

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:09-16561 Hossein Ghalari and Shahla Ghalari**

**Chapter 7**

■

**#1.00** Motion for Damages and Sanctions against Daniel Mayer for Repeatedly, Wilfully and Intentionally Violating the Post Discharge Stay

Docket No: 28

**Tentative Ruling:**

Service appears in order. It was made to P.O. Box 2652, Lake Arrowhead, CA 92352, which is the address on the demand for payment made in March 2016. Mr. Mayer was also aware of this contention due to the email exchanges in May 2016.

Prior to bankruptcy, Debtor and Daniel Mayer (creditor) made a deal that Mayer would release his lien in the estimated sum of \$7,635 for the reduced amount of \$2,500. This was a judgment lien. Debtors thought this took care of the matter and did not include Mayer in their chapter 7 case. The payment had been made prepetition through a short-sale escrow. Debtors are now trying to sell another property and find that Mayer has a lien on that parcel and has refused to release it.

Debtors received their discharge in 2010. There are funds in the amount of about \$7,735 being held in escrow because of the Mayer lien. This home was purchased after the discharge. Per the schedules, at the time of the bankruptcy the Debtors owned no real property.

The Debtors have been trying to get this resolved since April 2106

Debtors seek compensatory damages of \$2,500 and reasonable attorney's fees of an estimated amount of \$4,000. They also seek an order that the funds held in escrow are to be released to the Debtors, and punitive damages of \$750.

No opposition received as of October 20, 2016.

Release the funds in escrow to the Ghalaris. They will be entitled to their

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attorney fees once I have an accounting of them. As to the compensatory damages, was the \$2,500 paid twice? It does not appear that punitive damages are warranted.

<b>Party Information</b>
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**Debtor(s):**

Hossein Ghalari

Represented By  
Devin Sawdayi

**Joint Debtor(s):**

Shahla Ghalari

Represented By  
Devin Sawdayi

**Trustee(s):**

David Seror (TR)

Pro Se

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10:00 AM

**1:09-19105 Francisco Xavier Pedroza and Jody Lynn Pedroza**

**Chapter 7**

**#2.00** Trustee's Motion for Order Disallowing  
Claim of Exemption

fr. 6/21/16, 8/16/16

Docket No: 26

**\*\*\* VACATED \*\*\* REASON: Order ent continuing hrg to 2/7/17 at 10:00  
a.m. - jc**

**Tentative Ruling:**

Continued by stipulation to Feb. 7, 2017 at 10:00 a.m. in order to allow the parties to continue to discuss settling.

prior tentative ruling (6/21/16)

This revolves around a personal injury claim that the Debtor has asserted for product liability. When the bankruptcy was first filed, schedules B and C did not reveal such a claim.

In July 2015 there was a complaint filed in the US District Court in West Virginia (2:15-cv-09785), asserting that the devices at issue were implanted prior to the petition date, specifically in 2008 and 2004 (Ex. B). This is for a prolapsed bladder.

On April 22, 2016, Debtors filed their amended schedules B and C to list two personal injury lawsuits and claim them as exempt. The amended schedules value this claim at \$138,727 (anticipated settlement against Boston Scientific Corp for \$78,727 and anticipated settlement against Johnson & Johnson for \$60,000). The entire amount is claimed as exempt.

\$43,969.20 of claims were previously filed. When the case was reopened, a new bar date of 7/18/16 was set.

The Motion

The court may disallow a claim of exemption if the debtor engaged in bad faith. This is proven by a preponderance of the evidence and is determined by examining the totality of the circumstances. One common example of bad faith is where the debtor conceals assets. To determine whether concealment is intentional, the court looks at the facts and circumstances of the case including whether the non-disclosure resulted from

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**CONT...**      **Francisco Xavier Pedroza and Jody Lynn Pedroza**      **Chapter 7**

the debtor's reckless disregard for the truth and the accuracy of information in the bankruptcy filings. Later disclosure may be denied due to "unclean hands."

The debtor cannot wait for along period of time after s/he becomes aware of the claim. Here the lawsuit was filed nearly a year before the amended schedules.

Even if the Court does not find bad faith by concealment, the exemptions should be disallowed in light of prejudice to the estate. Here the Debtors had initially claimed exemptions under CCP §703 and on that basis the Trustee filed a report of no distribution to the detriment of the Debtors' creditors who had already filed claims. Now the Debtors has trying to get a second bite at the apple by changing to CCP §704.

Under FRBP 4003, this motion is timely in that the amended schedule C was filed on 4/22/16 and this objection was filed on 5/20/16.

No opposition received, but there was a stipulation to continue this to 8/16/16.

Proposed Ruling:

The personal injury was before the petition date and, in fact, the remedial surgery appears to have taken place in the year before the petition was filed. For some reason the complaint was not filed until 6 years later, which would appear to be long after the statute of limitations had run. So there is something else happening here that is not clear. However, it is the duty of the Debtors to clarify and explain and they have not done so.

According to the amended schedules filed on 4/22/16, the Debtors are represented by Steven Diamond, Chang & Diamond, 9089 Clairemont Mesa Blvd., Suite 110, San Diego 92123. This objection was served by electronic means on Steven J. Diamond (steve@thebklawyers.com) and by mail on each of the debtors at 29121 Marilyn Dr., Canyon Country, CA 91387. This is the proper email address for counsel and there is no indication that the Debtors have moved.

Sustain the objection.

<b>Party Information</b>
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**Debtor(s):**

Francisco Xavier Pedroza

Represented By

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**CONT... Francisco Xavier Pedroza and Jody Lynn Pedroza**  
Charles J Brash  
Steven J Diamond

**Chapter 7**

**Joint Debtor(s):**

Jody Lynn Pedroza

Represented By  
Charles J Brash  
Steven J Diamond

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Carmela Pagay

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10:00 AM

**1:10-12079 The Yucca Group, LLC**

**Chapter 11**

**#3.00** Status Conference re: Chapter 11 Voluntary Petition

fr. 12/2/10, 2/22/11, 3/15/11, 8/30/11, 12/6/11, 4/17/12,  
7/17/12, 8/28/12, 12/4/12, 12/18/12, 1/29/13, 3/19/13,  
4/16/13, 7/9/13, 10/1/13, 10/22/13, 11/19/13, 5/13/14,  
9/23/14; 3/24/15, 7/28/15; 10/20/15, 3/1/16, 6/7/16; 8/30/16

Docket No: 1

**Tentative Ruling:**

Off calendar. Final decree entered on 9/7/16.

**Party Information**

**Debtor(s):**

The Yucca Group, LLC

Represented By

Jerome Bennett Friedman

Jerome Bennett Friedman

Edward A Gallow

**United States Bankruptcy Court  
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Tuesday, October 25, 2016

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10:00 AM

**1:10-10442 Victor Hugo Hernandez**

**Chapter 11**

**#3.01** Status Conference on Chapter 11 Case

fr. 1/11/11, 3/29/11, 4/12/11, 6/14/11, 8/23/11, 10/25/11,  
1/17/12, 1/31/12, 2/28/12, 4/10/12, 6/12/12, 7/31/12,  
9/11/12, 11/20/12, 12/11/12, 2/26/13, 4/30/13, 6/18/13,  
8/27/13, 11/19/13, 1/14/14, 2/4/14, 3/11/14, 4/1/14, 6/24/14,  
9/16/14, 11/18/14, 12/16/14, 1/20/15, 2/24/15; 3/31/15; 5/12/15  
6/30/15; 8/18/15, 9/22/15, 2/9/16; 3/15/16; 4/26/16,  
6/7/16, 7/12/16, 8/16/16; 9/13/16, 10/11/16

Docket No: 1

**Tentative Ruling:**

On July 12, 2016 the hearing on the Second Amended Disclosure Statement was taken off calendar. If the motion to borrow, etc. is granted, please make the corrections needed and file either an Amended Second Amended or a Third Amended Disclosure Statement. Let's set it on shortened notice and finish this up. The only prior objections were O'Neill and Leichter-Maroko and they are being paid off through the borrowing/distribution.

Continue without appearance to Oct. 25 at 10:00 a.m. You can set your amended disclosure statement for hearing at that time so long as it is served by 10/11/16.

prior tentative ruling (7/12/16)

On 9/9/16, Debtor filed a motion for unsecured post-petition financing and hardship distribution for 401K funds.. This is to pay the priority claims. This is set for 10/11/16. Continue the status conference without appearance to 10/11/16 at 10:00 a.m.

prior tentative ruling (8/16/16)

Debtor and his ex-spouse stipulated to distribute his remaining home sales sales proceeds to pay her support payments. This was approved by an order entered on 8/5/16. Although Ms. O'Neill's counsel signed off on the stipulation, it does not affect his claim.

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CONT... Victor Hugo Hernandez

Chapter 11

The disclosure statement was taken off calendar on 7/12, largely due to the objection of Mr. Leichter-Maroko. What is the status of that?

<b>Party Information</b>
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**Debtor(s):**

Victor Hugo Hernandez

Represented By  
David I Brownstein  
Bonni S Mantovani

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10:00 AM

**1:11-18629 Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

**#4.00** Motion for Order Approving Adequacy of Disclosure Statement Describing the Trustee's Third Amended Plan of Reorganization

fr. 10/7/14; 12/2/14, 2/10/15, 4/28/15, 7/28/15, 9/22/15, 11/17/15, 12/22/15, 1/26/16; 3/15/16, 5/17/16; 7/12/16 9/13/16

Docket No: 379

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow

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**CONT...**

**Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

Michael T Delaney

Fahim Farivar

Andrew P Altholz

Gavin L Greene

Leslie A Cohen

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10:00 AM

**1:11-18629 Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

**#5.00** Motion to Dismiss or Convert to Chapter 7

fr. 12/17/13, 2/25/14, 3/11/14, 5/6/14, 7/22/14  
9/23/14; 12/2/14, 2/10/15, 4/28/15, 7/28/15,  
9/22/15, 11/17/15, 12/22/15, 1/26/16; 3/15/16,  
5/17/16; 7/12/16; 9/13/16

Docket No: 176

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Movant(s):**

Internal Revenue Service

Represented By  
Gavin L Greene  
Andrew P Altholz  
Leslie A Cohen

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**CONT... Robert Vilas Johnson and Linda Joyce Johnson  
Ashley M McDow**

**Chapter 11**

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

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10:00 AM

**1:11-18629 Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

**#6.00** Evidentiary Hearing re: Motion to Disallow  
Claims No. 14-1 filed by Drew Kaplan

fr. 2/4/14, 3/11/14, 5/6/14, 7/22/14, 11/18/14, 12/1/14,  
1/20/15, 3/31/15, 5/26/15; 6/2/18, 8/18/15, 9/22/15,  
11/17/15, 12/22/15, 1/26/16; 3/15/16, 5/17/16; 7/12/16; 9/13/16

Docket No: 196

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

prior tentative ruling (8/18/15)

On 5/26 I continued this to 6/2 as a holding date to make sure that either Judge Jury or Judge Bluebond would be willing to serve as mediator. Judge Jury has agreed, so the June 2 hearing is continued without appearance to 8/18/15 at 10:00 a.m. On 7/28 there is a status conference in the main case and a UST motion and perhaps other things. As we get closer to the date, the parties can agree to advance this status conference to 7/28 or delay the other matters to 8/18 or just to leave the calendar as it is.

prior tentative ruling (5/26/15)

Everything else in this case was continued to 7/28/15 at 10:00 a.m. Nothing has been filed as to this claim. Should this also be continued to that date?

prior tentative ruling (3/31/15)

Continued by stipulation to 5/26/15 at 10:00 a.m.

prior tentative ruling (1/20/15)

On 1/8/15 the Court entered its order granting in part and denying in part claim as to the issues of statute of limitations and of the derivative nature of the claim. The fraud claims survived, but the breach of fiduciary duty one did not. The parties were ordered to provide the Court with a discovery schedule and proposed trial dates. Mediation was suggested.

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**Chapter 11**

As of 1/15, nothing more has been filed.

prior tentative ruling (7/22/14)

The Trustee filed this motion objecting to the claim of Drew Kaplan in the principal amount of \$8.6 million for damages and loss of value of shares and investment in IS West. The claim has no substantiating evidence and merely attaches an unauthenticated chart relating to the value of an unidentified company and also attaches a copy of the §523 complaint.

The claim is also untimely and the adversary proceeding does not meet the requirements of an informal claim. The claims bar date was 2/1/12. The adversary complaint was filed on 12/29/11. The proof of claim was filed on 10/22/13.

On 4/18/11 Kaplan filed an arbitration seeking to remove Johnson as a director of ISW and impose liability for conduct similar to that alleged in the AP complaint. This was not attached to the proof of claim and has been stayed by the bankruptcy case.

The proof of claim is deficient in that it does not show that the debt is related to ISW and it does not demonstrate that Kaplan owned any interest in ISW. Although this is alleged in the adversary complaint, that is not evidence. There are various other deficiencies.

As to timeliness, there is no doubt that Kaplan was aware of the bankruptcy and the bar date.

The adversary complaint does not constitute an informal proof of claim because it does not meet the two prong test of M.J. Waterman & Associates, Inc., 227 F.3d 604 (6th Cir. 2000): it must meet the technical requirements of a proof of claim and the allowance of the claim must be equitable. The complaint failed to explicitly state the nature and amount of the claim in that it merely points to the judgment against Johnson and ISW in favor of third parties and then concludes that the judgment diminished the value of ISW. It does not explicitly establish that Johnson is liable to Kaplan for his allegedly wrongful conduct or that Kaplan is entitled to compensation for the diminution in value of ISW, if any. It does not establish a legal theory or agreement

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**Chapter 11**

under which Johnson is liable to Kaplan for the alleged damages. The complaint is against Johnson and does not show an intention to hold the estate liable.

It would be inequitable to allow the claimant to assert the claim. The Trustee has worked tirelessly to obtain control over ISW and to liquidate it for an amount sufficient to pay the allowed claims of both this estate and of ISW in full. Kaplan was well aware of this and never demonstrated an intention to hold the estate liable for Johnson's misconduct. Allowing Kaplan a prorata distribution would substantially diminish the amounts that the other claimants will receive. These claimants timely filed their proofs of claim and were accounted for when the sale price of ISW was negotiated.

Kaplan has received and holds fund obtained from ISW and this is a potential fraudulent transfer. This precludes Kaplan from recovering from the ISW estate.

Kaplan's claim is barred by the statute of limitations. The actions complained of occurred in 1998. The three-year statute of limitations started running when Kaplan discovered that he had a cause of action. This was no later than 12/2/05 when the state court lawsuit was filed by Cleveland, et. al. The bankruptcy petition was filed in 2011, well after the statute of limitations had run.

Opposition

The objection is premature since it is unknown whether this is a surplus case. If so, Kaplan would be entitled to payment under §726(a)(3). Beyond that, the IRS has filed multiple motions to dismiss or convert. Further, the adjudication of the §523 complaint should occur before the validity of the claim is dealt with.

This proof of claim is not like that in M.J.Waterman since there is a valid proof of claim and the written demands are clear and have undeniably put all parties on notice. Further, Kaplan held a 50% interest in the timely filed ISW proof of claim, which was released in the settlement after the bar date. Kaplan did not participate in the settlement. Unlike Waterman, there is no pending plan of reorganization so there has been no effort to get creditors

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**Chapter 11**

paid. Thus the POC should be given presumptive validity.

There is no requirement that a proof of claim comply with the official form. The complaint attached to the POC provides all of the necessary information. There has never been a question of Kaplan's 50% ownership in ISW. This is also set forth in the equity holders list the Trustee's counsel prepared for the ISW case.

The complaint provides a sufficiently detailed description of the basis of Johnson's liability. The claim arises from a tort and need not be based on a writing *per se*. It also gives a date and an amount.

The Kaplan claim was timely filed following ISW's withdrawal of its claim - claim 12-1, which was based on the 2011 judgment against Johnson and ISW. That claim was withdrawn on 9/18/13 and Kaplan filed his formal POC on 10/22/13. Not only did Kaplan not agree to the withdrawal of the claim, but he specifically reserved his rights to maintain his claim against ISW and Johnson.

The adversary complaint, which was filed before the bar date, comprises an informal proof of claim. It meets the requirement that it "must state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable." Sambo's Rest., Inc. v. Sheeler (In re Sambo's Rest., Inc.) 754 F.2d 811, 815 (9th Cir. 1985). The adversary complaint clearly brought the attention of the court to the nature and amount of the claim. See Franciscan Vineyards, Inc., 597 F.2d 181, 183 (9th Cir. 1979). Multiple courts have held that the filing of a §523 complaint qualifies as an informal proof of claim. See, for example, In re Hayes, 327 B.R. 453 (Bankr. C.D. Cal. 2005).

The two part test of M.J. Waterman has not been adopted by the 9th circuit. The 9th circuit follows Sambo's. And even the equity arguments do not support the Trustee's position.

As to the statute of limitations, this is a defense to the adversary. Beyond that the judgment on the Judgment Creditors' lawsuit was not entered until 3/25/11, the Johnson bankruptcy was filed in July 2011 and the adversary

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**Chapter 11**

was filed in Dec. 2011, which was nine months after the state court judgment. In the complaint, Kaplan alleges that during the lawsuit, Johnson intentionally prevented him from learning or discovering the nature of the lawsuit or its magnitude. It appeared that the Judgment Creditors gave Johnson money for a different entity and not ISW.

Reply

The Trustee repeats his arguments from the motion itself. As to the contention that Kaplan was reserving his right to file a proof of claim until ISW withdrew its claim, that is wholly unsupported by the law. The proof of claim has no presumption of validity. And the adversary complaint is not a proof of claim.

As to the statute of limitations, there is no dispute that it is three years from when Kaplan discovered the cause of action or by reasonable diligence should have discovered it. Unpingco v. Hong Kong Macau Corp., 935 F.2d 1043 (9th Cir. 1991). It is not when the judgment was entered. Here the lawsuit was commenced against ISW in 2005, at which time Kaplan was a 50% owner of ISW and heavily involved in its operations. He admits that he knew of the lawsuit from its initiation. Kaplan asserts in his adversary complaint that Johnson had concealed from him possible liability to the Judgment Creditors when he induced Kaplan to enter into the Shareholder Cross-Purchase Agreement in 1998. Thus, when the lawsuit was filed in 2005, Kaplan found out that Johnson had concealed from him this potential liability of ISW. The burden is on Kaplan to show that he did not discover this and that the failure to discover it was not due to his negligence and that he had no actual or presumptive knowledge of facts that would have put him on notice to inquire.

Once the statute of limitations expired in 12/08, the claim ended.

If the Court does not grant the motion, the Trustee would like this converted to an adversary proceeding and taken to trial without delay. This is needed so that the Trustee can determine the amount to be distributed to general unsecured creditors and whether the Debtor will receive any surplus. Further, even if this is deemed to be a valid informal proof of claim, the Court must determine whether it should be subordinated to other general unsecured

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**Chapter 11**

claims, which requires an adversary proceeding. FRBP 3007(b), 7001(8).

proposed ruling

Deny in part and grant in part. The adversary complaint is sufficient to serve as an informal pleading. This meets the requirements of Sambo's, which is the controlling case.

It seems that the objection to claim and the adversary against Johnson should be handled together. I am not sure that I can "convert" the objection to the claim into an adversary so as to satisfy FRBP 3007(b) if the Trustee decides to seek to subordinate this claim. So the Trustee may need to file a new adversary proceeding and I will handle that and the objection to claim together.

But since the issue here is fraud, etc., won't Kaplan still have to prove his claim by obtaining a judgment in the adversary case against Johnson? It seems that the amount of that judgment (if any) will determine his claim. Therefore it is appropriate to handle the Johnson adversary and the objection to claim together, even if the Trustee does not bring his own adversary proceeding against Kaplan.

As to the equities, Kaplan has made it clear that he is looking to Johnson and the Johnson estate to recover. No one is hurt by this and it is his right as a potential unsecured creditor.

However, the issue of the statute of limitations is a critical first step. It seems that I should set a short discovery schedule and set this one issue for an evidentiary hearing. If the statute of limitations began running anytime before mid-July 2008, the objection to the claim must be sustained and perhaps the adversary proceeding against Johnson must be dismissed.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow

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CONT... **Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

Leslie A Cohen  
Fahim Farivar

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Movant(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

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**1:11-18629 Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

**#7.00** Status Conference re: Chapter 11 Case

fr. 11/17/11, 3/15/12, 4/26/12, 7/26/12, 9/20/12,  
11/1/12, 1/31/13, 2/12/13, 3/5/13, 5/14/13, 5/28/13,  
6/11/13, 8/27/13, 12/17/13, 2/25/14, 3/11/14, 5/6/14,  
11/18/14, 12/1/14, 2/10/15; 4/28/15, 7/28/15, 9/22/15,  
11/17/15, 12/22/15, 1/26/16; 3/15/16, 5/17/16; 7/12/16  
9/13/16

Docket No: 1

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

prior tentative ruling (5/17/16)

Per the status report filed on 5/10/16, the Trustee now believes that his best option is to propose an amended Plan rather than a structured dismissal. The Trustee is in the process of preparing the amended Plan. The Trustee wants all matters continued to 7/12, but does want the status conference to go forward at this time to deal with any questions by the IRS.

prior tentative ruling (3/15/16)

The status report filed on 3/1/16 deals with the new Ninth Circuit opinion of Zachary v. California Bank & Trust, which holds that the absolute priority rule applies in individual chapter 11 cases. [Note that this Court does not agree with the Ninth Circuit holding, but this is not the first time that such has happened and will probably not be the last time. They have the authority and their ruling will be followed.]

Because of this ruling, the Trustee feels that he must reevaluate all potential exit strategies and has started discussions with Judge Jury (the mediator) and the OUST. Thus, the Trustee requests a 60 day continuance.

Continue without appearance to May 17, 2016 at 10:00 a.m.

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10:00 AM

CONT... **Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

prior tentative ruling (11/18/14)

Per the status report filed on 11/4, the Trustee wishes to delay filing an amended plan until after the resolution of the Kaplan Claim Objection. Trail this with the claim objection.

prior tentative ruling (5/6/14)

On 4/14 the Trustee filed a motion to extend his time until 7/31/14 to file a plan and disclosure statement. This is to allow the Franchise Tax Board sufficient time to complete its audit of Internet Specialties West. Until that is done, the Trustee will not know how much this estate will receive from the sale of ISW.

This probably needs to trail with the Kaplan claim.

prior tentative ruling (3/11/14)

Per the status report filed 3/5/14. The main issue remaining is resolving the \$8.6 million claim of Drew Kaplan. The Trustee is investigating the assets of the Estate and is trying to determine if the estate has any interest in Johnson's current company Cyber Resources, Inc. The Trustee intends to file a plan of reorganization.

Continue to 5/6/14 at 10:00 a.m.

prior tentative ruling (1/31)

Jeffrey Golden has been appointed as the Trustee. The motion to dismiss has been withdrawn. On 1/18 the Trustee filed a motion to approve a budget for the Debtors' reasonable living expenses and authorizing the Trustee to pay those. No hearing was set and as of 1/28 there has been no opposition. If there is no opposition, I will enter the the order.

There is an application to employ Mirman, Bubman & Nahmias, LLP as counsel for the Trustee (filed 12/4), but no order was entered and no written objection has been filed. Is there any objection?

I assume that what happens here is contingent on what happens in the ISW case. This status conference should trail that matters in that case.

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**CONT... Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

prior tentative ruling

Pursuant to 11 U.S.C. §§ 105(a) and 1104(a)(1) and (2), the Court will order the appointment of a chapter 11 trustee. Appointment of a chapter 11 trustee is in the interest of creditors, because the debtors have post-petition income, and there is other property of the estate that can be used to provide a distribution to creditors under a chapter 11 plan. Additionally, the debtors have not timely confirmed a chapter 11 plan, and have not complied with Orders setting a deadline to confirm a plan, as well as to file an adequate disclosure statement. Consequently, there is cause to appoint a chapter 11 trustee.

On July 18, 2011, Robert Vilas Johnson and Linda Joyce Johnson ("Debtors") filed a chapter 11 petition.

On October 14, 2011, the Court entered an Order setting a hearing on, *inter alia*, the status of this chapter 11 case. This Order stated that the Court may order the appointment of a chapter 11 trustee at any continued status conference without further notice. Notice of the October 14, 2011 Order and the initial chapter 11 status conference, which was held on November 17, 2011, was served on all creditors.

On November 23, 2011, the Court entered an Order setting a bar date and other deadlines. This Order set a deadline of July 1, 2012 for Debtors to confirm a chapter 11 plan.

On July 26, 2012, the Court held a continued chapter 11 case status conference. On July 27, 2012, the Court entered an Order requiring that, on or before August 23, 2012, Debtors file an amended disclosure statement and chapter 11 plan which rectified the deficiencies identified by the Court on the record at the July 26, 2012 status conference and set forth in Docket No. 79.

Despite an order of the Court, Debtors have not confirmed a plan by July 1, 2012. Additionally, as explained in the Opposition to the First Amended Plan and Disclosure Statement filed by judgment creditors Kenneth Cleveland and William Bickley, Debtors' First Amended Disclosure Statement does not rectify the deficiencies identified by the Court on the record at the July 26, 2012 status conference and set forth in Docket No. 79. Among other things, the First Amended Disclosure Statement does not contain adequate information, particularly with respect

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**CONT... Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

to a feasibility analysis. For example, Debtors have disregarded the Court's instructions that the amended disclosure statement contain projections to demonstrate how Debtors will make the proposed plan payments to unsecured creditors.

Based on Debtors' schedule F, filed on July 29, 2011, Debtors have a substantial amount of unsecured debt held by a significant number of creditors. In their Reply to the Opposition to the First Amended Plan and Disclosure Statement, Debtors state that they anticipate an upcoming sale of an entity (now in receivership) will net the estate almost \$1,000,000. Based on Debtors' schedule B, filed on July 29, 2011, the estate has a 50% equity interest in this entity. This income, in addition to Debtors' other post-petition income, could provide a considerable distribution to unsecured creditors pursuant to a chapter 11 plan.

As a pro rata distribution of any such income would be in the best interest of unsecured creditors, appointing a chapter 11 trustee is appropriate under 11 U.S.C. § 1104(a)(2). Thus, rather than converting or dismissing this case, the Court will order the appointment of a chapter 11 trustee.

The Court will prepare the order.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz

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CONT...

**Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

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10:00 AM

**1:11-18629 Robert Vilas Johnson**

**Chapter 11**

Adv#: 1:11-01679 Kaplan v. Johnson et al

■  
**#8.00** Status Conference Re: Complaint to determine dischargeability of debt [11 U.S.C. §523(a)(2)(A); 11 U.S.C. §523(a)(4) and 11 U.S.C. §523(a)(6)

fr. 2/6/12, 2/12/13, 3/5/13, 5/14/13, 5/28/13, 6/11/13, 8/6/13, 9/17/13, 12/17/13, 2/25/14, 3/11/14; 5/6/14, 11/18/14, 12/2/14, 2/10/15; 4/28/15, 7/28/15, 9/22/15, 11/17/15, 12/22/15, 1/26/16; 3/15/16, 5/17/16; 7/12/16, 9/13/16

Docket No: 1

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

prior tentative ruling (5/17/16)

Because of the *Zachary v. CB&T* case, the Trustee is preparing an Amended Plan. The Trustee requests that this be continued to 7/12/16. Unless Kaplan wants to appear on May 17, continue without appearance to 7/12/16 at 10:00 a.m.

prior tentative ruling (5/6/14)

On 4/22 each side filed its own status report and on 4/28 the Trustee filed his. According to the Plaintiff, he has attempted to meet with counsel for the Trustee and with counsel for Johnson. To no avail. He asserts that the Cross-Complaint alleges claims that belong to the estate and cannot be brought by Johnson. He requests that the Court issue an OSC re dismissal of the cross-complaint.

Defendant's counsel asserts that he met with Trustee's counsel, but Plaintiff's counsel was unavailable to meet. Discovery cutoff has occurred except for Kaplan's written discovery responses, which are due shortly. He anticipates a 3-5 day trial, would like to set this for mediation and have a pretrial conference.

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CONT... **Robert Vilas Johnson**

**Chapter 11**

The Trustee will be ready for trial in October and wishes to take depositions and written discovery. He would like a mediation. He is the successor to the claims in the adversary proceeding and is evaluating his course of action as to those brought by the Debtor.

proposed ruling

We need to talk.

(1) is a formal settlement conference of all issues (including the Kaplan claim in the bankruptcy case) warranted? If so, who should be the mediator?

[There was one formal mediation, but it did not resolve the matter.]

(2) should the Court issue an OSC on the counterclaim, cross-claim, and third party claim? What is left of these?

(3) what remains to be done before I can bring this matter to trial?

(4) when will the remaining Kaplan discovery responses be completed?

(5) what discovery does the Trustee want and does he need to bring a motion to extend the discovery cutoff?

(6) exactly what is the Trustee's involvement? Does he (as the estate) own Johnson's cross-claim and counterclaim? What about the one against ISW where he could be both Plaintiff and Defendant?

(7) how does this fit into the objection to the Kaplan proof of claim?

prior tentative ruling (3/11/14)

The discovery cutoff was extended by stipulation to 2/21/14. No status report has been filed as of 3/10 at 11:30 a.m. Should this trail the objection to Kaplan's claim? I don't think it needs to although that lawsuit will establish the damages amount.

prior tentative ruling (8/6/13)

Continued to 9-17-13 at 10:00 a.m. pursuant to stipulation approved 8-6-13.

prior tentative ruling (6/11/13)

This is resolved by the compromise. Should the status conference be continued to be sure that the order is entered?

prior tentative ruling (2/12)

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**CONT... Robert Vilas Johnson**

**Chapter 11**

This is a §523 action by Kaplan against Johnson, with a counterclaim by Johnson against Kaplan and a third part complaint by Johnson against David Pasternak, Internet Specialties West, and Imagine Technologies. Pasternak has been dismissed as a third party defendant by order entered on 5/10. It appears that all other parties have answered. This was assigned to mediation in May 2012, but obviously has not settled. The status conference has been continued from time-to-time since then.

No status conference report has been received as of 3/3.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Defendant(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Plaintiff(s):**

Drew Kaplan

Represented By  
Teri T Pham

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**CONT... Robert Vilas Johnson**

**Chapter 11**

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By

Jeffrey I Golden (TR)

Ashley M McDow

Michael T Delaney

Fahim Farivar

Andrew P Altholz

Gavin L Greene

Leslie A Cohen

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10:00 AM

**1:11-18629 Robert Vilas Johnson**

**Chapter 11**

Adv#: 1:14-01095 Golden v. Kaplan et al

■

**#9.00** Status Conference Re Complaint for:  
Avoidance of Fraudulent Transfers (Actual Intent);  
Avoidance of Fraudulent Transfers (Constructive  
Fraud); Recovery of Unlawful Corporate Distributions;  
Recovery of Avoided Transfers; and  
Constructive Trust

fr. 7/22/14; 11/18/14; 12/1/14, 2/10/15; 4/28/15,  
7/28/15, 9/22/15, 11/17/15, 12/22/15, 1/26/16; 3/15/16,  
5/17/16; 7/12/16; 9/13/16

Docket No: 1

**Tentative Ruling:**

Continued without appearance to October 25, 2016 at 10:00 a.m.

prior tentative ruling (5/17/16)

Because of the *Zachary v. CB&T* case, the Trustee is preparing an Amended Plan. The Trustee requests that this be continued to 7/12/16. Unless Kaplan wants to appear on May 17, continue without appearance to 7/12/16 at 10:00 a.m.

prior tentative ruling (2/15/15)

On 1/29/15 the Trustee filed a unilateral status report. I am not sure what is being asked of the Court. On Jan. 8, 2015 the Court issued its ruling as to certain issues of the objection of claim, which is tied to this adversary proceeding. The Court ruled that  
(1) the claims for fraud as to both the initial investment and the promises allegedly made in 2005 have been brought within the statute of limitations and are not derivative, but that they have been subordinated to the claims of the other unsecured creditors. and  
(2) the claim was breach of fiduciary duty was brought within the statute of limitations, but is derivative, belongs to the Trustee, and has been waived by the Trustee as part of the settlement.

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CONT... Robert Vilas Johnson

Chapter 11

The status conference on this Kaplan claim has been continued to 3/31/15 at 10:00 a.m.

Continue this status conference on the adversary proceeding without appearance to 3/31/15 at 10:00 a.m. I think that this and the claims objection should proceed together.

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Defendant(s):**

Imagine Technologies, Inc.

Represented By  
Teri T Pham  
Ashley M McDow

Drew Kaplan

Represented By  
Teri T Pham  
Ashley M McDow

**Joint Debtor(s):**

Linda Joyce Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow  
Leslie A Cohen  
Fahim Farivar

**Plaintiff(s):**

Jeffrey I Golden

Represented By

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**CONT... Robert Vilas Johnson**

**Chapter 11**

Michael T Delaney  
Ashley M McDow  
Teri T Pham

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

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10:00 AM

**1:11-22424 Ronald Alvin Neff**

**Chapter 7**

**#10.00** Status conference after remand and vacature of order regarding claim of exemption by Ninth Circuit Bankruptcy Appellate Panel

fr. 5/14/15; 7/23/15; 8/20/15; 10/22/15; 1/14/16; 2/10/16; 2/17/16; 4/13/16  
8/10/16; 8/30/16

Docket No: 87

**Tentative Ruling:**

On 8/30/16, the Court issued its ruling on Douglas DeNoce's Motion for Evidence, Issue Preclusion, Monetary and Contempt Sanctions for Multiple Failures to Obey Court Orders on Answers to Interrogatories ("Motion for Sanctions"). At the hearing on 8/30, the Court allowed Mr. DeNoce to recover his copying costs from the initial objection and from this objection as well as any attorney's fee for consultations concerning the Motion for Sanctions. Dkt. ## 278, 279, 285.

On September 19, DeNoce filed his compilation of costs and fees in connection with discovery motions (dkt. 292). In it he seeks a total of \$1,918.02:

\$578.83 in copying costs

\$256 for court call

\$100.15 for postage

\$208.04 for mileage

\$150 for typist

\$625 for consultation with Law offices of Robert A. Koenig & Associates

Objection

Mr. Kwasigroch objects that this is not under penalty of perjury and thus not evidence. Further, the Court only ordered costs for the two motions, not prior motions or papers.

There was no meet and confer, so the motion on discovery should not have been considered. This is a violation of LBR 7026-1(c). The motions violated

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CONT... **Ronald Alvin Neff**

Chapter 7

FRBP 9013, LBR 9013-1(c), and FRBP 9006(d).

Debtor believes that the appropriate costs should not exceed \$50.

Reply

The Court did not require that these be filed under penalty of perjury. But, if required, the DeNonce will provide a declaration. The objection is boilerplate. DeNoce sent the costs and fee compilation, with a tracking number, which is attached. So there is no doubt that it was received.

DeNoce then reviews the past history that led to this award.

All of the costs are real and proof is attached for each. Additional costs for this reply:

copying - \$0.84

mileage - \$16.56

postage - \$11.45

Proposed ruling:

First of all, the Court is very unhappy that the parties could not work out the amount given how small it is. It certainly cost Mr. Kwasigroch more valuable work time to prepare the opposition rather than just paying the requested amount. And since this is a discovery sanction, he is not required to report it to the state bar. However, an objection was filed and must be dealt with.

Unlike costs after trial, the type of expenses under FRCP 37(b)(2)(C) are not limited to certain categories - only that they be reasonable and that they are connected with actions concerning the discovery that is at issue. In this motion, the costs are clearly within that category. Mr. DeNoce has provided back-up for his claimed expenses. However, he does need to file a declaration under penalty of perjury that these are true and correct copies of receipts, that they are all in connection with the motion filed on 1/5/16 (dkt. 230 and related documents) and/or the motion filed on 7/21/16 (dkt. 259 and related documents), and that he has actually paid these amounts.

Upon receipt of this declaration, to the extent that the amount is substantiated by the declaration, the Court will allow him his original request for \$1,918.02 as a joint and several judgment against Ronald Alvin Neff and his Michael D.

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CONT... Ronald Alvin Neff  
Kwasgroch.

Chapter 7

As to the additional requested amount, that is denied. Although not specified in the order, evidence must be presented under penalty of perjury or it cannot be considered as evidence. Although the balance of the objection may not be valid (for example, the Court is not sure which charges have nothing to do with these two motions) the opposition was at least partially correct.

Upon receipt of the declaration noted above, the Court will prepare the order. The sum is to be paid within 30 days after entry of the order. If the payment is not made, DeNoce may file an Order to Show Cause re: Contempt. At that time the issue will be the ability of Kwasigroch and/or his client to make the payment. If I find that Mr. Kwasigroch has the ability to make the payment and has failed to do so within the 30 day time period, I will apply monetary sanctions and will report him to the State Bar. Thus, I suggest that the payment be made in a timely fashion or, if there is an appeal, that you obtain a stay pending appeal.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Ronald Alvin Neff

Represented By  
Michael D Kwasigroch

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
M Douglas Flahaut  
Aram Ordubegian

United States Bankruptcy Court  
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1:14-15182 Mark Alan Shoemaker

Chapter 7

#11.00 Motion for Order Confirming That  
William H Brownstein & Associates,  
Professional Corporation Have Not  
Been Counsel for the Debtor since  
December 31, 2010

Docket No: 165

\*\*\* VACATED \*\*\* REASON: Advanced to 10/18/16 at 10:00, per order  
entered 9/30/16 (dkt no. 168) - jc

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Trustee(s):**

Alfred H Siegel (TR)

Pro Se

**United States Bankruptcy Court  
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10:00 AM

**1:14-15182 Mark Alan Shoemaker**

**Chapter 7**

Adv#: 1:14-01206 U.S. Trustee v. Shoemaker

■

**#12.00** Status Conference re: Complaint for  
Denial of Discharge Pursuant to  
11 USC 727(a)(2), (a)(3), (a)(4) and (a)(5)

fr. 3/25/15; 5/12/15, 9/1/15, 12/8/15, 12/22/15,  
3/1/16, 6/7/16

Docket No: 1

**\*\*\* VACATED \*\*\* REASON: Advanced to 10/18/16 at 10:00 a.m. per  
order ent 10/5/16 (dkt no. 163) - jc**

**Tentative Ruling:**

Per the joint status conference report filed on 5/16/16, Plaintiff will have completed discover by mid-August and be ready for trial a month later. The trial estimate is 8 hours by Plaintiff and 5-7 days by Defendant. Defendant requests a pretrial and mediation; Plaintiff does not. Mediation will not be of benefit in a §727 action since it is "all or nothing." However, a pretrial would be of help in focusing the issues.

At the status conference on 6/7, let's figure out the best way to prepare this matter for trial. I have a courtroom available for the last two weeks of Spetember. So even if the trial takes as long as Mr. Shoemaker estimates, we can complete it at that time.

Please mark your calendars for trial starting on September 19 and continuing through September 30. Once we see the pretrial, I will be able to release some of those days.

prior tentative ruling (3/1/6)

The discovery cutoff date has passed. The UST has a little work to do as to my proposed ruling on the protective order. Apparently Shoemaker has not responded to discovery requests. If this is so, does the UST plan to do a motion to compel? There will be no more discovery except (1) that already propounded, but not yet responded to and (2) any discovery that reasonably

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CONT... Mark Alan Shoemaker

Chapter 7

arises from information provided in these new responses.

Let's set a date for a pretrial.

<b>Party Information</b>
--------------------------

**Attorney(s):**

Bret D Lewis

Represented By  
Bret D Lewis

**Counter-Claimant(s):**

Mark Alan Shoemaker

Pro Se

**Counter-Defendant(s):**

Alfred H Siegel

Pro Se

Peter C Anderson

Represented By  
Kenneth G Lau

**Debtor(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Defendant(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Plaintiff(s):**

U.S. Trustee

Represented By  
Kenneth G Lau  
Hatty K Yip

**Trustee(s):**

Alfred H Siegel (TR)

Represented By  
Anthony A Friedman

Alfred H Siegel (TR)

Pro Se

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**CONT... Mark Alan Shoemaker**

**Chapter 7**

**US Trustee(s):**

United States Trustee (SV)

Pro Se

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**1:15-12309 Roberta Mackey**

**Chapter 7**

Adv#: 1:15-01221      Gordon et al v. Mackey

▪  
**#13.00**      Defendant's Motion in Limine

Docket No: 123

**Tentative Ruling:**

Off calendar. Heard on 10/11. However, please note that I have now received the declaration of Dr. Krumian and it meets the requirements for the deposition of Jacquelynn Gordon to be used in the place of live testimony.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Roberta Mackey

Represented By  
James R Selth

**Defendant(s):**

Roberta Mackey

Represented By  
David Brian Lally

**Plaintiff(s):**

Jacquelynn Y. Gordon

Represented By  
Ray B Bowen Jr

William M. Gordon

Represented By  
Ray B Bowen Jr

**Trustee(s):**

Nancy J Zamora (TR)

Pro Se

**United States Bankruptcy Court  
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10:00 AM

**1:15-12380 Lanker Partnership**

**Chapter 11**

Adv#: 1:16-01059 Lanker Partnership v. Washington Mutual Bank, FA, a corporation et al

▪  
**#14.00** Status conference and order to show cause re:  
Remand in a removed proceeding

fr. 5/26/16, 6/16/16, 9/15/16(xfr from  
Judge Barash's calendar), 9/13/16

Docket No: 1

**Tentative Ruling:**

The motion for remand was decided by order entered on 7/1/16, dkt. 30. The issues concerning First American Title Insurance Co. have been remanded to the superior court. As to all other defendants, the motion for remand has been denied.

Per the joint status report filed on 10/11/16, the parties agree to a discovery cutoff of 1/17, with a 1-3 day trial to begin in March. A pretrial conference is requested for some date after 1/15/17. Plaintiff wishes to mediate. Defendant does not indicate a preference. Plaintiff consents to a final judgment in the bankruptcy court, Defendant does not.

As I understand the basic issue in this case, the Lanker Partnership purchase a single family residence to sell or rent, paid \$400,000, and then had an offer to buy it for \$600,000. There was a title insurance policy which showed no liens. However, during the due diligence period it was discovered that WAMU had a trust deed executed by Youval Ziv (apparently a prior owner) for \$980,000. Lanker made demand on the title insurance policy, but that was turned down. The lawsuit against the title insurance company has been remanded, but the suit against WAMU, etc. is continuing in this court for negligently recording (failing to record?) the trust deed prior to the Lanker purchase.

It appears that copies of all of the state court papers have not been filed in this adversary proceeding. See LBR 9027-1(d). Please do so at once. Also,

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10:00 AM

CONT... **Lanker Partnership**

**Chapter 11**

has the remaining defendant(s) filed a response to the complaint such as an answer?

**Party Information**

**Debtor(s):**

Lanker Partnership

Represented By  
Charles Shamash  
Joseph Caceres  
Nedda Haeri  
Stuart I Koenig

**Defendant(s):**

Deutsche Bank National Trust Compan

Represented By  
Matt Nazareth  
Shiva D. Beck

Select Portfolio Servicing, Inc.

Represented By  
Matt Nazareth  
Shiva D. Beck

Quality Loan Service Corporation, a co

Represented By  
Matt Nazareth

Washington Mutual Bank, FA, a corpor

Represented By  
Matt Nazareth  
Shiva D. Beck

DOES 1-100

Pro Se

**Plaintiff(s):**

Lanker Partnership

Represented By  
Joseph Caceres  
Stuart I Koenig

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:15-12380 Lanker Partnership and First American Title Insurance Comp Chapter 11**

**#15.00** Scheduling and case management conference re  
Chapter 11 Voluntary Petition

fr. 8/11/15, 12/15/15, 4/26/16; 4/27/16, 9/13/16(xfr  
from Judge Barash calendar); 9/13/16

Docket No: 1

**Tentative Ruling:**

Per the status report filed on 9/6/16, Debtor is employing a new special counsel for the adversary proceeding. The adversary proceeding should go to trial in the early spring.

This should trail the adversary proceeding. I will continue it to the same date as the continued status conference on cal. #14. No appearance is necessary on 10/25/16 by counsel for the Debtor in the main case since the adversary has special counsel.

prior tentative ruling (9/13/16)

It looks like this should be continued to 10/25 because of the continued status conference on the adversary proceeding. Although the status report filed 9/6 requests a longer continuance, I would like to keep this together with the adversary.

Continue without appearance to 10/25/16 at 10:00 a.m. No further status report is required for that hearing.

**Party Information**

**Debtor(s):**

Lanker Partnership

Represented By  
Charles Shamash  
Joseph Caceres  
Nedda Haeri  
Stuart I Koenig

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:15-14213 Michael Robert Goland**

**Chapter 7**

Adv#: 1:16-01052 Triple Images, LLC v. Goland

▪  
**#16.00** Motion to Dismiss Adversary Proceeding Objecting  
to Dischargeability of Debt 11 USC Section 523(a)(6)

fr. 9/7/16(xfr from Judge Kaufman's calendar); 9/13/16,  
9/27/16

Docket No: 17

**\*\*\* VACATED \*\*\* REASON: Stip. Dismissal entered 10/19/16 (eg)**

**Tentative Ruling:**

This is trailing the Wicklund settlement motion. Continue without appearance  
to 11/15/16 at 10:00 a.m.

prior tentative ruling (9/13/16)

Per Debtor's counsel, settlement stipulation will be filed. Based on counsel's  
representations, the motion to dismiss will be continued to September 27,  
2016 at 10:00 a.m. If the case settles, the hearing will be taken off calendar.

**Party Information**

**Debtor(s):**

Michael Robert Goland

Represented By  
David S Hagen

**Defendant(s):**

Michael Goland

Represented By  
David S Hagen

**Movant(s):**

Michael Goland

Represented By  
David S Hagen

**Plaintiff(s):**

Triple Images, LLC

Represented By  
Christopher Delaplane

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

**Tuesday, October 25, 2016**

**Hearing Room 303**

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10:00 AM

**CONT... Michael Robert Goland**

**Chapter 7**

**Trustee(s):**

Diane Weil (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:15-14213 Michael Robert Goland**

**Chapter 7**

Adv#: 1:16-01052 Triple Images, LLC v. Goland

▪  
**#17.00** Status conference re: first amended  
complaint to determine non-dischargeability  
of debt under 11 USC 523(a)(6)

fr. 6/8/16, 8/24/16(xfr from Judge Kaufman's calendar); 9/13/16,  
9/27/16

Docket No: 16

**\*\*\* VACATED \*\*\* REASON: Stip. Dismissal entered 10/19/16 (eg)**

**Tentative Ruling:**

This is trailing the Wicklund settlement motion. Continue without appearance  
to 11/15/16 at 10:00 a.m.

**Party Information**

**Debtor(s):**

Michael Robert Goland

Represented By  
David S Hagen

**Defendant(s):**

Michael Goland

Represented By  
David S Hagen

**Plaintiff(s):**

Triple Images, LLC

Represented By  
Christopher Delaplane

**Trustee(s):**

Diane Weil (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
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Tuesday, October 25, 2016

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10:00 AM

1:16-11537 Tessie Cue

Chapter 11

#18.00 Motion to Reconsider Dismissal of Case

Docket No: 93

**Tentative Ruling:**

Tessie Cue ("Cue" or the "Debtor") moves for reconsideration of this Court's order dismissing Cue's chapter 11 case (the "Dismissal Order"), pursuant to Fed. R. Civ. P. 60(b)(6) and Bankruptcy Code §105(a).

**Service:** Appears to be in order. The motion was timely served on Ansett Aircraft Spares & Services, Inc. ("Ansett"), the US Trustee, Franklin Tan, Lufthansa Technik Philippines, and the Debtor's secured creditors.

**Background:**

Cue filed for chapter 11 relief on May 23, 2016.

On July 14, 2016, Ansett filed a motion for dismissal of Cue's chapter 11 case pursuant to Bankruptcy Code §1112(b) (the "Motion to Dismiss") [dkt. 39]. The Debtor opposed this motion to dismiss [dkt. 44]. After an August 30, 2016 hearing, the Court entered an order dismissing this chapter 11 "for the reasons set forth by the Court on the record of the hearing and in the Court's tentative ruling . . . ." (the "Dismissal Order") [dkt. 89 at 2:7-8]. The Court's tentative ruling on the Motion to Dismiss was entered on to the docket (the "Tentative Ruling") [dkt. 84].

The factual background of this matter is set forth in the Tentative Ruling and all defined terms used but not defined herein are as defined in the Tentative Ruling.

**Motion** – Cue argues as follows:

Fed. R. Civ. P. 60(b)(6) (applicable though Fed. R. Bankr. P 9024) provides for relief from an order for "any other reason that justifies relief. . . ."

Ansett did not seek dismissal of Cue's case based on a lack of value of Cue's shares to satisfy her debts. Since Ansett did not present share

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CONT...

Tessie Cue

Chapter 11

valuation data to this Court, Cue did not present share valuation data to this Court. Nevertheless, the hearing on the Motion to Dismiss focused on the value of Cue's Ansett shares. The Court raised *sua sponte* whether there would be third party purchasers who might provide a source of funds sufficient to pay creditors upon the disposition of Cue's appeal. Focusing on the availability of third party purchasers at some point in the future misses the boat: the issue is the value of Cue's Ansett shares relative to her ability to satisfy (i) any of Ansett's judgment that may be affirmed on appeal and (ii) her only other unsecured obligation – to Franklin Tan ("Tan").

Ansett valued Cue's Ansett shares at approximately \$5.9 million as of June 30, 2015. Ansett's Judgment against Cue is for approximately \$1.8 million. Tan's claim is \$700,000 (principal).

Ansett failed to provide the Court with an accurate record of the underlying proceedings. Cue has a statutory right of access to Ansett's books and records pursuant to Cal. Corp. Code §1601. Cue removed her state court lawsuit to this Court in order to enforce such right. The value of Cue's Ansett shares is a primary issue in Cue's chapter 11 and it is imperative that this Court allow Cue to vindicate her statutory rights, given that it affects her ability to satisfy Ansett's claim.

The May 2012 state court injunction is immaterial to the Motion to Dismiss. One, the injunction did not enjoin Cue from disposing of her assets as she saw fit. Two, the injunction is no longer in effect. Three, Cue donated a large sum to a religious charity prior to bankruptcy with a belief that the Ansett shares would be sufficient to satisfy Ansett's Judgment against her. Prior to the filing this chapter 11, Cue offered to pledge her Ansett shares pending resolution of the appeal of the Judgment, but Ansett unreasonably demanded that the value of Cue's shares (which had originally been set by Ansett) should be reduced by 25% and that these shares should also secure the judgment against Majestic (even though there has been no finding of *alter ego* liability and the judgment is several).

Opposition – Ansett argues as follows:

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CONT...

**Tessie Cue**

**Chapter 11**

In the Ninth Circuit, Rule 60(b)(6) is used sparingly, applied only as necessary to prevent manifest injustice, and requires a very high threshold of proof. Cue has not met this standard.

Cue's excuse for reconsideration - that the value of her shares is sufficient to satisfy Ansett's judgment - has already been raised and argued by Cue and rejected by this Court as a basis for denying the Motion to Dismiss. This is clear from both the Tentative Ruling and the record of the hearing on the Motion to Dismiss [dkt. 86]. In fact, in reaching its decision the Court assumed that Cue's Ansett shares were worth more than what Cue is currently claiming.

The fact that these shares are ultimately worth what a buyer is willing to pay was not raised *sua sponte* at the hearing. Ansett had raised this argument in response to Cue's argument that a valuation of the Shares was critical to her bankruptcy.

The Court dismissed this case because Cue commenced it for an improper purpose - solely to delay collection of a judgment - and because Cue had engaged in extensive prepetition fraudulent transfers. The Tentative Ruling and the Court's comments at the hearing made it clear that the Court does not trust Cue. Nothing in Cue's motion to reconsider calls these findings into question. Cue's inconsistent statements in her pleadings [which are detailed in the Opposition] support the Court's conclusion that Cue is untrustworthy.

Cue's argument that she can satisfy Ansett's judgment further supports dismissal, because it shows she filed for an improper purpose.

Neither Tan's claim nor Cue's action to inspect Ansett's books and records supports reconsideration of the Dismissal Order.

Cue's argument regarding the continued enforceability of the Superior Court injunction is misplaced. Ansett did not argue that the Superior Court injunction barred Cue from disposing of assets, but rather that the Superior Court judge had found Cue's testimony to be "wholly incredible" and that the timing of events in the Trade Secret Litigation made it clear that Cue's transfers of funds overseas were intentionally fraudulent.

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CONT...

**Tessie Cue**

**Chapter 11**

Cue's characterization of her settlement discussions with Ansett are misleading, as they fail to disclose a number of strings that Cue placed on her offer to pledge her Ansett shares.

Lufthansa Technik Philippines joins in Ansett's opposition.

Reply – Cue argues as follows:

Cue is not seeking to rehash issues already decided by the Court; the only issue brought for reconsideration is whether Cue's Ansett shares will be sufficient to satisfy the claims of Cue's creditors. The Debtor is not claiming that the Court did not consider this issue, but rather that the Court erroneously focused on whether there would be third parties who might be willing to buy Cue's shares so she can use the funds to pay creditors. The question *should* be whether Cue's Ansett shares will be available to satisfy Ansett's Judgment if it is affirmed. The answer is yes – the shares are worth at least \$5.895 million (using Ansett's own math), while the Judgment is \$1.8 million (and Tan's claim – the only other unsecured claim - is \$700,000). Ansett will happily take those shares, as obtaining them has been its long-time goal.

Thus, Cue's Ansett shares are sufficient to pay all creditors. The Debtor has no control over the depreciation of this asset and no way to abscond with them. Ansett is secure on its judgment pending appeal.

Even if the Court finds that the circumstances set forth in this motion do not satisfy the standards of Rule 60(b)(6), the Court can always grant relief under §105(a).

Analysis

Rule 60(b)(6) and §105(a) both require an extremely high threshold for relief. However, the court does not need to consider these standards, as Cue has not shown *any* real grounds for reconsideration of the Dismissal Order.

This Court had already considered the argument advanced in Cue's

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CONT...

Tessie Cue

Chapter 11

motion to reconsider – that the value of Cue’s Ansett shares was sufficient to cover Cue’s obligations to Ansett and that the action to value these shares is central to Cue’s chapter 11 – when it found cause to dismiss Cue’s chapter 11 case. Furthermore, the value of the shares was not relevant to the Court’s reasons for dismissing Cue’s chapter 11.

It is very clear from the Tentative Ruling that this court granted the Motion to Dismiss and entered the Dismissal Order as a result of a "troubling" history of pre-petition transactions [dkt. 84 at 20:14-22:25]. The Court found the approximately \$1 million transferred overseas to a charity controlled by the Debtor to be fraudulent transfers and cause for dismissal under §1112(b). Her failure to disclose and misrepresentation of certain real estate transactions with her family were also found to be cause. The record of the August 30, 2016 hearing on the Motion to dismiss confirms that the Debtor’s lack of trustworthiness evidenced by these transactions, as well as her use of bankruptcy to effectively stay execution of the Judgment pending appeal, were the reasons for dismissal [dkt. 86 at 20:3-19].

In her reply, Cue appears to suggest that, given the value of the Shares, Ansett is "oversecured" and thus has not been harmed by fraudulent transfers. The reply also argues that Ansett (and other creditors) would not be harmed by a continued chapter 11, because "there is no way for the Debtor to ‘abscond’ with" the Shares. [Dkt. 98 at 3:2.] None of this changes the Court’s conclusion that Cue’s fraudulent transfers of money overseas and failure to properly disclose certain family real estate transactions were cause for dismissal under §1112(b).

Proposed ruling: Motion to reconsider denied.

<b>Party Information</b>
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**Debtor(s):**

Tessie Cue

Represented By  
Stella A Havkin

**United States Bankruptcy Court  
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10:00 AM

**1:16-11538 Majestic Air, Inc.**

**Chapter 11**

**#19.00** Motion for Authority to Use Cash Collateral

Docket No: 89

**Tentative Ruling:**

At the time that the case was filed, Debtor had the following:

cash collateral

\$4,500 at Chase

\$15,935 in recent accounts receivable

\$51,099.69 in old accounts receivable which are believed to be uncollectible

Inventory of about \$35,000

non-cash collateral assets

\$10,403.45 security deposit with the landlord

LTP's inventory on consignment in approximate value of \$220,000

Debtor asserts that Ansett does not have a lien on the security deposit or on the proceeds of sale of the LTP inventory (of which Debtor receives 40% of the sale price with the balance being deposited into a separate account).

Debtor has not and will not sell any of its existing inventory, which is subject to Ansett's lien. Debtor has been buying new inventory and operating through the sale of the LTP inventory and collection of its accounts receivable.

Debtor sets forth a budget and requests consent to use the cash collateral to operate under the budget with a 15% upward leeway.

In order to provide adequate protection for Ansett's per-petition lien, the Debtor will not sell its inventory valued at \$35,000, but will store it. Thus the only cash collateral that the Debtor will be using is the \$15,935 in accounts receivable and the \$4,500 in cash that was in the bank at the time that the case was filed.

Debtor is reducing her proposed salary to \$2,000 per month.

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CONT... Majestic Air, Inc.

Chapter 11

Ansett Opposition

Debtor can only reorganize if it prevails on the appeal of the Ansett judgment. In the meantime it is losing money. There is no evidence that the further use of cash collateral will not put it in a worse position than it was at the time it filed for bankruptcy.

However, if the Court is inclined to allow the use of cash collateral, Ansett requests the following conditions:

- (1) a replacement lien on all assets to the extent of any diminution in its security interest as of the petition date;
- (2) a budget deviation limited to 10% per line item;
- (3) that this be only for a three month period and that the Debtor must file a budget-to-actual comparison in connection with its next motion for use of cash collateral; and
- (4) the parties reserve any and all rights and arguments related to the extent and priority of Ansett's judgment lien and any other asserted interests in cash collateral.

It should be noted, that Ansett asserts that its lien attaches to both the landlord's security deposit (if it is returned) as it is an account receivable, and to the good consigned by LTP. Minimally, Ansett holds a first-priority lien in the portion of the proceeds from the LTP goods to which the Debtor claims an entitlement. Ansett does not wish an immediate determination of the rights of LTP and Ansett to the proceeds, it just wants to preserve its rights pending the use of cash collateral.

LTP Opposition

LTP joins the Ansett opposition.

DIP Reply

The consigned LTP part take up at least 85% of the warehouse space and incur significant expenses for insurance, overhead and maintenance as to the warehouse. There is low demand for these parts and year-to-date the sales have totalled only about \$13,860. This is due to both the fact that these are for older type planes and because they do not have the necessary documents tracing their origin. Debtor will not be maintaining these parts and will be

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CONT... **Majestic Air, Inc.**

**Chapter 11**

moving to a smaller facility at lower cost.

This is particularly true since the rent increase will be 200% as of 11/30. Once the LTP inventory is fold and shipped out, Debtor only needs about 100 square feet for its operations. This would cost about \$1,200 per month, including CAM charges and property taxes. The insurance costs and maintenance costs will also be decreased.

The Debtor will be filing a motion to sell the LTP parts. It has an offer for \$95,000. Packing and shipping will cost about \$20,000 and Debtor will retain 40% of the net proceeds (about \$30,000).

The security deposit belongs to Debtor's current landlord. Because there is wear and tear on the building, it is unlikely that any of it will be refunded.

The Debtor is willing to have a three month review of the cash collateral status. Once the move is complete, the Debtor will submit an amended budget.

Proposed Ruling

Grant the motion with a 10% leeway through 1/20/17. Grant a replacement lien on the accounts receivable, security deposit, and cash. Grant a replacement lien on the LTP proceeds to the extent that it is later determined that Ansett has a lien on these. This must be determined soon as the LTP inventory will be sold. By 1/10/17, Debtor is to file an updated accounting showing the use of the money through 12/31/16, along with a proposed budget for through 3/31/17.

**Party Information**

**Debtor(s):**

Majestic Air, Inc.

Represented By  
Stella A Havkin

**United States Bankruptcy Court  
Central District of California  
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10:00 AM

**1:16-11538 Majestic Air, Inc.**

**Chapter 11**

**#20.00** Motion for Setting Insider Compensation

fr. 8/4/16(xfr from Judge Tighe's calendar); 8/30/16,  
9/27/16

Docket No: 26

**Tentative Ruling:**

Per the motion to use cash collateral, Ms. Cue has reduced her request to \$2,000 per month. There does not appear to be an objection to this amount.

prior tentative ruling (9/27/16)

Tessie Cue, president of the Debtor, seeks compensation of \$10,716/mo (paid twice a month - improperly denominated as being "every two weeks"). This would come from the net profits of the business and is a salary reduction of \$877 per month. It is unclear, but it appears that from January through May 2016, she received a total of \$28,848 in salary.

On 9/15/16, Ms. Cue filed a supplemental declaration that Majestic's inventory which existed at the time of filing is still at Majestic's office and that none of it has been sold. However, Majestic has been selling the Lufthansa inventory pursuant to stipulation with Lufthansa and Ansett could not have had a lien on the Lufthansa inventory since Majestic is only a consignee.

Response of Ansett

The money used to pay compensation is cash collateral of Ansett and so a motion to use cash collateral must be filed. Ansett has a perfected judgment lien on the Debtor's personal property including inventory, equipment, accounts receivable, cash and proceeds thereof. In dkt. #22, Majestic stated that it would file a motion for use of cash collateral. But it has not done so.

As to the assertion that Majestic is only selling inventory consigned by Lufthansa Technik Philippines (LTP), no admissible or credible evidence is provided in support thereof. Further, in amended Schedule A the Debtor shows \$220,000 consigned by LTP, but in the most recent MOR it states that

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CONT... **Majestic Air, Inc.**

**Chapter 11**

Debtor has generated revenues of \$600,241 as of 8/31/16 (for a net loss).

According to the stipulation between the Debtor and LTP, the Debtor cannot use the proceeds from the sale of the LTP consigned inventory. These must all be held in a bank account pending resolution of Majestic's claims against LTP. Since these cannot be used, the insider compensation must come from Ansett's cash collateral.

There is no evidence that the requested compensation is reasonable. Ms. Cue is the President and sole owner of the Debtor. She did not start paying herself any compensation until a few days after Ansett's judgment was entered. Then she started paying herself \$5,769.60/mo, which is only about half of what she requests in this motion. Since she claims that she only pays herself when there are sufficient funds and not when the Debtor "had a limited cash flow," there should be no ongoing compensation since the Debtor has operated at a net loss since the Petition Date.

No reply received as of 9/25/16.

Proposed Ruling

The cash collateral issue must be resolved. Once that is done, there should be a reasonable compensation based on actual work done, etc.

<b>Party Information</b>
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**Debtor(s):**

Majestic Air, Inc.

Represented By  
Stella A Havkin

**Movant(s):**

Majestic Air, Inc.

Represented By  
Stella A Havkin

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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**1:16-11538 Majestic Air, Inc.**

**Chapter 11**

**#21.00** Motion for an Order Authorizing Debtor to Enter into Postpetition lease of Nonresidential Property Pursuant to FRBP 6004(a), 11 USC Section 363(b) and LBR 6004-1(d)

Docket No: 72

**Tentative Ruling:**

Majestic Air operates from Chatsworth. At the premises, it stores a large inventory of LTP materials, which is has on consignment, as well as some of its own inventory. The current lease on Superior St. expires in 11/16. The renewal terms would be \$6,576.90 with a 36 month length. The Debtor found other premises in Simi Valley for \$5,575.15 for a two year term. Cue and her husband would be guarantors and there would be two months of rent as a security deposit.

Ansett opposes on the ground that the Debtor cannot demonstrate that it has any prospect of reorganizing. The exclusivity period has expired and no proposed Plan and Disclosure Statement have been filed. The Debtor is losing money post-petition on a cumulative basis. There are also accrued administrative expenses, fees, and insider compensation that must be paid. Being tied to a new two year lease would create a large administrative claim if the Debtor cannot reorganize.

Further, no copy of the proposed lease has been provided, just a proposal. Relocation costs are missing. There is no discussion of possible improvements.

LTP joins the Ansett opposition.

Reply

The proposed lease is attached. The other parts of the reply are the same as for the reply on the motion to use cash collateral. They show that there will be a substantial savings, smaller square footage, sale of all LTP inventory.

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CONT... Majestic Air, Inc.

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Proposed Ruling

The Court has a major concern as to the viability of this business. From the operating report filed on 10/13/16, it appears that the Debtor has a small net gain for September (\$495.99), which will be more than eaten up by the salary of \$2,000 to be paid to Ms. Cue. Since filing there is a total net loss of \$1,842.17. The issue here is the future of this business.

Forgetting the Ansett judgment for the moment, we are talking about a two year period. What will change to let the Debtor start making a profit?

**Party Information**

**Debtor(s):**

Majestic Air, Inc.

Represented By  
Stella A Havkin

**United States Bankruptcy Court  
Central District of California  
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**1:16-11538 Majestic Air, Inc.**

**Chapter 11**

**#22.00** Status and Case Management Conference

fr. 8/4/16(xfr from Judge Tighe's calendar); 8/30/16,  
9/27/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Majestic Air, Inc.

Represented By  
Stella A Havkin

**United States Bankruptcy Court  
Central District of California  
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Judge Geraldine Mund, Presiding  
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**Tuesday, October 25, 2016**

**Hearing Room 303**

10:00 AM

**1:16-11670 The Automart, Inc.**

**Chapter 11**

Adv#: 1:16-01098 West Marine Products, Inc v. The Automart, Inc. et al

■  
**#23.00** Motion to Dismiss Plaintiff's First Amended Complaint

fr. 8/30/16; 9/13/16, 10/11/16

Docket No: 27

**Tentative Ruling:**

**Service:** Ok.

**Procedural Background:**

On March 25, 2016, West Marine Products, Inc. ("West Marine" or "Plaintiff") filed a complaint against Debtor The Automart, doing business as Associated Marketing Concepts ("Defendant" or "AMC") and Martin Spiegel, AMC's former president, in the California Superior Court.

On June 6, 2016, Defendant AMC filed a voluntary Chapter 11 petition. On July 15, 2016, Defendant AMC filed a notice of removal in the U.S. Bankruptcy Court and a copy of the notice of the state court action pending in the Superior Court.

On August 11, 2016, Plaintiff filed a First Amended Complaint ("FAC"). The FAC added a fourth cause of action for trade defamation, as well as a new defendant Scott Spiegel, the current president of AMC.

**First Amended Complaint:**

**Summary of the FAC**

Plaintiff West Marine is a retailer of marine related products and gear. Defendant AMC sells folding bicycles that can be stored on boats and used while at a dock or in port. Plaintiff had entered into a contract with Defendant AMC to purchase these bicycles. Plaintiff purchased two of the models from Defendant AMC to resell in its retail stores and on its website.

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CONT... The Automart, Inc.

Chapter 11

In or about October 2013, the Consumer Product Safety Commission determined that certain of the AMC bicycles were defective, including the two models purchased by West Marine. As a result, both models were recalled. Plaintiff contends that the contract between it and AMC contemplates a recall. According to Plaintiff, in the event of a recall, Defendant must pay AMC for its expenses. Plaintiff contends the recall costs total approximately \$610,000. Moreover, Plaintiff contends Defendant AMC acknowledged its liability.

Despite AMC's acknowledgement of liability, AMC has failed to pay its remaining obligations to Plaintiff. Per Plaintiff, AMC owes approximately \$475,000, in addition to legal fees and costs. Plaintiff contends AMC has not acted in good faith and alleges AMC's bankruptcy was not filed in good faith.

Subsequent to the recall, AMC and West Marine amended their Terms and Conditions ("T &C") clause of their contract. In Schedule I of the T & C, AMC expressly acknowledged its debt and West Marine agreed to accept 1,200 units of a new model of bicycle in exchange for a partial offset of the debt owed to Plaintiff. However, over the course of the next couple of years, tensions continued to increase between AMC and West Marine. For instance, the quality of the newer bicycle was also deficient which ultimately caused further relationship issues between Plaintiff and its customers. Plaintiff contends despite the tensions, it still attempted to work with AMC to find a satisfactory resolution.

On August 17, 2015, Martin Spiegel, AMC's then president, informed West Marine that it would be filing bankruptcy within days if it was forced to pay the West Marine debt. Unable to reach an agreement, West Marine demanded payment of the full debt on October 29, 2015.

**Trade Defamation Allegations**

On June 1, 2016, AMC and Scott Spiegel issued a press release regarding the litigation between AMC and West Marine. The statements in the press release regarding West Marine and its involvement in the recall

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deem West Marine as a malicious wrongdoer. The statements are false and hurt West Marine's trade relationships with its suppliers. West Marine contends that AMC and Scott Spiegel "knowingly publicized these false statements in order to harm West Marine's business." See, *First Amended Complaint*, p. 9.

**Alter Ego Allegations**

West Marine alleges that there are grounds to pierce the corporate veil of Defendant Automart and hold Martin Spiegel liable for the debts of Defendant Automart. West Marine asserts that Automart was operated by Martin Spiegel as his alter ego. West Marine contends the following:

- That Martin Spiegel was the sole officer and director of Defendant;
- That Scott Spiegel, Martin's son, assumed 95% ownership of the company upon Martin's retirement;
- Martin Spiegel, the Spiegel Family Trust, and Automart shared the same mailing address;
- Scott Spiegel testified that Martin had not taken a salary in years and that the company had been struggling for a long time. However, bankruptcy documents show he's taken up to \$7,000 per month.
- Martin Spiegel operated Automart without observing any required corporate formalities.

**First Claim for Relief: Breach of Written Contract against  
Automart and Martin Spiegel**

West Marine has fully performed all of its duties to Defendants. Defendants confirmed their liability and their duty to pay their obligation to West Marine. A total of \$475,000 plus attorney's fees remain due and owing

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to West Marine. However, Defendants have failed to make payment. Due to Defendants' breach, West Marine has suffered damages.

**Second Claim for Relief: Promissory Estoppel against Automart and Martin Spiegel**

Defendants, on several occasions, confirmed their liability and promised to pay West Marine. West Marine relied on Defendants representations. However, the amount of \$475,000 remains due and owing.

**Third Claim for Relief: Unjust Enrichment against Automart and Martin Spiegel**

West Marine paid for the bicycles that were ultimately recalled. Defendants confirmed their liability. However, there remains due and owing to West Marine the sum of at least \$475,000. Thus, it would be unjust for Defendants to retain the benefit they've received from West Marine.

**Fourth Claim for Relief: Trade Defamation against Automart and Scott Spiegel**

Defendants made false statements in the June 1, 2016 press release. These statements were disparaging of West Marine's business. Defendants knew these statements were not true. These statements caused West Marine to suffer harm to its business.

**Motion:**

Defendants argue that West Marine has wrongly accused Martin Spiegel and Scott Spiegel and therefore all causes of action as to Martin and Scott Spiegel should be dismissed. Moreover, Defendants assert that the second, third and fourth causes of action should be dismissed as to all Defendants. Defendants contend this is a simple breach of contract case and that is all it is.

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Defendants contend that West Marine and AMC have been in a business relationship for years. However, approximately three years ago, their business relationship began to endure tension due to a product recall by Consumer Product Safety Commission ("CPSC"). Defendants contend the recall was instigated by West Marine's reporting of cracked bicycle frames on three of its bicycles. As time progressed, the parties disagreed with the severity of this situation. Defendants explain tense meetings between West Marine's executives and in-house counsel and AMC. Moreover, Defendants contend that West Marine consistently failed to share crucial information concerning the recalled bikes. Also, West Marine failed to provide AMC with the salvageable parts of the bikes which AMC estimates were valued in excess of \$100,000. Without this crucial information from West Marine, Defendants contend it cannot determine whether it continues to hold remaining liability for the recall.

Defendants believe much of this litigation is being driven by personal animosity of West Marine's in-house counsel and certain of West Marine's buyers toward Martin Spiegel. Also, Defendants allege that West Marine actually suggested that if Martin Spiegel was no longer the owner of AMC, then the West Marine product buyers would start buying products again from the business. As a result of this suggestion, Martin retired and Scott Spiegel (95% ownership) and James Collins (5% ownership) took over a newly formed business called A2Z.

Defendants argue West Marine's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, on the following grounds:

1<sup>st</sup> Claim for Relief for Breach of Contract

First, Defendants argue the FAC fails to state a cause of action for breach of contract against Martin Spiegel. Defendants contend that West Marine cannot allege any facts that establish the first element for a breach of contract action (existence of a contract between plaintiff and defendant) against Martin Spiegel because he is not a party to the contract. Moreover,

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this claim against Martin is not saved by including alter ego allegations because West Marine's factual allegations with respect to alter ego do not establish an alter ego claim. Furthermore, West Marine alleges Automart was entirely owned by the Spiegel Family Trust so there cannot be an alter ego claim against Martin. Thus, West Marine has not and cannot demonstrate that Martin Spiegel breached the contract.

2nd Claim for Relief for Promissory Estoppel

Defendants contend that this cause of action must fail because Plaintiffs fail to allege any new facts that differ from the breach of contract claim. Defendants rely on *Horne v. Harley-Davidson, Inc.*, 660 F. Supp. 2d 1152, 1163 (C.D. Cal. 2009) for the proposition that "plaintiff has not alleged any new facts with respect to its cause of action for promissory estoppel and there is no basis for maintaining this cause of action in addition to the cause of action for breach of contract." *Motion*, p. 18.

3<sup>rd</sup> Claim for Relief for Unjust Enrichment

Defendants contend that this cause of action is not a valid cause of action in the state of California. See, *Melchior v. New Line Productions, Inc.*, 106 Cal.App.4<sup>th</sup> 779, 793 (2003) (stating that "there is no cause of action in California for unjust enrichment.") Therefore, Plaintiff's cause of action should be dismissed.

Even if the Court finds unjust enrichment exists under California law, Defendants contend Plaintiffs have failed to plead this cause of action with particularity. For instance, with respect to AMC, a binding contract existed between the parties. Therefore, any benefits received by AMC cannot be considered unjust enrichment. Further, with respect to Martin Spiegel, the unjust enrichment claim must also fail because Plaintiffs failed to establish alter ego theory.

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4<sup>th</sup> Claim for Relief for Trade Defamation

Defendants contend this cause of action is not a valid cause of action in the state of California. However, even if Plaintiff intended on pleading a cause of action for trade libel or defamation, Plaintiff has failed. The statements in the press release are truthful statements of opinion concerning a contract between Defendants and Plaintiff. *Citing, Baker v. Los Angeles Herald Exam'r*, 42 Cal.3d 254, 260 (1986) ("Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected.") These statements are not disparaging statements concerning Plaintiff's "quality of services or a product of their business." Further, while Plaintiff states it suffered damages, it does not allege the necessary special damages for a trade libel cause of action.

Finally, Plaintiff cannot establish any liability against Scott Spiegel. Plaintiff cannot prove Scott Spiegel made any statements as an individual and cannot prove liability based on an alter ego theory. Therefore, the claim against Scott Spiegel should be dismissed.

**Opposition:**

In its Opposition, Plaintiff argues as follows:

First, the claims for promissory estoppel and unjust enrichment have been adequately pled. "Although relief may not be granted upon an equitable ground when a valid contract exists, it is well-established that a party may plead alternative theories that are inconsistent with one another." *Mendoza v. Rast Produce Co.*, 140 Cal. App. 4<sup>th</sup> 1395, 1403 (2006). While Defendants rely on *Walker v. KFC Corp*, 728 F.2d 1215, 1220 (9<sup>th</sup> Cir. 1984), Defendants' reliance on Walker is misplaced. Promissory estoppel is inapplicable only where the breach of contract claim is established. Until Defendants stipulate that a valid contract existed or there is a finding establishing a valid contract, promissory estoppel may be pled in the alternative.

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As for the unjust enrichment claim, the FAC alleges Defendants received hundreds of thousands of dollars from Plaintiff for its bikes. Thus, a benefit was conferred upon Defendants. Therefore, Plaintiff argues that should the contract be deemed invalid, an alternative theory such as unjust enrichment would be proper. Also, as to Defendants' argument that unjust enrichment is not a proper cause of action in California, this is untrue. There is a split in California courts regarding unjust enrichment. The court in *Quid.me, Inc. v. Schrom* noted that "California courts have held that a plaintiff may state a claim for unjust enrichment, particularly where their claim seeks restitution where other remedies are inadequate." *Quid.me, Inc. v. Schrom*, 2013 WL 4833990, \*6 (S.D. Cal. Sept. 9, 2013).

The allegations concerning alter ego have been sufficiently pled. To adequately plead alter ego, a plaintiff must plead the following two key elements: (1) unity of interest; and (2) an inequitable result. With respect to the unity of interest element, the FAC specifically alleges Martin Spiegel dominated Automart; was its sole officer; took up to \$7,000 monthly from Automart to pay for personal expenses; and shared the same mailing address as Automart and the Spiegel Family Trust. The specific allegations of the FAC sufficiently demonstrate unity of interest and show that Martin Spiegel used Automart to achieve an inequitable result. Therefore, dismissal should be denied and the parties should be allowed to proceed with discovery.

Finally, Plaintiff contends that it has pled all the elements of a defamation claim. The elements are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or cause special damage. *Sanders v. Walsh*, 219 Cal. App. 4<sup>th</sup> 855, 862 (2013). The elements of a trade libel claim include (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages. While Defendants seem to assert Plaintiff has not properly named its claim, either way the allegations are read, all of the above elements have been pleaded.

Defendants argue that the statements in the press release are

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statements of opinion and do not amount to defamation or trade libel. However, Plaintiff disagrees. The statements were addressed to a specific audience and it can be reasonably inferred that the timing of the press release was a retaliatory move by Defendants. As for damages, West Marine has pleaded the damages it is aware of. With discovery, West Marine will be able to determine the existence of further damages. West Marine could then amend the FAC if needed.

Finally, Scott Spiegel may still be held liable even if he made the statements on behalf of the corporation. As an officer, Scott is not immune from personal liability where he participated in wrongful conduct. Plaintiff argues that "in the context of a claim for defamation, a plaintiff need only establish that the individual defendants took a reasonable part in the publication of defamatory matter." Citing, *Hawran v. Hixson*, 209 Cal.App. 4<sup>th</sup> 256, 275-76 (2012).

While all claims have been properly pled, should the Court believe otherwise, then leave to amend is requested.

**Reply:**

Defendants' Reply reiterates that with the exception of the breach of contract claim against AMC, West Marine has failed to state a claim upon which relief can be granted. Therefore, the Motion to Dismiss should be granted.

With respect to the alter ego claim, Defendants contend that the FAC falls very short of alleging facts that support an alter-ego claim against Martin Spiegel. The alter ego allegations of the FAC do not demonstrate a unity of interests between Martin Spiegel and AMC. The allegations that Martin Spiegel was the sole proprietor; that he took up to \$7,000 per month for certain perquisites; and that Automart and Martin Spiegel share the same mailing address are not sufficient to support an alter ego claim. Moreover, these allegations have been misconstrued and misrepresented in an effort to

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cast Martin in a bad light. Without more, the alter ego allegations should be dismissed with prejudice or alternatively, dismissed without prejudice.

With respect to the promissory estoppel claim, Defendants contend that this claim must be dismissed because this claim does not allege any new facts that differ from the breach of contract claim. *Citing, Hernandez v. Aurora Loan Servs., LLC*, 2011 U.S. Dist. LEXIS 143066, \*12 (C.D. Cal. December 13, 2011) (dismissing with prejudice cause of action for promissory estoppel as duplicative of breach of contract claim on a 12(b)(6) motion).

With respect to the unjust enrichment claim, the Court should dismiss this claim despite West Marine's argument, as it is not an independent cause of action. Here, Plaintiff has alleged a contract governs the subject matter. Therefore, since the breach of contract claim provides for an adequate remedy, the unjust enrichment claim must be dismissed.

Finally, Defendants hold firm that West Marine's trade defamation claim is improper. West Marine seems to combine two different claims for relief: trade libel and defamation. As such, West Marine has not properly pleaded this cause of action and Defendants should not have to respond to an unintelligible claim. Moreover, West Marine has not pled special damages which is a required element of trade libel. Therefore, this claim should be dismissed as to AMC and Scott Spiegel.

**Analysis:**

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the allegations set forth in the complaint. A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9<sup>th</sup> Cir. 2008), *quoting Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990).

In resolving a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-

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pleaded factual allegations as true. *Johnson*, 534 F.3d at 1122; *Knox v. Davis*, 260 F.3d 1009, 1012 (9<sup>th</sup> Cir. 2001). On the other hand, the court is not bound by conclusory statements, statements of law, and unwarranted inferences cast as factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9<sup>th</sup> Cir. 1994). "In practice, a complaint... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562, quoting, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7<sup>th</sup> Cir. 1984).

**First Cause of Action: Breach of Written Contract**

The FAC has adequately pled the elements of the 1<sup>st</sup> cause of action for breach of written contract against Automart. Defendants do not challenge the sufficiency of this cause of action against Automart. In fact, in their Motion, Defendants state "Plaintiff's allegations related to causes of action one through three amount to nothing more than an alleged claim for breach of contract amongst two corporate entities, West Marine and AMC, who are signatories to a written contract and alleged modification thereto. See, Motion, p. 12.

The Motion does question the adequacy of the 1<sup>st</sup> cause of action of the FAC as it relates to Martin Spiegel. To state a claim for a breach of contract, a plaintiff must allege: (1) the existence of a contract between plaintiff and defendants, (2) plaintiff's performance or excuse for nonperformance of the contract, (3) defendant's breach, and (4) the resulting damages. *Schaffer Family Investors, LLC v. Sonnier*, 120 F. Supp. 3d 1028, 1048 (C.D. Cal. 2015). An essential element of a contract is the consent of the parties, or mutual assent; in other words there must be a meeting of the minds. *Id.*

With respect to the first cause of action against Martin Spiegel, the FAC alleges that President Martin Spiegel "originally executed an agreement with West Marine titled 'West Marine's Standard Terms and Conditions' wherein AMC agreed that West Marine's terms and conditions of sale would govern and control AMC's sales of products to West Marine." (FAC ¶ 13) The FAC further alleges an alter ego theory wherein Plaintiff alleges that

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"there are grounds to pierce the corporate veil and hold Martin Spiegel personally liable for the debts of the company." (FAC ¶ 36) The alter ego doctrine has two elements: (1) "there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist;" and (2) "there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Codexis, Inc. v. EnzymeWorks, Inc.*, 2016 U.S. Dist. LEXIS 106542, \*24 (N.D. Cal. August 11, 2016); *Sonora Diamond Corp. v. Super. Ct. of Tuolumne Cnty.*, 83 Cal.App.4<sup>th</sup> 523, 538 (2000).

The *Codexis* court noted various factors that indicate a unity of interest. The factors include "1) commingling of funds, 2) failure to maintain minutes or corporate records, 3) identification of the equitable owners with the domination and control of the two entities, 4) the use of the same office or business locations, 5) the identical equitable ownership of the two entities, 6) the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual, and 7) the failure to adequately capitalize a corporation." *Codexis*, 2016 U.S. Dist. LEXIS 106542, \*24-\*25. Furthermore, "ownership is a prerequisite to alter ego liability." *Id.*

In support of its alter ego theory, the Plaintiff alleges the following: 1) Over the course of 16 years, West Marine conducted business with Automart almost exclusively with Martin Spiegel; 2) West Marine is not aware Martin had to seek approval of any directors or shareholders; 3) Martin was the sole shareholder and director of the corporation until his retirement in 2015; 4) Automart was entirely owned by the Spiegel Family Trust, of which Martin and his wife are trustees; 5) Martin, the corporation and the Spiegel family trust share the same mailing address; 6) Automart's bankruptcy filings do not disclose any minutes or other documents relating to ordinary principles of corporate governance; 7) Automart was undercapitalized, filed bankruptcy, yet Martin continued to take up to \$7,000 monthly for certain perquisites; 8) Martin entered into personal transactions with Automart without other directors' approval; and 9) Martin disbursed all of Automart's assets for his own benefit leaving the corporation with no assets. (FAC ¶¶ 36, 37, 40, 41, 42, 44, 46, 48) Based on the FAC allegations, the Court finds West Marine has plausibly pleaded a unity of interest between Martin and Automart.

Nonetheless, before the Court can rule on whether the alter ego theory may stand, the Court must find an inequitable result to justify an alter ego

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finding. The FAC alleges that West Marine suffered damages in excess of \$475,000 due to the breach of contract by Automart and Martin Spiegel. Accordingly, the Court finds the allegations support an inequitable result and therefore, the alter ego allegations have been properly pleaded against Martin Spiegel. Thus, the Court denies Defendants' request to dismiss the first cause of action against Martin Spiegel.

**Second Cause of Action: Promissory Estoppel**

Defendants contend that the claim for promissory estoppel must necessarily be dismissed because Plaintiff has alleged a cause of action for breach of contract. The breach of contract claim is based on the same contract that the promissory estoppel claim is based. On the other hand, West Marine urges that since Defendants dispute there is a valid contract, West Marine is entitled to plead this alternative theory of promissory estoppel.

A claim for promissory estoppel is improper where there is an express contract. *Hernandez v. Aurora Loan Services, LLC*, 2011 U.S. Dist. LEXIS 143066, \*12 (C.D. Cal. December 13, 2011). In *Hernandez*, the court stated that "because the SFA is an express contract, the claimed breach may be asserted through a breach of contract claim, but not through a claim for promissory estoppel." Here, the Court finds that there is no dispute that this litigation involves an express contract and an alleged breach of the express contract. As such, the claim for promissory estoppel is not appropriate. Accordingly, the Court grants Defendants' Motion to Dismiss this claim with prejudice.

**Third Cause of Action: Unjust Enrichment**

Defendants argue that Plaintiff's unjust enrichment claim must be dismissed as it is not a valid cause of action in California. However, assuming it is, Defendants then state that the unjust enrichment claim must still be dismissed as Plaintiff has not pled the claim with sufficient facts to show it is entitled to unjust enrichment against AMC in light of the existence of the contract.

First, the Court rejects Defendants' argument that the unjust enrichment claim must be dismissed as it is not a valid cause of action in

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California. In *Qpid.Me, Inc. v. Schrom*, 2013 U.S. Dist. LEXIS 12921, \*16 (S.D. Cal. September 9, 2013), the court noted that California courts are split on the issue of whether unjust enrichment can be an independent cause of action. However, California courts have held that "a plaintiff may state a claim for unjust enrichment, particularly where their claim seeks restitution where other remedies are inadequate." *Id.*, \*17.

While the Court finds that an unjust enrichment claim may be a valid cause of action under California law, an unjust enrichment claim will not lie where, as here, an express binding agreement exists and defines the parties' rights. *California Medical Assn. v. Aetna U.S. Healthcare of California*, 94 Cal. App. 4<sup>th</sup> 151, 172 (2001). As noted above with promissory estoppel, the Court finds that there is no dispute that this litigation involves an express contract and an alleged breach of the express contract. Therefore, since the parties have an actual contract, Plaintiff may not proceed on its unjust enrichment claim because the subject matter of the claim, whether Plaintiff is entitled to the sum of \$475,000 from Defendants, is governed by the express contract. *Id. at 173*. As such, the Court grants Defendants' Motion to Dismiss this claim with prejudice.

**Fourth Cause of Action: Trade Defamation**

As with the unjust enrichment claim, Defendants argue that Plaintiff's trade defamation claim must be dismissed as there is no such cause of action in California. Defendants assert that the correct causes of action are trade libel and defamation. Defendants argue that the "two torts are distinct" and that "trade libel is not true libel and is not actionable as defamation." *Citing, Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543 (Ct. App. 1985). Moreover, Defendants urge the Court to dismiss this claim for relief as Plaintiff has not pled the required element of special damages.

West Marine refutes Defendants' argument and asserts that it has pled the elements for both defamation and trade libel. West Marine also argues that Defendants' statements are not statements of opinion and for that reason, the statements are actionable under a defamation cause of action.

The Court agrees with West Marine and does not find dismissal at this juncture is appropriate. The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. *Sanders v. Walsh*, 219

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Cal. App. 4<sup>th</sup> 855, 862 (2013). For a defamation cause of action, the statement must contain a provable falsehood. *Id.* Courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. *Id.* "To determine whether a statement is actionable fact or nonactionable opinion, courts use a totality of the circumstances test of whether the statement in question communicates or implies a provably false statement of fact." *Id.*

In their Reply, Defendants contend that "when the entire press release is considered, it is clear that it served an independent and justifiable purpose, logically related to the litigation and Case, that the statements made were AMC's opinion and that the press release could not have caused any damage to West Marine." *Reply*, pgs. 8-9. Here, the Court finds the press release contains factual claims regarding the recall process, West Marine's failure to pay, and West Marine's initiation of the litigation. For instance, the press release states: "West Marine commenced a lawsuit for breach of contract under a written vendor agreement to recover its disputed claim for damages arising out of the overbroad recall against the company and, without basis and maliciously, also individually named the retired founder of our company, Marty Spiegel." Thus, where specific, alleged false allegations are published, a defamation claim will lie. *Sanders v. Walsh*, 219 Cal. App. 4<sup>th</sup> at 865. While AMC's opinion may also be considered a part of this press release, at this time, AMC has not persuaded the Court to find that the statements are purely opinion and that West Marine has not suffered damages from the press release. Specifically, the Court finds that West Marine has pled that damages resulted from this press release, specifically stating its reputation and business have been affected. Therefore, the Court will not dismiss this claim against AMC and will allow Plaintiff to amend the title of this cause of action.

Finally, as to the trade defamation cause of action against Scott Spiegel, the Court agrees with Defendants that Scott Spiegel issued this press release on behalf of the corporate company. Plaintiff's allegations do not demonstrate otherwise. Therefore, the trade defamation claim against Scott Spiegel is dismissed.

**Proposed Ruling:**

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Re First Cause of Action, Breach of Contract: The Court denies Defendants' request to dismiss this cause of action against AMC and against Martin Spiegel.

Re Second Cause of Action, Promissory Estoppel: The Court grants Defendants' request to dismiss this cause of action with prejudice.

Re Third Cause of Action, Unjust Enrichment: The Court grants Defendants' request to dismiss this cause of action with prejudice.

Re Fourth Cause of Action, Trade Defamation: The Court grants Defendants' request to dismiss this cause of action with prejudice against Scott Spiegel.

The Court denies Defendants' request to dismiss this cause of action against AMC.

<b>Party Information</b>
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**Debtor(s):**

The Automart, Inc.

Represented By  
Blake J Lindemann  
Jonathan Shenson  
Lauren N Gans

**Defendant(s):**

Scott Spiegel

Represented By  
Lauren N Gans  
Jonathan Shenson

Martin Spiegel

Represented By  
Lauren N Gans  
Jonathan Shenson

The Automart, Inc.

Represented By  
Lauren N Gans  
Jonathan Shenson

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**Movant(s):**

Scott Spiegel

Represented By  
Lauren N Gans  
Jonathan Shenson

Martin Spiegel

Represented By  
Lauren N Gans  
Jonathan Shenson

The Automart, Inc.

Represented By  
Lauren N Gans  
Jonathan Shenson

**Plaintiff(s):**

West Marine Products, Inc

Represented By  
Shani Williams

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Adv#: 1:16-01098 West Marine Products, Inc v. The Automart, Inc. et al

■

**#24.00** Status Conference re: Amended First Complaint  
by Shani Williams on behalf of West Marine Products, Inc  
against all defendants

fr. 9/27/16, 10/11/16

Docket No: 18

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

The Automart, Inc.

Represented By  
Blake J Lindemann  
Jonathan Shenson  
Lauren N Gans

**Defendant(s):**

Martin Spiegel

Represented By  
Lauren N Gans  
Jonathan Shenson

The Automart, Inc.

Represented By  
Lauren N Gans  
Jonathan Shenson

**Plaintiff(s):**

West Marine Products, Inc

Represented By  
Shani Williams

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12255 Solyman Yashouafar and Solyman Yashouafar**

**Chapter 11**

**#25.00** Motion to Disqualify Mark  
Goodfriend as Debtor's Counsel

Docket No: 114

**\*\*\* VACATED \*\*\* REASON: Order ent continuing hrg to 11/15/16 at  
10:00 a.m. - jc**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Solyman Yashouafar

Represented By  
Mark E Goodfriend

Solyman Yashouafar

Pro Se

**Movant(s):**

Howard L. Abselet

Represented By  
Henry S David

**Trustee(s):**

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12255 Solyman Yashouafar**

**Chapter 11**

**#26.00** Motion for relief from stay and relief from turnover by Prepetition Receiver or other Custodian

fr. 9/15/16(xfr from Judge Tighe's calendar), 9/27/16, 10/11/16

Docket No: 22

**Tentative Ruling:**

On 10/23 Mr. Goodfriend filed a supplemental opposition. He believes that there is an agreement between the Receiver and the Trustee for the sale of 16661 Ventura, subject to the approval by the District Court. It should also be approved by this Court.

The Receiver need relief from the automatic stay to dispose of property of the Debtor since this is based on a prepetition judgment.

The motion to sell is set before the District Court on or about 10/28, with the sale to close on or about 11/30. The factors to be considered by the District Court are not the same as those to be considered by the Bankruptcy Court. Relief from stay may also be necessary in the ECPLP case since the Receiver is now acting only for the lender.

*From the Court: Since this was filed so late, no opposition has been received and will not be reviewed prior to the hearing. At the hearing, I would like to hear from the Trustee as to whether he believes that relief from the stay is needed.*

prior tentative ruling (9/27/16)

There are several actions proceeding in front of District Judge John Walter. In August 2012, Abselet obtained a judgment against Alliance Lending Group and both Yashouafars, CV11-00815-JFW(JEMx). The judgment was for \$5,986,580.20 plus costs and fees of \$804,520, all of which

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**CONT... Solyman Yashouafar**

**Chapter 11**

accrues interest at 6% per annum. (Solyman dkt. 21, ex. 2) At this point Abselet has received only \$5,060 and the judgment has grown to over \$10 million.

On January 29, 2015, Abselet levied on, and on April 29, 2015 he purchased the Judgment Debtors' stock in ECP Building, Inc (ECP Building), Roosevelt Lofts, Inc. (RLI), and Alliance Property Investments, Inc. (APII). Together these are referred to as the Corporations. The children of the Judgment Debtors and the Judgment Debtors moved to set aside the sale. Judge Walter denied some of the motions and deferred others pending the outcome of an action in Oklahoma as to which court should hear the motion. It was referred back to Judge Walter, who denied more of the motions. An appeal was taken, part of which is still pending.

Abselet filed a case in Oklahoma (Abselet v. Alliance Lending Group, Inc, et. al) as to the real property that APII owns indirectly. That property is in receivership and now in escrow with expected net proceeds of over \$20 million. This motion as to retaining the custodian only refers to the real property at 18661 Ventura Blvd., Encino.

As to Encino Corporate Plaza, Judge Walter held that ECP Building is the sole general partner of Encino Corporate Plaza, LP, which owns the real property. Abselet obtained a charging order and the appointment of William J. Hoffman as receiver. Raymond Yashuoafar tried to stop this by filing a new bankruptcy for Encino Corporate Property, LP, but that case was dismissed. The Receiver took control of the building in April 2016.

There is an appeal concerning Abselet's purchase of the Yashouafar's stock in ECP Building. This Stock Appeal is pending in the Ninth Circuit (16-55257). Briefs are due. On Dec. 10, 2015, Judge Walter awarded Abselet post-judgment fees and costs of \$1.7+ million. That is now on appeal (The Fee Appeal - 15-55526).[Jointly "the Appeals."] The two appeals have been consolidated by the Court of Appeals.

Beyond that there is a fraudulent transfer to Kadima, which is another Yashouafar company. In ECP, there is a turnover order, but the 2011 to 2014 tax returns have not been turned over and the preparer has not been

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CONT... Solyman Yashouafar  
identified.

Chapter 11

Title and transfers: Abselet asserts that he now owns all of the Yashouafar's stock in ECP Building and APII and also 46.7% or 93.4% of the stock in RLI. Those rulings are part of the Stock Appeal pending in the 9<sup>th</sup> circuit. The Debtors' children claim ownership of the ECP Building and APII stock and the Yashouafars have affirmatively disavowed any interest in that stock.

UPDATED STATUS:

On August 22, 2016, Abselet filed motions to withdraw the reference in these bankruptcy cases [2:16-CV-06296 and 2:16-CV-06297]. Both were denied by Judge Walter. Meanwhile there are two other cases in front of Judge Walter brought by Abselet against the Yashouafars and other related entities. These are both stayed pending appeal in the Stock Appeal [2:15-cv-7625 (declaratory relief and fraudulent transfer); 2:15-cv-8570 (RICO and fraudulent transfer)]. And there is another case by Abselet against Levene Neale Bender Yoo and Brill, et al. for conversion, etc. (2:16-cv-6263).

The only case that names the Yashouafars and is not already stayed by Judge Walter is the one in which a Receiver is in control of the property at 1661 Ventura Blvd (2:11-cv-00815). This is the custodian that Abselet wishes to keep in place.

Per the declaration of William Hoffman, Receiver:

Per Judge Walter's order, he is to sell the 9 story building and to manage it until sold. He hired Holiday Fedoglio Fowler (HFF) as the broker. There have been dozens of prospective purchasers. He expects offers by 9/7, to select a buyer by 9/21, and to close by 11/18/16.

During the receivership, he terminated the property management agreement with Whiterock Realty Solutions, which seems to be owned by two of the Yashouafar children. Trigild is not the property manager. This

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CONT... **Solyman Yashouafar**

**Chapter 11**

company has managed hundreds of commercial properties.

He terminated the asserted lease with Kadima Parking Management as to the parking structure. Judge Walter found that this asserted lease was a fraudulent transfer. LPS of America, Inc. now manages the parking garage.

OPPOSITIONS

Massoud asserts that this should wait until the Chapter 11 Trustee and analyze the situation and make sure that the assets are used to benefit all creditors (not just Abselet) and that their value is maximized. He thinks that some deals can be made and that the Trustee should be given time to form a plan of action.

Solyman wants there to be more time for the Trustee to analyze this situation.

The Petitioning Creditors believe that Abselet will be an unsecured, not a secured, creditor. The Petitioning Creditors are in a similar situation as Abselet, having loaned millions of dollars to the Debtors in the course of their businesses and not having been repaid. There are other lawsuits around the country arising out of this same kind of conduct.

The relief from stay here concerns the Encino Plaza property. There are disputes as to who owns it, who has the right to liquidate it, and who is entitled to the distribution of the money when it is sold. The Chapter 11 Trustee needs time to marshal and evaluate the assets of the Estates before assets are liquidated solely for the benefit of Abselet. There should be time for an appraisal of the property before it is sold. The duties of a Receiver, which is to satisfy the Abselet judgment, are not the same as those of the Trustee, who is a fiduciary to all creditors.

Further as to turnover, it is the movant's burden to establish cause and that has not occurred. The issue of Debtor mismanagement is not an issue since there is now a trustee in place. And to allow a sale before the "true nature" of the Abselet claim can be determined in the bankruptcy case, gives Abselet a windfall.

As to the 2015 stock sale that invested Abselet with the ownership of

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CONT... **Solyman Yashouafar**

**Chapter 11**

ECP Building, the doctrine of equitable redemption may be utilized to allow the Debtors to redeem the general partnership interests for the benefit of all creditors of the Estate, particularly since Abselet only paid \$10 for the purchase, which is a grossly inadequate price.

I am aware of the evidentiary objections filed by Ms. McDow and choose not to deal with them at this time.

REPLIES:

Encino – 16661 Ventura Blvd Trust asserts that it is a senior secured creditor of Encino Corporate Plaza, L.P. (ECPLP), which holds the first priority lien on the real property. It does not want the property turned over to the Trustee, who has no right to administer the assets of ECPLP, which is not a debtor. The Yashouafar Debtors do not own this property. The automatic stay does not apply to the receiver's ongoing management, operation, marketing, or sale of the property. §543 only applies to property of the debtor or of the estate. This is neither.

Abselet replies through his attorney. He has spoken to the attorney for the first trust deed and they will foreclose if the property is not sold. Their demand is \$34.5 million.

PROPOSED RULING:

As far as I can tell, the Receiver has done a professional job and has properly marketed the property. I know from prior hearings as part of the Encino Corporate Plaza case that the predecessor to the current first lienholder gave a short time to sell the building or it would foreclose. Although Mr. David's reply is hearsay as to his conversations with the Venable law firm, it does appear that the first lienholder has a right to foreclose regardless of the automatic stay or the case in front of Judge Walter. At best the Yashouafars would be considered to be the principals and/or shareholders of the actual owner of the building. Thus, the sale of the building is not stayed by their bankruptcy.

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CONT...

**Solyman Yashouafar**

**Chapter 11**

The real issue here is where do the excess proceeds go. There is also a side issue as to whether the sale is after proper marketing, etc. It appears that the Receiver has done so. Will the Receiver be bringing a motion to sell before Judge Walter? If so and if the Trustee does not agree with the sale process, he should object to the sale in front of Judge Walter.

As noted, it appears that the bankruptcy estate may be able to assert an ownership in the stock of ECP Building, but not in the building itself.

Although Judge Walter has refused to withdraw the reference, he had I can deal jointly – as needed – on some of these issues. He can also withdraw the reference at any time. Perhaps it might be a good idea for Judge Walter and me to hold a joint hearing on how to proceed with the sale, etc.

Given the structure of ownership of the building (that it is owned by an entity of which the Yashouafars may or may not be owners and not by the Yashouafars themselves), there really was not need to bring this motion to retain the Receiver. But in an abundance of caution, it is wise that it was brought. And, in an abundance of caution:

The Trustee notified the Court that there may be an agreement between him and the Receiver. This will still not deal with the objections of the Debtors. In the meantime, leave the Receiver in place as to 16661 Ventura Blvd. Continue this to October 25 at 10:00 a.m. to allow the Trustee time to respond.

<b>Party Information</b>
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**Debtor(s):**

Solyman Yashouafar

Pro Se

**Movant(s):**

Howard L. Abselet

Represented By  
Henry S David

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
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10:00 AM

**1:16-12255 Solyman Yashouafar**

**Chapter 11**

**#26.01** Status Conference re: Chapter 11 case

fr. 9/1/16(xfr from Judge Tighe's calendar), 9/27/16,  
10/11/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Solyman Yashouafar

Pro Se

**United States Bankruptcy Court  
Central District of California  
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10:00 AM

**1:16-12408 Massoud Aron Yashouafar**

**Chapter 11**

**#27.00** Motion to Disqualify Greenberg Glusker Fields  
Claman & Machtinger LLP as Counsel for Debtor

Docket No: 128

**\*\*\* VACATED \*\*\* REASON: Cont'd per Stip Order #169. If**

**Tentative Ruling:**

Continued by stipulation to 11/15/16 at 10:00 a.m.

<b>Party Information</b>
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**Debtor(s):**

Massoud Aron Yashouafar

Represented By  
Brian L Davidoff

**Trustee(s):**

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12408 Massoud Aron Yashouafar**

**Chapter 11**

**#28.00** Howard Abselet's Motion for (A) Relief from the Automatic Stay Under 11 USC 362 (Real Property) and (B) Relief from Turnover Under 11 USC 543 by Prepetition Receiver or Other Custodian

fr. 9/15/16(xfr from Judge Tighe's calendar), 9/27/16, 10/11/16

Docket No: 28

**Tentative Ruling:**

Nothing new received as of 10/23. The issues are set forth in the Solyman Yashouafar tentative rulings.

**Party Information**

**Debtor(s):**

Massoud Aron Yashouafar

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12408 Massoud Aron Yashouafar**

**Chapter 11**

#28.01 Status Conference re: chapter 11 case  
fr. 9/27/16, 10/25/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
--------------------------

**Debtor(s):**

Massoud Aron Yashouafar

Pro Se

**United States Bankruptcy Court  
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Tuesday, October 25, 2016

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10:00 AM

**1:16-12388 Major Textile Imports Inc.**

**Chapter 7**

**#29.00** Motion for relief from stay

Orient Gate Enterprise Ltd.

Docket No: 102

**Tentative Ruling:**

**Service:** Proper. No opposition filed as of 10/20.

**Petition Date:** October 23, 2014

**Movant:** Orient Gate Enterprise, Ltd.

**Relief Sought to:** To pursue pending litigation

**Litigation Information**

Case Name: Orient Gate Enterprise Ltd. v. Major Textile Imports, et al.

Court/Agency: Los Angeles Superior Court

Date Filed: 6/3/14

Judgment Entered: No

Trial Start Date: Movant believes this action will be set for trial by February 2017.

Action Description: Breach of contract; Goods sold and delivered; Open book account; and Accounts stated

Grounds

Movant seeks recovery primarily from third parties.

Non-bankruptcy claims that are best resolved in non-bankruptcy forum.

**Opposition:** As of 10/120, no Opposition has been filed.

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CONT... Major Textile Imports Inc.

Chapter 7

**Proposed Ruling:** GRANT under 11 U.S.C. 362(d)(1). GRANT relief requested in paragraphs **2** (proceed under non-bankruptcy law to judgment, with stay against enforcement against property of the estate); and **5** (waiver of the 4001(a)(3) stay).

Movant also seeks (1) an order that is binding and effective in any bankruptcy case commenced by or against the Debtor for a period of 180 days and (2) an order that is binding and effective in any future bankruptcy case, no matter who the debtor may be, without further notice. No bad faith alleged so #2 seems like the Movant is overreaching. Grant the first request as to any new bankruptcy case by or against this Debtor filed in the next 180 days. Deny as to any future bankruptcy case, regardless of who the debtor is - this doesn't even make sense since this is a lawsuit for breach of contract, not a foreclosure on real property.

No appearance necessary if you submit on the tentative ruling. Except in the case of a trustee's final report and simultaneous hearing on applications for approval of professional fees, the prevailing party is to lodge a proposed order in conformance with this tentative ruling within seven court days after the hearing, serving all interested parties with a copy of the proposed order.

<b>Party Information</b>
--------------------------

**Debtor(s):**

Major Textile Imports Inc.

Represented By  
Jaenam J Coe  
Michael Jay Berger

**Movant(s):**

ORIENT GATE ENTERPRISE LTD

Represented By  
Sandra Khalili

**Trustee(s):**

Carolyn A Dye (TR)

Represented By  
Christian T Kim  
James A Dumas Jr

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12388 Major Textile Imports Inc.**

**Chapter 7**

**#30.00** Motion for Order to allow claimant  
Sepehr Omrani to file Supplement  
Declarations of Beth Chrisman  
and Sepehr Omrani

fr. 9/27/16, 10/11/16

Docket No: 93

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

Major Textile Imports Inc.

Represented By  
Jaenam J Coe  
Michael Jay Berger

**Trustee(s):**

Carolyn A Dye (TR)

Represented By  
Christian T Kim  
James A Dumas Jr

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

**1:16-12388 Major Textile Imports Inc.**

**Chapter 7**

**#31.00** Status Conference on Evid Hearing -

re: Debtor's Objection to (i) Claim (#11) of Sepehr Omrani as Lacking the Required Evidence and Legal Basis, and (ii) Claim (#12) of Sepehr Omrani as Duplicate

fr. 7/21/16(xfr from Judge Neiter's calendar); 9/27/16

Docket No: 43

**Tentative Ruling:**

This is not an evidentiary hearing, but a status conference at which the evidentiary hearing will be set.

**Party Information**

**Debtor(s):**

Major Textile Imports Inc.

Represented By  
Jaenam J Coe  
Michael Jay Berger

**Trustee(s):**

Carolyn A Dye (TR)

Represented By  
Christian T Kim  
James A Dumas Jr

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

:  
Adv#: 1:16-01123      Speier v. SunCal Management LLC et al

Chapter 0

■  
**#32.00**      Order Setting Hearing on the Trustee's Motion for  
Partial Summary Adjudication, docket no. 275

Docket No: 0

**Tentative Ruling:**

See cal. #34.

<b>Party Information</b>
--------------------------

**Defendant(s):**

Argent Management, LLC

Represented By  
Craig H Averch

SunCal Management LLC

Represented By  
Craig H Averch

**Plaintiff(s):**

Steven M Speier

Represented By  
Mike D Neue  
Gary A Pemberton  
Heather B Dillion

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

:  
Adv#: 1:16-01124      Speier v. SunCal Management LLC et al

**Chapter 0**

■  
**#33.00**      Order Setting Hearing on the Trustee's Motion for  
Partial Summary Adjudication, docket no. 276

Docket No: 0

**Tentative Ruling:**

See cal. #34.

<b>Party Information</b>
--------------------------

**Defendant(s):**

Argent Management, LLC

Represented By  
Craig H Averch

SunCal Management LLC

Represented By  
Craig H Averch

**Plaintiff(s):**

Steven M Speier

Represented By  
Mike D Neue  
Gary A Pemberton  
Heather B Dillion

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

:  
Adv#: 1:16-01122      Speier v. SunCal Management LLC et al

Chapter 0

■

#34.00      Order setting hearing on the Trustee's motion for partial summary adjudication

Docket No: 0

**Tentative Ruling:**

The actual motion for summary judgment will be heard on 11/15, but at this time it is difficult for the Court to prepare it since there is confusion as to what is being sought. It appears that the parties agree that the Trustee has standing to pursue his claim for relief. It also appears that the Defendants agree that the Trustee has standing because the Debtor was a third-party beneficiary of the DMA. But it seems that the Defendant does NOT want a decision that the third-party beneficiary status was the sole relationship of the Debtor to the DMA or that the DMA is the only agreement governing the contractual relationship between the Debtor and the Defendant. Thus, there would be a limited finding that the Trustee has standing in that the Debtor is a third-party beneficiary of the DMA, with no finding as to any other relationship of the Debtor to the DMA or to the Defendant.

The Trustee has been ordered to prepare a proposed order that should clarify this issue. A proposed order was lodged on 10/24 that merely states that *"the Trustee has standing to pursue his breach of contract claim for relief because the Debtor is a third party beneficiary of the Development Management Agreement."*

It seems that this should resolve the matter. If so, please let my law clerk know and no appearance will be necessary on 10/25 and the motion for summary judgment scheduled for 11/15 will go off calendar since the Court will have signed this order. However, there will be a status conference hearing as scheduled on 11/15 at 10:00 a.m. so that we can proceed toward trial.

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10:00 AM

CONT...

Chapter 0

Please discuss it and see if you can finalize it and then let me know the status at the 10/25 hearing.

<b>Party Information</b>
--------------------------

**Defendant(s):**

Argent Management, LLC

Represented By  
Craig H Averch

SunCal Management LLC

Represented By  
Craig H Averch

**Plaintiff(s):**

Steven M Speier

Represented By  
Mike D Neue  
Gary A Pemberton  
Heather B Dillion

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
Courtroom 303 Calendar**

Tuesday, October 25, 2016

Hearing Room 303

10:00 AM

:  
Adv#: 1:16-01120      Speier v. SunCal Management LLC et al

**Chapter 0**

▪  
**#35.00**      Order setting hearing on the Trustee's motion for partial  
summary adjudication

Docket No: 0

**Tentative Ruling:**

See cal. #34.

<b>Party Information</b>
--------------------------

**Defendant(s):**

Argent Management, LLC

Represented By  
Craig H Averch

SunCal Management LLC

Represented By  
Craig H Averch

**Plaintiff(s):**

Steven M Speier

Represented By  
Mike D Neue  
Gary A Pemberton  
Heather B Dillion

**United States Bankruptcy Court  
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San Fernando Valley  
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Tuesday, October 25, 2016

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10:00 AM

:

**Chapter 0**

Adv#: 1:16-01121      Speier v. SunCal Management, LLC et al

■

**#36.00**      Order setting hearing on the Trustee's motion for partial summary adjudication

Docket No: 0

**Tentative Ruling:**

See cal. #34.

<b>Party Information</b>
--------------------------

**Defendant(s):**

Argent Management, LLC

Represented By  
Craig H Averch

SunCal Management, LLC

Represented By  
Craig H Averch

**Plaintiff(s):**

Steven M Speier

Represented By  
Mike D Neue  
Gary A Pemberton  
Heather B Dillion