competent and that he could make an informed decision for W. Austin Cooper to represent him.

6. Now, in the pleading prepared by Gloria Freeman, she and Laurence Freeman assert that Laurence Freeman is not and was not mentally competent and that the Settlement Agreement he entered into with the Trustee, while represented by independent legal counsel (David Schultz, not W. Austin Cooper) should be set aside.

7. Recently, Laurence Freeman has been signing pleadings prepared by Gloria Freeman. In these pleadings, Mr. Freeman purportedly asserts that (1) in 2010 a doctor certified that he was incompetent due to a stroke; (2) Ulrich, Nash & Gump had funds (or was) property of the Gloria Freeman bankruptcy estate; (3) Laurence Freeman continued to be incompetent during this Chapter 11 case; (4) Gloria Freeman was aware of Laurence Freeman's incompetency during the bankruptcy case; (5) the settlement agreement with the Trustee in the Gloria Freeman estate by which specific property was acknowledged as Laurence Freeman's separate property and the community property claims of Gloria Freeman should be rescinded; and (6) Laurence Freeman has been the victim of elder abuse.

8. A detailed declaration recounting his mental incapacity and how he was unfairly taken advantage of (as was previously alleged by Gloria Freeman in the adversary proceeding she commenced against Laurence Freeman claiming that his separate property assets were community property and part of the Gloria Freeman bankruptcy case) purporting to be the testimony of Laurence Freeman has been filed.

9. Taken on its face, Laurence Freeman admits that he is disabled, unable to represent his legal and business interests, has been the victim of

> elder abuse, and could not effectively engage or utilize counsel in the proceedings before this court. The court recognizes that substantial portions of Laurence Freeman's "testimony" are the arguments and contentions previously stated by Gloria Freeman in her battles with the Chapter 11 Trustee over his attempts to obtain control of, maintain, and liquidate property of the Gloria Freeman bankruptcy estate.
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> 10. These contentions as to Laurence Freeman's lack of business, financial, legal, and mental competency continue, are most recently stated in the Gloria Freeman and Laurence Freeman Motion to Disgorge Fees, Dckt. 1031.

Id. Based on the foregoing, the court does not find Gloria Freeman's contentions that the Trustee (which this application does not concern) "took $300,000.00 from Mr. Freeman while he was not competent" credible. The court notes that Mr. Freeman does not appear to have an interest in this bankruptcy estate, but pursuant to a settlement with the Chapter 11 Trustee obtained a judicial determination that his specified assets were his separate property – not subject to a community property claim by Gloria Freeman.

Third, Debtor argues the Trustee did not file tax returns for the estate. Again, these allegations are against the Trustee, not the accountants for the trustee, for which this applications pertains. Flemmer Associates contends that it did file the bankruptcy estate's From 1041 for 2010 and 2011 and attempted to gather information necessary to prepare the 2012 tax return. However, Flemmer Associates asserts that Debtor has been uncooperative, created the problem for which she complains, and then had to hire new accountants to finalize the 2012 tax returns.

These issue has been raised and overruled by this court on several occasions. The Motion to Convert, filed by Debtor and heard June 6, 2013, Debtor argued that the Trustee engaged in gross mismanagement by failing to file tax returns. Civil Minutes, Dckt. 741. Chapter 11 Trustee stated that Debtor refers to mismanagement that Debtor herself conducted. Notably, Debtor alleged that Chapter 11 Trustee engaged in mismanagement throughout the case when Chapter 11 Trustee was not appointed until January of 2012. The court found that Debtor did not provide sufficient evidence to demonstrate cause for conversion. *Id.* Debtor made vague allegations and references to documents that had not been filed and provided no evidence, other than her declaration, to warrant the requested relief. *Id.* The court also noted that much of the difficulties in this case have been caused by the strategies imposed by Gloria Freeman and her counsel, originally as Debtor in Possession and as Debtor. This included her litigation against her husband and then when she allied with him after being deposed with the appointment of the Chapter 11 Trustee. The attempt to convert or dismiss this case was merely thinly veiled trustee shopping, hoping that she could get rid of the current Trustee. *Id.*

Similarly, the Motion to Remove Trustee filed by Debtor and heard on June 6, 2013, Debtor argued that the Trustee was disinterested and failed to file tax returns. The court continued the hearing to July 11, 2013, and denied the Debtor's request based on the lack of evidence showing the Trustee alleged conflict results in the Trustee's interest being adverse to the estate and on the lack of evidence supporting Debtor's contentions. Civil Minutes, Dckt. 841.

Additionally, the Motion to Remove Flemmer & Associates, initially heard on August 8, 2013, Debtor argued that Flemmer & Associates should be removed, their fees disgorged and to appoint Julie Heath. Civil Minutes, Dckt. 943. The court noted that the motion did not address the authority for the Debtor to seek an order mandating the Trustee to hire a specific professional and that the only evidence in support of the motion was the Declaration of Julie Heath, which did not state what basis she has for joining the motion to have the court order to her be employed by the Chapter 11 trustee. The court found it did not have the requisite evidence to remove the CPA for the Trustee or disgorge any fees. *Id.* The court continued the hearing but the Debtor later withdrew the motion. Dckt. 908.

Furthermore, the Motion to Stay Pending Appeal filed by the Debtor and heard on August 29, 2013, Debtor re-hashed the same arguments from the Motion to Remove the Trustee in an attempt to stay all bankruptcy proceedings. Civil Minutes, Dckt. 1018. The court found that the only evidence presented in support of the motion, the declaration filed by Gloria Freeman, was not persuasive. *Id.* The court also found that,

> the Debtor is attempting to use this one instance in which an asset that Laurence Freeman asserted was his separate asset and in which the Debtor had no interest as the reason to bring the bankruptcy case to a halt. She seeks to stop the Trustee from objecting to her claim of exemption. She seeks to stop the Trustee from attempting to confirm a Plan. She seeks to have the Trustee stop in his efforts to recover monies received by W. Austin Cooper for representing the Debtor in Possession when he was not approved to so represent the Debtor in Possession and which monies were transferred from a related entity that the Debtor controlled, with the monies being paid shortly before the Debtor had the related entity commence its own Chapter 11 case (for which a trustee has been appointed). W. Austin Cooper was the attorney for the related entity, controlled by the Debtor, during the period in which it was Debtor in Possession.

Id. The Debtors arguments now are a further litigation tactic as her bankruptcy case comes to a close.

Debtor then filed a Motion to Set Aside Order of Settlement Agreement in the Estate, Notice of Objection to Plan and Disclosure Statement and Request for TRO and to Return Funds purportedly with Laurence Freeman. The court noted its concern in the filing of this motion by Mr. Freeman, as it was conducting a Order for Status Conference on Ability of Laurence Freeman to Participate in Bankruptcy Court Proceedings and Appearance of Independent Counsel, filed September 12, 2013, Dckt. 1044, and that Mr. Freeman may not be understanding the documents he is purporting to sign. Civil Minutes, Dckt. 1059. The court was not willing to proceed with the requested relief until Mr. Freeman was properly represented. *Id.*

As depicted above, Gloria Freeman has filed cases out of district, attempted to dismiss or convert this case and remove the trustee in several attempts to Trustee and forum shop. Her interactions with W. Austin Cooper and Steven Berniker (former counsel) caused actions by the Trustee to disgorge fees. The court has raised several serious issues of Gloria Freeman filing

Motions on behalf of her husband, Laurence Freeman (which appear to be against his interests) and other purported abuse, which the court is currently addressing in the above referenced Status Conference.

The court notes that the arguments of Gloria Freeman are simply a rehash of factual misstatements and insufficient legal arguments that have been rejected by this court numerous times before. A prime example is in Debtor's Motion to Strike, heard October 24, 2013, in which Debtor contended that Mr. David Schultz, prior counsel for Laurence Freeman, was an unlicensed attorney. This contention that Mr. Schultz has been stated by Gloria Freeman on several occasions. At the hearing on the Motion to Strike, the court noted,

> Notwithstanding having that information, Gloria Freeman continues to state that Mr. Schultz is unlicensed. A search of the State Bar of California website shows that David Schultz is an active member of that bar. FN.1. The Status History shows that on August 16, 2007, Mr. Schultz was suspended for failing to pay his bar member dues, but was active again one day later, August 17, 2007. Similarly, on July 3, 2012, Mr. Schultz was suspended for failing to pay his bar member dues, but again became active two days later, July 5, 2012. It does not appear that Mr. Schultz was ever unlicensed and has no public record of discipline. Furthermore, the total of three (3) days in which he was not eligible to practice law does not appear to be material to Gloria Freeman's argument and representations to this court.
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> FN.1. http://members.calbar.ca.gov/fal/Member/Detail/143108.
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Civil Minutes, Dckt. 1180.

The court is not persuaded by these re-hashed arguments that (1) do not pertain to the accountants, (2) that this court has already addressed in multiple motions and hearings, (3) for which no additional (or original) evidence has been provided to the court, and (4) that have no factual basis or legal merit.

Rule 9011

It is incumbent on the parties to have researched and developed not only a good faith belief that the relief they request is based on the facts and law, but to present that to the court.

Federal Rule of Bankruptcy Procedure 9011 provides that, by presenting a petition, pleading, written motion, or other paper to the court, an attorney or unrepresented party certifies that s/he has made a reasonable inquiry under the circumstances. The purpose of Rule 9011 is to deter baseless filings and avoid unnecessary judicial effort in order to make proceedings more expeditious and less costly. 10 Collier on Bankruptcy ¶ 9011.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Rule 9011 requires that the parties certify in good faith that they have done their due diligence and research.

Rule 9011(b) places an affirmative duty on attorneys to make a reasonable investigation of the facts before signing and submitting any

pleading or motion, thereby encouraging attorneys to "'think first and file later.'" *Id*.

Rule 11 is designed to "reduce the burden on district courts by sanctioning, and hence deterring, attorneys or **unrepresented parties** who submit motions or pleadings which cannot reasonably be supported in law or in fact." *Golden Eagle Distrib. Corp. v. Burroughs Corp*., 801 F.2d 1531, 1542 (9th Cir. Cal. 1986)(overruled based on 1993 amendments *Hanson v. Loparex, Inc*., 2011 U.S. Dist. LEXIS 117014 (D. Minn. Oct. 11, 2011))(emphasis added).

The court notes that any pleadings that are filed with facts or law that have not been reasonably investigated before being presented to the court can and will be sanctioned to deter such actions.

The court has granted Debtor leeway in filing pleadings and responses in this case. However, Debtor should be aware that Rule 9011 applies to attorneys and self-represented parties alike and the court can and will sanction parties that are not in compliance.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
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> (A) the time spent on such services;
>
> (B) the rates charged for such services;
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> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
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> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
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> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or

(ii) services that were not--
(I) reasonably likely to benefit the debtor's estate;
(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

> (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel’s services rendered a successful monitoring of the Ulrich, Nash & Gump including tax preparation.

Section 327(a) Disinterestedness

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines “disinterested person” as a person that

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
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> (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect

> relationship to, connection with, or interest in, the debtor, or for any other reason.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

The U.S. Bankruptcy Appellate Panel for the Ninth Circuit agrees that a court should apply a totality-of-circumstances analysis in determining lack of disinterestedness under § 101(14)(C). *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 152 (B.A.P. 9th Cir. 2006).
The court does not subscribe to a rigid application of factors, however, but views them as aids for the court's discretionary review. *Id.*

Section 101(14)(C) has been described as a "catch-all clause" and appears broad enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code. COLLIER, supra at 327.04[2][a]. Examples of such materially adverse interests include:

> -- a prepetition claim against the debtor;
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> -- representation of a shareholder;
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> -- representation of an adversary;
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> -- representation of certain investors of the debtors; and
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> -- performance of services for an entity whose subsidiary is a member of the creditors' committee.

Id.

A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. *Lamie v. United States Tr.*, 540 U.S. 526, 538-39 (2004). The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Until proper disclosure has been made, it is premature to award fees because employment is a prerequisite to compensation and until there is proper disclosure it cannot be known whether the professional was validly employed. *See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 55-56 (9th Cir. BAP 1994)(§ 327(a) "clearly states that the court cannot approve the employment of a person who is not disinterested" and "bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language"). Thus, professionals must disclose all connections with

the debtor, no matter how irrelevant or trivial those connections seem. *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996)

However, the bankruptcy court has discretion to excuse a failure to disclose. *CIC Inv. Corp.*, 175 B.R. at 54. Once the bankruptcy court acquaints itself with the true facts, it "has considerable discretion in determining to allow all, part or none of the fees and expenses of a properly employed professional." *Movitz v. Baker (In re Triple Star Welding, Inc.)*, 324 B.R. 778, 789 (B.A.P. 9th Cir. 2005). *See also Film Ventures Int'l Inc.*, 75 B.R. 250, 253 (B.A.P. 9th Cir. Cal. 1987) ("[T]he trial court is in the best position to resolve disputes over legal fees."). If the bankruptcy court finds no need to take remedial measures, it appropriately can do so in the exercise of its discretion. *CIC Inv. Corp.*, 175 B.R. at 54 (*citing Film Ventures Int'l, Inc.*, 75 B.R. at 253).

Evidence of Disinterestedness

The Debtor offers no evidence in support of this Motion. The issue of the Accountant's disinterestedness has been raised in her opposition as mere argument. Dckts. 1158, 1183.

However, the parties do not have any significant dispute as to the under lying facts. The evidence before the court on the issue of disinterestedness and adverse interests are the declarations filed by the Trustee and Flemmer and Associates, accountants for Trustee. Declaration of David Flemmer, Dckt. 1122; Declaration of Lynn Conner, Exhibit D, Dckt. 1121.

Flemmer Associates is a partnership owned 51% by David D. Flemmer, and 49% by Paracorp, Incorporated, dba Parasec ("Parasec"). Conner Declaration ¶ 3. Debtor argues Parasec was a business in competition with UNG, a business that the Trustee was asserting (based on the adversary proceeding commenced by Gloria Freeman, as debtor in possession). Counsel for Trustee contends that Parasec is not a legal education business but bills itself as a 35 year old company offering legal support services in the form of document filing and retrieval for attorneys and business entities nationwide. *See also* Conner Declaration ¶ 2.

Accountant admits that for a short period of time, commencing after September 2010 and terminating recently, Parasec had entered into an agreement in which MCLEZ, an unrelated company providing continuing legal education products. Conner Declaration ¶ 5. Accountant contends that the agreement between Parasec and MCLEZ was a minor marketing agreement giving MCLEZ access to Parasec's customers, and generated $1,112.97 over a span of two and one half years. Conner Declaration ¶ 6.

Accountant states that Flemmer Associates, L.P. does not own Parasec, or any part of Parasec, but is an employee-owned company. Flemmer Declaration ¶ 4. Mr. Flemmer states that his involvement with UNG lasted from January 2011 to May 2011 when Larry Freeman locked him and Flemmer Associates out of the business. Flemmer states that Mr. Freeman has exclusive control over the operation of the business and he merely had oversight over the financial accounting functions of the business. Flemmer Declaration ¶ 8.

Conner testifies that in January 2011 she was requested to assist in this bankruptcy case. Conner Declaration ¶ 7. Conner states she disclosed the fact that she wrote and presented CLE seminars on a pro bono basis and that Mr. Freeman was uncomfortable with her providing insights so the two agreed to keep the relationship strictly to accounting. *Id.* at ¶ 8. Conner states she did not take any proprietary or confidential information from UNG during the four months that she was allowed to assist in the accounting functions of UNG. *Id.* at ¶ 8, 11.

The following undisputed facts relating to this motion are the following:

1. Parasec is one of the partners of Flemmer & Associates, holding a 49% interest;

2. Flemmer & Associates oversaw the financial accounting of UNG (then a part of the bankruptcy estate of Gloria Freeman);

3. Parasec entered into an agreement in which MCLEZ, an unrelated company providing continuing legal education products, would market to Parasec's customers through their website;

4. Parasec generated $1,112.97 over a span of two and one half years from the agreement;

5. Lynn Conner, Chairman of the Board of Paracorp, assisted in this bankruptcy case by providing accounting services to UNG.

There are three different definitions of disinterested person under section 101(14). First, Flemmer Associates is not a creditor, an equity security holder or an insider of the Debtor, Gloria Freeman. 11 U.S.C. § 101(14)(A). If the Debtor is an individual, an insider is (I) a relative of or a general partner of the debtor; (ii) a partnership in which the debtor is a general partner, (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer or person in control. 11 U.S.C. § 101(31)(A). Flemmer Associates is not any of the above to Debtor Gloria Freeman. Second, Flemmer Associates is not a director, officer, or employee of the Debtor. 11 U.S.C. § 101(14)(B).

The third definition of disinterested person is provided in § 101(14)(C) which states, in relevant part, that a "disinterested person" means a person that:

> does not have an interest materially adverse to the interest of the estate or of any class of creditors . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason.

The term "adverse interest" is not defined in the Bankruptcy Code, but the reported cases have defined what it means to hold an adverse interest as follows: (1) to possess or assert any economic interest that would tend to lessen the value of the bankrupt estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate. *In re Perry, 194 B.R. 875, 878-79 (Bankr. E.D. Cal. 1996) citing Bank*

Brussels Lambert v. Coan (In re AroChem Corp.), 176 F.3d 610, 623 (2d Cir. 1999); *Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831, 835 (7th Cir. 1998); *Electro-Wire Prods., Inc. v. Sirote & Permutt (In re Prince)*, 40 F.3d 356, 361 (11th Cir. 1994); *In re Roberts*, 46 B.R. 815, 826-27 (Bankr. D. Utah 1985), *aff'd in relevant part*, 75 B.R. 402 (D. Utah 1987).

Examples of such materially adverse interests include, a prepetition claim against the debtor (*Sholer v. Bank of Albuquerque (In re Gallegos)*, 68 B.R. 584 (Bankr. D.N.M. 1986)); representation of a shareholder (*In re Temp-Way Corp.*, 95 B.R. 343 (E.D. Pa. 1989), *In re Git-N-Go, Inc.*, 321 B.R. 54 (Bankr. N.D. Okla. 2004), *In re Carrousel Motels, Inc.*, 97 B.R. 898 (Bankr. S.D. Ohio 1989), *In re Hoffman*, 53 B.R. 564 (Bankr. W.D. Ark. 1985)); representation of an adversary (*In re Johore Inv. Co.*, 49 B.R. 710 (Bankr. D. Haw. 1985)); representation of certain investors of the debtors (*In re Envirodyne Indus.*, 150 B.R. 1008 (Bankr. N.D. Il. 1993)); and performance of services for an entity whose subsidiary is a member of the creditors' committee (*In re Hub Business Forms, Inc.*, 146 B.R. 315 (Bankr. D. Mass. 1992)).

The ultimate question is if Flemmer Associates has an interest materially adverse to the interest of the estate by reason of any direct or indirect relationship to or connection with Gloria Freeman, the Chapter 11 Debtor. This can be separated into three issues.

First, does Flemmer Associates posses or assert an economic interest that would lessen the value of the bankruptcy estate? The bankruptcy estate consists of the assets of the individual Chapter 11 Debtor, which in this case includes a community interest in a non-debtor entity, UNG. The chapter 11 Trustee does not run a company that an individual debtor owns an interest in, but must administer assets owned by the Debtor. UNG is not the Debtor, but a separate and distinct entity. Nor is UNG a creditor of the estate. It appears that providing accounting services to an asset of the estate would not lessen the value to the overall estate. The parties have agreed that Accountant did not harm the business or take proprietary information. Therefore, Flemmer Associates does not possess or assert an economic interest that would lessen the value of Gloria Freeman’s estate.

As to the issue of Lynn Conner, Chairman of the Board of Paracorp, and also member of Flemmer Associates providing accounting services to UNG, the court applies the same rationale. Does this connection lessen the value of the bankruptcy estate? Again, the services provided are undisputedly harmless. It is not disputed that Lynn Conner did not have access to proprietary information, as Mr. Freeman did not allow her to take or possess any information regarding their clients. Lynn Conner testifies that the services provided were strictly accounting related in her capacity as an employee of Flemmer Associates.

Second, does Flemmer Associates possess or assert an interest that would create an actual or potential dispute in which the estate is a rival claimant? The parties agree that no actual dispute exists. Flemmer Associates does not “possess or assert” an interest in Gloria Freeman, UNG, or MCLEZ. A partner holding a 49% interest of Flemmer Associates, Parasec, may hold an interest to UNG, through its contract with a competing business, MCLEZ, but UNG is not the Debtor and Parasec is not the accounting Firm. The Debtor is Gloria Freeman, who held a disputed community property interest in UNG and the accounting firm is Flemmer Associates. Thus, the estate of Gloria Freeman,

would not appear to potentially be a rival claimant to any interest asserted by Flemmer Associates. If UNG was the Debtor, the analysis would be much different, as it would be if Parasec was the accounting firm. The circumstances here are too attenuated when the Debtor is the individual Gloria Freeman and the accountant is the partnership Flemmer Associates.

As to the issue of Lynn Conner, Chairman of the Board of Paracorp, and also member of Flemmer Associates providing accounting services to UNG, the court finds that no actual dispute arose. Does this interest create a potential dispute in which the estate is a rival claimant? Flemmer Associates having an employee that is also on the board of Paracorp, as a separate and distinct corporation, does not appear to create a dispute in the estate of Gloria Freeman. The contention is that Lynn Conner could have, if provided access, stolen "private information" from UNG in her capacity as accountant with Flemmer Associates, does not amount to there being a disqualifying interest.

UNG is a non-debtor entity, in which the estate (at that time) asserted it had a community property interest (this was hotly contested at the time by Laurence Freeman). Parasec, a entity with an interest in Flemmer Associates, is not an accounting firm nor does competing business with UNG. Parasec's contract with MCLEZ was for advertizing purposes only in which Parasec generated $1,112.97 over a span of two and one half years. This demonstrates the attenuated relationship and the lack of any interest in the success or failure of MCLEZ.

There is no evidence that MCLEZ had any control over Parasec or vice versa. There is not sufficient evidence before the court that a potential dispute exists between the estate of Gloria Freeman and an accountant at Flemmer Associates providing limited accounting services to a non-debtor entity.

Third, does Flemmer Associates possess a predisposition under circumstances that render a bias against the estate of Gloria Freeman? Gloria Freeman's interest in UNG is part of the bankruptcy estate. Flemmer Associates has a partner (holding a 49% interest), Parasec that has a contract with a known Competitor, MCLEZ. MCLEZ was allowed to advertize their products on Parasec's website. There is no indication that this contract would interfere with the accounting firm, Flemmer Associates, or their interactions with the services they provide to bankruptcy estates. Again, if UNG was the actual entity in bankruptcy, the court would be more inclined to find a potential for bias against them, but the facts here are Gloria Freeman, the individual is the debtor in the instant case. Further, Parasec is not the accounting firm providing services, rather Flemmer Associates is the accounting firm. The court finds these circumstances do not create a bias against the estate.

The issue of Lynn Conner, Chairman of the Board of Paracorp, and also member of Flemmer Associates providing accounting services to UNG does not create bias against the estate of Gloria Freeman. Again, the services provided did not harm the non-debtor entity. Again, the fear asserted is that Lynn Conner could have stolen "private information," if given access to it, from UNG in her capacity as accountant with Flemmer Associates. She could have then imparted that "private information" to MCLEZ, an asserted competitor of UNG. The bias against the estate would be that Gloria Freeman's community property interest in UNG would be lessened because the competitor would have some sort

of advantage in the business and UNG would lose profit. There are too many "ifs" in this scenario. The key is that Flemmer Associates did not have a direct adverse interest against the estate of Gloria Freeman, which contained an interest in the non-debtor entity UNG.

The court has also considered whether this relationship even creates an appearance of impropriety. The court concludes that it does not. When the actual facts are known, Parasec has no economic connection with the success or failure of MCLEZ. The business transactions were minimal, quite possibly dropping below the radar for all but the lowest level of employees at Parasec.

Additionally, when this revelation was presented to the court, Trustee, and Accountant, the Trustee and Accountant agreed to terminate the employment. On the one hand, Gloria Freeman could argue that they had been caught with their hand in the cookie jar and scurried away. Alternatively, and the facts bear this out, it could well be that once identifying this issue, the Accountant and Trustee determined that to avoid any argument over the appearance of impropriety the proper course of action was to obtain replacement counsel.

This objection of Gloria Freeman must be considered in context of her actions in this case. Since the Trustee was appointed, every step of the way Gloria Freeman, with the assistance of her former attorney W. Austin Cooper, challenged and attempted to depose the Chapter 11 Trustee, counsel for the Chapter 11 Trustee and accountants. This objection has the character of another device used to delay, harass, and derail the Chapter 11 Trustee in attempting to prosecute this Chapter 11 case.

Based on a review of the evidence before the court, the case law on adverse interests, and the arguments of the parties, the court is not persuaded that the attenuated connections are sufficient under the totality of the circumstances to warrant denial of fees for the accountants.

FEES ALLOWED

The hourly rates for the fees billed in this case are $275.00/hour for accountant for 21.5 hours. The court finds that the hourly rates reasonable and that accountant effectively used appropriate skill and rates for the services provided.

Total interim professional fees for Accountant are allowed pursuant to 11 U.S.C. § 331, which are subject to final review pursuant to 11 U.S.C. § 330, in the amount of $5,912.50. The court commonly authorizes the payment of 50% of the fees on an interim basis. However, due to the complexity of the case, the court authorizes the Plan Administrator to pay 60% of the allowed fees, which is $3,547.50, from the available funds of the Estate as permitted by any stipulation or order authorizing the use of cash collateral or from unencumbered funds in a manner consistent with the order of distribution in this Chapter 11 case.

Accountant is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Accountant's Fees	$5,912.50

For a total final allowance of $5,912.50 in Accountant’s Fees in this case.

CONTINUANCE

Debtor filed a Notice of Unavailability on October 30, 2013. The court awarded the above stated fees and continued the hearing to final hearing. Because of the modest amount of fees, the court did not make an interim award.

Based on a review of the application for fees and the opposition, the court grants the final fee request in the amount of $5,912.50.

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 Allowance of Fees and Expenses filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Flemmer Associates, LLP is allowed the following fees and expenses as a professional of the Estate:
>
> Flemmer Associates, LLP, Accountant for the Chapter 11 Trustee Accountant’s Fees Allowed in the amount of $5,912.50
>
> **IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.
>
> **IT IS FURTHER ORDERED** that this is a final allowance of fees and the plan administrator is authorized to pay such fees from funds of the Estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

8. 10-23577-E-11 GLORIA FREEMAN
WFH-41 Pro Se

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILKE, FLEURY, HOFFELT, GOULD & BIRNEY, LLP FOR DANIEL L. EGAN, TRUSTEE'S ATTORNEY(S), FEES: $102,450.00, EXPENSES: $1,458.54
10-10-13 [1126]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 11 Trustee, all creditors, and Office of the United States Trustee on October 10, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Final Application for Fees 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 court's tentative decision is to grant the Fourth and Final Application for Fees. 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:

FEES REQUESTED

Wilke, Fleury, Hoffelt, Gould & Birney ("Wilke Fleury"), counsel to Chapter 11 Trustee for the Estate, makes a Fourth and Final Request for the Allowance of Fees and Expenses. The period for which the fees are requested is for the period April 19, 2013 through September 23, 2013. The order of the court approving employment of counsel was entered on February 4, 2011.

Description of Services for Which Fees Are Requested

Asset Analysis and Recovery: Counsel spent 14.9 hours in this category for total fees of $5,799.00. Counsel describes tasks performed as filing an order to show cause directed at Steven Berniker and W. Austin Cooper. Additionally, Counsel prepared a motion for approval of the agreement reached between two Trustees and Mr. Bernicker.

Case Administration: Counsel spent 88.5 hours in this category for total fees of $32,562.00. Counsel describes tasks performed as responding to 495 pleadings filed by Debtor and attending hearings on various motions such as a motion to convert or dismiss the case. Additionally, Counsel reviewed monthly

operating reports and conferred with creditors and the Office of the United States Trustee.

Exemptions: Counsel spent 34.2 hours in this category for total fees of $13,326.00. Counsel describes tasks performed as evaluating and objecting to Schedule C filed by the Debtor with three separate amendments.

Fee/Employment Applications: Counsel spent 20.9 hours in this category for total fees of $8,037.00. Counsel describes tasks performed as preparing its third and fourth interim fee applications and prosecuting its third interim fee application. Counsel also prepared and filed an application to retain Gonzales & Sisto and fee application for Flemmer Associates, LLP.

Freeman II & Counsel Withdrawal: Counsel spent 37.2 hours in this category for total fees of $13,902.00. Counsel describes tasks performed as representing the Trustee in Freeman v. Flemmer, Adv. Pro. No. 13-2027. Counsel filed a motion to compel defendant's counsel to withdraw, prepared for and responded to discovery, and corresponded with Defendant's potential attorney.

Other Contested Matters: Counsel spent 8.3 hours in this category for total fees of $3,237.00. Counsel describes tasks performed as preparing an opposition brief for the Bankruptcy Appellate Panel on whether or not bankruptcy court's order denying Debtor's motion to remove the Chapter 11 Trustee is interlocutory and whether leave should be granted to allow Debtor to appeal the order.

Plan and Disclosure Statement: Counsel spent 88.5 hours in this category for total fees of $32,562.00. Counsel describes tasks performed as filing a plan and a disclosure statement, obtaining approval of the disclosure statement, and obtaining confirmation of the plan over the objection of the Debtor.

Relief from Stay: Counsel spent .9 hours in this category for total fees of $351.00. Counsel describes tasks performed as reviewing and filing a non-opposition to a motion for relief from stay.

OPPOSITION BY DEBTOR

Debtor filed two oppositions to the Motion for Compensation (Dckt. 1155, 1186), which essentially raise the same issues. Debtor opposes the Motion for Compensation for the following reasons.

First, Debtor alleges the Trustee stole her mailbox and laptop and was purposefully sending notices to the wrong address. First, the Debtor does not make clear how Counsel was involved with this alleged conduct. Second, Debtor does not provide any evidence in support of these conclusory contentions. Furthermore, this allegation, as well as several similar vague allegations and references for which no evidence has been provided to the court, has been addressed by this court at the hearing on the Motion to Convert, Civil Minutes, Dckt. 741.

Second, Debtor claims that the Trustee failed to disclose that he is being sued in *Freeman v. Flemmer* (Case No. 13-2027) by Laurence Freeman for his failure to honor a "settlement agreement" that was approved by the court in July 11, 2012. Debtor also raises the argument that the Trustee did not file

tax returns for the estate that have not been filed. Again, these allegations are against the Trustee, not the Counsel for the trustee, for which this applications pertains.

These issues have also been raised and overruled by this court on several occasions. The Motion to Convert, filed by Debtor and heard June 6, 2013, Debtor argued that the Trustee engaged in gross mismanagement by failing to file tax returns. Civil Minutes, Dckt. 741. Chapter 11 Trustee stated that Debtor refers to mismanagement that Debtor herself conducted. Notably, Debtor alleged that Chapter 11 Trustee engaged in mismanagement throughout the case when Chapter 11 Trustee was not appointed until January of 2012. The court found that Debtor did not provide sufficient evidence to demonstrate cause for conversion. *Id.* Debtor made vague allegations and references to documents that had not been filed and provided no evidence, other than her declaration, to warrant the requested relief. *Id.* The court also noted that much of the difficulties in this case have been caused by the strategies imposed by Gloria Freeman and her counsel, originally as Debtor in Possession and as Debtor. This included her litigation against her husband and then when she allied with him after being deposed with the appointment of the Chapter 11 Trustee. The attempt to convert or dismiss this case was merely thinly veiled trustee shopping, hoping that she could get rid of the current Trustee. *Id.*

Similarly, the Motion to Remove Trustee filed by Debtor and heard on June 6, 2013, Debtor argued that the Trustee was disinterested and failed to file tax returns. The court continued the hearing to July 11, 2013, and denied the Debtor's request based on the lack of evidence showing the Trustee alleged conflict results in the Trustee's interest being adverse to the estate and on the lack of evidence supporting Debtor's contentions. Civil Minutes, Dckt. 841.

Additionally, the Motion to Remove Flemmer & Associates, initially heard on August 8, 2013, Debtor argued that Flemmer & Associates should be removed, their fees disgorged and to appoint Julie Heath. Civil Minutes, Dckt. 943. The court noted that the motion did not address the authority for the Debtor to seek an order mandating the Trustee to hire a specific professional and that the only evidence in support of the motion was the Declaration of Julie Heath, which did not state what basis she has for joining the motion to have the court order to her be employed by the Chapter 11 trustee. The court found it did not have the requisite evidence to remove the CPA for the Trustee or disgorge any fees. *Id.* The court continued the hearing but the Debtor later withdrew the motion. Dckt. 908.

Furthermore, the Motion to Stay Pending Appeal filed by the Debtor and heard on August 29, 2013, Debtor re-hashed the same arguments from the Motion to Remove the Trustee in an attempt to stay all bankruptcy proceedings. Civil Minutes, Dckt. 1018. The court found that the only evidence presented in support of the motion, the declaration filed by Gloria Freeman, was not persuasive. *Id.* The court also found that,

> the Debtor is attempting to use this one instance in which an asset that Laurence Freeman asserted was his separate asset and in which the Debtor had no interest as the reason to bring the bankruptcy case to a halt. She seeks to stop the Trustee from objecting to her claim of exemption. She seeks to stop the Trustee from attempting to confirm a Plan. She seeks to

> have the Trustee stop in his efforts to recover monies received by W. Austin Cooper for representing the Debtor in Possession when he was not approved to so represent the Debtor in Possession and which monies were transferred from a related entity that the Debtor controlled, with the monies being paid shortly before the Debtor had the related entity commence its own Chapter 11 case (for which a trustee has been appointed). W. Austin Cooper was the attorney for the related entity, controlled by the Debtor, during the period in which it was Debtor in Possession.

Id. The Debtors arguments now are a further litigation tactic as her bankruptcy case comes to a close.

Much of the same contentions were argued in the Motion to Remove Wilke Fleury, heard July 25, 2013, Dckt. 880. The court found that the Debtor had not provided any evidence or explanation of her conclusory statements against Mr. Egan or Wilke Fleury and "the Debtor provides broad allegations and witnesses who provide the court with their conclusions, not evidence of specific events and circumstances." Dckt. 880. The court also stated that Debtor wished to remove Counsel because they are "not doing her bidding in this case." *Id.*

Fourth, Debtor also contends that Movant and the Trustee are not disinterested parties due to conflicts with Parasec MCLEZ, a competitor of Ulrich, Nash and Gump. These arguments appear to related not to Counsel for the Trustee, but a potential conflict with the Trustee and his accountants. Nevertheless, the court will address these contentions below.

Fifth, Debtor also asserts that the Trustee has filed irrelevant motions related to Staff USA Inc., and interfered with Estate of Staff USA, Plazaria, Premium Access and Sunfair. Additionally, Debtor asserts that the Trustee should not have filed Chapter 11 plan and disclosure, instead this case will be better served through Chapter 7 liquidation. Again, these allegations are against the Trustee, not the Counsel for the trustee, for which this applications pertains. Furthermore, these re-hashed allegations have already been addressed by this court.

The court addressed these same contentions at the hearing on the Motion to Remove Wilke Fleury. The court stated,

> Debtor alleges several other acts by the Trustee's attorney, including that the attorney hastily rushed to file a Chapter 11 plan and disclosure statement and included a provision for the disabled debtor to pay $250,000, which Debtor argues is unfair and biased. Debtor further claims the Attorney's fees and reports are inaccurate and he is continuing to "milk the estate." However, no evidence has been presented to the court regarding any of these accusations. The testimony provided does not explain how these actions, if true violate the Bankruptcy Code. How does hastily rushing to file a Chapter 11 Plan and disclosure statement a biased act by the Trustee's attorney? How is the $250,000 provision in the "settlement agreement" unfair and biased? How are the attorney fees inaccurate? How are the attorney reports (whatever those may

> be) inaccurate? How is the attorney "milking the estate"? What injury or damage has the attorney inflicted on the estate? The Debtor has not provided any evidence or explanation of her conclusory statements against Mr. Egan and Wilke Fleury.

Civil Minutes, Dckt. 880.

The court also noted at the hearing on the Motion to Convert, that

> much of the difficulties in this case have been caused by the strategies imposed by Gloria Freeman and her counsel, originally as Debtor in Possession and as Debtor. This includes her litigation against her ex-husband (or husband, depending on how they interpret their state court dissolution proceedings) and then when she allied with him after being deposed with the appointment of the Chapter 11 Trustee. The attempt to convert or dismiss this case, as is her attempt to dismiss or convert the Staff USA case is merely thinly veiled trustee shopping, hoping that she can get rid of the current Trustee. This Chapter 11 Trustee is currently prosecuting claims against Gloria Freeman's counsel, who also has represented a series of related debtors in possession, and her ex-husband (husband) Lawrence Freeman. This is similar to the judge shopping that Gloria Freeman and her counsel engaged in when they filed the Staff USA bankruptcy case in the Northern District of California. That case was transferred to the Eastern District of California, the judge in the Northern District of California concluding that it was improperly filed in that District.

Civil Minutes, Dckt. 741.

The court also noted in the Motion for Third Interim Compensation for Wilke Fleury, that

> The Debtor is correct, there are significant legal fees in this case. This has appears to have occurred for a number of reasons. First, there has been significant litigation in this case and the related Adversary Proceedings. That litigation centers around the pre- and post-petition conduct of the Debtor, counsel for her as Debtor in Possession, and Lawrence. This has also been caused because of the many related entities and disputes which arose in connection with those case. These disputes include the interests of the Debtor's brother and sister in law and the claims of the Trustee in the Staff U.S.A., Inc. case that monies from that business were paid to bankruptcy counsel and family law counsel of the Debtor in Possession.
>
> In reviewing all of the litigation, contentions made by Lawrence Freeman, positions advanced by the Debtor and counsel while as Debtor in Possession and now as Debtor, the asserted conflicts of interest by the Debtor against her attorney, and the attorney who represented the estate while the Debtor served as Debtor in Possession now representing Lawrence

> Freeman against the estate, the court is convinced that a significant amount of these legal expenses are the Debtor's own doing. These have arisen not because of mistake or inadvertence, but the intentional conduct and strategy of the Debtor and her attorney representing the estate when she was Debtor in Possession and now attempting to represent Lawrence Freeman against the Chapter 11 Trustee.

Civil Minutes, Dckt. 823.

The court notes that this Chapter 11 case has been one far out of the norm. First, there are multiple related bankruptcy cases filed by Gloria Freeman and her attorney, W. Austin Cooper, for Ms. Freeman and the entities she controlled. Trustees have been appointed in those cases, or they have been dismissed. Each has been fraught with extensive litigation, disputes, and shifting positions by Gloria Freeman. In the Gloria Freeman case alone (not including the four adversary proceedings), there are over 1200 docket entries. This rivals the 1184 docket entries in the Chapter 9 municipal bankruptcy case filed by the City of Stockton.

The court notes the difficulty the Chapter 11 Trustee in this case in interacting with Gloria Freeman and her prior counsel, W. Austin Cooper. Gloria Freeman has displayed litigation tactics that necessitated the Trustee to file several motions, responses and replies. W. Austin Cooper was not authorized to be employed as counsel in either the Staff USA, Inc. case or the Gloria Freeman case, and no fees were approved by the court for him to be paid for any legal services provided Gloria Freeman, the Debtor in Possession.

It appears much of the "irrelevant motions" and "interference" was caused by Gloria Freeman herself, not Counsel for the Trustee.

Sixth, Debtor asserts that Counsel has "continued to discriminate against the disabled steal their funds, deny them their rights, and are continuing to violate the ADA and ADAA in this courthouse through their unscrupulous actions." Dckt. 1155, 9:17-19. Debtor does not cite to specific portions of the ADA or ADAA that Counsel has allegedly violated, any specific disabilities or any specific acts by Counsel that would be considered discrimination. Nor does debtor provide any evidence in support of these conclusions.

The court also addressed this contention at the Motion to Remove Wilke Fleury and found,

> The present motion and declarations do not provide any specifics about any disabilities for the Debtor or Mr. Freeman, or how Mr. Freeman has gone from disabled and incompetent when sued by the estate, to not disabled and competent when the Debtor was removed as debtor in possession for cause, to once again disabled and incompetent when the Debtor wants to have Mr. Freeman disavow the settlement in Adversary Proceeding 10-2536.

Civil Minutes, Dckt. 880. The court concluded that the protestations of the Debtor is that Counsel does not trust them. This is not sufficient to find that Counsel engaged in any discriminatory conduct.

Seventh, with respect to the attorneys' fees itself, Debtor argues that billing is grouped and time was not kept in periods of one-tenths of an hour. She also argues that the time entries lack sufficient detail, the summary sheet does not include the total hours billed, total amount billing for each person, and total compensation received to date.

As to the specific issues related to the attorneys' fees, Movant does not block bill. Dckt. 1129, Exhibit B. Movant provides sufficient detail for each entry and it is recorded in increments of one-tenth of an hour. Dckt. 1129, Exhibit B. Movant provides names of the individuals providing legal services, number of hours and billed for each professional, and total amount billed. Dckt. 1129, Exhibit B, pages 21-22.

Each motion is not viewed in isolation; rather the court determines the issues and the parties credibility based on the entirety of the case. Here, Gloria Freeman is essentially a pot calling the kettle black in asserting that the Trustee, his accountants and Counsel have conflicts. As depicted above, Gloria Freeman has filed cases out of district, attempted to dismiss or convert this case and remove the trustee in several attempts to Trustee and forum shop. Her interactions with W. Austin Cooper and Steven Berniker (former counsel) caused actions by the Trustee to disgorge fees. The court has raised several serious issues of Gloria Freeman filing Motions on behalf of her husband, Laurence Freeman (which appear to be against his interests) and other purported abuse, which the court is currently addressing in the above referenced Status Conference.

The court notes that the arguments of Gloria Freeman are simply a rehash of factual misstatements and insufficient legal arguments that have been rejected by this court numerous times before. A prime example is in Debtor's Motion to Strike, heard October 24, 2013, in which Debtor contended that Mr. David Schultz, prior counsel for Laurence Freeman, was an unlicensed attorney. This contention that Mr. Schultz has been stated by Gloria Freeman on several occasions. At the hearing on the Motion to Strike, the court noted,

> Notwithstanding having that information, Gloria Freeman continues to state that Mr. Schultz is unlicensed. A search of the State Bar of California website shows that David Schultz is an active member of that bar. FN.1. The Status History shows that on August 16, 2007, Mr. Schultz was suspended for failing to pay his bar member dues, but was active again one day later, August 17, 2007. Similarly, on July 3, 2012, Mr. Schultz was suspended for failing to pay his bar member dues, but again became active two days later, July 5, 2012. It does not appear that Mr. Schultz was ever unlicensed and has no public record of discipline. Furthermore, the total of three (3) days in which he was not eligible to practice law does not appear to be material to Gloria Freeman's argument and representations to this court.
> ---
> FN.1. http://members.calbar.ca.gov/fal/Member/Detail/143108.
> ---

Civil Minutes, Dckt. 1180.

The court is not persuaded by these re-hashed arguments that (1) do not pertain to Counsel, (2) that this court has already addressed in multiple

motions and hearings, (3) for which no additional (or original) evidence has been provided to the court, and (4) that have no factual basis or legal merit.

Rule 9011

It is incumbent on the parties to have researched and developed not only a good faith belief that the relief they request is based on the facts and law, but to present that to the court.

Federal Rule of Bankruptcy Procedure 9011 provides that, by presenting a petition, pleading, written motion, or other paper to the court, an attorney or unrepresented party certifies that s/he has made a reasonable inquiry under the circumstances. The purpose of Rule 9011 is to deter baseless filings and avoid unnecessary judicial effort in order to make proceedings more expeditious and less costly. 10 Collier on Bankruptcy ¶ 9011.01 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Rule 9011 requires that the parties certify in good faith that they have done their due diligence and research.

Rule 9011(b) places an affirmative duty on attorneys to make a reasonable investigation of the facts before signing and submitting any pleading or motion, thereby encouraging attorneys to "'think first and file later.'" *Id*.

Rule 11 is designed to "reduce the burden on district courts by sanctioning, and hence deterring, attorneys or **unrepresented parties** who submit motions or pleadings which cannot reasonably be supported in law or in fact." *Golden Eagle Distrib. Corp. v. Burroughs Corp*., 801 F.2d 1531, 1542 (9th Cir. Cal. 1986)(overruled based on 1993 amendments *Hanson v. Loparex, Inc*., 2011 U.S. Dist. LEXIS 117014 (D. Minn. Oct. 11, 2011))(emphasis added).

The court notes that any pleadings that are filed with facts or law that have not been reasonably investigated before being presented to the court can and will be sanctioned to deter such actions.

The court has granted Debtor leeway in filing pleadings and responses in this case. However, Debtor should be aware that Rule 9011 applies to attorneys and self-represented parties alike and the court can and will sanction parties that are not in compliance.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;

> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

> (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful advice and counsel to Chapter 11 Trustee, investigation of Debtor's assets and liabilities, and litigation and settlement against Larry Freeman related to Ameriprise fund, Moss Lane Property, and Ulrich Nash & Gump.

Section 327(a) Disinterestedness

Section 327(a) authorizes the employment of professional persons, only if such persons do not hold or represent an interest adverse to the estate and are "disinterested persons," as that term is defined in section 101(14) of the Code. Section 101(14) defines "disinterested person" as a person that

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

When determining whether a professional holds a disqualifying "interest materially adverse" under the definition of disinterested, courts have generally applied a factual analysis to determine whether an actual conflict of interest exists. 3 COLLIER ON BANKRUPTCY ¶ 327.04[2][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.) Some courts have been willing to go further and find a potential conflict or appearance of impropriety as disqualifying. *See Dye v. Brown*, 530 F.3d 832, 838 (9th Cir. 2008) (in context of section 324, examining totality of circumstances, trustee's past relationship with insider created potential for materially adverse effect on estate and appearance of conflict of interest).

The U.S. Bankruptcy Appellate Panel for the Ninth Circuit agrees that a court should apply a totality-of-circumstances analysis in determining lack of disinterestedness under § 101(14)(C). *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 152 (B.A.P. 9th Cir. 2006).
The court does not subscribe to a rigid application of factors, however, but views them as aids for the court's discretionary review. *Id.*

Section 101(14)(C) has been described as a "catch-all clause" and appears broad enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code. COLLIER, supra at 327.04[2][a]. Examples of such materially adverse interests include:

-- a prepetition claim against the debtor;

-- representation of a shareholder;

-- representation of an adversary;

-- representation of certain investors of the debtors; and

-- performance of services for an entity whose subsidiary is a member of the creditors' committee.

Id. The Court of Appeals for the Second Circuit held that the distinction between the "interest adverse" and "disinterested" prongs of section 327(a) is that the former forbids persons who represent interests adverse to the estate from also being employed by the trustee under section 327(a); in contrast, the latter focuses on the interest held by, that is personal to, the professional and does not forbid persons who represent, rather than have or hold, interests adverse to creditors or equity security holders from also representing the estate. *Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610 (2d. Cir. 1999).

A professional failing to comply with the requirements of the Code or Bankruptcy Rules may forfeit the right to compensation. *Lamie v. United States Tr.*, 540 U.S. 526, 538-39 (2004). The services for which compensation is requested should be performed pursuant to appropriate authority under the Code and in accordance with an order of the court. 3 COLLIER ON BANKRUPTCY ¶ 327.03[c] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

Evidence of Disinterestedness

The Debtor offers no evidence in support of her opposition to this Motion. No declaration is attached to the opposition. Debtor filed an "Exhibit List" consisting of a list of 85 documents. However, none of these documents are (1) attached to the exhibit list or appear anywhere on the docket; (2) are properly authenticated; or (3) are organized in a manner where the court is able to determine which exhibits support individual factual allegations set forth in the opposition. The issue of the Counsel's disinterestedness has been raised in her opposition as mere argument. Dckts. 1155, 1186.

The only evidence before the court on the issue of disinterestedness and adverse interests is the declaration filed by the Daniel Egan of Wilke Fleury. Declaration of Daniel Egan, Dckt. 1128.

The court distills two different allegations of disinterestedness by Counsel from the opposition filed by Debtor.

First, Debtor contends that Counsel has a conflict because Flemmer Associates and Trustee have a conflict with the allegedly competing business Paracorp with Ulrich Nash & Gump (Laurence Freeman's separate property business). The Debtor does not make clear how Mr. Egan or Wilke Fleury are involved with this entity. Furthermore, there is no evidence that Counsel or Wilke Fleury has any interest in Paracorp, Flemmer Associates, LLP or Ulrich Nash & Gump. The allegations set forth by Debtor appear to lump the Trustee, his Counsel and his accountants into one entity. The court addressed this same contention at the hearing on the Motion to Remove Wilke Fleury on July 25, 2013. Dckt. 880. There is no evidence that Counsel has any adverse interest to the estate on this basis.

Second, the contention that Counsel has a conflict with Bank of America does not have merit. The court also addressed this at the hearing on the Motion to Remove Wilke Fleury on July 25, 2013, stating,

> Debtor states that Mr. Egan admitted to representing Bank of America and that the relationship has created numerous conflicts because Mr. Egan and Wilke Fleury are "in alliance" with Bank of America. However, Debtor has not clarified what conflicts have been created through the previously disclosed relationship between the parties, how Bank of America is involved in the present case, and what harm or injury has occurred through the alleged conflict.

Civil Minutes, Dckt. 880. Debtor has not since refined her arguments against Counsel or more importantly, provided any evidence in support of her contentions that Counsel is disinterested because of any connection with Bank of America.

The court is not persuaded with Debtor's allegations and the evidence is insufficient under the totality of the circumstances to warrant denial of fees for Counsel.

Debtor provides no supporting evidence in support of her opposition to this motion and simply rehashes factual allegations that have been refuted by this court. Most of the arguments are arguments toward Mr. Flemmer as Trustee, not any alleged conflicts with Counsel. The court does not find merit in Debtor's arguments.

CONDUCT OF DEBTOR AND DEBTOR'S COUNSEL

The court takes very seriously the duties of representatives of bankruptcy estates, whether they be trustees, debtors in possession, or Chapter 13 debtors (the "estate fiduciary"), and the professionals hired to representative the estate fiduciary. This case has beset with issues relating to the conduct of representatives of fiduciaries and some of the parties. As is chronicled above and through the various rulings of this court, the Debtor and her counsel have engaged in a campaign to delay, hinder, and derail the prosecution of this Chapter 11 case and the related Chapter 11 (recently converted to Chapter 7) case for Staff USA, Inc., Bankr. ED Cal. 11-48050. Though she and her counsel, W. Austin Cooper, commenced the voluntary Chapter 11 cases for Gloria Freeman and Staff USA, Inc., the conduct of the Debtors in Possession were sufficient cause for the appointment of Chapter 11 Trustees.

As demonstrated by the present objections, Gloria Freeman's oppositions and attacks are based largely on unsupported allegations and contentions. As the present case has developed, these contentions and allegations change, fitting whatever is Gloria Freeman's current agenda. The various orders and Civil Minutes in this case which address this conduct of Gloria Freeman and W. Austin Cooper include the following: (1) Order for Status Conference on Ability of Laurence Freeman to Participate in Bankruptcy Court Proceedings and Appearance of Independent Counsel, Dckt. 1044; (2) Civil Minutes, Motion for Stay Pending Appeal, Dckt. 1018, Dckt. 1018; (3) Civil Minutes, Debtor's Motion to Convert Case, Dckt. 1016; (4) Civil Minutes, Debtor's Motion to Disgorge Fees From Flemmer and Associates and have Julie Heath appointed as accountant for the Chapter 11 Trustee, Dckt. 943; (5) Civil

Minutes, Debtor's Motion to Remove Counsel for Chapter 11 Trustee, Dckt. 880; (6) Civil Minutes, Debtor's Motion to Remove Chapter 11 Trustee, Dckt. 841; (7) Civil Minutes, Motion for Compensation by Counsel for Chapter 11 Trustee, Dckt. 823; (8) Civil Minutes, Order to Show Cause Regarding Fees Paid to W. Austin Cooper, Dckt. 747; (9)Civil Minutes, Debtor's Motion to Compel Abandonment of Staff USA, Inc. stock, Dckt. 334; and (10) Civil Minutes, Laurence Freeman Motion to Dismiss or Convert Case, Dckt.

VOICES OF CREDITORS

Interestingly, while Gloria Freeman has been beating the drum to get the Chapter 11 Trustee, counsel for the Chapter 11 Trustee, and the accountant for the Chapter 11 Trustee out of the case, no creditors have stepped forward to support her efforts. While the inaction of creditors does not determine whether a professional is disinterested or whether the requested fees are proper, it is an indication that Gloria Freeman's protestations as to counsel are not grounded in fact or good faith. Rather, it highlights that these recurring attacks by Gloria Freeman are a rear-guard attempted battle of attrition to obtain opponents which Gloria Freeman hopes are less knowledgeable, less professional, and less inclined to fulfill their duties to the estate. Her efforts have been unsuccessful, but costly to the estate. However, that cost is not borne by Gloria Freeman, but by her creditors.

A survey of the proofs of claim file indicates that the unsecured claims are in excess of $3,000,000. A portion of this unsecured debt arises from guaranties give by Gloria Freeman for related entities for which she also commenced bankruptcy cases. Those various cases have either been converted to Chapter 7 or dismissed after the creditor foreclosed on the collateral which secured the debt guarantied by Gloria Freeman. On Schedule F Gloria Freeman listed $5,036,939.00 of general unsecured claims which were not disputed, contingent, or unliquidated. Dckt. 10 at 19-20. On Schedule E Gloria Freeman listed unknown tax claims. *Id.* at 18.

With creditors holding general unsecured claims such as Bank of America, N.A., Wells Fargo Bank, N.A., Capital One, Citi Bank, US Small Business Administration, and Union Bank, N.A., it cannot be said that these creditors are unsophisticated simpletons who don't understand what a trustee and counsel for trustee must do in a case. Further, they have been repeatedly provided notice of Gloria Freeman's arguments and allegations. But none rise up supporting Gloria Freeman.

FEES ALLOWED

The hourly rates for the fees billed in this case is $390/hour for 248.9 hours for Counsel Egan and $330/hour for 16.3 hours for Counsel Lewis. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

Total final professional fees for Counsel are allowed pursuant to 11 U.S.C. § 330, and interim fees pursuant to 11 U.S.C. § 331, which are subject to final review pursuant to 11 U.S.C. § 330. The court allows on an interim basis fees in the amount of amount of $102,450.00. The court continues the final approval of the fees to the continued hearing date pursuant to the request of Gloria Freeman. Due to the complexity of the case, the court authorizes the Plan Administrator to pay 75% of the allowed fees, which is

$90,337.50, from the available funds of the Estate as permitted by the confirmed Chapter 11 Plan in this case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of $1,458.54 for copies and postage. The total costs in the amount of $1,458.54 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	$90,337.50
Costs and Expenses	$1,458.54

CONTINUANCE

Debtor filed a Notice of Unavailability on October 30, 2013. The court will award the above stated fees and continued the hearing for final approval of fees.

The court having reviewed the application for fees and the above described opposition, the fees in the amount of $102,450.00 are approved in full.

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 Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Wilke, Fleury, Hoffelt, Gould & Birney ("Wilke Fleury") is allowed the following fees and expenses as a professional of the Estate:
>
> Wilke Fleury, Counsel for the Chapter 11 Trustee for the Estate
>
> Applicant's Fees Allowed in the amount of $102,450.00
>
> Applicants Expenses Allowed in the amount of $1,458.54,
>
> **IT IS FURTHER ORDERED** that this is a final allowance of fees and the plan administrator is authorized to pay $102,450.00 of the allowed fees and $1,458.54 of the allowed expenses from funds of the Estate as permitted by the confirmed Chapter 11 Plan in this case.

9. 10-27399-E-13 DAN GOODLOW **MOTION BY DOUGLAS B. JACOBS TO**
12-2195 **WITHDRAW AS ATTORNEY**
GOODLOW V. MARTIN ET AL **11-5-13 [65]**

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, Chapter 13 Trustee, and Office of the United States Trustee on November 5, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Withdraw as Attorney has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 1007(b)(2). 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 court's tentative decision is to grant the Motion to Withdraw as Attorney. 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:

Douglas B. Jacobs, attorney of record for Defendant Dorice Goodlaw, filed a Motion to Withdraw as a Attorney. Movant states the following reasons for the motion: (1) lack of cooperation, communication, and response from the Defendant-Client to prosecute the case, (2) Defendant's failure to pay attorney fees as per agreement, and (3) disagreement between Movant and Defendant on how to proceed with the case. Movant does not reveal any specific facts because he is bound by the attorney-client privilege.

PROCEDURAL ISSUE

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party did not use a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

RELEVANT LEGAL AUTHORITY

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last

known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might case to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 915.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdrawal from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l. Conduct 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probably cause and for the purpose of harassing or maliciously injuring any person, (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act, and (3) has a mental or physical condition which makes Counsel's continued employment unreasonably difficult. Cal. R. Prof'l. Conduct 3-700(B).

Permissive Withdrawal is limited to when to situations where:
(1) 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.

Cal. R. Prof'l. Conduct 3-700(C).

DISCUSSION

Movant filed and noticed a motion to the Defendant. Movant provided the following address for the Defendant: P.O. Box 1148, Berry Creek, California in the Motion, not in the declaration.

Movant provides various reasons for his Motion to Withdraw as Attorney such as his inability to work and communicate with Defendant for over four months to move the case forward. Additionally, Movant and Defendant are in disagreement over how to proceed forward with the case.

Movant does not discuss any prejudice his withdrawal as a counsel will or will not cause to the other litigants or harm it might or might not have on administration justice. However, Trustee, Debtor or any other relevant party has not filed an opposition to this Local Bankruptcy Rule 9013-1(f)(1) motion.

Furthermore, under the California Rules of Professional Conduct 3-700(C)(1)(d), Defendant's conduct, such as the lack of response to correspondence from the Movant as well as inability to agree with the Movant on how to proceed forward with the case, is hindering Movant's ability to carry out his employment and duties effectively. These are sufficient reasons for permissive withdrawal. Additionally, Defendant's breach of agreement or obligation to pay fees pursuant to California Rules of Professional Conduct 3-700(C)(1)(f) is a ground for permissive withdrawal.

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 Withdraw as Attorney filed by Debtor's Counsel 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 Withdraw as Attorney is granted.