UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 9, 2013 at 10:00 a.m.

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1. 13-30804-A-11 ELWYN/JEANNINE DUBEY — ORDER TO SHOW CAUSE 11-19-13 [66]

Final Ruling: The order to show cause will be discharged and the petition will remain pending.

The debtor was given permission to pay the petition filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment fee in the amount of $303 due on November 14, 2013 was not paid. However, the debtor paid the installment fee on December 2, 2013. No prejudice has resulted from the delay.

2. 08-26813-A-9 OHS-49 CITY OF VALLEJO, CALIFORNIA — MOTION FOR ORDER APPROVING STIPULATION 11-22-13 [1388]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the City of Vallejo, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The City of Vallejo, along with Lori Robinson Bauer and Andrew Washington, Jr., request approval of a settlement agreement and stipulation between the City, on one hand, and Ms. Bauer and Mr. Washington, Jr., on the other hand, resolving the allowance, determination, and payment of Ms. Bauer's and Mr. Washington, Jr.'s claims against the City. Those claims were for civil rights violations under 42 U.S.C. § 1983, assault, battery, false arrest, false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, and wrongful death. The claims, part of two pending district court actions, pertain to the death of Andrew Washington on September 16, 2004 in the City.

Ms. Bauer timely filed a proof of claim in this case for $10 million. Mr. Washington, Jr. timely filed a proof of claim in this case for $5 million. The City's plan, confirmed by the court on August 5, 2011, classified the claims as class 7 general liability claims. The plan provides that the City will pay 23.0793% of the allowed amount of the claim, up to the amount of $500,000. In

April 2012, the City filed an objection to the proofs of claim, which objection was stayed, pending resolution of the district court actions.

Under the terms of the settlement and stipulation, Ms. Bauer will reduce her proof of claim amount from $10 million to $367,965, and the City will pay $85,000, or 23.0793%, of that amount, in full satisfaction of the claim.

Mr. Washington, Jr. will reduce his proof of claim amount from $5 million to $606,061, and the City will pay $140,000, or 23.0793%, of that amount, in full satisfaction of the claim.

The City will dismiss the pending objections to the proofs of claim and Ms. Bauer and Mr. Washington, Jr. will dismiss the pending district court actions. Ms. Bauer's and Mr. Washington, Jr.'s claims will be deemed discharged as of the plan's effective date.

After notice and hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986); see also TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, reh'g denied, 391 U.S. 909 (1968). The court must consider and balance four factors: 1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending to it; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. Woodson v. Fireman's Fund Insur. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given the approximate 96% reduction in the amount of Ms. Bauer's claim, given the approximate 88% reduction in the amount of Mr. Washington, Jr.'s claim, given that the issues involved are potentially quite complex, and given the avoidance of the inherent costs, risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be fair and equitable. The court may give weight to the opinions of the parties and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). And, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

3. 13-30417-A-13 PATRICK FAGUNDES — MOTION TO
13-2261 KYL-2 — DISMISS ADVERSARY PROCEEDING
FAGUNDES V. JPMORGAN CHASE ET AL — 11-7-13 [34]

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

One of the defendants in this proceeding, JPMorgan Chase Bank, moves for dismissal of the claims against it, pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6).

The facts giving rise to the instant proceeding are as follows. In December 2005, the plaintiff borrowed funds from Long Beach Mortgage Company to finance his purchase of real property in Rocklin, California. LBMC assigned the deed of trust to Washington Mutual in May 2008. WaMu was acquired by JPMorgan Chase Bank in September 2008, along with its interest in the property. Because of a

default by the plaintiff under the loan, the property was sold at foreclosure in January 2013.

On February 11, 2013, the plaintiff filed a state court action against JPMorgan Chase Bank, California Reconveyance Company, and Does 1-100, inclusive. The claims pleaded in that action include:

- quiet title,
- intentional infliction of emotional distress,
- negligence,
- fraud,
- violations of Bus. & Prof. Code § 17200, et seq.,
- breach of contract, and
- promissory estoppel.

Docket 37, Ex. 6.

JPMorgan Chase Bank removed the state court action to federal district court on April 23, 2013. Docket 37, Ex. 7. On May 2, 2013, JPMorgan Chase Bank and California Reconveyance filed a motion to dismiss the claims of the plaintiff. After conducting a hearing on the dismissal motion on August 9, 2013, the district court took the motion under submission. Docket 37, Ex. 7 at 2, 4.

The plaintiff filed the underlying chapter 13 case, Case No. 13-30417, on August 7, 2013. He filed this adversary proceeding on August 21, 2013. The causes of action asserted in this proceeding also pertain to the January 2013 foreclosure sale and include:

- quiet title,
- intentional infliction of emotional distress,
- negligence,
- fraud,
- conversion,
- violations of the California Foreclosure Protection Act, and
- breaches of the covenants of good faith and fair dealing.

The plaintiff is seeking injunctive relief and TRO as to the property and against the current owner of the property, is seeking rescission, restoration and restitution, and is seeking declaratory relief that the defendants have no interest in the property.

The underlying bankruptcy case was dismissed on August 30, 2013. On October 18, 2013, the plaintiff filed another bankruptcy case, a chapter 13 proceeding, Case No. 13-33496. The court will treat the instant adversary proceeding as if it was filed in the plaintiff's latest bankruptcy case, Case No. 13-33496, filed on October 18, 2013.

28 U.S.C. § 1334(c)(2) provides: "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

Hence, under 28 U.S.C. § 1334(c)(2), this court "shall" abstain from hearing a proceeding based on state law claims, "related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to

which an action could not have been commenced in a court of the United States absent jurisdiction under this section," if "an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." Williams v. Shell Oil Co., 169 B.R. 684, 688, 690-91 (S.D. Cal. 1994). This is mandatory abstention.

"Mandatory abstention requires a finding of the following elements: (1) a timely motion; (2) a purely state law question; (3) a non-core proceeding that is merely a proceeding related to a bankruptcy case; (4) no basis for federal jurisdiction apart from the bankruptcy case; (5) a pending action in state court; (6) the state court action can be timely adjudicated; (7) appropriate jurisdiction exists in the state forum."

Schulman v. California State Water Resources Control Board (In re Lazar), 200 B.R. 358, 370 (Bankr. C.D. Cal. 1996).

28 U.S.C. § 1334(c)(1) provides that "[n]othing 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." This is discretionary abstention.

In the Ninth Circuit, the factors that a court must consider when deciding whether to apply discretionary abstention include: (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. Christensen v. Tuscon Estates, Inc. (In re Tuscon Estate, Inc.), 912 F.2d 1162, 1166-67 (9th Cir. 1990).

Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

Although mandatory and discretionary abstention do not apply in the absence of a pending state proceeding, there is an analogous pending district court proceeding here. See Docket 37, Ex. 7. As this court is a division of the district court, as the claims in the district court action arise from the same event, transaction or occurrence - namely, the plaintiff's obtaining of a loan to purchase the property and the foreclosure sale of the property, as the claims have been pending in the district court for four months prior to the filing of this proceeding, and as the district court has already taken a dismissal motion by JPMorgan Chase Bank on the merits under submission, this court must abstain from adjudicating the claims asserted by the plaintiff in this proceeding.

At least four of the claims in the instant proceeding against JPMorgan Chase

Bank are identical to claims asserted in district court, including claims to/for quiet title, intentional infliction of emotional distress, negligence and fraud. The pendency of identical claims in different courts carries a risk of inconsistent outcomes for JPMorgan Chase Bank.

While the other three claims in this proceeding (*i.e.*, conversion, violations of the California Foreclosure Protection Act, breaches of the covenants of good faith and fair dealing) are not identical to the other three claims in the district court action (*i.e.*, violations of Bus. & Prof. Code § 17200, et seq., breach of contract, promissory estoppel), all the claims brought by the plaintiff, in both this and the district court action, are substantially similar and intertwined. The plaintiff is challenging the pre-petition loan he obtained to purchase the real property, is challenging the pre-petition foreclosure of the property, is seeking to recover the property, and is seeking damages and equitable relief against the defendants.

Further, although JPMorgan Chase Bank is a defendant in both this and the district court actions, the other defendant in this proceeding, Jesbir Brar, is not a defendant in district court. Also, the other defendant in district court, California Reconveyance, is not a defendant in this proceeding. Permitting the continuance of the instant proceeding then has the potential to expose both Jesbir Brar and California Reconveyance to binding inconsistent outcomes as well. This is especially true about California Reconveyance, which appears to have been an active participant in the foreclosure sale that is challenged in this proceeding, yet California Reconveyance is not named as a defendant in this proceeding.

As to defendants "Does 1-100, inclusive," at least in nondiversity actions, there is no authority permitting a plaintiff to name fictitious defendants in federal court.

In short, the court will not allow the plaintiff to simultaneously litigate claims arising from the same event, transaction, or occurrence in different forums. Such claims must be litigated in one forum - in this case, the district court - as that court is addressing the merits of the claims already. To the extent the district court action does not include all claims against Mr. Brar, because he is the purchaser at the foreclosure sale being contested by the plaintiff and is the successor of the named defendants, it should be relatively easy to amend the district court action to name him as a defendant.

Other factors warrant abstention as well. The simultaneous litigation of the plaintiff's same or similar claims in this court and the district court impairs judicial economy because two courts are expending resources to hear claims that should be adjudicated by one tribunal. Also, the claims in this proceeding are not core and do not involve bankruptcy issues. The claims are based solely on state law that can be easily resolved outside of bankruptcy court. The court's jurisdiction over the claims is solely "related to" jurisdiction.

Lastly, the commencement of this proceeding likely involves forum shopping by the plaintiff. The plaintiff has a history of deficient bankruptcy filings since May 2008. The latest bankruptcy case by the plaintiff, Case No. 13-33496, permitting this court to have "related to" jurisdiction over the instant claims, was filed on October 18, 2013. This is the plaintiff's sixth bankruptcy case since May 6, 2008.

On May 6, 2008, the plaintiff filed a chapter 7 bankruptcy case, Case No. 08-25909. The plaintiff received a discharge in that case on November 3, 2008.

On December 22, 2008, the plaintiff filed a chapter 13 case, Case No. 08-38926. That case was dismissed on February 19, 2009 due to the plaintiff's ineligibility for chapter 13 relief and due to his failure to timely file a plan, schedules, and statements.

On May 19, 2010, the plaintiff filed another chapter 13 case, Case No. 10-33102. That case was dismissed on June 7, 2010 due to the plaintiff's failure to timely file a chapter 13 means test statement.

On June 27, 2011, the plaintiff along with his spouse, Tammy Figuera, filed a chapter 11 case, Case No. 11-35879. That case was dismissed on July 27, 2011 due to the plaintiff's failure to timely file the bankruptcy schedules and statements.

On August 7, 2013, the plaintiff filed yet another chapter 13 case, Case No. 13-30417. That case was dismissed on August 30, 2013 due to the plaintiff's failure to timely file a chapter 13 plan and means test statement.

The lack of prosecution by the debtor of the last four reorganization cases convinces the court that the presently pending chapter 13 case was likely filed only to manufacture jurisdiction for the adjudication of the instant claims by this court. The court will abstain from the adjudication of the subject claims.

4. 12-35921-A-12 HARMINDER HEER — MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEES $107,153.50, EXP. $2,754.94) 11-11-13 [157]
DB-11

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

Downey Brand, attorney for the now post-confirmation debtor, has filed its second interim motion for approval of compensation. The requested compensation consists of $85,209 in fees and $1,085.04 in expenses, for a total of $94,490.45. This motion covers the period from February 20, 2013 through September 30, 2013. The court approved the movant's employment as the debtor's attorney on October 29, 2012. In performing its services, the movant charged hourly rates of $180, $235, $275, $290, $330, $375, $390, and $400.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) addressing various plan implementation, executory contract, and tax issues with the debtor and his farm business, (2) assisting the debtor in the implementation of the settlement agreement with his former spouse, including a required financing transaction, (3) analyzing tax claims, (4) negotiating with taxing authorities and the debtor's former business partner regarding the payment of the tax claims, (5) extensively litigating an objection to the claim of the debtor's former business partner, (6) litigating property division issues between the debtor and his former spouse, (7) negotiating and analyzing settlement with the debtor's former spouse, (8) litigating in state court the improper lien sale of a valuable boat owned by the debtor, and (9) preparing and filing employment and compensation motions.

Except as provided below, the court concludes that the compensation is for actual and necessary services rendered in this case.

The court will not approve the $23,614.40 in attorney's fees for the litigation pertaining to an improper lien sale of the debtor's boat. Docket 157 at 7-8. The court approved the movant's employment as counsel for the debtor in possession solely in this bankruptcy case. The court has jurisdiction to review and approve the movant's fees and costs only to the extent they pertain to this case, including pre and post plan confirmation matters that relate to the debtor's reorganization. The motion does not say how the boat lien sale litigation pertains to this case or why this court has jurisdiction to review and approve the fees the movant has incurred in connection with that litigation. The court does not recall taking the boat lien sale litigation into account when determining whether to confirm the debtor's plan. Also, the court does not have evidence that the lien sale litigation relates to plan implementation. The court is not convinced that it has jurisdiction to review and approve the fees and costs the movant has incurred in that litigation. Such fees and costs will not be approved.

Finally, the court is approving the movant's fees and costs incurred in the state court litigation with the debtor's former spouse and former business partner, as such fees and costs directly pertain to the implementation of the debtor's confirmed chapter 12 plan - the plan provided for the completion of that litigation.

Nevertheless, the approval of such fees and costs does not replace or eliminate the necessity for their approval by the state court, to the extent necessary or required. This court's approval of such fees and costs is without prejudice to the state court reviewing and approving the fees and costs independently from this court's review and approval. This qualification applies to all state court litigation fees and costs sought by and granted to the movant, by this court. The motion will be granted in part and denied in part.

5.	09-41322-A-7 10-2034 PATELCO CREDIT UNION V. SHILIN	ANATOLIY SHILIN AND NATALYA DIVAKOV	MOTION FOR SUMMARY JUDGMENT 10-25-13 [56]

Tentative Ruling: The motion will be granted in part.

The plaintiff, Patelco Credit Union, seeks summary judgment on its claims under 11 U.S.C. § 523(a)(2)(A) and (a)(6) against the defendant, Anatoliy Shilin, the debtor in the underlying bankruptcy case.

The facts giving rise to this proceeding are as follows. On or about August 20, 2008, the defendant applied for an auto loan with the plaintiff. Docket 57 at 2; Docket 64, Ex. 1. The defendant gave the plaintiff a loan application and a retail installment contract for the purchase of a 2007 BMW 525i vehicle from Holland Auto Sales. The defendant represented to the plaintiff that he was entering into a contract with Holland Auto to purchase the vehicle. Docket 57 at 2. He also represented that the plaintiff would receive a security interest in the vehicle as part of the consideration for making the loan. Docket 57 at 2.

On August 20, 2008, the plaintiff issued a check for $44,872.49, made payable to the defendant and Holland Auto. Docket 57 at 2; Docket 64, Ex. 2. The defendant made no payments on the loan and the plaintiff has been unable to locate the vehicle. Docket 57 at 3. The defendant does not have possession of the vehicle. Docket 66 at 64-66.

In a deposition conducted by counsel for Sierra Central Credit Union, the defendant admitted that he borrowed money for the purchase of vehicles from the

plaintiff, Sierra Central Credit Union, U.S. Bank, and other lenders, as part of a scheme concocted by two acquaintances of the defendant, Yakovlev and Cornell. They convinced the defendant to borrow money by pretending to purchase vehicles for himself, while they told the defendant that the vehicles he purchases would be used in a limousine business and that the limousine company would make the monthly payments on the loans obtained by the defendant. The benefit promised to the defendant was that he would build a credit history that would allow him to obtain business loans in the future.

Yakovlev and Cornell would prepare all paperwork necessary for the defendant to obtain the loans, including purchase agreements, loan applications, etc. The defendant would sign the paperwork for the loans and then would apply for the loans in person at a branch for the lender. The defendant, who claims to have a limited proficiency of the English language, states that he did not review or understand what was written in the various papers he signed and submitted to obtain the loans.

Once the lender issued the check for the loan, the defendant would turn the check over to Yakovlev and/or Cornell, who would cash the check and the lender would not receive any payments.

Docket 66 at 19-24, 30-34, 37-40, 53-56, 63-69.

The defendant has admitted that the loan he obtained from the plaintiff to purchase the subject vehicle was part of the above-described scheme.

Docket 66 at 64 lns. 16-25 & at 65 lns. 1-8.

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

To the extent the evidence in the record comes from statements by the defendant, such statements are not hearsay and are admissible under Fed. R. Evid. 801(d)(2)(A) as the statements are offered against the defendant.

11 U.S.C. § 523(a)(2) provides that an individual is not discharged "from any debt for money . . . , to the extent obtained by- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff justifiably relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but

not reasonable, reliance")). These elements are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999).

When the defendant signed and presented to the plaintiff the loan application and other papers to obtain the subject loan, the defendant made representations to the movant that he was the person seeking the loan, he was the one who would be repaying the loan, and he is purchasing the vehicle for his own use.

While the defendant says that he did not know about the scheme perpetrated by Yakovlev and Cornell and that he did not know or understand what was written in the papers he signed and submitted to obtain the loan from the plaintiff, it is clear from the defendant's admissions that:

- he understood he was the one applying for the loan,

- he was the one promising to repay the loan,

- he was applying on the pretext that he was purchasing a vehicle,

- he knew those representations to be false when he applied for the loan with the plaintiff, and

- he intended to deceive the plaintiff into making the loan to the defendant, even though the defendant had no intention to repay the loan or to purchase the vehicle that was the pretext for the loan.

In describing the scheme in general, the defendant said that: "[w]e are liable in front of the bank because our signature [on the loan papers] is there, but we don't have neither one money or the vehicle" (Docket 66 at 22); "[u]sually [Yakovlev and Cornell] gave me the pre-made pre-filled out the papers and I was signing and they were saying, you know, take it to the office[,] [i]f they give you the check, we're going to be in front of the bank so you give it back to us. That's it" (Docket 66 at 33).

In describing the person who asked him to obtain the loans, Yakovlev, the defendant said "[h]e was just very trustful," "I just trust him," "I trusted him and I signed [the loan papers]," implying that he understood that, at the time he applied for the loans, he was the one responsible for repaying the loans. Docket 66 at 23. This is further corroborated by the defendant in referring to Yakovlev, that "he gave me some papers from the dealer . . . [h]e ask me to do this papers and sign for the loan because *I'm going to be approved* and I sign it, *but actually the vehicle will go to a different company*." Docket 66 at 21.

The defendant also admitted that he understood he was not to "receive any money or any property in the request of signing this" and he was explained that his benefit would come in the future in the form of an improved credit history. Docket 66 at 24.

In connection with the vehicle "purchased" by borrowing from Sierra Central Credit Union, the defendant admitted: "I didn't think about any payment and actually I didn't own this car. Leo explained to me that this car necessary only for this only to open the business loan and I ask him I don't want to pay anything for this car and I don't need this car, but if you tell me that it's correct to do that and it is better to do that so you have to take this car for business for limousine car something and Leo or the company they will pay. I didn't promise any payment for this car." Docket 66 at 55. This statement was

given by the defendant as a response to the question of whether he intended to repay the loan when he signed the loan documents. Id.

In other words, although the defendant clearly understood he was the one obtaining the loans and responsible for their repayment, he had an undisclosed "side agreement" with Yakovlev about someone other than the defendant actually benefitting from the loans, someone other than the defendant actually repaying the loans, *i.e.*, "the limousine company," and there being no actual purchase of the vehicle that was used as the pretext for the loan. This undisclosed side agreement with Yakovlev negated the promises the defendant was making to the lenders - including the plaintiff - about who is borrowing the funds, who is responsible for their repayment, and about the purchase of the vehicle. The plaintiff and the other lenders were obviously unaware of this private agreement with Yakovlev.

From the foregoing, the court infers that the defendant knew the representations he made to the plaintiff to be false, when he made them, and that he made the representations with the intent and purpose to deceive the plaintiff into extending credit that was not to be repaid by the defendant and was not to be used for the purposes represented to the plaintiff, *i.e.*, the purchase of the vehicle.

The plaintiff justifiably relied on the representations of the defendant when it loaned the $44,872.49. Those representations included that the defendant would repay the loan and the loan was to be used to finance the purchase of a vehicle by the defendant.

As the defendant never took ownership or possession of the vehicle, as the plaintiff has been unable to locate the vehicle, and no payments have been made on the loan given to the defendant, the plaintiff sustained damages. The elements of 11 U.S.C. § 523(a)(2)(A) are satisfied. The court finds it unnecessary to address other basis for nondischargeability.

The court has sufficient evidence from the plaintiff about damages only in the amount of the principal loan amount, $44,872.49. Docket 57 at 3. The requested $11,186.85 in interest, from August 20, 2008 through August 13, 2013, at $6.15 per diem, is not supported by sufficient evidence. The plaintiff does not say why $6.15 in per diem interest is applicable here. The plaintiff also does not explain why the requested attorney's fees in the amount of $8,096.88 are reasonable and necessary. Additionally, there is no description of the services representing those attorney's fees. See Docket 57 at 3.

The motion will be granted in part. The plaintiff shall submit an order granting this motion and shall submit a separate judgment for nondischargeability consistent with this ruling.

6. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO APPROVE DISCLOSURE STATEMENT 10-11-13 [169]
DRE-19

Tentative Ruling: The motion will be conditionally granted.

The debtors ask for approval of their disclosure statement filed on October 11, 2013. Docket 171.

Nationstar Mortgage opposes approval of the disclosure statement, contending that the disclosure statement does not say who must pay the taxes and insurance on the Tupelo Drive property securing its claim and does not say how or when

the post-petition arrears on its claim will be cured.

The motion will be granted and the disclosure statement will be approved, subject to the debtors making the changes below.

In addition to the issues highlighted by Nationstar, the disclosure statement has the following deficiencies:

(1) The disclosure statement says that the debtors' corporation, Lart Group, Inc., stopped paying rent to them for the gas station, smog test station, and car wash facilities in March 2012 and resumed payment of the rent in April 2013.

However, the disclosure statement does not say what Lart did with the cash it generated from the property during the period it was not paying rent to the debtors. Obviously, the debtors are in full control of Lart and any cash that Lart made was utilized under the control of the debtors. This is especially important because the debtors filed this case on October 2, 2012, about half-way in the period during which Lart did not pay rent.

(2) The disclosure statement is inconsistent as on page 6 it says in one place that Lart stopped making rent payments in March 2012, while in another place on the same page it says that Lart stopped making rent payments in February 2012. The inconsistency should be reconciled.

(3) The disclosure statement says on page 7 that the construction on the street where the debtors' business is located is "almost completed." Yet, the court recalls that the construction is over already.

(4) Mr. Giri's income in the disclosure statement is still inconsistent with his income in the operating reports. The last operating report for October 2013 (Docket 189 at 5) says that his income is $1,844, while the disclosure statement says that his income is $2,400 (Docket 171 at 6).

(5) The payroll deductions in the projected plan budget and the operating reports are still inconsistent and this should be explained (in the plan budget $1,700 a month (DS page 8), whereas $0.00 payroll taxes in the October 2013 operating (Docket 189 at 5)).

(6) The court notes that the debtors still have not submitted an order granting the valuation motion as to the collateral of Huntington National Bank (DCN DRE-17). The court will not allow the debtors to move forward with plan confirmation unless and until they lodge an order granting that motion. Docket 155.

Future amendments of the disclosure statement and/or plan should be accompanied with red/black-lined versions of those documents.

7. 12-37724-A-11 UDDHAV/CHRISTINE GIRI — MOTION TO DISMISS CASE 3-12-13 [65]
UST-1

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

The U.S. Trustee moves for dismissal, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors have violated an order of the court because they paid their counsel fees for unlawful detainer action work without order of this court, the

debtors have accomplished nothing since the case was filed was filed five months ago, and there is no reasonable likelihood of rehabilitation.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . (E) failure to comply with an order of the court." 11 U.S.C. § 1112(b)(4)(A), (E).

The order approving the employment of the debtors' counsel D. Randall Ensminger states: "No compensation is permitted except upon court order following application pursuant to 11 U.S.C. § 330(a)." Docket 30. Nevertheless, Mr. Ensminger admits to receiving $1,250 from the debtors for the eviction of a tenant from one of the debtors' two rental properties.

Stating that "[h]ad they or undersigned counsel realized that court permission was required it would have been requested on an emergency basis," Mr. Ensminger blames ignorance for his failure to obtain a court order approving the payment of the $1,250. Opposition at 4. Mr. Ensminger does not offer to pay back the funds received from the debtors and has made no effort to apply even for retroactive approval of the fees.

The debtors and Mr. Ensminger have violated this court's employment approval order. Docket 30.

The court notes that after the filing of this motion and after the April 19 and June 17 hearings on this motion, Mr. Ensminger has agreed to return the $1,250 he charged the debtors for the eviction work. Docket 147. Although this has mitigated in part Mr. Ensminger's violation of the employment order, the fact remains that he collected the fees in violation of the employment order and that he agreed to return them only five months after this motion was filed.

Further, the court agrees with the U.S. Trustee that there has been delay by the debtors that is prejudicial to creditors. This case was filed on October 2, 2012. This motion was filed on March 12, 2013. Prior to the filing of this motion, the debtors had not filed any valuation motions and the debtors' two cash collateral motions were dismissed by the court. Dockets 32 & 53.

The debtors filed a plan and disclosure statement on January 30, 2013, but they did not set the approval of the disclosure statement for hearing. Also, the plan and disclosure statement were filed as a single document, a total of six pages in length (Docket 63), even though the debtors are not a small business debtor. Unless the debtors are a small business debtor, they are not allowed to file the plan and disclosure statement as a single document. See 11 U.S.C. § 1125(f)(1).

More, the disclosure statement and plan have gross deficiencies on the face of the six-page document, including, without limitation, conclusory liquidation and feasibility analyses, the classification and treatment of claims is incomplete, no narrative or otherwise history of the debtors' pre-petition financial condition and what precipitated the filing, no future financial projections with stated assumptions, no discussion of how the road construction

at the debtors' gas station business has affected the financial affairs of the business and no discussion of how the debtors are planning to confirm a plan given that the road construction hampering business will not be completed until August of 2014 and the debtors' monthly operating reports reflect the debtors' inability to fund a plan.

The March 2013 report reflects that the debtors have netted cumulatively a negative $2,247 during the life of this case. Docket 85.

The February 2013 report indicates that the debtors had netted cumulatively $1,763. Docket 73. According to the February 2013 report, in that month the debtors lost $4,009 and in January 2013 they lost $6,153. Docket 73. The January 2013 report (mislabeled as January 2012) indicates that the debtors had netted cumulatively a negative $3,389. Docket 64.

These figures do not take into account that the debtors have not been paying the mortgage on the gas station property. The gas station business, via the debtors' Lart Group, Inc. operator corporation, is the debtors' principal source of income.

In reviewing the debtors' reports, the court has noticed also that the reports are inconsistent and contain contradictory information. For instance, the February 2013 report says that in the prior month (January 2013), the debtors lost $6,153, whereas the January 2013 report (mislabeled as January 2012) reflects positive net cash receipts of $3,881 and reflects the prior month's receipts (December 2012) as a negative $6,153. Docket 64. The reports are in need of some serious corrections.

The reports are deficient also in reporting the financials of the debtors' corporation, Lart Group, Inc., which runs the gas station business and makes lease payments to the debtors for use of the gas station property. The debtors use the lease payments to pay the mortgage on the property. As of the time this motion was filed, Lart had not been making any lease payments to the debtors and they had not been making any payments on account of the mortgage on the property. The lack of transparency with respect to Lart's financials is a serious concern because the debtors control whether and when Lart will make lease payments to them individually.

On the other hand, the court does not have evidence of how much income is coming into Lart and where that income is going. The only evidence the court has is that Lart has been operating the gas station business and generating some revenue, albeit not making any lease payments to the debtors, and the debtors have not been paying the mortgage on the property.

It was not until this motion was filed that the debtors agreed to prompt Lart to make "reduced" lease payments to them in the amount of $7,500.

The court does not understand why the debtors are characterizing the $7,500 in lease payments from Lart as "reduced" when the motion states that the lease payments should be in the amount of $5,500, which is the approximate amount of the mortgage on the property.

The lease payments from Lart apparently started on April 3, 2013, apparently for the first time post-petition. The debtors do not say when Lart stopped making lease payments to them pre-petition and when exactly they stopped making the mortgage payments.

The debtors predict that Lart's $7,500 in lease payments can "continue in that

amount until the construction is completed and a six month period for business to return to normal is allowed for." Opposition at 2-3.

However, the court is not persuaded that Lart is able to maintain $7,500 lease payments to the debtors, given that Lart did not make lease payments for at least eight months pre-petition and the construction project inhibiting business will not be completed until August of 2014. Motion at 2, 3.

More important, while the court does not have Lart's financials, even if Lart is able to make the $7,500 of lease payments until completion of the construction project, the debtors have not explained why Lart did not make such payments for the eight months pre-petition and for the last six months post-petition. Lart is an entity the debtors own and control. Yet, they have not explained what has changed that Lart is now able to pay $7,500 a month. The construction project is still ongoing.

From the above, the court concludes that the debtors have either not been honest about whether and to what extent Lart has been able to make lease payments to the debtors or Lart is unable to make the asserted $7,500 in payments until the construction project is completed. Either way, there is cause for conversion or dismissal of the case. If the debtors have not been honest about Lart's operation of the gas station, they have mismanaged the estate. See 11 U.S.C. § 1112(b)(4)(B). If Lart is unable to maintain the lease payments to the debtors, in light of Lart's post-petition failure to make lease payments, there is substantial or continuing loss to or diminution of the estate and an absence of a reasonable likelihood of rehabilitation. See 11 U.S.C. § 1112(b)(4)(A). The debtors have stated that their gas station business will not "return to normal" "until the [two-year] construction is completed and a six month period [after completion of the construction]." Opposition at 2-3; Docket 63 at 2.

In conclusion, the debtors' failure to obey this court's orders, the delay in obtaining plan confirmation, the lack of transparency as to Lart's financials, the lack of explanation as to how Lart is suddenly able to make $7,500 in lease payments, and the nominal positive income reported for the life of this case are cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

As the debtors own a rental property with a value of $60,000, free and clear of any encumbrances, the court concludes that conversion to chapter 7 is in the best interest of the creditors and the estate. Schedule A. The case will be converted to a chapter 7 proceeding.

8. 10-36150-A-11 KARIN FRANK — MOTION FOR SANCTIONS AND TO ENFORCE CONFIRMED PLAN
KMF-27 — 11-12-13 [412]

Tentative Ruling: The motion will be denied.

The debtor is seeking damages/sanctions for alleged Citimortgage, Inc.'s violation of the debtors' confirmed chapter 11 plan, as Citimortgage has been collecting more in monthly payments than required by the plan. In the motion, the debtor says that Citimortgage's claim is secured by 4009 33rd Street Sacramento, California.

The motion will be denied because the claim in the plan that is secured by 4009 33rd Street Sacramento, California is held by Citibank and the payment amount for Citibank's claim in the plan does not match the payment amount for the

claim referenced in the subject motion.

The required monthly payment for claim 1h in the plan is $494.24 for five years, including $363.02 for principal and interest and $131.22 for "PITI." Docket 342 at 9. Yet, the monthly payment for the claim referenced in the motion is $388.62.

Further, even though this motion implicates Citibank, the motion was not served on Citibank in accordance with Fed. R. Bankr. P. 7004(h), which requires service on insured depository institutions (as defined by section 3 of the Federal Deposit Insurance Act) to be made by certified mail and addressed to an officer of the institution.

9. 10-36150-A-11 KARIN FRANK — MOTION FOR SANCTIONS AND TO ENFORCE CONFIRMED PLAN
KMF-27 — 11-22-13 [419]

Tentative Ruling: This motion will be dismissed as duplicative of the prior matter on calendar.

10. 13-34696-A-7 JEFFREY JOHNSON — MOTION FOR RELIEF FROM AUTOMATIC STAY
JMD-2 — 11-27-13 [22]
JAMES DARRAH VS.

Final Ruling: The motion will be dismissed.

The movant, James Darrah, filed this motion on November 27, 2013, asking for relief from stay with respect to a mooring at a boat dock in Stockton, California. The movant also filed a request for an order shortening the time for notice of the motion. The court did not see the request for order shortening time until December 3, when it signed an order shortening time and conducted a preliminary hearing on the motion. Only the debtor appeared at the December 3 hearing. The movant did not appear. The court continued the hearing on the motion to December 9, 2013 at 10:00 a.m.

After conducting the December 3 hearing on the motion and continuing the hearing to December 9, the court noticed that the movant filed an amended motion for relief from stay, setting it for hearing without the necessity for an order shortening time, on December 16, 2013 at 10:00 a.m.

Given the amended motion filed by the movant on December 2, the court deems this motion to have been voluntarily dismissed.

11. 12-41197-A-11 JOHN/MARTA SCHULZE — MOTION TO CONFIRM PLAN
JHH-5 — 9-5-13 [76]

Tentative Ruling: The motion will be conditionally granted.

The debtors ask the court to confirm their chapter 11 plan. The court is willing to confirm the debtors' plan, subject to reviewing the tabulation of ballots at the hearing and subject to the debtors explaining the following issues:

(1) How can the court confirm a plan that proposes to pay unsecured claims less than 100% dividend, while the debtors are retaining property of the estate;

(2) How is the plan proposed in good faith when the Alternative 2 potential treatment for unsecured creditors is a 50% dividend over a 15-year (180-month) period (assuming the $1,146,827 claim of the Greater Sacramento Certified Development Corporation is allowed).

The confirmation objection filed by the Greater Sacramento Certified Development Corporation on October 18, 2013 will be overruled. The court does not understand what SCDC means by "[p]ayments under Alternative 2 to unsecured creditors of 50% is inadequate given the cash flow of the asset property." The objection does not say: what "asset property" it is referring to, why and what is the problem with cash flow, and how this makes the dividend "inadequate."

Also, the statement that "[p]ayment under Alternative [presumably 2] should not include any relief to Co-debtors not a party to Debtors' bankruptcy" makes no sense. The court is not approving any plan payments to co-debtors with the debtors on any property. To the extent the debtors may pay a co-debtor any funds from the income generated by a property, those payments are on account of the co-debtor's co-ownership interest in the property.