

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Bankruptcy Judge  
Modesto, California

December 18, 2014 at 2:30 p.m.

1. [10-94411](#)-E-7 CAROLE CAMERON  
[14-9005](#)  
FERLMANN V. GARRETT ET AL

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

Final Ruling: No appearance at the December 18, 2014 Status Conference is required.

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Plaintiff's Atty: Carl W. Collins  
Defendant's Atty:  
    Samuel Kelsall [Karen J. Garrett]  
    unknown [Glenn Alan Garrett]

Adv. Filed: 1/30/14  
Answer: 3/26/14

Nature of Action:  
Recovery of money/property - fraudulent transfer  
Recovery of money/property - other

**The Status Conference is continued to 2:30 p.m. on April 30, 2015, to allow the parties to consummate the settlement which has been approved by the court.**

Notes:

Continued from 8/21/14

*Filed in Parent Case:* [CWC-4] Motion to Approve Settlement of Controversy filed 7/17/14 [Dckt 51]; Order granting filed 8/28/14 [Dckt 58]

December 18, 2014 at 2:30 p.m.

- Page 1 of 21 -

2. [10-94411](#)-E-7 CAROLE CAMERON  
[14-9006](#)  
FERLMANN V. GARRETT

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

**Final Ruling: No appearance at the December 18, 2014 Status Conference is required.**

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Plaintiff's Atty: Carl W. Collins  
Defendant's Atty: Samuel Kelsall

Adv. Filed: 1/30/14  
Answer: 3/18/14

Nature of Action:  
Recovery of money/property - fraudulent transfer  
Recovery of money/property - other  
Approval of sale of property of estate and of a co-owner

**The Status Conference is continued to 2:30 p.m. on April 30, 2015, to allow the parties to consummate the settlement which has been approved by the court.**

Notes:

Continued from 8/21/14

*Filed in Parent Case:* [CWC-4] Motion to Approve Settlement of Controversy filed 7/17/14 [Dckt 51]; Order granting filed 8/28/14 [Dckt 58]

[SKV-1] Order denying motion to dismiss filed 8/28/14 [Dckt 51]

3. [14-90521](#)-E-7 DAVID RICE  
[14-9019](#)  
TURLOCK IRRIGATION DISTRICT V.  
RICE

PRE-TRIAL CONFERENCE RE:  
COMPLAINT OBJECTING TO  
DISCHARGEABILITY OF DEBT  
5-22-14 [[1](#)]

Plaintiff's Atty: Ken R. Whittall-Scherfee  
Defendant's Atty: Pro Se

Adv. Filed: 5/22/14  
Answer: 8/6/14

Nature of Action:  
Dischargeability - fraud as fiduciary, embezzlement, larceny

Notes:

Scheduling Order -  
Pretrial statement filed by 12/15/14

4. [12-92723](#)-E-7 JOHN/KRISTINE ROBINSON  
[13-9004](#)  
GRANT BISHOP MOTORS, INC. V.  
ROBINSON, IV ET AL

STATUS CONFERENCE RE: COMPLAINT  
1-17-13 [[1](#)]

Final Ruling: No appearance at the December 18, 2014 Status Conference is  
required.

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Plaintiff's Atty: Steven S. Altman  
Defendant's Atty: William M. Woolman

Adv. Filed: 1/17/13  
Answer: 2/15/13

Nature of Action:  
Objection/revocation of discharge  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - fraud as fiduciary, embezzlement, larceny  
Dischargeability - willful and malicious injury  
Dischargeability - other

The Court having set the Pre-Trial Conference for July 2, 2015, the Status Conference is removed from the calendar.
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Notes:

Set by order of the court dated 10/1/14 [Dckt 58]

[WMW-2] Pretrial conference set for 7/2/15 at 2:30 p.m.

Disclose experts by 3/20/15

Exchange expert reports by 3/20/15

Non-Expert close of discovery 3/20/15

Supplemental experts disclosed by 4/17/15

Expert close of discovery 5/15/15

Dispositive motions heard by 5/21/15

5. [12-93049](#)-E-11 MARK/ANGELA GARCIA  
[13-9029](#)

STATUS CONFERENCE RE: COMPLAINT  
8-23-13 [[1](#)]

UNITED STATES FIRE INSURANCE  
COMPANY V. GARCIA ET AL

Plaintiff's Atty: Gregory M. Salvato  
Defendant's Atty: Mark J. Hannon

Adv. Filed: 8/23/13  
Answer: 10/4/13

Nature of Action:

Dischargeability - false pretenses, false representation, actual fraud

Dischargeability - fraud as fiduciary, embezzlement, larceny

Dischargeability - willful and malicious injury

The Status Conference is Continued to 2:30 p.m. on xxxxxxxx, 2015.
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Notes:

Continued from 5/22/14. All proceedings in this Adversary Proceeding are stayed pending further order of the court. On or before 11/21/14 Parties are to file and serve updated status conference statements.

Status conference statements not filed as of 12/11/14.

6. [14-90473](#)-E-7 ROBERT WOJTOWICZ AND CONTINUED STATUS CONFERENCE RE:  
[14-9023](#) SHERRI HERTZIC-WOJTOWICZ COMPLAINT  
 HERTZIC-WOJTOWICZ V. IRM 7-11-14 [[1](#)]  
 CORPORATION

Final Ruling: No appearance at the December 18, 2014 Status Conference is required.

Plaintiff's Atty: Shane Reich  
Defendant's Atty: unknown

Nature of Action:  
Recovery of money/property

Notes:

Motion for Entry of Default heard 11/20/14 and continued by order of the court to 1/29/15 at 2:30 p.m. [Dckt 23]

**Final Ruling:** No appearance at the December 18, 2014 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Charles Mills ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on October 22, 2014. The court computes that 58 days' notice has been provided.

8. [14-29284](#)-E-11 CHARLES MILLS  
Lucas B. Garcia

CONTINUED ORDER TO SHOW CAUSE -  
FAILURE TO PAY FEES  
11-21-14 [[90](#)]

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

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The Order to Show Cause was served by the Clerk of the Court on Charles Mills ("Debtor"), Trustee, and other parties in interest on November 23, 2014. The court computes that 18 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case (\$429.00 due on November 17, 2014).

<p>The court's decision is to continue the hearing on the Order to Show Cause to 10:30 a.m. on February 26, 2015.</p>
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The court's docket reflects that the default in payment which is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$429.00.

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 other sanctions are issued pursuant thereto, and the case is dismissed.

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

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Debtor's Atty: Lucas B. Garcia

Notes:

Continued from 12/3/14 to be heard in conjunction with other matters on calendar. Specially set on the Modesto calendar - telephonic appearances permitted.

Amended Schedules B and C and Amended Statement of Financial Affairs filed 12/10/14 [Dckt 118]

<b>The court orders that the case is converted to one under Chapter 7, and the Chapter 11 Status Conference is removed from the Calendar.</b>
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This Chapter 11 case was filed by Charles Mills, the Debtor, on September 17, 2014. The Debtor has accepted the responsibilities of, and the opportunities which go with, serving in the fiduciary office of Debtor in Possession since the commencement of the case.

Within weeks of filing the Debtor in Possession sought an order authorizing him to sell real property of the estate for an amount well in excess of all claims in this case. Motion, Dckt. 41. It was represented to the court that the sale would close by November 14, 2014. Motion ¶ 12, *Id.* The Debtor in Possession also represented that the proceeds of the sale would be used to pay creditors.

Supplemental information about the sale was required and the hearing (which was set on an order shortening time) was continued. The court entered the Order approving the sale on October 28, 2014, expediting the processing of the Order to accommodate the Debtor in Possession's representations that closing was imminent.

On November 11, 2014, the Debtor in Possession filed a motion to use \$25,000.00 of the consummated sales proceeds for personal living expenses. As it was later disclosed, the sale was not consummated and the \$25,000.00 was merely the nonrefundable deposit. Order and Civil Minutes, Dckts. 94 and 92, respectively.

Monthly Operating Reports, one of the basic, fundamental fiduciary duties of a Debtor in Possession have come due for September 2014, October 2014, and

November 2014. None have been filed by the Debtor in Possession.

#### **STATUS CONFERENCE ORDER**

This judge conducts early and regular status conferences in Chapter 11 cases to avoid the situation where a debtor in possession fails to fulfill his, hers, or its duties and cases languish when there is not active creditor involvement. Additionally, this reduces the abuse of the federal judicial system by the improper filing and prosecution of bankruptcy cases (such as using gutter addresses for creditors).

The Court's Status Conference Order provides that failure to comply with the status conference order may result in the appointment of a trustee, conversion of the case or dismissal of the case. Failure to file Monthly Operating Reports fails to provide the necessary information for the court to consider the required Status Reports. No updated Status Reports have been filed by the Debtor in Possession for the continued Status Conference.

The Debtor in Possession has pending a Motion to Dismiss. Dckt. 81. It is premised on the real property having been "sold" and once out of bankruptcy, the Debtor will provide for payment of his creditors' claims. No report of sale has been filed, and as seen from the Motion for Relief From the Stay filed by Joseph and Stacy Lackey, it appears that the buyer has defaulted on the sales contract.

#### **CONVERSION OF THIS CASE IS NECESSARY AND PROPER**

The Estate has a \$2,900,000 real property asset which has now become entangled in an escrow which is not closing and the Debtor in Possession cannot provide any meaningful evidence of its status (confirmation that funding has been deposited in escrow, buyer has defaulted and the property is being placed back on the market). Additionally, though the court approved the sale on specific terms, the Debtor in Possession took it upon himself to modify the terms and extend the closing date without obtaining an amendment of the court's order approving the sale. The proposed buyer, Randy Renfro, is an attorney licensed to practice law in the State of California (CBN: 224309) and should be aware of the significance of a court's order approving the terms of a sale.

The Debtor in Possession's failure to fulfill his basic fiduciary duties and appearing unable to protect the assets of the estate, conversion or appointment of a trustee is appropriate. Dismissal of the case is not appropriate as there is a significant asset which can be liquidated, creditors paid, and the Debtor receiving a significant equity in the property. Further, the court has no confidence that upon dismissal creditors would be paid. It may well be that the Chapter 11 case was a canard meant to abuse the bankruptcy laws and federal court, and dismissal would be part of a larger scheme to divert monies which should be paid to creditors.

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9<sup>th</sup> Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9<sup>th</sup> Cir. 2002)).



The Bankruptcy Code Provides:

[O]n 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 sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Cause exists to convert this case pursuant to 11 U.S.C. § 1112(b).

First, the Debtor-in-Possession has failed to file timely monthly operating reports, as well as other required periodic reports. Local Bankr. R. 2015-1; Fed. R. Bankr. P. 2015.3; 11 U.S.C. § 1112(b)(4)(F). In fact, the Debtor-in-Possession has not filed a single monthly operating report.

Second, the Debtor-in-Possession has not paid the required installment payment of \$429.00 due on November 17, 2014. 11 U.S.C. § 1112(b)(4)(K).

Third, the Debtor-in-Possession has failed to consummate the sale of the property commonly known as 201 Rua Esperanza, Lincoln, California (the "Property"). On October 28, 2014, the court granted Debtor-in-Possession's motion to sell the Property to Randy Renfro. Dckt. 73.

However, to date, the sale has still not been consummated and Debtor-in-Possession and counsel have not provided evidence of the proof of funds from Mr. Renfro. See Declaration of Holly Estioko, Dckt. 133.

The underlying purpose of this Chapter 11 was for the sale of the Property. With the sale not yet consummated and there being no indication of when such sale would take place, the purpose of the Chapter 11 has been frustrated.

The failure of the sale to be consummated and the Debtor-in-Possession's failure to enforce the terms of the Purchase Agreement appears to be a gross mismanagement of the estate leaving an absence of a reasonable likelihood of rehabilitation. 11 U.S.C. § 1112(b)(4)(A) and (B). FN.1. The Debtor-in-Possession has in the past unilaterally extended the closing date after emphasizing to the court the importance of closing soon. This unilateral extension is only further exasperated by the Debtor-in-Possession asking the court to authorize the early disbursement of estimated remaining funds from the sale, prior to the sale even being consummated. These actions, to the court, reveal that the Debtor-in-Possession is narrowly viewing this sale as to the benefit to himself rather than to the benefit of the estate. It is a gross mismanagement of the estate and it appears that there is little likelihood of rehabilitation.

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FN.1. If the failure to consummate the sale is due to the buyer breaching the Purchase Agreement, the Debtor-in-Possession may have potential state law claims to pursue against the buyer, as wells as marketing the property to

achieve its fair value.

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The Debtor-in-Possession as well as the creditors will benefit from the conversion to a Chapter 7 as a Chapter 7 Trustee will be able to manage the assets of the estate and liquidate the assets.

The Debtor-in-Possession has failed to meet the reporting requirements of Local Bankr. R. 2015-1 and Fed. R. Bankr. P. 2015.3, has failed to pay the required installment, and the Debtor-in-Possession has grossly mismanaged the estate. Therefore, the case is converted to a case under Chapter 7.

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.

**IT IS ORDERED** that the case is converted to a under Chapter 7 of Title 11, United States Code.

10. [14-29284-E-11](#) CHARLES MILLS  
FWP-1 Lucas B. Garcia  
12-4-14 [[105](#)]  
JOSEPH LACKEY VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY

**Tentative Ruling:** The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on December 4, 2014. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

<p><b>The Motion for Relief From the Automatic Stay is denied without prejudice.</b></p>
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Joseph and Stacy Lackey ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 201 Rua Esperanza, Lincoln, California (the "Property"). Movant has provided the Declaration of Stacey Lackey to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Lackey Declaration states that the Movant is a creditor with a secured claim based upon an All-Inclusive Purchase Money Promissory Note dated January

19, 2011 in the principal amount of \$1,7200,000.00 and made in connection with the seller-financed sale of the Property by the Movant to the Debtor. To secure payment the Debtor executed an All-Inclusive Purchase Money Deed of Trust with Assignment of Rents dated January 19, 2011, naming the Movant as beneficiary with respect of the Property. The Deed of Trust was properly recorded on January 21, 2011 in the Placer County Recorder's Office.

The Lackey Declaration states that as of the petition date, the Debtor owes no less than \$1,584,291.02. The Movant states that they recorded a Notice of Default on May 12, 2014 and properly noticed a non-judicial foreclosure sale of the Property with a sale date of September 17, 2014. The current continued sale date is January 2, 2015.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$1,786.957.69 (including \$1,584,291.02 secured by Movant's first deed of trust), as stated in the Lackey Declaration and Schedule D filed by Debtor. The value of the Property is determined to be at least \$2,600,000, as stated in Schedules A and D filed by Debtor. (The property is currently in contract, with related normal personal furnishings, to sell for \$2,850,000.00).

The Movant states that the Debtor proposed, and the court approved, a sale of the Property pursuant to the court's order dated October 28, 2014. Dckt. 74. The sale of the Property has been delayed numerous times, most recently due to the Buyer's inability to produce funds. The Debtor now asserts that the sale will be consummated no later than December 15, 2014.

The Lackey Declaration states that the monthly costs to maintain the Property is approximately \$6,957.35, with costs including:

Type	Monthly Amount
Real Property Tax	\$2,074.02 (pro-rated based on 2013/2014 taxes)
Real Property Insurance	\$333.33 (pro rated)
Water	\$800.00
Utilities (unoccupied)	\$2,000.00
Landscaping Maintenance	\$1,000.00
Pool Maintenance	\$750.00
TOTAL	\$6,957.35

The Movant alleges that the Debtor has misrepresented the status of liability insurance on the Property. At the Debtor's initial 341 meeting of creditors held on October 15, 2014, counsel for the Movant inquired whether the liability insurance on the Property was current. The Debtor responded that it was current. Later that afternoon, the Movant was informed by their insurance agent that the insurance had been cancelled nine days earlier on October 6, 2014 for non-payment of premiums. Dckt. 110, Exhibit D.

The Movant states that the Debtor later indicated that the insurance had

been reinstated. On October 25, 2014, however, the Movant was informed that despite the temporary reinstatement, Chubb Insurance made the determination that it would not continue the policy or honor the reinstatement due to Debtor's negative repayment history, and that the policy was cancelled.

The Movant argues that relief from the automatic stay is proper under 11 U.S.C. § 362(d)(1) for the following reasons:

1. Maintenance Costs of the Property. The Movant argues that as former owner, they are familiar with the monthly costs. As indicated in the above table, the minimum monthly cost of maintaining the Property is \$6,957.25.

2. The Debtor does not have the funds to maintain the Property. The Debtor does not appear to have the funds required to maintain and insure the Property, which puts the Property at risk for damage, depreciation, and loss.

3. Economic hardship to Movant. The Debtor has not made his quarterly \$25,000.00 payment to the Movant since August 2012 and, as a result, has been in default for over two years as to his quarterly payments. In addition, the Debtor has not made his monthly \$10,312.27 payment to the Movant since April 2014, which payment was applied to the January payment due. As a result, the Debtor has been in default for 11 months as to his monthly payments.

Due to the Debtor's failure to make his payments, the Movant has suffered an acute loss in income, and have had to sell four investment properties and been unable to pay real property taxes.

4. Debtor's misconduct. The Debtor has misrepresented, under oath, the status of the liability insurance on the Property, and has failed to pay his filing fees, resulting in two orders to show cause why the case should not be dismissed

The Movant also asserts that the 14-day stay of Fed. R. Bankr. P. 4001(a)(3) should be waived so the Movant can avoid any further delay in exercising their rights and remedies under the relevant agreements and applicable law.

## **DISCUSSION**

The court has converted the case to a case under Chapter 7.

Relief from the automatic stay, in this context, would not be proper as the Movant here would be able to foreclose on the Property at the expense of the Debtor-in-Possession's other creditors. To allow the senior lienholder to foreclose on the Property and reap the benefits of the foreclosure sale would be improper when under a Chapter 7 the Chapter 7 Trustee would be able to evaluate and administer the estate.

While the court appreciates the hardships of the Movant arising from the mismanagement of the Property, to allow the Movant to foreclose on the Property would be improper when a Chapter 7 Trustee will be able to take control of the Debtor-in-Possession's assets and manage the estate in the best interest of all creditors and the Debtor-in-Possession.

For this creditor and creditor's counsel, having an independent fiduciary

who will take possession and control of the property, can provide the desired vehicle for everyone properly advancing, and protecting, their respective interests. This creditor can work with the Trustee to insure that insurance is in place, the property is effectively marketed, and in a commercially reasonable manner brought to sale.

The motion is denied without prejudice.

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

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

The Motion for Relief From the Automatic Stay filed by Joseph and Stacy Lackey ("Movant") 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 without prejudice.

11. [14-29284-E-11](#) CHARLES MILLS  
LBG-5

CONTINUED MOTION TO EMPLOY LUKE  
GARCIA AS ATTORNEY  
10-9-14 [[46](#)]

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on parties requesting special notice on October 8, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

<p><b>The court's decision is to continue the hearing on the Motion to Employ to 10:30 a.m. on June 18, 2015.</b></p>
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The Debtor-in-Possession, Charles Mills, seeks to employ counsel Luke Garcia, pursuant to Local Bankruptcy Rule 9014-1(f)(2) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of counsel to assist the Debtor-in-Possession and provide services associated with legal representation of the Debtor-in-Possession .

The Debtor-in-Possession argues that counsel's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate regarding present financial affairs of both the Debtor-in-Possession and Debtor-in-Possession's estate.

Luke Garcia testifies that he is representing the Debtor-in-Possession and the estate. Mr. Garcia testifies he and the firm do not represent or hold any interest adverse to the Debtor or to the estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

#### **OCTOBER 23, 2014 HEARING**

The court continued the hearing to 10:30 a.m. on December 11, 2014 to allow Debtor's Attorney to file and serve the supplemental declaration and the continued Notice of Hearing on all interested parties.

#### **DEBTOR'S ATTORNEY SUPPLEMENTAL DECLARATION**

On October 28, 2014, Lucas Garcia, Debtor's Attorney, filed a supplemental declaration and attached the Attorney-Client Retainer Agreement, which outlined the scope of representation, costs, and other necessary information on the representation. Dckt. 76 and 77.

#### **DECEMBER 4, 2014 ORDER**

On December 4, 2014, the court issued an order continuing the hearing on the Motion to 2:30 p.m. on December 18, 2014. Dckt 103. The court continued the hearing to accommodate the Debtor-in-Possession's unilateral extension of the closing date of the sale of the Rua Esperanza Property.

#### **DECEMBER 18, 2014 HEARING**

At the hearing, -----

#### **DISCUSSION**

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

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

Unfortunately, the court cannot find that employment of this counsel is proper in this case. Though having a very valuable asset and getting the court to rush through a sale order, nothing is happening. The Debtor in Possession has failed to do the most basic things in Chapter 11, with no Monthly Operating Reports having been filed.

The court having converted the case to one under Chapter 7, counsel and the Debtor may elect to have counsel continue with the representation.

The court continues the hearing to June 18, 2015 at 10:30 a.m. to consider this request. If counsel wants to pursue the employment authorization, he shall file and set for hearing a motion for the attorneys' fees requested. The court continues this hearing so as not creating an otherwise unnecessary legal issue concerning retroactive employment.

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.

**December 18, 2014 at 2:30 p.m.**

**- Page 16 of 21 -**



The Motion to Employ filed by the Debtor-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 to Employ is continued to 10:30 a.m. on June 18, 2015. If counsel wants to pursue the employment authorization, he shall file and set for hearing a motion for the attorneys' fees requested. The court continues this hearing so as not creating an otherwise unnecessary legal issue concerning retroactive employment.

12. [14-29284-E-11](#) CHARLES MILLS  
LBG-7 Lucas B. Garcia

CONTINUED MOTION TO DISMISS  
CASE  
11-17-14 [[81](#)]

**Tentative Ruling:** The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).**

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

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, and Office of the United States Trustee on November 17, 2014. By the court's calculation, 24 days' notice was provided. 35 days' notice is required. Fed. R. Bank. P. 2002(a)(4) 21-day notice for Chapter 7, 11, and 12 cases and L.B.R. 9014(a)(f)(1) 14-day written opposition filing requirement.

The Motion to Convert the Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

<b>The Motion to Dismiss is denied as moot, the court having converted the case to a case under Chapter 7.</b>
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This Motion to Dismiss the Chapter 11 bankruptcy case of Charles Mills ("Debtor") has been filed by Debtor on November 17, 2014. Dckt. 81.

The Debtor states that the financial situation of the Debtor has unexpectedly changed and the Debtor now desires to dismiss this case. Most notably, the impending foreclosure of the Debtor's residence has been resolved through the sale approved by this court.

The Debtor requests the dismissal of the case and an order releasing the segregated funds to the control of the Debtor.

#### UNITED STATES TRUSTEE'S OPPOSITION

Tracy Hope Davis, the United States Trustee, ("UST") filed an opposition to the instant Motion on December 1, 2014. Dckt. 95.

The UST argues that the Motion should be denied for the following reasons:

1. The relief request in the Motion is antithetical to the *raison d'être* for this Chapter 11 case and is not in the best interest of creditors and the estate. The Debtor stated at the beginning of this case: "this case involves a home with equity which the debtor believes can be sold to pay for all secured and unsecured creditors." Dckt. 34.

Now, instead, the relief request would allow the Debtor unrestricted control over and use of the net proceeds from the sale of the Debtor's home with no bankruptcy court oversight and no enforcement mechanism to ensure that the Debtor will apply net sale proceeds to the payment of all undisputed secured and unsecured claims in this case; unpaid quarterly fees for disbursements made by or on behalf of the Debtor, including disbursements out of escrow; and any tax liability incurred by the bankruptcy estate resulting from the post-petition sale. Hence, the dismissal of the case which unconditionally releases segregated funds to the control of the Debtor is not in the best interests of creditors or the estate. 11 U.S.C. § 1112(b)(1).

2. The Motion was filed prematurely. When the Motion was filed on November 17, 2014, it was not supported by evidence demonstrating that the sale of the Debtor's house, pursuant to the court's order approving the sale, had closed. Dckt. 73; Local Bankr. R. 9014(d)(6).

3. The Motion was not supported by evidence that there were, in fact, "segregated funds" to be released. The Motion was not supported by evidence of a bank account holding the segregated funds. The court order required "all of the net sales proceeds shall be deposited into a segregated bank account from which no funds may be withdrawn without further order of this court." Dckt. 73. Furthermore, if the sale closed, the Debtor has not provided a final accounting of sale proceeds, nor has he filed an itemized statement required by Fed. R. Bankr. P. 6004(f).

4. The net sale proceeds are property of the bankruptcy estate. 11 U.S.C. § 541. The Motion should be denied because it seeks the dismissal of the case and also the abandonment of property of the estate, i.e. the net sale proceeds, to the Debtor. The abandonment of property of the estate is a contested matter and should be brought by a separate notice or motion. Fed. R. Civ. P. 18 and Fed. R. Bankr. P. 7018 are not incorporated into contested matter proceedings, through Fed. R. Bankr. P. 9014.

5. If the court grants the motion, the UST recommends that the court issue a conditional order that provides *inter alia* for a structured dismissal of the case, whereby, before an order dismissing the case is entered:

- i. The Debtor shall comply with Fed. R. Bankr. P. 6004(f);
- ii. The Debtor shall file with the court the escrow closing statement concerning the sale of the Debtor's house; an accounting of all funds the Debtor received from the sale; a description of the bank or financial institution where a segregated account holding such funds was established; the estimated tax liability incurred by the bankruptcy estate from the sale, including the amount of any capital gains taxes; and appropriate declaration(s) to support the aforementioned information;
- iii. All monthly operating reports shall be filed, so that all disbursements from the bankruptcy estate are disclosed and reported, and quarterly fees can be calculated;
- iv. All disputed claims must be resolved, with appropriate claims objection set for hearing and determined;
- v. Adequate funds shall remain segregated and reserved for the payment of any tax liability to the bankruptcy estate arising from the sale of the Debtor's house; and
- vi. All undisputed claims, administrative claims, quarterly fees, and tax liabilities of bankruptcy estate are paid from the segregated funds.

Alternatively, the UST argues that conversion of the case to Chapter 7, rather than dismissal, is the best interest of the creditors and the estate. Specifically, the UST argues that there is "cause" to convert the case because the Debtor has failed to file monthly operating reports, as well as other required periodic reports. Local Bankr. R. 2015-1; Fed. R. Bankr. P. 2015.3; 11 U.S.C. § 1112(b)(4)(F).

The UST asserts that the Debtor is a 90% Energy Masters Agents. Dckt. 50, Schedule B, Item 13. The Debtor's first periodic report (Form 26) was due not later than October 8, 2014, seven days before the meeting of creditors. The Debtor failed to file the first periodic report. Counsel for the UST has repeatedly informed the Debtor's counsel to comply with Fed. R. Bankr. P. 2015.3. Such continuing lapses by the Debtor's counsel in complying with reporting requirements are inexcusable and warrant conversion of this case. Additionally, the Debtor has not provided documentation to the UST's office to verify that the Debtor has opened appropriate debtor-in-possession account(s).

#### **DECEMBER 4, 2014 ORDER**

On December 4, 2014, the court issued an order continuing the hearing to 2:30 p.m. on December 18, 2014 in United States Courthouse, 1200 I Street, Second Floor, Modesto, California. Dckt. 101.

#### **DISCUSSION**

The court has converted the case to a case under Chapter 7, the instant Motion is denied as moot.

**December 18, 2014 at 2:30 p.m.**

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 the Chapter 11 case filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is denied as moot, the court having converted the case to a case under Chapter 7.

13. [13-91938](#)-E-7 OSCAR CARDENAS  
[14-9001](#)  
TURLOCK IRRIGATION DISTRICT V.  
CARDENAS, JR.

TRIAL SCHEDULING CONFERENCE RE:  
COMPLAINT OBJECTING TO  
DISCHARGEABILITY OF DEBT  
1-22-14 [[1](#)]