

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, November 09, 2016

Hearing Room 1568

10:00 AM

2:12-22639 Claire Levine

Chapter 7

#1.00 Hearing

RE: [275] Motion RE: Objection to Claim Number by Claimant Gerald Goldstein. Claim Number 10; Declarations of Claire Levine and Stella Havkin (Havkin, Stella)

FR. 6-4-14; 8-6-14; 9-17-14; 10-22-14; 1-7-15; 4-21-15; 6-17-15; 1-6-116; 3-15-16; 7-13-16

Docket No: 275

*** VACATED *** REASON: CONTINUED 1-25-17 AT 10:00 A.M.

Tentative Ruling:

6/16/2015: No appearances required. Hearing continued as set forth below.

Pleadings Filed and Reviewed

1. Debtor's Objection to Gerald Goldstein Claim No. 10; Memorandum of Points and Authorities; Declarations of Stella Havkin and Claire Levine in Support Thereof ("Motion") (D.E. 275)
2. Notice of Motion (D.E. 276)
3. Amended Notice of Hearing (D.E. 277)
4. Stipulation to Continue Hearing (D.E. 279)
5. Order Granting Stipulation (D.E. 281)
6. Stipulation to Continue Hearing (D.E. 283)
7. Order Granting Stipulation (D.E. 285)
8. Stipulation to Continue Hearing (D.E. 287)
9. Order Granting Stipulation (D.E. 289)
10. Debtor's Status Report Regarding Debtor's Objection to Goldstein's Claim No. 10 (D.E. 300)
11. Debtor's Status Report Regarding Debtor's Objection to Goldstein's Claim No. 10 (D.E. 312)

Claire Levine ("Debtor") filed a voluntary petition for chapter 11 relief on 4/10/12. On 7/30/12, the Court entered an order converting the case to a case under chapter 7. On 12/03/12, Gerald Goldstein ("Claimant") filed a proof of claim in the amount of "not less than \$5,571,022.62" ("Claim").

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The chapter 7 trustee Howard Ehrenberg ("Trustee") has entered into an agreement to sell property co-owned by the Debtor and the Claimant. The Trustee is still in the process of selling the property and there are several outstanding issues that need to be resolved. This sale will resolve the Claim and the objection to Claim. The Debtor requests a 120-day continuance to resolve the outstanding issues. If they are not resolved, the Debtor intends to proceed to a hearing on her objection to claim.

For the reasons, the Court hereby continues the hearing to January 6, 2016 at 10:00 a.m. The Debtor shall provide notice.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact David Riley at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Claire Levine

Represented By
Dennis E Mcgoldrick
Thomas M Geher
Stella A Havkin

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CONT... Claire Levine

Chapter 7

Movant(s):

Claire Levine

Represented By
Dennis E Mcgoldrick
Thomas M Geher
Stella A Havkin

Trustee(s):

Howard M Ehrenberg (TR)

Represented By
Howard M Ehrenberg (TR)
Daniel A Lev
Asa S Hami
Jennifer M Hashmall

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Hearing Room 1568

10:00 AM

2:15-25138 Eldier Israel Ortiz Morales and Judith Elizabeth Vargas

Chapter 7

#2.00 APPLICANT: BRAD D KRASNOFF, Trustee

Hearing re [17] re Applications for chapter 7 fees and administrative

Docket No: 0

Tentative Ruling:

11/8/2016

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows:

Total Fees: \$1,123.50

Total Expenses: \$0.00

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Eldier Israel Ortiz Morales

Represented By
Heather J Canning

Joint Debtor(s):

Judith Elizabeth Vargas

Represented By
Heather J Canning

Trustee(s):

Brad D Krasnoff (TR)

Pro Se

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Wednesday, November 09, 2016

Hearing Room 1568

10:00 AM

2:16-22763 James McClain Jr

Chapter 7

#3.00 Status Hearing RE: [1] Chapter 7 Involuntary Petition Against an Individual. Viridiana)

Docket No: 1

Tentative Ruling:

11/8/2016

The involuntary petition is DISMISSED for the reasons set forth below.

Pleadings Filed and Reviewed:

- 1) Chapter 7 Involuntary Petition Against an Individual [Doc. No. 1]
- 2) Involuntary Summons Issued on James McClain [Doc. No. 3]

Local Bankruptcy Rule ("LBR") 1010-1 provides: "The court may dismiss an involuntary petition without further notice and hearing if the petitioner fails to ... serve the summons and petition within the time allowed by FRBP 7004 [and] file a proof of service of the summons and petition with the court." These requirements are prominently restated in bold type on the involuntary summons that is issued by the Clerk of the Court to the Petitioning Creditor:

To the Petitioning Creditor(s): If you fail to timely serve the summons and involuntary petition and/or to file proof of service ... thereof with the court or to appear at the status conference, this involuntary case may be dismissed in accordance with LBR 1010-1.

Jerry Smith ("Petitioning Creditor") has failed to file a proof of service indicating that the summons and involuntary petition were served upon James McClain, Jr. (the "Alleged Debtor"). Pursuant to LBR 1010-1, this involuntary petition is DISMISSED. The Court will prepare the order.

Party Information

Debtor(s):

James McClain Jr

Pro Se

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Central District of California
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Hearing Room 1568

10:00 AM

2:14-25758 Wesley Brian Ferris

Chapter 11

#4.00 Hearing re Confirmation of Debtor's Chapter 11 Plan

fr. 7-6-16; 10-4-16

Docket No: 109

*** VACATED *** REASON: CONTINUED 12-7-16 AT 10:00 AM..

Tentative Ruling:

7/5/2016: Chapter 11 debtor and debtor-in-possession Wesley Brian Ferris ("Debtor") seeks approval of the Disclosure Statement. Doc. No. 109. For the reasons set forth below, the Court grants the motion seeking approval of the Disclosure Statement.

Pleadings Filed and Reviewed

- Debtor's Chapter 11 Plan of Reorganization Dated March 4, 2016 ("Plan") [Doc. No. 108]
- Debtor's Disclosure Statement In Support of Plan ("Disclosure Statement") [Doc. No. 109]
- Notice of Hearing on Disclosure Statement and Deadline for Filing Objections to Disclosure Statement ("Notice") [Doc. No. 114]
- Objection to Approval of Disclosure Statement Filed by Secured Creditor The Bank of New York Mellon ("Mellon Objection") [Doc. No. 117]
- Objection to Approval of Disclosure Statement Filed by Secured Creditor Bank of America ("BANA Objection") [Doc. No. 118]
- Debtor's Reply to Objections ("Reply") [Doc. No. 119]

Facts and Summary of Pleadings

Description and History of Debtor's Case and Assets

The Debtor filed a voluntary, individual chapter 11 petition on August 15, 2014 ("Petition"). Doc. No. 1. The Debtor is a certified public accountant. The Debtor invested in real estate as part of his retirement plan. At the time of the Southern California real estate market crash, the Debtor owned six (6) homes and

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other investment properties. In July 2008, the Debtor was laid off, leading to the sale at a loss or foreclosure on three (3) of the properties. The primary assets of the estate are the remaining three (3) properties (referred to as "Alta Vista," "Myrtle," and "Greystone," or collectively, "Properties"). The Debtor became seriously delinquent on Alta Vista and Myrtle but regained employment in April 2010 and was able to cure the deficiency on Myrtle in 2012. The Debtor filed the Petition to restructure the debts secured by the Properties. The Debtor was laid off in July 2015, but is once again employed and has a regular source of income which he contends will enable him to fund the Plan. The Debtor's financial history for the past 12 months is attached to the Disclosure Statement as Exhibit "D."

Treatment of Claims and Interests

The Plan becomes effective on the 30th day following the entry of an order of the Court confirming the Plan ("Effective Date"). The Plan classifies claims asserted against the estate into following groups. Plan, Ex. A; Disclosure Statement, Ex. E.

Class 1: Claims secured by Alta Vista real property: Claim 1A is comprised of the secured claim of Structured Asset Mortgage Investments II, Inc., Bear Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2004-3, U.S. National Bank as Trustee, as serviced by Specialized Loan Servicing Inc. ("Specialized"), secured by a first Deed of Trust ("DOT") on Alta Vista. Specialized's claim, estimated to be \$780,000, will be bifurcated into a secured claim of \$750,000 secured by a DOT payable over thirty (30) years from the Effective Date at a fixed rate of 3.85%, fully amortized with no penalty. The remainder will be an unsecured claim of \$30,000 treated as a Class 5 claim. Plan at 2. Specialized has been receiving adequate protection payments of \$2,000 per month since October 2015. Class 1B is comprised of the claim of Green Tree Servicing, LLC ("Green Tree Servicing") filed as Claim No. 3, in the amount of \$51,271.01, based on a "Charged off Second Mortgage." *Id.* at 3. Since Alta Vista has a value of less than the balance due to Specialized, Class 1B will be treated as a Class 5 claim. *Id.*

Class 2: Claim secured by Greystone real property: Class 2 is comprised of the secured claim of The Bank Of New York Mellon Fka The Bank Of New York As Trustee For The Certificateholders of the CWALT, Inc. Alternative Loan Trust 2006-OA-17 ("Mellon"), Mortgage Pass-Through Certificates, series secured by a first DOT

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on Greystone. The Debtor's obligation to Mellon is current. The balance of the Class 2 claim as of the Effective Date, calculated to be approximately \$560,000, will be payable over thirty (30) years from the Effective Date at a fixed interest rate of 3.85%, fully amortized, with no prepayment penalty. Plan at 3.

Class 3: Claims secured by Myrtle real property: Class 3A is comprised of the secured claim of Bank of America, N.A. ("BANA") secured by a first DOT on Myrtle. The Debtor's obligation to BANA is current. The balance of the Class 3 claim as of the Effective Date, calculated to be approximately \$392,000, will be payable over thirty (30) years from the Effective Date, at a fixed interest rate of 3.85%, fully amortized, with no prepayment penalty. Class 3B is comprised of the claim of the City of Monrovia filed as Claim No. 6 in the amount of \$8,500. The Debtor disputes the amount of Monrovia's claim and the validity of its security interest. The Plan is a compromise to avoid the cost of litigation. Class 3B will be paid \$7,500 on the Effective Date as payment in full of Class 3B's claim.

Class 4: Priority Claims: To the Debtor's knowledge, there are no priority claims entitled to special treatment under 11 U.S.C. § 507.

Class 5: General Unsecured Claims: Class 5 contains all general unsecured claims. Holders of Class 5 claims will receive a one-time pro rata distribution of Available Cash (as defined below) within thirty (30) days following the Effective Date, estimated to be \$100,000. If Class 5 does not vote to accept the Plan, the Debtor will add "new value" to the Plan by contributing \$500 per month for one (1) year into a "second distribution" fund, from which a second distribution will be made based on a pro rata basis to Class 5 within thirty (30) days following the final payment into the "second distribution" fund. Class 5 consists of three (3) claims: (1) Specialized's deficiency claim of \$30,000; (2) Green Tree Servicing's claim of \$51,271.01; and (3) JP Morgan Chase's wholly underwater secured claim in the amount of \$152,429.42. A proposed treatment of Class 5 claims is detailed in Exhibit "F" to the Disclosure Statement.

Class 6: Debtor's Interest: As of the Effective Date, the Debtor will be re-vested with all of his interest in the Properties, subject to the payments required by the Plan.

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Means of Implementation

As of February 29, 2016, there was approximately \$109,000 in cash in the debtor-in-possession bank account. Plan at 4-5. Available Cash will be the cash remaining in the DIP bank account after the payment of Class 3B held by City of Monrovia and a reserve of \$20,000 for professional fees. It is not anticipated that Available Cash will be less than \$100,000, but in the event that Available Cash on the initial distribution date is less than \$100,000, counsel for the DIP agrees to defer payment of a sufficient portion of her fees to allow an initial distribution of \$100,000, provided the reorganized Debtor provides assurance of payment. Holders of Class 5 claims will receive a pro rata share of Available Cash within thirty (30) days following the Effective Date. According to Debtor's liquidation analysis, unsecured creditors will be paid approximately 65% of their claims in a chapter 7 liquidation proceeding. Disclosure Statement, Ex. "G."

The Debtor's projected revenues and expenses, and proposed payments to creditors under the Plan ("Projected Financials") are specified in Exhibit "C" to the Disclosure Statement. The Projected Financials also include cash flow projections for each of the Properties. The Debtor has no pre-petition executory contracts. Subsequent to the petition date, the Debtor has entered into leases for Myrtle and Greystone. Those leases, to the extent applicable, will be assumed. Plan, Ex. B.

Mellon Objection

Secured creditor Mellon objects to approval of the Disclosure Statement ("Mellon Objection"). Doc. No. 17. Under the current promissory note secured by a DOT on Greystone that matures on August 1, 2036, Mellon is entitled to receive a monthly payment, including taxes and insurance, of \$3,688.22. *Id.* at 2. The Debtor proposes to modify the loan by taking the total lien and amortizing it over 30 years from the Effective Date, extending the original maturity date by approximately 10 years at a 3.85% fixed rate per annum. *Id.* Mellon contends that Debtor's proposed fixed rate of 3.85% does not reflect a reasonable market rate. Additionally, the Debtor's proposed treatment of Mellon's secured claim is not beneficial to the estate and its creditors because the proposed fixed rate of 3.85% is higher than the current variable rate of 3.625% and will result in a higher total interest payment over the next thirty (30) years. Based on Debtor's ability to continue paying Mellon under the terms

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of the current promissory note, Mellon contends that Debtor should not be allowed to reduce and extend the payments to Mellon to have additional funds for other expenses.

BANA Objection

Secured creditor BANA objects to approval of the Disclosure Statement ("BANA Objection"). Doc. No. 118. BANA is entitled to receive payments pursuant to a promissory note secured by a DOT on Myrtle that matures on August 1, 2037. In sum, BANA contends the Debtor fails to provide adequate information under 11 U.S.C. § 1125 relevant for a creditor to determine whether to accept or object the Plan. *Id.* at 3. Specifically, BANA contends that Disclosure Statement fails to provide necessary financial information, data, valuations or projections relating to the Properties. In addition to not attaching copies of current leases, the Debtor fails to provide any information beyond the projected monthly rental income for each of the Properties. *Id.* Additionally, BANA objects to the reduction of its interest rate from 6.875% to 3.85% because the Debtor has the ability to maintain the loan payments and has maintained the payments post-petition. *Id.* BANA does not believe that Debtor's proposed interest rate is fair and equitable in violation of 11 U.S.C. § 1129 (b)(1) because it does not take into account the Debtor's default record and current bankruptcy filing. *Id.* at 4.

Debtor's Reply to Objections

In his response, the Debtor states that while the Debtor has been able to maintain the debt on a current basis for the Alta Vista and Myrtle properties by using earned income to make up the deficiency, the Debtor is unable to do so for the Greystone property ("Reply"). Doc. No. 119, at 2. Further, while the Debtor who is 60 years old has the current ability to earn a substantial income and cut personal living expenses to a bare minimum, "no one can work forever." *Id.* Thus, the Debtor contends that restructure of the debt secured by the Property is "absolutely necessary." *Id.* As to Greystone, contrary to Mellon's contentions, the rent is \$3,000 per month, not \$3,750, with the \$750 transferred into the cash collateral account from the general account to make the monthly mortgage payment. *Id.* at 2-3. Therefore, the expenses of the Greystone property exceed the income by \$1,405.22 per month. *Id.* at 3. The Debtor contends that the payments on a re-amortized loan at the interest rate of 3.85%

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would reduce the mortgage payment by over \$500. Assuming a reasonable rent increase, the rental income would then at least pay for the mortgage, property taxes, and insurance. *Id.*

As to BANA's objection based on failure to provide sufficient financial information, the Debtor states that the Debtor is "more than happy" to provide requested information. Next, the Debtor notes that expenses of the Myrtle property far exceed the income by \$1,937.86. Reply at 2-3. Additionally, the current interest rate of 6.875% is well above market rate, and a reduction would not be unreasonable. *Id.* at 4. The estimated monthly payment on the restructured loan at 3.85% including taxes and insurance is \$2,616.54, well within the ability of the Myrtle property to be sustained. *Id.* The Debtor states that the "modest deficiency" in the income to meet total expenses could be made up from his earned income. *Id.* In sum, the Debtor believes the Plan to restructure the debt enables the Properties to come closer to breaking even and is willing to supplement the Disclosure Statement to the extent the Court believes necessary. *Id.*

Findings of Fact and Conclusions of Law

Section 1125 requires a disclosure statement to contain "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, ... that would enable ... a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125. In determining whether a disclosure statement provides adequate information, "the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information." 11 U.S.C. § 1125(a). Courts interpreting § 1125(a) have explained that the "primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan." *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985). "According to the legislative history, the parameters of what constitutes adequate information are intended to be flexible." *In re Diversified Investors Fund XVII*, 91 B.R. 559, 560 (Bankr. C.D. Cal. 1988). "Adequate information will be determined by the facts and circumstances of each case." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988), *accord. In re Ariz. Fast Foods, Inc.*, 299 B.R. 589 (Bankr. D. Ariz. 2003).

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Wesley Brian Ferris

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Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectability of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates.

In re Metrocraft Pub. Services, Inc., 39 B.R. 567, 568 (Bankr. Ga. 1984). However, "[d]isclosure of all factors is not necessary in every case." *Id.* The plan proponent bears the burden of proving the adequacy of the disclosure statement. *In re Jeppson*, 66 B.R. 269 (Bankr. D. Utah 1986).

Notwithstanding, "[a] disclosure statement is not intended to be the primary focus of litigation in a contested chapter 11 proceeding, and care must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing." *In re Broad Assocs. Ltd. P'ship*, 1989 Bankr. LEXIS 2248, at * 6-7 (Bankr. D. Conn. Dec. 29, 1989); *see also In re Copy Crafter Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("[C]are must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing, due process considerations are protected and objections are restricted to those deficits that could

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not be cured by voting."). As a general practice, the Court does not consider objections to a plan before confirmation. Only in extraordinary cases where the plan is obviously and patently unconfirmable will the Court deny approval of an associated disclosure statement. *See In re Phoenix Petroleum, Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("[T]he disclosure statement should be disapproved at the ... [disclosure statement hearing] only where the plan it describes displays fatal facial deficiencies or the stark absence of good faith.").

Here, the Court notes some concerns regarding lack of information with respect to the Properties. As stated by BANA, the Debtor needs to provide documents and information pertaining to current lease agreements beyond the monthly rental income, including copies of actual lease agreements, payment history of current tenants, scheduled rent increases, necessary or expected repairs of Properties, and any other relevant information relating to rental of the Properties. However, the Court finds that the Disclosure Statement otherwise provides adequate information to permit a reasonable creditor to decide whether to vote to accept or reject the Plan. The Disclosure Statement adequately describes, among other things, the events which led to the filing of a bankruptcy petition; a description of the available assets and their value; present condition of the Debtor; scheduled claims; a liquidation analysis; a summary of the Plan; and estimated administrative expenses. The *Metrocraft* items not present in the Disclosure Statement are either irrelevant, or would not provide sufficient information to creditors, in view of the complexity of the case, to justify the costs of additional disclosure. The secured creditors' objections to the plan treatment of their respective claims should be addressed at the plan confirmation hearing. As stated above, the purpose of a hearing on the approval of the disclosure statement is to determine whether the Disclosure Statement provide adequate information for creditors to vote for or against the Plan. It is not an opportunity for creditors to object to proposed treatment of their claims.

Although the following are plan confirmation issues, Debtor should be aware that the proposed plan in its present form cannot be confirmed over the opposition of the class of general unsecured creditors. Under § 1129(b)(2)(B), a debtor may not retain any pre-petition property under the plan in order for the plan to be confirmed over the dissent of a class of unsecured creditors. *Zachary v. California Bank & Trust*, 811 F.3d 1191, 1199 (9th Cir. 2016); *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012). Here, the Plan provides for the Debtor to retain pre-petition property.

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Wesley Brian Ferris

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Additionally, § 1129(a)(15) gives any single unsecured creditor the power to block confirmation where the proposed plan does not pay the creditor the present value of its claims or distribute property equal to the Debtor's projected monthly disposable income. Here, holders of Class 5 claims will receive a pro rata share of Available Cash, estimated to be approximately \$100,000, within thirty (30) days following the Effective Date. Unsecured creditors may seek to challenge the Debtor's projections of disposable income, potentially creating an additional obstacle to confirmation. Based on the foregoing reasons, the Court APPROVES Debtor's Disclosure Statement and sets dates as follows, but expects that he will provide to BANA the additional information it requests:

- No later than July 12, 2016, Debtor shall file and serve an amended disclosure statement and plan containing sufficient information pertaining to the rental properties as explained above.
- A hearing will be held on the confirmation of the Debtor's Chapter 11 Plan on October 4, 2016 at 10:00 a.m.
- In accordance with FRBP 3017(a), the Disclosure Statement, the Plan, a notice of hearing on confirmation of the Plan, and if applicable, a ballot conforming to Official Form No. 14, shall be mailed to all creditors, equity security holders and to the Office of the United States Trustee, pursuant to FRBP 3017(d), on or before August 22, 2016
- **September 2, 2016** is fixed as the last day for creditors and equity security holders to return Debtor's counsel ballots containing written acceptances or rejections of the Plan, which ballots must be actually received by Debtor's counsel by 5:00 p.m. on such date.
- **September 16, 2016** is fixed as the last day on which the Debtor must file and serve a motion for an order confirming the Plan ("Confirmation Motion") including declarations setting forth a tally of the ballots cast with respect to the Plan ("Ballots"), and attaching thereto the original Ballots, and setting forth evidence that the Debtor has complied with all the requirements for the confirmation of the Plan as set forth in § 1129 of the Bankruptcy Code.

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Wesley Brian Ferris

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- **September 23, 2016** is fixed as the last day for filing and serving written objections to confirmation of the Plan, as provided in Rule 3020(b)(1) of the Federal Rules of Bankruptcy Procedure (the "Objection Date").
- **September 30, 2016** is fixed as the last day on which the Debtor may file and serve its reply to any opposition to the Confirmation Motion ("Reply").

The Debtor shall lodge a conforming proposed order within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact James Yu or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Wesley Brian Ferris

Represented By
Diane C Weil

**United States Bankruptcy Court
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Hearing Room 1568

10:00 AM

2:16-11527 Almario P. Gonzales and Myrna B. Gonzales

Chapter 11

#5.00 Hearing re [50] Chapter 11 Disclosure Statement

Docket No: 0

***** VACATED *** REASON: PER ORDER ENTERED 10-28-16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Almario P. Gonzales

Represented By
Daren M Schlecter

Joint Debtor(s):

Myrna B. Gonzales

Represented By
Daren M Schlecter

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Hearing Room 1568

10:00 AM

2:16-17463 Gardens Regional Hospital and Medical Center, Inc.

Chapter 11

#6.00 Status conference to review the status of the sale re [92]

fr. 6-21-16; 7-13-16; 7-18-16; 7-26-16; 10-11-16

Docket No: 0

***** VACATED *** REASON: CONTINUED 12-7-16 AT 10:00 A.M.**

Tentative Ruling:

10/7/2016

No appearances required. The status conference is continued. Debtor shall submit an order setting forth proposed dates for the continued status conference.

Party Information

Debtor(s):

Gardens Regional Hospital and Medica

Represented By
Samuel R Maizel
John A Moe

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Hearing Room 1568

11:00 AM

2:14-20693 Essen Polymers, Inc.

Chapter 7

#100.00 Other Expenses: INTERNATIONAL SURETIES

Hearing re [58] Applications for chapter 7 fees and administrative expenses

Docket No: 0

Tentative Ruling:

See Cal. No. 103, below, incorporated in full by reference.

Party Information

Debtor(s):

Essen Polymers, Inc.

Represented By
Tappan Zee

Trustee(s):

Howard M Ehrenberg (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, November 09, 2016

Hearing Room 1568

11:00 AM

2:14-20693 Essen Polymers, Inc.

Chapter 7

#101.00 APPLICANT: Other Expenses: Franchise Tax Board

Hearing re [58] Applications for chapter 7 fees and administrative expenses

Docket No: 0

Tentative Ruling:

See Cal. No. 103, below, incorporated in full by reference.

Party Information

Debtor(s):

Essen Polymers, Inc.

Represented By
Tappan Zee

Trustee(s):

Howard M Ehrenberg (TR)

Pro Se

**United States Bankruptcy Court
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Chapter 7

#102.00 APPLICANT: Accountant for Trustee- GROBSTEIN TEEPLE

Hearing re [58] Applications for chapter 7 fees and administrative expenses

Docket No: 0

Tentative Ruling:

11/8/2016

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below.

Fees: \$7,130.00

Expenses: \$30.85

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Party Information

Debtor(s):

Essen Polymers, Inc.

Represented By
Tappan Zee

Trustee(s):

Howard M Ehrenberg (TR)

Pro Se

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Chapter 7

#103.00 APPLICANT: Trustee - Howard M. Ehrenberg

Hearing re [58] Applications for chapter 7 fees and administrative expenses

Docket No: 0

Tentative Ruling:

11/8/2016

No objection has been filed in response to the Trustee's Final Report. This court approves the fees and expenses, and payment, as requested by the Trustee, as follows:

Total Fees: \$12,000.00

Total Expenses: \$0.00

Other Expenses (Franchise Tax Board): \$822.00 [**Note 1**]

Other Expenses (International Sureties, Ltd.): \$49.92

No appearance is required if submitting on the court's tentative ruling. To submit on the tentative ruling contact Daniel Koontz or Nathaniel Reinhardt, the Judge's law clerks, at 213-894-1522, by no later than one hour prior to the hearing.

Note 1

The Trustee's payment of taxes was approved by an order entered on September 6, 2016 [Doc. No. 54].

Party Information

Debtor(s):

Essen Polymers, Inc.

Represented By
Tappan Zee

Trustee(s):

Howard M Ehrenberg (TR)

Pro Se

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Chapter 7

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11:00 AM

2:15-27769 Crystal Waterfalls LLC

Chapter 11

Adv#: 2:15-01671 Crystal Waterfalls, LLC a California limited liability v. DOES 1 through 10, including

■

#104.00 HearingRE: [111] Motion to Set Aside Default Entered Against Benjamin Kirk by HCL 2011, LLC on its Counterclaim

Docket No: 111

Tentative Ruling:

11/8/2016: For the reasons set forth below, the Motion to Set Aside Default is GRANTED.

Pleadings Filed and Reviewed:

- 1) First Amended Complaint for: (1) Cancellation of Written Instrument; (2) Quiet Title; (3) Declaratory Relief ("Complaint") [Doc. No. 13]
- 2) Answer to First Amended Complaint and Counterclaim Against Crystal Waterfalls LLC, Lucy Gao, Benjamin Kirk, and Shelby Ho ("Counterclaim") [Doc. No. 56]
- 3) Counter-Defendant Benjamin Kirk's Motion to Set Aside Default Entered August 4, 2016 Against Him by HCL 2011, LLC on its Counterclaim, Pursuant to Fed. R. Civ. P. 55(c) ("Motion") [Doc. No. 111]
- 4) Opposition to Counter-Defendant Benjamin Kirk's Motion to Set Aside Default ("Opposition") [Doc. No. 119]
- 5) Counter-Defendant Benjamin Kirk's Reply in Support of Motion to Set Aside Default Entered August 4, 2016 Against Him by HCL 2011, LLC on its Counterclaim, Pursuant to Fed. R. Civ. P. 55(c) ("Reply") [Doc. No. 122]

I. Facts and Summary of Pleadings

On May 21, 2016, Crystal Waterfalls, LLC ("Crystal Waterfalls") filed a First Amended Complaint ("Complaint") against HCL 2011, LLC ("HCL"). The Complaint's allegations are as follows:

- 1) On October 12, 2011, Crystal Waterfalls purchased property—a 258-room hotel—located in Covina, California (the "Property"). Crystal Waterfalls operates the hotel under the "Park Inn by Radisson" branding. Crystal Waterfalls borrowed \$7 million from First Commercial Bank ("First Commercial") to purchase the

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Property.

- 2) Crystal Waterfalls had two members: Lucy Gao, the managing member, and Golden Bay Investments, LLC, a California limited liability company ("Golden Bay"). Gao is the sole and managing member of Golden Bay.
- 3) On September 29, 2014, a Grant Deed purporting to transfer the Property to Washe, LLC ("Washe") was executed and recorded. Although the Grant Deed identifies Crystal Waterfalls as the transferor, Crystal Waterfalls did not authorize the transfer. The Grant Deed states that it was executed by Benjamin Kirk ("Kirk") as the "managing member" of Crystal Waterfalls. However, Kirk was not a member of Crystal Waterfalls and lacked authority to execute the Grant Deed.
- 4) On December 5, 2014, an unauthorized and invalid Deed of Trust was recorded in favor of HCL and against the Property, purporting to secure a \$28.5 million loan to Washe. Crystal Waterfalls did not consent to issuance of the Deed of Trust. Crystal Waterfalls never entered into a loan agreement with HCL, never borrowed money from HCL, never received any funds from HCL, and neither Crystal Waterfalls or the Property received any benefit from the recordation of the Deed of Trust.
- 5) Although Crystal Waterfalls had never monetarily defaulted on the First Commercial Loan, First Commercial declared Crystal Waterfalls in default as a result of the Grant Deed and Deed of Trust. Crystal Waterfalls commenced its voluntary Chapter 11 petition to halt First Commercial's non-judicial foreclosure sale of the Property.
- 6) Shortly after the filing of the petition, Gao, as managing member of Crystal Waterfalls, and Kirk, as managing member of Washe, executed a stipulation providing that the Grant Deed purporting to transfer the Property to Washe was void and of no force and effect. On November 30, 2015, the Court entered an order approving the stipulation.

Based upon the foregoing allegations, Crystal Waterfalls seeks to cancel the Deed of Trust in favor of HCL, seeks to quiet title to the Property, and seeks a declaration that the Deed of Trust is void and that HCL has no enforceable interest in the Property.

On June 9, 2016, HCL answered the Complaint and filed a Counterclaim against Crystal Waterfalls, Lucy Gao, Benjamin Kirk, and Shelby Ho. The Counterclaim's allegations are as follows:

- 1) Liberty Asset Management Corporation ("LAMC") is the 100% beneficial owner of Crystal Waterfalls. LAMC commenced a voluntary Chapter 11 petition on March 21, 2016, Case No. 2:16-bk-13575-TD. Benjamin Kirk ("Kirk") is a

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- shareholder and officer of LAMC. Kirk owns LAMC in partnership with Gao.
- 2) Shelby Ho ("Ho") holds an ownership interest in Washe in trust for a group of real estate investors led by Benny Lee and Sophia Huang (the "Lee Investors"). After the 2008–09 financial crisis, Ho, a real estate investor in the San Francisco area, promoted to investors the purchase of distressed real estate in California. Ho introduced LAMC to the Lee Investors.
 - 3) LAMC, Kirk, Gao, Ho, and the special purpose LLCs controlled by Kirk and Gao (collectively, the "LAMC Group") promised to purchase distressed real properties for the Lee Investors under the following terms:
 - a) The LAMC Group would identify the Target Property.
 - b) The LAMC Group and the Lee Investors would sign an agreement for the Target Property, in which the parties agreed upon the price that LAMC would sell the Target Property to the Lee Investors provided the LAMC Group was successful in purchasing the Target Property.
 - c) After the agreement was signed, the LAMC Group would create a new special purpose limited liability company for the Lee Investors to hold title to the Target Property. The LAMC Group would then attempt to purchase the Target Property.
 - d) After obtaining title to the Target Property, the LAMC Group would transfer title to the Target Property to the special purpose LLC that had been created to hold title on behalf of the Lee Investors.
 - 4) As of the middle of 2014, the LAMC Group and the Lee Investors had seven unfulfilled contracts, in which LAMC had agreed to purchase the Target Properties but had failed to do so. With respect to each contract, the Lee Investors demanded refund of the purchase price, but the LAMC Group failed to refund the purchase price.
 - 5) Without permission or authorization, the LAMC Group diverted the Lee Investors' funds, which had been designated for the purchase of specific Target Properties, to purchase other properties whose legal title was held in various special purpose LLCs created by Kirk and/or Gao individually. The total amount of improperly diverted funds was in excess of \$28.375 million. **[Note 1]**
 - 6) In 2014, Ho formed Washe for the purpose of (1) refunding to the Lee Investors the \$28.375 million in diverted funds and (2) holding property for the benefit of the Lee Investors. Pursuant to an agreement to refund funds to the Lee Investors, the LAMC Group, represented by Kirk, transferred legal title to several pieces of real property to Washe, including the Property. To guarantee the refund to the Lee

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Investors, Washe recorded the Deed of Trust in favor of HCL for the benefit of the Lee Investors.

- 7) In 2015, Kirk, on behalf of the LAMC Group, affirmed the security arrangement evidenced by the Deed of Trust in three settlement documents. In each settlement document, Kirk acknowledged that Ho was holding Washe in trust for the benefit of the Lee Investors, and that the properties transferred by the LAMC Group to Washe would provide security for the \$28.375 million owed to the Lee Investors.
- 8) On November 20, 2015, Kirk caused Washe to file a voluntary Chapter 11 petition. Kirk had no authority to cause Washe to file the petition since he was not a member of Washe and Washe's 100% beneficial owner, the Lee Investors, did not authorize the bankruptcy filing. While Washe was in bankruptcy, Kirk entered into a stipulation ("Stipulation") with Crystal Waterfalls to void the Grant Deed transferring the Hotel to Washe. The Court subsequently entered an order approving the Stipulation. That Order should be vacated because (a) Kirk had no authority to sign the Stipulation on behalf of Washe and (b) Kirk failed to serve a copy of the Stipulation upon HCL, which is adversely affected by the Stipulation.

Based upon the foregoing allegations, the Counterclaim asserts claims against Kirk for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) conversion, (6) breach of fiduciary duty, (7) imposition of a constructive trust, and (8) declaratory relief. The Counterclaim seeks compensatory damages of \$28.375 million, a determination that the Stipulation is void and that the order approving the Stipulation should be vacated, and a determination that the Deed of Trust is valid.

HCL served the Counterclaim upon Kirk by first-class mail on June 13, 2016. *See* Doc. No. 63. The Clerk of the Court entered default against Kirk on August 4, 2016. *See* Doc. No. 83.

Summary of Kirk's Motion to Set Aside Default

Kirk's Motion to set aside his default may be summarized as follows:

Civil Rule 55(c) provides that the Court "may set aside an entry of default for good cause." The Ninth Circuit explains the factors the Court must consider in making that determination:

To determine "good cause", a court must "consider[] three factors: (1) whether [the party seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the default judgment would prejudice" the other party. This

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standard, which is the same as is used to determine whether a default judgment should be set aside under Rule 60(b), is disjunctive, such that a finding that any one of these factors is true is sufficient reason for the district court to refuse to set aside the default. *See id.* Crucially, however, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits."

United States v. Signed Pers. Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010).

Kirk's Failure to Timely Respond to the Counterclaim Was Not Culpable

Failure to respond is not culpable if the defaulting party offers a credible explanation for the delay that negates "any intention to take advantage of the opposing party, interfere with judicial decision-making, or otherwise manipulate the legal process." *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001), *as amended on denial of reh'g and reh'g en banc* (May 9, 2001). Kirk's failure to timely respond was not done for the purpose of manipulating the legal process. Kirk was overwhelmed by dealing with multiple lawsuits filed in connection with the LAMC bankruptcy, and inadvertently missed the deadline. Kirk's declaration explains:

When I received the summons and complaint in the mail, I did not understand that service by mail was effective service. It was my understanding that I needed to be personally served, so I anticipated that the summons and complaint would be arriving by a process server.

I did inform my prior counsel of this matter before default was entered and believed he was handling any necessary response. It was not until well after default was entered that I learned about the default, and it was not until on or about September 28, 2016 that that I learned that Crystal Waterfalls had filed a Cross-Claim against me in this litigation. A motion to dismiss the Crystal Waterfalls Cross-Claim was filed on September 30, 2016.

It took time for me to locate new counsel to represent me in the multiple matters I am involved in, otherwise this motion would have been filed earlier. I retained Mr. Crockett on or about September 13, 2016, and have worked with him daily on the many matters related to the Liberty Asset Management Corporation Chapter 11 bankruptcy, including this action.

This adversary proceeding is one part of a large number of lawsuits and Chapter 11 bankruptcy cases. I am responsible for assisting with the management of the Chapter 11 case of Liberty Asset Management

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Corporation, and working there to preserve assets. A significant number of these matters concern a larger dispute between myself and Ms. Gao, who is the person responsible for Crystal Waterfalls. I am actively involved in every case.

Ms. Gao and I are actively involved in other pending litigation, adversarial to each other, specifically with respect to the Chapter 11 case *In re Liberty Asset Management Corporation*, Case No. 2:16-BK-13575-TD, *In re Oak River Asset Management, LLC*, Chapter 11 Case No. 2:16-bk-19233-TD, and the adversary proceedings filed within these cases, *Official Committee of Unsecured Creditors of Liberty Asset Management Corporation v. Gao, et al.*, Adv. No. 2:16-ap-01337-TD and *Official Committee of Unsecured Creditors of Liberty Asset Management Corporation v. Ho, et al.*, Adv. No. 2:16-ap-01374-TD.

There are well over a dozen lawsuits, adversary proceedings and bankruptcy cases in addition to the foregoing which require my active involvement and effort, and which are intertwined with Ms. Gao. I am overwhelmed trying to fulfill my responsibilities in each of these matters. This is the only action in which default has been entered against me.

Kirk Decl. at ¶¶2–7.

Kirk Has a Meritorious Defense

A defense is considered meritorious if "there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default." *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). Kirk has a meritorious defense to the Counterclaim. With respect to the first claim for breach of contract, Kirk cannot be held liable because he is not a party to the referenced contract. To the extent that HCL intends to rely on its alter ego theory, the Counterclaim contains only conclusory allegations that are insufficient to withstand a motion to dismiss. Similarly, with respect to the second claim for breach of the implied covenant of good faith and fair dealing, Kirk cannot be held liable because the covenant applies only to contracting parties.

With respect to the third and fourth claims for intentional and negligent misrepresentation, Kirk's declaration testimony establishes that he did not make the alleged misrepresentations: "I made no misrepresentations to Cross-Complainant HCL or the Lee Investors." Kirk Decl. at ¶10. With respect to the fifth claim for conversion, Kirk testifies that he did not misappropriate funds belonging to the Lee Investors: "I never diverted any monies received from HCL or the Lee Investors for my personal

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use." *Id.* at ¶12. Kirk's testimony that he did not misappropriate funds is also a defense to the seventh claim for constructive trust. Finally, the eighth claim seeks declaratory relief against Washe and does not apply to Kirk.

HCL Will Not Be Prejudiced if Default is Set Aside

"To be prejudicial, the setting aside of a [default] must result in greater harm than simply delaying resolution of the case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered.' *Falk, supra*, 739 F.2d at 463; *see also Thompson, supra*, 95 F.3d at 433-34 (to be considered prejudicial, 'the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion')." *Knoebber*, 244 F.3d at 701.

HCL will not be prejudiced because the case has been delayed for only a short time.

Summary of HCL's Opposition

HCL's Opposition to the Motion may be summarized as follows:

Kirk's Failure to Respond Was Culpable

Kirk has admitted that he received notice of the Counterclaim, but failed to respond because he believed that service by mail was ineffective. Kirk is a sophisticated businessman who convinced the Lee Investors to entrust more than \$28 million with the LAMC Group controlled by Kirk. *See Icho v. McHammer*, Case No. 10-15386, D.C. No. 5:01-cv-20858-JF, filed May 23, 2011 (Ninth Circuit unpublished opinion) (finding that defendant's conduct was culpable because defendant was a sophisticated businessman who ignored documents addressed to him). Kirk signed the Stipulation to invalidate the transfer of the Property from Crystal Waterfalls to Washe; that Stipulation led to this proceeding. Kirk had to have known that HCL would pursue legal action against him, especially considering that the Lee Investors (on whose behalf HCL was formed) have actively pursued Kirk in litigation in both state and federal courts. Kirk's admission that he received notice of the Counterclaim but failed to act shows that he wanted to manipulate the legal process to buy time.

Kirk Lacks a Meritorious Defense

In testimony at the meeting of creditors for the LAMC bankruptcy case, Kirk admitted that he was a 100% shareholder of LAMC and that LAMC took funds from the Lee Investors earmarked for the purchase of the Target Properties but failed to use

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the funds for that purpose:

Question: The amount that has been listed on the schedule for each of my clients [entities controlled by the Lee Investors]—for example, Faith Hope, in the amount of \$12 million—did Liberty receive that funds from my client?

Answer: Yes....

Question: Okay. So you did not purchase the property because it didn't close? Or you did purchase?

Answer: We purchase but didn't close.

Question: Escrow was opened but escrow did not close?

Answer: Yes....

Question: Okay. So the money is still in the escrow or in Liberty?

Answer: In Liberty.

Question: So Liberty has money in its bank account right now for \$12 million?

Answer: No, don't have any money.

Question: So where did the money go?

Answer: Money was used in many different operation already.

Question: So Liberty has just used the money for other purposes?

Answer: We were using the money for acquisition on every kind of every property, every kind of deal, not just only one deal.

Transcript of LAMC Meeting of Creditors at 95:11–99:4 (Opposition at Ex. B).

Kirk's admission that LAMC failed to use the funds from the Lee Investors for their intended purpose, and Kirk's status as a 100% shareholder of LAMC, shows that he is liable on the claims alleged in the Counterclaim.

HCL Will Be Prejudiced if the Default is Set Aside

Kirk and Gao have been actively liquidating real properties held in the name of various special purpose entities and have transferred assets to hide them from creditors. Prolonging the lawsuit against Kirk will allow him to move and hide assets, to the prejudice of HCL and the Lee Investors. *See Franchise Holding II, LLC v. Huntington Restaurants Grp., Inc.*, 375 F.3d 922, 926 (9th Cir. 2004) (finding that setting aside the default judgment would prejudice plaintiff by giving the defendant additional time to hide assets).

Summary of Kirk's Reply

Kirk makes the following arguments in Reply to HCL's Opposition:

“[J]udgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits.” *United States v. Signed*

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Pers. Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1089 (9th Cir. 2010). Here, there are no extreme circumstances warranting entry of a \$28 million default judgment against Kirk.

HCL's reliance upon the unpublished case *Icho v. McHammer* is misplaced. In *Icho*, the defendant had been personally served and waited seven years before seeking to set aside the entry of default judgment against him. No default judgment has been entered against Kirk, and Kirk moved to set the default aside approximately two months after it was entered.

Contrary to HCL's argument, Kirk has not admitted liability. Kirk has not admitted to breaching a contract to which he is not a party. Further, Kirk has defenses to the Counterclaim, including the fact that HCL has been made whole by means of its secured deed of trust against the Hotel.

Finally, HCL has not identified any prejudice to having to prove the merits of its Counterclaim. HCL's allegations that Kirk could move and hide assets are unsupported. If HCL has evidence that Kirk is moving assets, its remedy is a prejudgment attachment proceeding, not denial of Kirk's motion to set aside the default.

II. Findings and Conclusions

Civil Rule 55(c)—made applicable to these proceedings by Bankruptcy Rule 7055—provides: "The court may set aside an entry of default for good cause." "The 'good cause' standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b)." *Franchise Holding II, LLC v. Huntington Restaurants Grp., Inc.*, 375 F.3d 922, 925 (9th Cir. 2004). The Court may deny a motion to vacate a default for any of the following reasons: "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default." *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000), *as amended on denial of reh'g* (Nov. 1, 2000). Because "[t]his tripartite test is disjunctive," HCL is required to demonstrate only that one of the factors applies in order for the Court to deny the motion to vacate default. *Id.* However, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1089 (9th Cir. 2010).

HCL has failed to demonstrate that any of the factors applies. Kirk has a

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meritorious defense, the default was not the result of Kirk's culpable conduct, and HCL would not be prejudiced by vacatur of the default. Furthermore, HCL has failed to demonstrate that this case presents the "extreme circumstances" necessary to support entry of default with respect to a Counterclaim alleging \$28.375 million in damages. *See Mesle*, 615 F.3d at 1089.

Kirk's Failure to Timely Respond to the Complaint Was Not Culpable

A "defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and *intentionally* failed to answer.... Neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision-making, or otherwise manipulate the legal process is not 'intentional' under our default cases, and is therefore not *necessarily* ... culpable." *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 697-98 (9th Cir. 2001), *as amended on denial of reh'g and reh'g en banc* (May 9, 2001). In addition, a "'defendant's conduct [is] culpable ... where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.'" *Employee Painters' Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993, 1000 (9th Cir. 2007). The *Ethan Enterprises* court found culpability where the defendants provided the opposing party with an incorrect address, thereby precluding normal service of process. *Id*

Although Kirk received actual notice of the Counterclaim and failed to timely respond, his actions were negligent, not culpable. Kirk was overwhelmed, facing extensive litigation in the related LAMC bankruptcy case. Kirk informed his previous counsel of the Counterclaim, and believed that counsel was handling any necessary response. Kirk also mistakenly believed that service by mail was ineffective and expected to receive personal service. No default has been entered against Kirk in any of the actions filed against him in the LAMC case. Unlike the defendants in *Ethan Enterprises*, Kirk has not attempted to frustrate service of process by concealing his address from the opposing party. Kirk's failure to answer was not a deliberate and devious plan to delay the litigation; it was excusable neglect. *See Mesle*, 615 F.3d at 1092 (stating that "it is clear that simple carelessness is not sufficient to treat a negligent failure to reply" as culpable).

Icho v. McHammer, cited by HCL, is inapposite. In *Icho* the defendant waited seven years before moving to set aside a default judgment. Here, only default (not default judgment) [Note 2] has been entered against Kirk, and Kirk waited only two months to move to set aside the default.

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Kirk Has a Meritorious Defense

A party has a meritorious defense if “there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). The burden of demonstrating a meritorious defense “on a party seeking to vacate a default judgment is not extraordinarily heavy.” *Knoebber*, 244 F.3d at 700. “All that is necessary to satisfy the ‘meritorious defense’ requirement is to allege sufficient facts that, if true, would constitute a defense: ‘the question whether the factual allegation [i]s true’ is not to be determined by the court when it decides the motion to set aside the default. Rather, that question ‘would be the subject of the later litigation.’” *Mesle*, 615 F.3d at 1094.

Kirk has satisfied the meritorious defense requirement by showing that there is some possibility that he will not be found liable on the claims asserted in the Counterclaim after a full trial. Kirk has asserted several defenses to the claims against him, including that he is not a party to the LAMC contract that was allegedly breached and that he is not LAMC’s alter ego; that he did not make misrepresentations to HCL or the Lee Investors; that he did not misappropriate funds belonging to the Lee Investors for his personal use; and that HCL has been made whole by recordation of a deed of trust against the Property. At this stage in the proceedings it would not be appropriate for the Court to decide the issues disputed by Kirk and HCL. It is sufficient that Kirk has alleged facts showing that it is possible for him to prevail at trial.

HCL Has Not Demonstrated that it Would Be Prejudiced By Vacatur of the Default

"To be prejudicial, the setting aside of a [default] must result in greater harm than simply delaying resolution of the case. Rather, ‘the standard is whether [plaintiff’s] ability to pursue his claim will be hindered.’ *Falk, supra*, 739 F.2d at 463; *see also Thompson, supra*, 95 F.3d at 433–34 (to be considered prejudicial, ‘the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion’).” *Knoebber*, 244 F.3d at 701. Prejudice exists where vacatur of the default would allow the defendant “to move and hide assets.” *Franchise Holding*, 375 F.2d at 926.

HCL alleges that Kirk is likely to transfer assets if the default is set aside, but fails to proffer sufficient facts supporting this allegation to justify a finding that it would be prejudiced. The assets in which Kirk, HCL, the Lee Investors, and affiliated entities

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CONT... Crystal Waterfalls LLC

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claim an interest are already the subject of numerous lawsuits and two bankruptcy proceedings. In view of that fact, the Court does not believe that allowing Kirk to defend against HCL's Counterclaim will give Kirk the opportunity to conceal assets. Accordingly, HCL will not be prejudiced by vacatur of the default.

Conclusion

Based upon the foregoing, the Motion to Set Aside Default is GRANTED. Kirk shall answer the Counterclaim by no later than November 23, 2016. Kirk shall submit a conforming order, incorporating this tentative ruling by reference, within seven days of the hearing.

Note 1

At some points the Counterclaim alleges that the amount of funds wrongfully diverted from the Lee Investors was in excess of \$28.375 million; at other points the Counterclaim puts the amount at \$28.5 million.

Note 2

This distinction is significant. The "standards for setting aside entry of default under Rule 55(c) are less rigorous than those for setting aside" a default judgment. *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986).

Party Information

Debtor(s):

Crystal Waterfalls LLC

Represented By
Ian Landsberg

Defendant(s):

HCL 2011, LLC a California limited li

Pro Se

DOES 1 through 10, inclusive

Pro Se

Plaintiff(s):

Crystal Waterfalls, LLC a California lir

Represented By
Ian Landsberg

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, November 09, 2016

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11:00 AM

2:15-27769 Crystal Waterfalls LLC

Chapter 11

Adv#: 2:15-01671 Crystal Waterfalls, LLC a California limited liabi v. DOES 1 through 10, inclusi

#105.00 Hearing
RE: [99] Motion to Dismiss Adversary Proceeding First and Second Claims for Relief of Crystal Waterfall, LLC's Cross-Claim

Docket No: 99

***** VACATED *** REASON: PER STIPULATION ENTERED 10/26/16.**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Crystal Waterfalls LLC

Represented By
Ian Landsberg

Defendant(s):

HCL 2011, LLC a California limited li

Pro Se

DOES 1 through 10, inclusive

Pro Se

Plaintiff(s):

Crystal Waterfalls, LLC a California lir

Represented By
Ian Landsberg

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2:15-27769 Crystal Waterfalls LLC

Chapter 11

Adv#: 2:15-01671 Crystal Waterfalls, LLC a California limited liabi v. DOES 1 through 10, inclusi

#106.00 Hearing
RE: [106] Motion to Dismiss Adversary Proceeding First and Second Claims for Relief of Crystal Waterfall, LLC's Cross-Claim

Docket No: 106

***** VACATED *** REASON: DUPLICATE OF NO. 105**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Crystal Waterfalls LLC

Represented By
Ian Landsberg

Defendant(s):

HCL 2011, LLC a California limited li

Pro Se

DOES 1 through 10, inclusive

Pro Se

Plaintiff(s):

Crystal Waterfalls, LLC a California lir

Represented By
Ian Landsberg

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2:15-21624 Harry Roussos

Chapter 7

#107.00 HearingRE: [605] Motion to Use Cash Collateral Chapter 7 Trustee's Motion for Order Authorizing Use of Cash Collateral in Connection with Operation of Debtors' Businesses; Memorandum of Points and Authorities; Declaration of Howard M. Ehrenberg in Support Thereof (Lev, Daniel)

Docket No: 605

Tentative Ruling:

11/8/2016: For the reasons set forth below, the Trustee's motions to use cash collateral and to operate the Debtor's business are both GRANTED.

Pleadings Filed and Reviewed:

- 1) Chapter 7 Trustee's Motion for Order Authorizing Operation of Debtor's Businesses [Doc. No. 603]
 - a) Notice of Chapter 7 Trustee's Motion for Order Authorizing Operation of Debtor's Businesses
- 2) Chapter 7 Trustee's Motion for Order Authorizing Use of Cash Collateral in Connection with Operation of Debtors' Businesses [Doc. No. 605]
 - a) Statement Regarding Cash Collateral or Debtor in Possession Financing (FRBP 4001; LBR 4001-2) [Doc. No. 607]
 - b) Notice of Chapter 7 Trustee's Motion for Order Authorizing Use of Cash Collateral in Connection with Operation of Debtors' Businesses [Doc. No. 606]
- 3) CIT Bank, N.A.'s Omnibus Statement and Reservation of Rights Regarding Motions Filed by Chapter 7 Trustee as Bankruptcy Docket Nos. 601, 603, and 605 and Adversary Proceeding Docket No. 435 [Doc. No. 622]
- 4) No opposition on file

I. Facts and Summary of Pleadings

On October 7, 2016, the Court entered stipulated judgments (the "Property Judgments") providing, among other things, that properties located at 2727-2741 Abbot Kinney Boulevard, Venice, CA (the "Abbot Kinney Property") and 153 San Vicente Boulevard, Santa Monica, CA (the "San Vicente Property") (collectively, the

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“Properties”) are properties of the jointly-administered bankruptcy estates of Harry and Theodosios Roussos (the “Roussos Brothers”). The Property Judgments were entered in connection with the Court’s entry of an order approving a Settlement Agreement between the Trustee and defendants O.F. Enterprises, LP, Liro, Inc., S.M.B. Investors Associates, LP, SMB Management, Inc., Lula Michaelides, Harry Roussos, and Christine Roussos (collectively, the “Settling Defendants”). *See* Order Approving Settlement Agreement (“Settlement Approval Order”) [Doc. No. 591].

The Settlement Agreement provides that the Roussos Brothers’ estates will receive the amount of \$11 million, to be paid from the proceeds of the Trustee’s sale of the San Vicente Property and, if necessary, the sale of the Abbot Kinney Property. The Settlement Agreement provides that the Trustee shall market the San Vicente Property for between 90 to 180 days, and shall operate both Properties during the marketing period.

The Trustee seeks authority to operate the Properties for 180 days, subject to further extensions for cause shown, effective as of October 6, 2016. Operation will consist of maintaining the common areas, collecting rent, seeking tenants to fill vacant units, paying expenses related to operations (such as utility service, sanitation service, and ongoing repairs and maintenance) and, to the extent of available funds, making monthly payments to the holders of the liens against the Properties. Concurrently with this motion, the Trustee has filed, on a negative-notice basis, a motion to employ Seaside Properties as property manager and a motion to employ Newmark of Southern California as real estate broker.

The Trustee seeks authority to use cash collateral in connection with the operation of the Properties. The San Vicente Property is encumbered by a lien in favor of CIT Bank, N.A. (“CIT”) in the approximate amount of \$850,000. The Abbot Kinney Property is encumbered by a lien in favor of Chase Bank, N.A. (“Chase”) in the approximate amount of \$250,000. The Trustee’s use of cash collateral will not exceed the amounts set forth in the following budgets, unless Chase and/or CIT agree to a higher amount in writing:

San Vicente Property

- 1) Management fees--\$6,224.86
- 2) Supervisor salaries--\$266.24
- 3) Elevator--\$570.00
- 4) Maintenance and repair--\$4,946.95
- 5) Painting and decorating--\$13,160.00

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- 6) Window coverings--\$188.19
- 7) New appliances--\$3,877.41
- 8) Pool--\$1,088.28
- 9) Apartment and carpet cleaning--\$3,829.50
- 10) Gardening--\$614.16
- 11) Plumbing--\$2,787.00
- 12) Locksmith--\$447.70
- 13) Electrical--\$1,065.86
- 14) Water, sewer, and electricity--\$11,933.61
- 15) Natural gas--\$1,957.60
- 16) Loan payment to CIT--\$49,043.65
- 17) Legal and accounting--\$17,500
- 18) Property insurance--\$2,544.91
- 19) Professional and consulting fees--\$8,000.00

Abbot Kinney Property

- 1) Management fees--\$1,349.31
- 2) Maintenance and repair--\$6,833.31
- 3) Painting and decorating--\$10,690.00
- 4) Carpet and floor covering--\$1,100.00
- 5) Apartment and carpet cleaning--\$750.00
- 6) Plumbing--\$755.50
- 7) Electrical--\$2,549.00
- 8) Natural gas--\$45.02
- 9) Loan payment to Chase--\$24,478.99
- 10) Legal and accounting--\$5,000.00
- 11) Property insurance--\$2,995.83

CIT does not object to the Trustee's motion to use cash collateral, but reserves its right to argue in the future that all parties in the adversary proceedings have previously admitted that CIT possesses a valid and enforceable lien against the San Vicente Property.

II. Findings and Conclusions

Trustee's Motion to Operate Debtors' Businesses

The Trustee's motion for authority to operate the Properties pending

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consummation of the sale is GRANTED. Section 721 provides: "The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interests of the estate and consistent with the orderly liquidation of the estate." Here, the Trustee's operation of the Properties is in the best interests of the estate. If the Properties were not operated during the marketing period, they would fall into disrepair and would not command as high a sales price. The Trustee's operation is consistent with the orderly liquidation of the estate since the Trustee will be operating the Properties only until they can be marketed and sold.

Trustee's Motion to Use Cash Collateral

The Trustee's motion to use cash collateral is GRANTED. Section 363(c)(2) requires court authorization for the use of cash collateral unless "each entity that has an interest in such cash collateral consents." In the Ninth Circuit, satisfaction of Section 363(c)(2)(A) requires the "affirmative express consent" of the secured creditor; "implied consent," resulting from the failure of the secured creditor to object to use of cash collateral, does not satisfy the requirements of the statute. *Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 368-69 (9th Cir. 1987). Absent affirmative express consent, the Debtors "may not use" cash collateral absent the Court's determination that the use is "in accordance with the provisions" of Section 363—that is, that the secured creditor's interest in the cash collateral is adequately protected. Section 363(c)(2)(B); Section 363(e).

Both CIT's interest in the San Vicente Property, and Chase's interest in the Abbot Kinney Property, are adequately protected by the substantial equity cushion in each property. Although there is no formal evidence of the value of either property before the Court, there is no dispute that each property is worth millions of dollars. CIT's lien against the San Vicente Property is in the approximate amount of \$850,000, and Chase's lien against the Abbot Kinney Property is in the approximate amount of \$250,000. In both cases, the equity cushion is far in excess of 20%. *See Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396, 1401 (9th Cir. 1984) (holding that a 20% equity cushion constitutes adequate protection). Additional adequate protection is provided by the fact that the Trustee will continue to make mortgage payments to CIT and Chase, to the extent of available funds. *See* §361(1) (adequate protection may be provided by periodic cash payments).

The Court finds that the expenditures proposed in the Trustee's budget are reasonable and necessary to maintain the Properties during the marketing period. Such expenditures, which preserve the value of CIT and Chase's collateral, constitute an

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additional source of adequate protection. *See In re Megan-Racine Associates, Inc.*, 202 B.R. 660, 663 (Bankr. S.D.N.Y. 1996) (concluding that "[a]s long as there was a continuous income stream being generated by the Debtor, the fact that the Debtor consumed a portion of those monies to operate and maintain the facility each month did not diminish the value of the [secured creditor's] interest in the [cash collateral]").

CIT's right to argue in the future that all parties have admitted that it possesses a valid and enforceable lien against the San Vicente Property is preserved.

Conclusion

Based upon the foregoing, the Trustee's motions to use cash collateral and to operate the Debtor's business are both GRANTED. The Trustee shall submit conforming orders, incorporating this tentative ruling by reference, within seven days of the hearing.

Party Information

Debtor(s):

Harry Roussos

Represented By

David Burkenroad - DISBARRED -
Jonathan Shenson

Trustee(s):

Howard M Ehrenberg (TR)

Represented By

Daniel A Lev
Steven Werth
Ira Benjamin Katz
Robert A Weinberg
Asa S Hami

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Adv#: 2:15-01406 EHRENBERG v. Roussos et al

■

#108.00 HearingRE: [411] Motion to Dismiss Adversary Proceeding Notice Of Motion And Plaintiff's Motion For Order Dismissing Defendants Paula Roussos, Theodosios Roussos, Cit Bank N.A. Fka One West Bank N.A., And Chase Bank, N.A; Memorandum Of Points And Authorities; Declaration Of Howard M. Ehrenberg In Support Thereof

Docket No: 411

Tentative Ruling:

11/8/2016: For the reasons set forth below, the Trustee's Motion to dismiss non-settling defendants Paula Roussos, Theodosios Roussos, CIT Bank, and Chase Bank is DENIED.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Plaintiff's Motion for Order Dismissing Defendants Paula Roussos, Theodosios Roussos, CIT Bank NA FKA One West Bank NA, and Chase Bank, NA ("Motion") [Doc. No. 411]
- 2) Opposition of Theodosios Roussos to Motion to Dismiss Adversary Action Without Prejudice ("Opposition") [Doc. No. 417]
- 3) Plaintiff's Reply to Opposition of Theodosios Roussos to Motion to Dismiss Adversary Action Without Prejudice ("Reply") [Doc. No. 418]
- 4) CIT Bank, N.A.'s Omnibus Statement and Reservation of Rights Regarding Motions Filed by Chapter 7 Trustee as Bankruptcy Case Docket Nos. 601, 603, and 605 and Adversary Proceeding Docket No. 435 [Doc. No. 622, Case No. 2:15-bk-21624-ER]

I. Facts and Summary of Pleadings

The Chapter 7 Trustee ("Trustee") moves to dismiss non-settling defendants Paula Roussos, Theodosios Roussos, CIT Bank, N.A. fka One West Bank, N.A. ("CIT") and Chase Bank, N.A. ("Chase") (collectively, the "Non-Settling Defendants") from this action without prejudice, pursuant to Civil Rule 41(a)(2). **[Note 1]**

This litigation involves the Trustee's attempt to recover, on behalf of the estates of Harry and Theodosios Rouso (the "Roussos Brothers"), a (1) 20-unit apartment

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building located at 2727–2741 Abbot Kinney Boulevard, Venice, CA (the “Abbot Kinney Property”) and (2) a 30-unit building located at 153 San Vicente Boulevard, Santa Monica, CA (the “San Vicente Property”) (collectively, the “Properties”). The Roussos Brothers commenced voluntary Chapter 11 petitions on June 14, 1993. The cases were jointly administered. On August 5, 1994, the Bankruptcy Court entered an order approving the sale of the Properties to O.F. Enterprises, LP and S.M.B. Investors Associates, LP (the “Sale Order”).

On October 6, 2016, the Court entered an order approving a Settlement Agreement between the Trustee and Defendants O.F. Enterprises, LP, Liro, Inc., S.M.B. Investors Associates, LP, SMB Management, Inc., Lula Michaelides, Harry Roussos, and Christine Roussos (collectively, the "Settling Defendants"). *See* Order Approving Settlement Agreement ("Settlement Approval Order") [Doc. No. 591, Case No. 2:15-bk-21624-ER]. The Settlement Agreement provides for the entry of a stipulated judgment in the Adversary Proceedings in favor of the Trustee and against the Settling Defendants, a stay of the Adversary Proceedings, and the setting of a status conference to monitor the Settlement Agreement’s implementation. Theodosios Roussos ("Theodosios") [Note 2] filed a timely appeal of the Settlement Approval Order.

On October 6, 2016, the Court entered an order vacating the trial, staying the adversary proceedings pending further order of the Court, and scheduling a status conference regarding implementation of the Settlement Agreement on January 10, 2017. *See* Order Vacating Trial, Discharging Order to Show Cause, and Scheduling Status Conference Re: Implementation of Settlement Agreement (the “Vacation, Discharge, and Scheduling Order”) [Doc. No. 400]. On October 7, 2016, the Court entered the stipulated judgments (the "Property Judgments") contemplated by the Settlement Agreement in each of the adversary proceedings. Theodosios timely appealed the Property Judgments.

The Property Judgments provide, *inter alia*, that:

- 1) The 1994 Sale Order is void *ab initio* and of no force and effect and is vacated;
- 2) Title to each of the Properties reverts back to the way it was immediately prior to entry of the Sale Order without the need for a further grant deed;
- 3) The Properties are properties of the Roussos Brothers’ estates;
- 4) The grant deeds conveying title from the Roussos Brothers to the respective buyers and any other instruments recorded in connection with the aforesaid instruments are deemed canceled;
- 5) None of the defendants (whether they were parties to the Settlement

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Agreement or not) are prevailing parties for purposes of Bankruptcy Rule 7054 or otherwise;

- 6) Each party shall bear its own attorneys' fees and costs; and
- 7) The order entered by the Court on December 21, 2015, enjoining private arbitration between HCarry and Theodosios "to the extent it affects, directly or indirectly, title to, or ownership of" the Properties (the "Preliminary Injunction Order") is vacated.

Theodosios is currently prosecuting an appeal of the Preliminary Injunction Order before the Ninth Circuit. That appeal has been fully briefed, and oral argument has been tentatively scheduled for January 2017.

Trustee's Motion to Dismiss Non-Settling Defendants

The Trustee seeks dismissal of the Non-Settling Defendants for the following reasons:

The Settlement Agreement contains two provisions pertaining to the dismissal of the adversary proceedings. First, the Settlement Agreement provides that the adversary proceedings will be dismissed, without prejudice, as against the Non-Settling Defendants once (1) the orders approving the Settlement Agreement become final and non-appealable and (2) the Settlement Amount has been paid. Second, the Settlement Agreement provides that if the Property Judgments are vacated and/or the Settlement Approval Order is reversed, the dismissal will be vacated and the adversary proceedings will be restored to the Court's active calendar and rescheduled for trial.

Upon further review and reflection, the Trustee has determined that the first and second provisions are inconsistent. The first provision postpones dismissal of the adversary proceedings as against the Non-Settling Defendants until the Settlement Approval Order has become final and the Settlement Amount has been paid. The second provision assumes that dismissal would be entered concurrently with the Property Judgments—otherwise it would be unnecessary for the dismissals to be vacated if the Settlement Approval Order is reversed.

Because the Preliminary Injunction Order has been vacated, the appeal of that order before the Ninth Circuit is moot. The Trustee intends to file a motion to dismiss the appeal as soon as the instant Motion is determined. Dismissal without prejudice of the Non-Settling Defendants will facilitate the Trustee's motion to dismiss the appeal of the Preliminary Injunction Order. In the event that either the Property Judgments or Settlement Approval Order are reversed, the dismissals would be vacated and the

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adversary proceedings would be restored to the active calendar and set for trial. [Note 3]

Civil Rule 41(a)(2) provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." "A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). Legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.* Dismissal of the Non-Settling Defendants is proper given that (1) in the absence of the reversal of the Settlement Approval Order or Property Judgments, dismissal of the Non-Settling Defendants is required by the Settlement Agreement; (2) dismissal of the Non-Settling Defendants will benefit all parties by avoiding the incurrence of legal fees; and (3) dismissal will facilitate the dismissal of the appeal of the Preliminary Injunction Order.

Theodosios' Opposition to the Motion for Dismissal

Theodosios opposes the Motion for the following reasons:

First, the Court lacks jurisdiction to determine the Motion as a result of Theodosios' appeals of the Settlement Approval Order and the Property Judgments.

Second, by seeking dismissal of the Non-Settling Defendants the Trustee is attempting to manipulate the Ninth Circuit's jurisdiction over the appeal of the Preliminary Injunction Order. Litigants may not manipulate jurisdiction by manufacturing finality "without fully relinquishing the ability to further litigate unresolved claims." *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994). The Trustee does not propose to relinquish claims against Theodosios, instead indicating that the claims will be dismissed without prejudice.

Third, the requested dismissal contradicts the terms of the Settlement Agreement, which provides that the adversary proceedings would be dismissed against the Non-Settling Defendants only after (1) the Settlement Approval Order had become final and non-appealable and (2) the Settlement Amount had been paid. The Trustee has not demonstrated grounds for reconsideration of the Settlement Approval Order.

Fourth, Theodosios would be prejudiced by dismissal, making voluntary dismissal pursuant to Civil Rule 41(a)(2) improper. *See Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996) ("When ruling on a motion to dismiss without prejudice, the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal."); *Selas Corp. of Am. v. Wilshire Oil Co. of Texas*, 57 F.R.D. 3, 7 (E.D. Pa. 1972) (denying a motion to dismiss because

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dismissal would have precluded defendant from maintaining a claim for malicious prosecution). In determining whether a plaintiff has established legal prejudice, courts have considered the following factors:

- (1) whether the expense of a second litigation would be excessive and duplicative;
- (2) how much effort and expense has been expended by the defendant in preparing for the current trial;
- (3) the extent to which the current suit has progressed;
- (4) the plaintiff's diligence in bringing the motion to dismiss; and
- (5) whether the attempt at dismissal is designed to evade federal jurisdiction and frustrate the purpose of the removal statute.

Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 711, 715 (E.D. Pa. 2005).

Theodosios has expended significant effort and has incurred substantial costs in litigating this matter. The discovery cut-off has closed, a pretrial conference was held, and trial was imminent. *See Martinez Cruz v. Lausell*, 692 F. Supp. 48, 50 (D. P.R. 1988) (finding that plaintiffs were not entitled to voluntary dismissal without prejudice because the case had been pending for three years and extensive discovery had been undertaken at substantial cost to defendants); *Barron v. Caterpillar, Inc.*, 1996 WL 460086 (W.D. Pa. 1996) (denying plaintiff's motion for dismissal because it was brought subsequent to the discovery cut-off date and a final pretrial conference). The cost of a second action would be expensive, because based on the settlement by other parties, the action would take a different form. The dismissal is intended to avoid the Ninth Circuit's jurisdiction over the appeal of the Preliminary Injunction Order, which prejudices Theodosios' legal right to obtain a ruling upon that order.

In addition, dismissal is not appropriate under Rule 41 where based on the potential of a ruling. **[Note 4]** *Maxum Indemnity Insurance Company v. A-1 All American Roofing Co.*, 299 F. App'x 664 (9th Cir. 2008).

Finally, the hearing on the Motion should be continued to November 16, 2016, to be heard concurrently with the motion to determine whether the Settlement Agreement was entered into in good-faith pursuant to California Code of Civil Procedure §877.6.

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Trustee's Reply to Theodosios' Opposition

The Trustee makes the following arguments in Reply to Theodosios' Opposition to the Motion to Dismiss:

First, contrary to Theodosios' argument, the Court is not divested of jurisdiction to consider the Motion. On October 6, 2016, the Court entered the Vacation, Discharge, and Scheduling Order, which provides:

To permit consummation of the Settlement Agreement, the adversary proceedings are stayed pending further order of the Court. The stay shall not prevent the parties from taking any actions necessary to consummate the Settlement Agreement.

Vacation, Discharge, and Scheduling Order at ¶2.

Theodosios has not appealed the Vacation, Discharge, and Scheduling Order. The present Motion is the Trustee's attempt to consummate the Settlement Agreement by resolving the ambiguity between the provision that postpones dismissal until the Settlement Approval Order has become final and the provision that assumes that dismissal would be entered concurrently with the Property Judgments.

Second, granting the Motion will not manipulate appellate jurisdiction over Theodosios' appeal of the Preliminary Injunction Order. To the extent, if any, that Theodosios has standing to appeal the Settlement Approval Order or the Property Judgments, that standing would not be affected by the granting of the Motion. Moreover, the granting of the Motion is not a predicate for the Ninth Circuit to dismiss Theodosios' appeal of the Preliminary Injunction Order. The Preliminary Injunction Order was issued to preserve the Court's jurisdiction over the Properties, and is already moot as a result of the Property Judgments, which vacated the 1994 Sale Order and vacated the Preliminary Injunction Order.

Third, the Motion does not contradict the Settlement Approval Order or the Property Judgments. Once again, the Motion is simply an attempt to resolve an ambiguity in the Settlement Agreement.

Fourth, Theodosios will not be legally prejudiced by dismissal of the adversary proceedings without prejudice. The proposed dismissal provides that in the event the Property Judgments or Settlement Approval Order are overturned, the adversary proceedings will be restored to the Court's active list and set for trial. All of the work previously done by counsel will be preserved, and the trial will take place as if the dismissal without prejudice had never occurred. For these reasons, Theodosios' reliance upon *Westlands Water District v. United States*, 100 F.3d 94 (9th Cir. 1996) is misplaced. *Westlands* held that "the threat of future litigation which causes

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uncertainty is insufficient to establish plain legal prejudice” and “that the expense incurred in defending against a lawsuit does not amount to legal prejudice.” *Id.* at 96. As was the case in *Westlands*, the only result of dismissal will be that Theodosios may have to defend the litigation in the future (if the dismissal is vacated). Accordingly, *Westlands* actually supports granting of the Motion.

Theodosios’ reliance upon *Selas Corp. of Am. v. Wilshire Oil Co. of Texas*, 57 F.R.D. 3, 7 (E.D. Pa. 1972) is likewise misplaced. *Selas* held that loss of the right to file a malicious prosecution action can constitute legal prejudice, but does not automatically constitute legal prejudice. The defendant in *Selas* had a potentially meritorious malicious prosecution claim, which is not true of Theodosios. Therefore, *Selas* does not apply.

Theodosios cites *Maxum Indem. Ins. Co. v. A-1 All Am. Roofing Co.*, 299 F. App’x 664, 666 (9th Cir. 2008) for the proposition that dismissal is inappropriate when based merely on the potential of a ruling, but fails to specify the ruling which he asserts is a concern. Per *Maxum*, voluntary dismissal may be denied if the request is made to avoid a near-certain adverse ruling. Here, the Trustee only agreed to dismiss Theodosios and Paula because it was required by the Settling Defendants as a condition for their entering into the Settlement Agreement. The dismissal is not intended to avoid an adverse ruling; to the contrary, the Trustee is confident that he would prevail at trial against Theodosios and Paula.

Theodosios places undue reliance upon *Martinez Cruz v. Lausell*, 692 F. Supp. 48 (D. P.R. 1988) and *Barron v. Caterpillar, Inc.*, 1996 WL 460086 (W.D. Pa. 1996), cases which stand for the proposition that a motion for voluntary dismissal should be denied when there has been extensive discovery. In both *Martinez* and *Barron*, the motion to dismiss was brought only after defendants had moved for summary judgment and the case was ready for final disposition, plaintiff had been dilatory in bringing its motion to dismiss without a sufficient explanation, and there were other factors supporting a finding of prejudice. The posture of the instant case is far different: Theodosios’ motion for judgment on the pleadings has been denied, the Trustee is not facing a motion for summary judgment, and the trial has been vacated.

CIT Bank, N.A.’s Statement and Reservation of Rights

CIT Bank, N.A. (“CIT”) filed a Statement and Reservation of Rights (“Statement”) regarding the Motion. According to the Statement:

The Dismissal Motion requests, *inter alia*, that CIT be dismissed from the Adversary Proceeding with a finding that it is not a “prevailing party entitled

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to an award of attorneys' fees or other costs in the action pursuant to Rule 7054(b) which provides that a court may allow costs to a prevailing party." *See* Dismissal Motion, at 9.

CIT does not object to entry of an order stating that it is not a "prevailing party" so long as CIT preserves its rights to potentially recover amounts owed to it under Bankruptcy Code section 506(b) upon the sale of the Property, including attorneys' fees. Counsel to the Trustee has indicated that the Trustee does not object to this preservation of rights, so long as he preserves his rights to object to any such request made by CIT.

CIT has no other objections to the relief requested in the Dismissal Motion.

Statement at 3.

II. Findings and Conclusions

As a preliminary matter, the Court declines Theodosios' request to continue the hearing on the Motion to November 16, 2016. Because two other motions filed by the Trustee are scheduled for hearing on November 9, 2016, judicial efficiency would not be served by continuing the hearing on the Motion.

Turning to the merits, as a result of Theodosios' appeal of the Settlement Approval Order and the Property Judgments, the Court lacks jurisdiction to dismiss the Non-Settling Defendants. The Ninth Circuit has explained:

The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal. As stated in 9 Moore's Federal Practice, 2d ed., P 203.11, pp. 734-36: "The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. . . . Thus, after a notice of appeal is timely filed, the district court has no power to vacate the judgment, or to grant the appellant's motion to dismiss the action without prejudice, or to allow the filing of amended or supplemental pleadings."

Matter of Combined Metals Reduction Co., 557 F.2d 179, 200 (9th Cir. 1977).

Granting the Trustee's Motion would alter the Settlement Agreement, which provides that the Non-Settling Defendants will be dismissed only after the Settlement Approval Order becomes final and non-appealable. The Settlement Agreement is the subject of Theodosios' appeal of the Settlement Approval Order. Consequently, the Court has been divested of jurisdiction to approve any modification to the Settlement

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Agreement. [Note 5]

The Court’s Vacation, Discharge, and Scheduling Order does not change this result. That order provided only that the stay of the adversary proceedings “shall not prevent the parties from taking any actions necessary to consummate the Settlement Agreement.” The order did not—and could not have—reserved jurisdiction to modify the Settlement Approval Order or Property Judgments after both matters had been appealed.

The Trustee next argues that the requested dismissal is nothing more than a clarification of inconsistent provisions in the Settlement Agreement. The Trustee asserts that the language providing for dismissal of the adversary proceedings only after the Settlement Approval Order becomes final and non-appealable is inconsistent with language stating that the dismissal would be vacated if the Settlement Approval Order is reversed. The Trustee is correct that the language providing for dismissal only after the Settlement Approval Order becomes final makes the language providing for vacating the dismissal upon reversal of the Settlement Approval Order superfluous. However, this does nothing to change the fact that the Court has been divested of jurisdiction over the Settlement Approval Order and the Property Judgments as a result of Theodosios’ appeals. [Note 6] Nor can the Trustee overcome the Court’s lack of jurisdiction by asserting that the requested modifications to the Settlement Agreement are immaterial. Jurisdiction is binary: either the Court has it or it does not.

The Trustee’s Motion must also be denied because of its potential effect upon the Ninth Circuit’s jurisdiction over the appeal of the Preliminary Injunction Order. The Trustee acknowledges in the Motion that one of the purposes of dismissal is “to facilitate the granting of the Trustee’s anticipated motion to dismiss the Ninth Circuit Preliminary Injunction Appeal.” Motion at 10–11. [Note 7] In *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073 (9th Cir. 1994), the Ninth Circuit addressed the litigants’ attempt to manipulate jurisdiction in the context of Civil Rule 54. Rule 54 provides that a judgment that does not adjudicate all the claims presented in litigation is not final and is therefore not subject to appeal. The litigants in *Software Toolworks* stipulated to dismiss without prejudice claims that had not been decided for the purpose of giving the appellate court jurisdiction over the judgment pertaining to the claims that had been decided. The court held that the stipulated dismissal was an impermissible attempt to circumvent Rule 54, reasoning that “litigants should not be able to avoid the final judgment rule without fully relinquishing the ability to further litigate unresolved claims.” *Id.* at 1077.

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Software Toolworks stands for the proposition that a dismissal without prejudice cannot be used to affect appellate jurisdiction. Here, one of the express purposes of the Trustee's Motion is to affect the Ninth Circuit's jurisdiction over the appeal of the Preliminary Injunction Order. Use of Civil Rule 41 for that purpose is barred by *Software Toolworks*.

In addition, the Motion is denied because the voluntary dismissal would legally prejudice Theodosios. The Court may not grant a motion for voluntary dismissal under Civil Rule 41(a)(2) when "a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001). Legal prejudice means "prejudice to some legal interest, some legal claim, some legal argument." *Id.*

The legal prejudice to Theodosios does not emanate from the fact that he has spent significant time and money defending this litigation, or that discovery has closed. The dismissal procedure contemplated by the Trustee would restore the case to active status, as though dismissal had never occurred, in the event the Settlement Approval Order is reversed on appeal. Therefore, Theodosios' commitment of time and money to the litigation would not have been wasted. However, dismissal could potentially prejudice Theodosios by affecting his rights vis-à-vis the appeals of the Preliminary Injunction Order, Settlement Approval Order, and Property Judgments. Again, it is not for this Court to speculate upon what effect dismissal might have upon the pending appeals. As stated previously, the fact that dismissal could potentially affect the appeals is sufficient reason to deny the Trustee's Motion.

Finally, no purpose would be served by dismissing the Non-Settling Defendants now. The adversary proceedings are not active, having been stayed pending further order of the Court. There is no reason why dismissal of the Non-Settling Defendants cannot take place under the terms originally contemplated in the Settlement Agreement.

Based upon the foregoing, the Motion is DENIED. The Court will enter an appropriate order.

Note 1

The Trustee filed two identical complaints—one in Harry's case (Adv. No. 2:15-ap-01406-ER) and the other in Theodosios' case (Adv. No. 2:15-ap-01404-ER). Unless otherwise indicated, all citations to the docket refer to Adv. No. 2:14-ap-01406-ER. Throughout the prosecution of this litigation, identical motions and orders have been entered in each adversary proceeding. Because the record in each case is

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identical, the Court generally refers to the pleadings, orders, and judgments filed and entered in the adversary proceedings in the singular.

Note 2

A given name is used to distinguish Theodosios from his brother, Harry, who is also involved in this litigation. No disrespect is intended.

Note 3

The Motion requests that the Court find that none of the Non-Settling Defendants is a prevailing party entitled to an award of attorneys' fees or costs pursuant to Bankruptcy Rule 7054(b). In the Reply, the Trustee withdraws this request, based on the fact that the Property Judgments provide that "[n]one of the defendants (whether they were parties to the Settlement Agreement or not) are prevailing parties for purposes of Federal Rule of Bankruptcy Procedure 7054 or otherwise."

Note 4

The Opposition does not specify the "potential ruling" to which it is referring. Presumably it is the ruling upon the appeals of the Settlement Approval Order and Property Judgments.

Note 5

Since the Court lacks jurisdiction to modify the Settlement Agreement, the Court does not reach Theodosios' argument that the Trustee has failed to demonstrate that grounds exist for reconsidering the Settlement Agreement's provisions with respect to dismissal of the Non-Settling Defendants.

Note 6

It is also worth pointing out that the superfluous language in no way interferes with the parties' abilities to fulfill their obligations under the Settlement Agreement.

Note 7

The Trustee attempts to back away from this assertion in the Reply, arguing that the "granting of the Motion is not a predicate for the Ninth Circuit to dismiss Theodosios' and Paula's appeal from the Preliminary Injunction Order," and stating that he "sought dismissal of the Non-Settling Defendants prior to filing his motion to dismiss the appeals as moot for streamlining purposes." Reply at 10–11. It is not

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appropriate for this Court to speculate on whether dismissal of the Non-Settling Defendants would affect the Ninth Circuit's jurisdiction over the Preliminary Injunction Order. The fact that dismissal could potentially affect the Ninth Circuit's jurisdiction is sufficient reason for the Court to deny the Trustee's Motion to dismiss the Non-Settling Defendants.

Party Information

Debtor(s):

Harry Roussos

Represented By

David Burkenroad - DISBARRED -
Jonathan Shenson

Defendant(s):

Paula Roussos

Pro Se

Christine Roussos

Represented By

Jonathan Shenson

S.M.B. Management, Inc., a California

Pro Se

Does 1 Through 50

Pro Se

Theodosios Roussos

Pro Se

Paula Roussos

Pro Se

CIT Bank, N.A. f/k/a OneWest Bank N

Represented By

Gregory K Jones

O.F. Enterprises, L.P., a California limi

Pro Se

Theodosios Roussos

Pro Se

Harry Roussos

Represented By

Jonathan Shenson

Chase Bank N.A.

Pro Se

S.M.B. Investors Associates, L.P., a Ca

Pro Se

LIRO, INC., a California corporation

Pro Se

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One West Bank N.A., formerly known : Pro Se

Plaintiff(s):

HOWARD M EHRENBERG

Represented By
Ira Benjamin Katz
Robert A Weinberg
Daniel A Lev
Steven Werth

Trustee(s):

Howard M Ehrenberg (TR)

Represented By
Daniel A Lev
Steven Werth
Ira Benjamin Katz
Robert A Weinberg
Asa S Hami

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2:15-21624 Harry Roussos

Chapter 7

#109.00 HearingRE: [603] Motion Chapter 7 Trustee's Motion for Order Authorizing Operation of Debtors' Businesses; Memorandum of Points and Authorities; Declaration of Howard M. Ehrenberg in Support Thereof (Lev, Daniel)

Docket No: 603

Tentative Ruling:

See Cal. No. 107, above, incorporated in full by reference.

Party Information

Debtor(s):

Harry Roussos

Represented By

David Burkenroad - DISBARRED -
Jonathan Shenson

Trustee(s):

Howard M Ehrenberg (TR)

Represented By

Daniel A Lev
Steven Werth
Ira Benjamin Katz
Robert A Weinberg
Asa S Hami

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2:15-21626 Theodosios Roussos

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Adv#: 2:15-01404 Ehrenberg v. Roussos et al

■
#110.00 HearingRE: [435] Motion to Dismiss Adversary Proceeding Notice Of Motion And Plaintiff's Motion For Order Dismissing Defendants Paula Roussos, Theodosios Roussos, Cit Bank N.A. Fka One West Bank N.A., And Chase Bank, N.A; Memorandum Of Points And Authorities; Declaration Of Howard M. Ehrenberg In Support Thereof

Docket No: 435

Tentative Ruling:

See Cal. No. 108, above, incorporated in full by reference.

Party Information

Debtor(s):

Theodosios Roussos Pro Se

Defendant(s):

ONEWEST BANK N.A. Pro Se

Chase Bank N.A. Pro Se

Paula Roussos Represented By
Robert A Weinberg

Does 1 Through 50 Pro Se

Paula Roussos Pro Se

Theodosios Roussos Pro Se

CIT Bank, N.A. f/k/a OneWest Bank N Represented By
Gregory K Jones

O.F. Enterprises, L.P., a California limi Pro Se

Harry Roussos Represented By
Jonathan Shenson

Theodosios Roussos Pro Se

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LIRO, INC., a California corporation	Pro Se
Christine Roussos	Represented By Jonathan Shenson
S.M.B. Management, Inc., a California	Pro Se
S.M.B. Investors Associates, L.P., a Ca	Pro Se

Plaintiff(s):

Howard M. Ehrenberg	Represented By Ira Benjamin Katz Robert A Weinberg Daniel A Lev Steven Werth
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Trustee(s):

Howard M Ehrenberg (TR)	Represented By Daniel A Lev Steven Werth
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Hearing Room 1568

11:00 AM

2:16-22483 Sandra Jones

Chapter 11

#111.00 Hearing
RE: [20] Motion In Individual Chapter 11 Case For Order Authorizing Use Of
Cash Collateral

Docket No: 20

Tentative Ruling:

11/8/2016

Hearing required.

Party Information

Debtor(s):

Sandra Jones

Represented By
Onyinye N Anyama