

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

Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

**1:07-13004 Golden State TD Investments, LLC**

**Chapter 11**

**#1.00** Post confirmation Conference Re: Chapter 11 Case

fr. 8/31/10, 2/11/11, 3/1/11, 3/8/11, 10/4/11, 4/10/12,  
10/2/12, 4/16/13, 10/29/13, 4/22/14, 11/4/14,  
4/28/15; 10/20/15, 12/8/15, 8/16/16

Docket No: 1

**Tentative Ruling:**

Continue without appearance to 12/20/16 at 10:00 a.m. when there is to be a motion for final decree and to close the case.

prior tentative ruling (8/16/16)

According to the status report filed on 8/5/16, the payments are being made as set forth in the Plan. The Emerald Bay and Kevin Pound matters have been settled and the settlement was approved by an order entered on 2/19/16. It appears that there will be no further NIM Proceeds to distribute to Pacifcor, the Funds, or QHL. All other classes have been dealt with as described in the status report. This is a very thorough report and that is appreciated.

At the present time, a second audit is being conducted for the period of July 1, 2012 through June 30, 2016 in order to verify that all distributions have been properly made and properly apportioned between the Funds. The audit should be completed by Sept. 30, 2016. This will then be presented to the Court and it is anticipated that the cases will be closed by 12/31/16.

Continue without appearance to 12/6/16 at 10:00 a.m. Please file a further status report OR a motion to close prior to that time.

prior tentative ruling (12/8/15)

According to the status report filed on 11/24/15, the Plan is being consummated according to its terms. An audit is being conducted to verify all the disbursement that have been made and that they have been properly apportioned between the Funds. The case should be closed no later than

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CONT... Golden State TD Investments, LLC  
7/31/16.

Chapter 11

prior tentative ruling (10/20/15)

Per the status report, the Plan is being consummated according to its terms.

The Insurance, Gaiser, and Andrews Kurtz litigations have been settled. There are still litigation matters ongoing (this seems to be limited to the claims of Emerald Bay and Kevin Pound) and the Funds are managing those. The Funds estimate that the cases will be closed by 3/31/16.

The calendar still reflects that there are court costs due in the amount of \$1,750. Please confirm that these have been paid.

Continue without appearance to Oct. 20, 2015 at 10:00 a.m.

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

Golden State TD Investments, LLC

Represented By  
Mike D Neue  
Kerri A Lyman  
Alan J Friedman  
Jeffrey Lee Costell  
Jeffrey Lee Costell  
James Stang  
Jeffrey R Richter  
Howard N Gould  
Stacey N Knox  
Alan I Nahmias  
Russell H Rapoport

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**1:07-13005 QHL Holdings Fund Ten, LLC**

**Chapter 11**

**#2.00** Post Confirmation Plan Status Conference  
re: Chapter 11 Case

fr. 8/31/10, 2/22/11, 3/1/11, 3/8/11, 10/4/11, 4/10/12,  
10/2/12, 4/16/13, 10/29/13, 4/22/14, 11/4/14, 4/28/15,  
10/20/15, 12/8/15, 8/16/16

Docket No: 1

**Tentative Ruling:**

Continue without appearance to 12/20/16 at 10:00 a.m. when there is to be a motion for final decree and to close the case.

prior tentative ruling (8/16/16)

This is a very thorough status report, which is appreciated. The Plan is being consummated according to its terms. As noted in Golden State TD status conference report, there is a second audit that should be completed by 9/30/16. Continue without appearance to 12/6/16 at 10:00 a.m. Prior to that time, please file either an updated status report OR a motion to close.

prior tentative ruling (12/8/15)

According to the status report filed on 11/24/15, the Plan is being consummated according to its terms. An audit is being conducted to verify all the disbursement that have been made and that they have been properly apportioned between the Funds. The case should be closed no later than 7/31/16.

prior tentative ruling (10/20/15)

Per the status report, the Plan is being consummated according to its terms.

The Insurance, Gaiser, and Andrews Kurtz litigations have been settled. There are still litigation matters ongoing (this seems to be limited to a suit against Beazley and others in the district court brought by fund members). The Funds estimate that the cases will be closed by 3/31/16.

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CONT... QHL Holdings Fund Ten, LLC

Chapter 11

The calendar still reflects that there are court costs due in the amount of \$4,500. Please confirm that these have been paid.

Continue without appearance to Oct. 20, 2015 at 10:00 a.m.

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

QHL Holdings Fund Ten, LLC

Represented By  
Mike D Neue  
Kerri A Lyman  
Alan J Friedman  
Jeffrey Lee Costell  
Jeffrey Lee Costell  
David M Poitras  
Jeffrey R Richter

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**1:09-10938 Jennifer C Reagh**

**Chapter 7**

**#3.00** Application For Compensation and Reimbursement Of Expenses By Danning, Gill, Diamond & Kollitz, LLP, As General Counsel To Chapter 7 Trustee Attorney, Period: 12/9/2014 to 10/31/2016, Fee: \$24,556.50, Expenses: \$565.36.

Docket No: 78

**Tentative Ruling:**

Originally this was a no asset case. When Debtor moved to reopen in order to add a lawsuit to her schedules, the Trustee was reappointed. At this time there is some money to distribute to creditors, though no claims have been timely filed. Also there must be federal and state tax returns to be filed. The Trustee has about \$30,000 to distribute and is entitled to his fees of about \$3,800. Since there are no filed claims, the Trustee is comfortable distributing \$20,000 at this time.

Trustee's counsel seeks interim fees of \$24,556.50 and costs of \$565.36. Most of this dealt with the Debtor's settlement in the Bayer case and the claim of exemption.

No opposition received as of 11/30/16.

There is a disclosure of a possible conflict in that the firm also represents Richard Diamond in the Century City Doctor's Hospital case and the Hospital is a large creditor of this Debtor. The Hospital has not filed a proof of claim and it appears that all of the collections on Hospital receivables will go to Fortress.

I am not clear what this means in terms of the firm's representation on this case. Please plan to appear by phone and let's clarify it.

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**CONT... Jennifer C Reagh**

**Chapter 7**

**Debtor(s):**

Jennifer C Reagh

Represented By  
Gerald J Koh - INACTIVE -  
Andre A Khansari

**Trustee(s):**

Brad D Krasnoff (TR)

Represented By  
Kevin Meek  
Eric P Israel  
Michael G D'Alba

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

**Chapter 7**

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

fr. 10/25/16; 11/15/16; 11/18/16

Docket No: 28

**Tentative Ruling:**

On 11/23/16, Debtors' counsel filed a Declaration explaining that Mayer had not responded to counsel's emails of 11/11/16 and 11/14/16. Counsel argues that Mayer has been given every opportunity to minimize the damages in this situation, yet Mayer has failed to do so.

Further, at the 11/15/16 hearing, Mayer stated that he had informed the Court at the 10/25/16 hearing that the release must be mailed to him because he was having problems with his printer. Debtors' counsel does not recall this conversation taking place at the hearing. Nonetheless, Mayer could have minimized damages by sending escrow an email stating he was relinquishing any hold on the funds. Mayer never did this.

**Notes from 10/25/16 Hearing:**

Mayer agreed he would withdraw the demand in escrow. Debtor's counsel acknowledged the parties had, at one time, agreed to a \$2500 settlement. However, there is no record of this payment to Mayer. Therefore, the Court called it a "wash." Mayer is to withdraw the demand but the Court would not order Mayer to pay attorney's fees.

Mayer did not inform the Court of his printer problems. However, the Court did instruct Debtors' counsel to prepare a letter to the title company which states Mayer is withdrawing his demand for the funds. Debtors' counsel was to mail this to Mayer and Mayer was to sign and then mail it back to counsel.

**Notes from 11/15/16 Hearing:**

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CONT... **Hossein Ghalari and Shahla Ghalari**

Chapter 7

Mr. Berneman appeared for Debtors' counsel Devin Sawdayi. Mayer appeared by phone. Mayer explained he did not return the release because he never received it in the mail per the Court's instructions. Rather, Debtors' counsel sent it by email. Mayer explained that he could not print and sign it because his printer is broken. The Court instructed Mr. Berneman to tell Debtors' counsel that the release has to be sent via priority mail today. Hearing continued to 11/18/16. At the 11/18/16 hearing, Mayer must have received the release by mail, signed it, and returned it to Debtors' counsel.

**Notes from 11/18/16 Hearing:**

Debtors' counsel appeared. Mayer did not appear. Debtors' counsel explained he received the release from Mayer. However, Debtors' counsel argued that due to Mayer's delay in signing the release, Debtors have incurred additional attorney's fees. Debtors should not have to be responsible for the attorney's fees. Mayer should have to pay the fees. Also, Debtors' counsel contended Mayer fabricated the fact that the release had to be mailed rather than emailed. The Court stated that it agreed with Debtors' counsel and that some of the attorney's fees should be paid by Mayer. The Court requested that counsel file a declaration requesting attorney's fees so that the Court could make a determination on an amount.

**Should Mayer have to pay Debtors' attorney's fees?**

Exhibit A attached to Devin Sawdayi's Declaration shows a request for attorney's fees in the amount of \$3,952.92. Per his time sheet, counsel performed 10.6 hours of work on this matter. At the 10/25/16 hearing, the Court noted that this matter was a "wash." There was no record that Mr. Mayer was ever paid a settlement amount of \$2,500 and moreover, Mayer had agreed to provide a release to the title company. Therefore, at the hearing, the Court noted that it would not require Mayer to pay Debtors' attorney's fees.

At the 11/18/16 hearing, the Court stated that it would now consider attorney's fees as Debtors' counsel argued Mayer's delay caused Debtors to incur further fees. After listening to the hearings on 10/25/16, 11/15/16, and 11/18/16, the Court finds that it's initial ruling on the attorney's fees request should stand. Mayer should not have to pay Debtors' attorney's fees as

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**Chapter 7**

Debtors' counsel failed to comply with the Court's instructions that the release had to be mailed to Mayer. Counsel's failure to comply added to the delay in the matter. While Mayer should have emailed counsel about his printer problems and while Mayer should have reiterated in that email that the release was to be mailed, the Court finds that Debtors' counsel's failure to mail the release forced another hearing on 11/18/16. Therefore, the Court denies Debtors' request for Mayer to pay their attorney's fees in connection with this matter. Further, since the delay and additional work was caused by Mr. Sawdayi's failure to mail the release, he should not ask his client for payment for much or most of the additional time and fees - the portion covered by the delay due to his assertion that Mayer had not timely responded, etc.

prior tentative ruling (10/25/16)

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 2016.

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

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of \$750.

Chapter 7

No opposition received as of October 20, 2016.

Release the funds in escrow to the Ghalaris. They will be entitled to their 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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**1:09-23807 Shellie Melissa Halper**

**Chapter 7**

**#4.00** Motion to Withdraw as Counsel for Debtor  
Shellie Melissa Halper

Docket No: 181

**Tentative Ruling:**

**Service:** Debtor has been served at a Las Vegas, Nevada address. The docket indicates a different address for Debtor. The Court needs confirmation that this is, in fact, Debtor's correct address.

**Motion:**

By way of this Motion, Greenberg & Bass ("G&B") seeks the Court's permission to withdraw as counsel for Defendant Shellie Melissa Halper ("Defendant"). According to G&B, Defendant entered into a retainer agreement with the firm on August 8, 2015. Since that time, G&B's services have included preparations in the discovery process of this case, as well as filing an opposition to a Sale Motion in the bankruptcy case.

Despite G&B's extensive legal services in the case and contrary to the executed retainer agreement, Defendant has failed to pay for her legal services since October 2015. G&B has continued to provide legal services to Defendant, however, Defendant has refused to pay her legal bill.

Also, Defendant continues to be unavailable for the discovery process. G&B understands Defendant has had to deal with health issues, as well as health issues that have affected members of her family. However, G&B asserts that this has made it increasingly difficult to represent Defendant as an active participant in this litigation.

G&B cites to Rule 3-700(c) of the California Rules of Professional Conduct in support of its request to withdraw as counsel. Under Rule 3-700 (c) an attorney may withdraw under certain enumerated circumstances, including (1) where the client's conduct renders it unreasonably difficult for the member to carry out the employment effectively, and (2) where a client breaches an agreement to the member as to expenses or fees. See, Motion, p. 6.

Here, Defendant's conduct fits both circumstances as she has

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Chapter 7

breached her agreement to pay G&B and she has failed to properly participate in this litigation.

Finally, G&B asserts that Defendant now necessitates legal advice in connection with criminal law matters. G&B cannot adequately advise Defendant on criminal matters and so G&B's withdrawal as counsel is even further justified.

**As of 12/1, no opposition filed.**

**Analysis:**

The **California Rules of Professional Conduct Rule 3-700** provides guidance concerning an attorney's termination of his employment. Rule 3-700 provides, in part, as follows:

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(C) Permissive Withdrawal. If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

The determination whether to grant or deny a motion to withdraw as

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CONT... **Shellie Melissa Halper** Chapter 7

counsel lies within the sound discretion of the trial court. *Manfredi & Levine v. Superior Court*, 66 Cal. App. 4th 1128, 1133 (1998); *citing, People v. Brown* 203 Cal. App. 3d 1335, 1340 (1988).

Here, Ms. Halper has not filed an opposition to G&B's request to withdraw. G&B argues that withdrawal as Ms. Halper's attorney is warranted since Defendant has failed to effectively participate in the discovery process, i.e. her non-appearance at her deposition, and has failed to pay her legal bill.

The Court finds that G&B is justified in withdrawing as counsel as G&B has satisfied the grounds for permissive withdrawal under Rule 3-700(C). Not only is it well documented that Defendant has continuously failed to appear for her deposition, G& B argues that Defendant has had a balance due to G&B for legal services since October 2015. Since that time, Defendant has failed to make a payment. *Darby v. City of Torrance*, 810 F.Supp. 275 (C.D. Cal. 1992) ("Failure of a client to pay attorney's fees will serve as grounds for an attorney to withdraw...")

Therefore, as long as G&B can confirm Defendant has received proper notice of this Motion and can confirm it provided Defendant with adequate notice for Defendant to hire new counsel, then the Court finds sufficient reason to allow G&B to withdraw as counsel. **This will apply to the main case as well as the two adversary proceedings.**

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

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1:09-23807 Shellie Melissa Halper

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#4.01 Order to Show Cause Why Shellie Melissa Halper Should Not Be Held In Contempt

Docket No: 0

**Tentative Ruling:**

**REVISED 12/5.**

**This was filed in the main case as well as the two adversary proceedings. I am not sure how the amount of sanctions should be divided between the two adversary proceedings. As to the main case, Movant is not seeking dismissal or anything in particular. Let's straighten this out at the hearing.**

On October 25, 2016, Plaintiff Soloman Cohen ("Plaintiff") moved the Court for issuance of an Order to Show Cause why Debtor/Defendant Halper ("Defendant") should not be held in contempt for failing to appear at her court ordered deposition. Specifically, Plaintiff requested an order (1) to show cause why Defendant should not be held in contempt for violating the Court's orders to appear at deposition; (2) awarding attorneys' fees and costs incurred by Plaintiff in preparing for the deposition, as well as the supporting motions and stipulations; and (3) striking Defendant's answer and entering default. On November 21, the Court granted the motion and issued its Order to Show Cause.

**Background:**

This adversary proceeding was filed on April 22, 2011. The action was stayed by the Defendant based on her assertion of her Fifth Amendment privilege. On May 26, 2015, the Court lifted the stay as the applicable criminal statutes of limitation had passed. From that date and on, the court continued the status conferences and ordered Defendant to appear for her

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**Shellie Melissa Halper**

**Chapter 7**

deposition. According to Plaintiff, Defendant has delayed the proceedings at least six times since the filing of the complaint. The delays have been due to Defendant's fifth amendment privilege; a substitution of counsel; Defendant's failure to provide a responsive document production; and Defendant's repeated failure to appear at her court ordered deposition. Plaintiff points out that the last deposition that was rescheduled for September 16, 2016 was cancelled by Defendant just one hour prior to the deposition start time of 10:00 a.m. According to Plaintiff, Defendant's counsel explained the reason for the cancellation was due to Defendant's renewed assertion of her Fifth Amendment privilege.

In the request for the issuance of the OSC, Plaintiff contended that based on Defendant's historically poor conduct and bad faith since the adversary was filed, contempt is the appropriate course. Moreover, this Court has the power to sanction the contemptuous conduct under FRCP 37, the Court's inherent powers, and Section 105(a).

Plaintiff contends that Defendant's continuous willful failure to appear at her Court ordered depositions subjects her to terminating and monetary sanctions under FRCP 37. Specifically, Plaintiff asks the Court to strike her answer and enter a default. Plaintiff contends these sanctions are appropriate since Defendant engaged in willful violations that were not outside of her control. *Citing, In re Exxon Valdez*, 102 F.3d 429, 432 (9<sup>th</sup> Cir. 1996); *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9<sup>th</sup> Cir. 2003); and *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9<sup>th</sup> Cir. 1994).

Plaintiff further argues that upon examination of the five part test described by the Ninth Circuit in *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091 (9<sup>th</sup> Cir. 2007), the requested terminating sanctions are warranted in this case.

The five factors include "(1) the public's interest in expeditious resolution of the litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy

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favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* at 1096.

Plaintiff argues that Defendant's willful delays have impeded an expeditious resolution of this matter; negatively affected the Court's ability to manage its dockets; and caused Plaintiff significant prejudice. Moreover, the effects of Defendant's continuous bad faith behavior outweighs the public policy of trying this case on its merits and ordering lesser sanctions.

Finally, should the Court not be inclined to award terminating sanctions, then the Court should issue a monetary fine to compensate Plaintiff's law firm for the fees and costs incurred in preparing the various stipulations and preparing for Defendant's deposition. If such fine is not paid by a specified date, then Plaintiff requests the Court strike Defendant's answer and enter her default.

Plaintiff's counsel filed two supplemental declarations. In the first (dkt. 87), he seeks not only terminating sanctions, but also additional damages of \$50,676.65 in fees and \$783.71 in costs. He asserts that these fees and costs are all in connection with compelling Defendant to cooperating in the adversary proceeding and in attending her deposition and have been incurred since the stay order was lifted.

The second declaration (dkt. 89) is in response to the opposition. Movant has removed some of the requested fees and explains that there is no double billing. The requested amount now is \$47,300.15 fees and \$555.63 costs.

**Defendant's Opposition:**

Defendant opposes the issuance of an Order to Show Cause and this same information is relevant to the OSC that was issued. Defendant contends there were extenuating circumstances that necessitated her non-appearance at the September 16, 2016 deposition. Defendant argues that

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due to a phone conversation between Plaintiff's counsel and Defendant's counsel the day prior to the deposition, her non-appearance was justified. According to Defendant, Plaintiff's counsel advised Defendant's counsel that he would be asking Defendant about certain transfers of money that could lead to claims that Defendant stole millions of dollars. As such, Defendant made the decision that she should consult with a criminal attorney. Since her current attorney does not practice criminal law, Defendant's counsel asked for a short continuance of the deposition. Defendant also offered to pay for any costs incurred for the court-reporter due to her non-appearance. As such, Defendant contends there is cause not to hold Defendant in contempt. In her opposition to the issuance of an OSC, Halper requested that she have an opportunity to be heard through a full written opposition and appearance at the hearing.

opposition

In her opposition to the Order to Show Cause (dkt. 88), Halper merely deals with the requested amount of the fees and costs.

She also submitted a declaration of Michael Becker, who practiced criminal law. Although he is aware of the prior stay and the order to appear, because opposing counsel made a claim that Halper was engaged in criminal wrong-doing, "Ms. Halper reasonably believed in the need to consult with a criminal lawyer to address her constitutional rights." Mr. Becker believes that her Fifth Amendment concerns would likely be eliminated if the scope of examination only went up to the date of bankruptcy and/or related to assets existing at the time of the filing. If there is no such limitation, Mr. Becker will attend the deposition to advise Halper of her rights.

**Analysis:**

This adversary proceeding was initiated over five years ago. While

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Defendant did file an answer, the Court ordered the adversary proceeding stayed under Defendant's Fifth Amendment privilege. There were many delays until the Court was satisfied that no criminal action could be brought due to the statute of limitations. On June 16, 2015, an Order Terminating Stay as to Adversary Proceeding ("Order") was entered. This Order provided that discovery may immediately commence and also provided for a continued status conference. Since then an order continuing the deposition and/or the status conference (due to the fact that the deposition has not yet occurred) has been entered on August 26, 2015, September 21, 2015, November 30, 2015, January 29, 2016, May 31, 2016, and July 18, 2016. Finally, Defendant's deposition was continued to September 16, 2016, however, she failed to attend. As a result, after numerous delays and continuances, Plaintiff filed this Motion on October 14, 2016.

Based on the facts presented by the Plaintiff, Defendant appears to be willfully avoiding her deposition without any justification. The Court recognizes Defendant's response to the contrary (in her Opposition, dkt. # 75) but cannot approve her failure to appear at her deposition at the eleventh hour especially considering the stay was lifted more than sixteen months ago. To date and since the lifting of the stay, this action has failed to proceed. Her newest contention that she suddenly needed to confer with criminal counsel about a new criminal proceeding that was hinted at by the Plaintiff's counsel is not credible unless the issues raised occurred during the last few years. Then it is still questionable given that we have been down this path before.

Ms. Halper will have one final chance to appear at her deposition. If she wishes to have Mr. Becker or another criminal attorney present, she is certainly allowed to do so. If he advises her to assert Fifth Amendment privilege on the record, so be it. If the scope of the privilege needs to be determined, that can be done later. If she fails to answer questions or to appear without good cause, her answer in the two adversary cases will be stricken.

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At the hearing, I will determine whether - prior to the most recent deposition - she has delayed making production or failing to appear without good cause.. If so, she will be ordered to pay an initial amount of \$10,000 before or at her deposition. The balance of the fee request will be considered at a continued hearing to take place after the deposition. If she appears, produces all requested documents, and cooperates, then the Court will consider reducing the monetary sanctions from the \$47,000+ requested. If she fails to appear or produce documents or is shown to be uncooperative with discovery, the full \$47,000+ requested will be granted as a judgment against her. The \$10,000 actually paid will be credited against the amount of fees awarded.

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

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

Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

1:09-23807 Shellie Melissa Halper

Chapter 7

Adv#: 1:11-01317 Cohen v. Halper et al

#5.00 Motion to Withdraw as Counsel for Debtor  
Shellie Melissa Halper

Docket No: 79

**Tentative Ruling:**

See cal. #4.

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Defendant(s):**

Alan W Forsley

Pro Se

Mark Sharf

Pro Se

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Plaintiff(s):**

Solomon M Cohen

Represented By  
Craig G Margulies  
Nina Z Javan

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By

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

**CONT... Shellie Melissa Halper**

**Chapter 7**

Michael H Weiss  
Laura J Meltzer

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

**1:09-23807 Shellie Melissa Halper**

Chapter 7

Adv#: 1:11-01317 Cohen v. Halper et al

▪  
**#6.00** Order Setting Hearing on Plaintiff Solomon M. Cohen's Motion for Issuance of an Order to Show Cause why Defendant Shellie Melissa Halper should not be Held in Contempt for Failure to Appear at her Court Ordered Deposition

fr. 11/15/16

Docket No: 73

**Tentative Ruling:**

Off calendar. The Order to Show Cause was entered on 11/21/16.

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

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Defendant(s):**

Alan W Forsley

Pro Se

Mark Sharf

Pro Se

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Plaintiff(s):**

Solomon M Cohen

Represented By

**United States Bankruptcy Court  
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San Fernando Valley  
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**Tuesday, December 06, 2016**

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10:00 AM

**CONT... Shellie Melissa Halper**

**Chapter 7**

Craig G Margulies  
Nina Z Javan

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

1:09-23807 Shellie Melissa Halper

Chapter 7

Adv#: 1:11-01317 Cohen v. Halper et al

#6.01 Order to Show Cause Why Shellie Melissa  
Halper Should Not Be Held in Contempt

Docket No: 0

**Tentative Ruling:**

See cal. 4.01

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Defendant(s):**

Alan W Forsley

Pro Se

Mark Sharf

Pro Se

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Plaintiff(s):**

Solomon M Cohen

Represented By  
Craig G Margulies  
Nina Z Javan

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By

**United States Bankruptcy Court  
Central District of California  
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**CONT... Shellie Melissa Halper**

**Chapter 7**

Michael H Weiss  
Laura J Meltzer

**United States Bankruptcy Court  
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10:00 AM

**1:09-23807 Shellie Melissa Halper**

**Chapter 7**

Adv#: 1:11-01317 Cohen v. Halper

▪  
**#7.00** Status Conference re Complaint to Object to  
Discharge of Debt due to Fraud 11 USC 523(a)(2)(A)

fr. 7/6/11, 8/31/11, 10/18/11, 12/13/11, 1/3/12, 1/17/12,  
2/7/12, 1/8/13; 6/4/13, 11/19/13, 3/11/14, 7/8/14; 1/13/15,  
1/20/14, 5/26/15; 6/2/15; 10/20/15, 12/8/15; 2/9/16; 4/5/16,  
6/21/16, 8/16/16, 9/27/16; 11/15/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley

**Defendant(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley

**Plaintiff(s):**

Solomon M Cohen

Pro Se

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
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**CONT... Shellie Melissa Halper**

**Chapter 7**

**US Trustee(s):**

United States Trustee (SV)

Pro Se

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

1:09-23807 Shellie Melissa Halper

Chapter 7

Adv#: 1:11-01319 Twin Palms Lending Group, LLC v. Halper

#8.00 Motion to Withdraw as Counsel for Debtor  
Shellie Melissa Halper

Docket No: 90

**Tentative Ruling:**

See cal. #4.

**Party Information**

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Defendant(s):**

Shellie Melissa Halper

Represented By  
James R Felton  
Yi S Kim

**Plaintiff(s):**

Twin Palms Lending Group, LLC

Represented By  
Jerome Bennett Friedman  
Craig G Margulies  
Nina Z Javan  
Meghann A Triplett

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

**1:09-23807 Shellie Melissa Halper**

**Chapter 7**

Adv#: 1:11-01319 Twin Palms Lending Group, LLC v. Halper

■

**#9.00** Status Conference re Complaint to Object to Discharge of Debt due to Fraud 11 USC sec 523(a)(2)(A)

fr. 7/6/11, 8/31/11,10/18/11, 12/13/11, 1/3/12, 1/17/12, 2/7/12, 1/8/13, 6/4/13, 11/19/13, 3/11/14, 7/8/14; 1/13/15, 1/20/15, 5/26/15; 6/2/15; 10/20/15, 12/8/15; 2/9/16; 4/5/16, 6/21/16, 8/16/16, 9/27/16; 11/15/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

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

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley

**Defendant(s):**

Shellie Melissa Halper

Pro Se

**Plaintiff(s):**

Twin Palms Lending Group, LLC

Pro Se

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

David Keith Gottlieb (TR)

Pro Se

**United States Bankruptcy Court  
Central District of California  
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**CONT... Shellie Melissa Halper**

**Chapter 7**

**US Trustee(s):**

United States Trustee (SV)

Pro Se

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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Tuesday, December 06, 2016

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10:00 AM

**1:09-23807 Shellie Melissa Halper**

**Chapter 7**

Adv#: 1:11-01319 Twin Palms Lending Group, LLC v. Halper

■  
**#9.01** Order to Show Cause Why Shellie Melissa  
Halper Should Not be Held in Contempt

Docket No: 0

**Tentative Ruling:**

See cal. 4.01

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

**Debtor(s):**

Shellie Melissa Halper

Represented By  
Mark M Sharf  
Alan W Forsley  
James R Felton  
Yi S Kim

**Defendant(s):**

Shellie Melissa Halper

Represented By  
James R Felton  
Yi S Kim

**Plaintiff(s):**

Twin Palms Lending Group, LLC

Represented By  
Jerome Bennett Friedman  
Craig G Margulies  
Nina Z Javan  
Meghann A Triplett

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Michael H Weiss  
Laura J Meltzer

**United States Bankruptcy Court  
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Hearing Room 303

10:00 AM

**1:10-14588 Ana Beatriz Betancourt**

**Chapter 7**

Adv#: 1:12-01221 Ballmer v. Betancourt

▪  
**#10.00** Motion for New Trial and/or Relief from Judgment

fr. 11/15/16

Docket No: 69

**Tentative Ruling:**

Submitted without appearance. This will be continued to Jan. 17 at 10:00 a.m. as a holding date in case the Court needs more information. But it is expected that a written ruling will be entered before that time.

**Party Information**

**Debtor(s):**

Ana Beatriz Betancourt

Represented By  
Raj T Wadhvani

**Defendant(s):**

Ana Beatriz Betancourt

Represented By  
Jeffrey D Nadel

**Plaintiff(s):**

Matthew Ballmer

Represented By  
Derek L Tabone

**Trustee(s):**

David R Hagen (TR)

Represented By  
Scott Lee

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

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10:00 AM

**1:10-24366 Lawrence Erwin Weisdorn**

**Chapter 11**

**#11.00** Post-Confirmation Status Conference

fr. 5/17/16, 8/2/16

Docket No: 341

**Tentative Ruling:**

Plan confirmed. Order entered 9/7/16. Fees have been awarded. No status report received as of 11/30.

prior tentative ruling (8/2/16)

On June 25 the Debtor filed a Fourth Amended Plan along with a notice and a new ballot. It attaches the prior stipulations with Nationstar. I have now reviewed the redlined copy and the case is ready for confirmation. The summary of ballots shows that all impaired classes accepted the plan and everyone voting voted in favor of the plan.

The Plan appears to meet all of the confirmation requirements.

prior tentative ruling (5/17/16)

The disclosure statement was previously approved. Service of the voting deadline, etc. was made on April 11, not April 8 as ordered by the Court (dkt. 329, 334) . The last day to vote or object to confirmation was 5/3/16. That is insufficient to meet the 28 day requirement of FRBP 2002(b). Was there an earlier notice that has not been filed with the court?

Assuming that the hearing can be held:

Nationstar Mortgage filed a limited objection of the Plan. A stipulation as to the treatment of this claim was approved on 7/28/15. The Plan is ambiguous as to article VI(G) and the related sale rights, so it is possible that this violates the terms of the stipulation and may not be fair and equitable to Nationstar. In general this concerns the language and application of the terms concerning a "material default." If that provision is triggered, it appears that there would be a standing order appointing CMA to market and sell the property. Nationstar requests that this not be a standing order, but that there needs to

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CONT... **Lawrence Erwin Weisdorn**

**Chapter 11**

be a motion and court order to do so.

Nationstar is also concerned that the process would require CMA to file a BPO with the court and that the creditors would then need to file an opposition and request for hearing if they oppose the listing price or the sale price. It seems that Nationstar is most concerned that at some future date it would not be aware of this "scream or die" requirement and would not timely object. It prefers a formal hearing on this provision at the time of the default and of the proposed listing and sale.

Beyond that, the Court could choose a listing and sale price that is insufficient to pay the secured claims in full. That makes is even more important that the creditors have formal notice and a hearing before this takes place.

The Plan also is not clear that the creditor can credit bid at any proposed sale.

According to the Debtor, the terms of class 2 (Nationstar) as in conformance with the settlement agreement with Weiermaier. The parties need to work this out.

The Debtor filed his ballot summary and confirmation brief. Of the impaired classes, class 3 (Weiermair - the judgment lienhold creditor) accepted. Class 2, which is Nationstar (the creditor secured by the principal residence), rejected the Plan. The Debtor talks about "class 4," but the plan (dkt. 322) does not have class 4 or 5, but only class 6. I assume that this is a typo and it is clear that he is referring to the class of general unsecured creditors. Although this is delinieated as an unimpaired class in the ballot summary, it is an impaired class because it is being paid over time. The ballot summary is also incorrect as to the percent accepting in both class 2 and 4. "N" is not the number of creditors in the class, but the number of claims that are actually voted. (Same with the column denominated as "Amt.") Thus, for class 4(6), it appears that only one creditor voted and that creditor accepted. Thus the class accepts 100% in number and also 100% in amount.

<b>Party Information</b>
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CONT... Lawrence Erwin Weisdorn

Chapter 11

**Accountant(s):**

Barbara Luna

Represented By  
Michael N Sofris

**Attorney(s):**

Michael N Sofris

Pro Se

Robert J Allan

Pro Se

**Creditor(s):**

Russell Miller Jr.

Represented By  
Bradley E Brook

Bank of America, N.A....

Represented By  
Mark T. Domeyer  
Lemuel Bryant Jaquez

Deutsche Bank National Trust Compan

Represented By  
Lemuel Bryant Jaquez  
Mark T. Domeyer

Nationstar Mortgage, LLC.

Represented By  
Bill Taylor  
Todd S Garan  
Michael Daniels

Vanda, LLC

Pro Se

Wells Fargo Bank N.A.

Represented By  
John H Kim

Porsche Financial Service, Inc.

Represented By  
Stacey A Miller

BAC Home Loan Servicing LP

Represented By  
Joe M Lozano Jr  
Mark T. Domeyer

Robert Weiermair

Represented By  
Rod Rummelsburg

**United States Bankruptcy Court  
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10:00 AM

**CONT... Lawrence Erwin Weisdorn**

**Chapter 11**

Vision Industries, Corp

Represented By  
Rochelle A Herzog

BMW Bank of North America, Inc. De

Pro Se

**Debtor(s):**

Lawrence Erwin Weisdorn

Represented By  
Michael N Sofris

**Interested Party(s):**

Ashley E Markow

Pro Se

Courtesy NEF

Represented By  
Richard J Bauer Jr  
Rod Rummelsburg  
Todd S Garan

**US Trustee(s):**

United States Trustee (SV)

Represented By  
S Margaux Ross

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
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Hearing Room 303

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**1:10-25103 Arna Susan Vodenos**

**Chapter 11**

**#12.00** Post Confirmation Status Conference

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

Docket No: 1

**Tentative Ruling:**

Off calendar. Case close on 10/20/16.

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

**Debtor(s):**

Arna Susan Vodenos

Represented By  
Illyssa I Fogel  
Jeff Katofsky  
Daniel B Spitzer

**United States Bankruptcy Court  
Central District of California  
San Fernando Valley  
Judge Geraldine Mund, Presiding  
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10:00 AM

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

**Chapter 11**

**#13.00** Hearing on Debtor's Fourth Amended Disclosure Statement

Docket No: 528

**Tentative Ruling:**

Jeffrey Golden (the "Trustee"), as trustee of the chapter 11 estate of Robert Vilas Johnson and Linda Joyce Johnson (the "Debtors"), moves for approval of the Trustee's Fourth Amended Disclosure Statement (the "Disclosure Statement" or "DS") describing the Trustee's Fourth Amended Chapter 11 Plan (the "Plan"). (For ease of reference, most numbers below are approximate.)

**Service:** More than 28 days' notice of the hearing required by Fed. R. Bank. P. 2002(b) and the 36 days' notice required by LBR 3017-1 were provided to the United States Trustee, the ECF list, and the creditors on the creditor matrix.

**Plan**

**Administrative Claims:** This class is comprised of professional fees as of the Effective Date of approximately \$245,000, consisting of \$5,000 for the Trustee, \$150,000 for Baker & Hoestetler, LLP, and \$90,000 for Crowe Horwath LLP [Plan p. 1]. (It appears that the Trustee also anticipates additional post-Effective Date expenses of approximately \$32,000, because total administrative expenses on Exhibit E to the DS are \$277,000.) This class shall be paid in full on the Effective Date, but, to the extent necessary, professionals have agreed to waive the right to payment in full on the Effective Date to ensure sufficient funds are available to pay all other claims entitled to payment in full on the Effective Date.

**Priority Tax Claims:** Approximately \$210,000 of priority tax claims [Plan p. 2.] shall be paid in full on the Effective Date.

**Class 1 - Other Priority Claims:** none

**Class 2 – Secured Claims on the Debtors' Principal Residence:** The Trustee (after notice and court approval) abandoned the Debtors' principal residence, so there are no claims in Class 2

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

**Chapter 11**

**Classes 3, 4 & 5 – Other Secured Claims:** none

**Class 6 – General Unsecured Claims:** This class of \$596,000 in claims [DS Ex. E] will be paid \$77,000 [Plan p. 6] or \$55,000 [Plan p. 6 n. 6] and/or 12.96% [Plan p. 6; DS p. 6] or 13.6% [DS p. 2] of their claims over a term of six years. The actual amount will depend of the amount of excess monthly income paid by the Debtors.

**Class 7 – Subordinated Tax Claims** of approximately \$11,000 [DS p. 3; Plan p. 6] and **Class 8 – Drew Kaplan’s voluntarily subordinated claim** of \$8.6 million [DS p. 3; Plan p. 7] will be paid after senior claims are paid in full. The Trustee does not anticipate making any distributions to these classes.

**Summary of the Plan** (The Trustee should inform the Court of any inaccuracies in this summary, I drew information from a variety places in the Plan and Disclosure Statement to create this summary.)

The estate will have approximately \$255,000 [DS p. 5; Plan p. 9] in cash on hand on the effective date, which will be used to pay the \$210,000 of Priority Tax Claims and \$45,000 (of the total \$245,000) of professional fees and costs on the effective date.

The Debtors’ excess income over the six-year life of the Plan is estimated to total \$325,000 [DS Ex. B]. This will be used first to pay professionals the \$200,000 unpaid as of the Effective Date, \$16,000 of post-confirmation U.S. Trustee fees and an additional \$32,000 of estimated post-Effective Date administrative expenses, with the estimated remainder of \$77,000 paid to Class 6 General Unsecured Creditors [DS Ex. E].

**Debtors’ Objection**

- The total payments and the estimated percentage payout are inconsistent throughout the Plan and Disclosure Statement:
  - \$77,221 and 12.96% on page 6 of the Plan
  - \$55,100 in footnote 6 of page 6 of the Plan
  - 13.66% on page 2 of the Disclosure Statement
- Page 5 of the Disclosure Statement includes an unknown amount from asset sales in "Sources of Payments under the Plan." The Debtors are not aware of any additional assets to be sold.
- Future disposable income estimate of \$3,822.07/month [which is the basis for the \$325,000 of projected disposable income over the life of the Plan] is grossly overstated. The income used is business income

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for the Debtor's business Cyber Resources, not personal income and the expenses from the operation of this business are about \$5,100/month, not the \$300/month in Exhibit B. Exhibit B to the DS also uses an IRS Standard for expenses that is both outdated and for the wrong county, understating monthly Housing and Utilities expenses by about \$140. Exhibit B also mislabels or excludes some of the Food, Clothing and Other expense items that are included in the IRS Standard, further understating monthly expenses by about \$120. Furthermore, the Debtors' expenses in Exhibit B are based on the Debtors having one vehicle, but the IRS Local Standards provide for two vehicles, thus adding \$266 in monthly expenses. Thus, expenses in Exhibit B to the disclosure Statement are understated by more than \$500. The Plan also fails to take into account that the IRS Local Standards will increase every year.

- The Plan assumes that Mr. Johnson will work for the next six years, but Mr. Johnson is 68 years old. His work is physically demanding. He plans to retire by June 17, 2018 at the age of 70. (See Johnson Dec. attached to the Debtors' Objection.) Thus, the likelihood of his being alive, willing to continue to work and physically able to work for the next six years is extremely low. As payments to unsecured creditors all come from Mr. Johnson's income, the Plan is not feasible.
- Page 5 of the Disclosure Statement includes \$50,215 for "Non-exempt interest in income derived from retirement account[s]" in "Sources of Payments under the Plan." Retirement accounts do not generate interest and any estimates of monies available over the six years of the Plan are illusory.
- Page 7 of the Disclosure Statement includes \$10,000 for asset sales and \$8,500 for additional cash "accumulate[d] from projected disposable income between now and the Effective Date" in sources of cash on hand on the Effective Date. There is no explanation for how these figures were determined.
- Exhibit A to the disclosure Statement is confusing: it indicates that Kenneth Cleveland and William Bickley were paid \$350,000 pursuant to settlement, but they were paid \$150,000 pursuant to settlement.

In sum, the full payment of administrative expenses and the payment of a small percentage to unsecured creditors are dependent on the Debtors' future disposable income. With the Debtors' projected expenses understated, other

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sources of cash unsubstantiated, and Mr. Johnson unlikely to continue to work for six more years, the Plan is not feasible.

**Reply** -- No reply has been filed [as of December 1, 2016].

**Legal Standards**

- Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. §1125(b).
- "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. §1125(a).
- "The determination of what is adequate information is subjective and made on a case-by-case basis." *Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 193 (B.A.P. 9th Cir. 2003)(quoting *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988)). It is largely within the discretion of the bankruptcy court. *Id.*
- "[D]isapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible." *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990); see also *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154-55 (3d Cir. 2012); *In re Pecht*, 53 Bankr. 768 (Bankr. E.D. Va. 1985); *In re Kehn Ranch, Inc.*, 41 Bankr. 832 (Bankr. D.S.D. 1984). However, such disapproval is discretionary and should not "convert the disclosure statement hearing into a confirmation hearing." *Cardinal Congregate I*, 121 B.R. at 764. Some confirmation requirements that frequently are at issue: §1129(a)(3)(that the plan be proposed in good faith), §1129(a)(7)(that the creditors receive at least what they would in a Chapter 7 liquidation), §1129(a) that each class of creditors be left unimpaired, vote to accept the plan or meet the requirements of §1129(b)("cram down"), §1129(a)(10) (that an impaired class of creditors vote to accept the plan), §1129(a)(11) (that the plan be feasible) and §1129(a)(15) (that "if an unsecured creditor objects, that the unsecured class be paid in full or the Debtor

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distribute property equal to five years of disposable income").

- Fed. R. Bankr. P. 2002(b) requires at least 28 days' notice to the debtor, the trustee and all creditors and indenture trustees. LBR 3017-1(a) requires at least 36 days' notice.

Legal Analysis: Disclosure

The Disclosure Statement is confusing. The Plan and Disclosure Statement are frequently inconsistent and just sloppy. Understanding the mechanics of the Plan takes repeated readings of both the Plan and Disclosure Statement. A summary of the Plan (similar to the one above) would be a good start in understanding the mechanics of the Plan. The following additions/corrections should also be made:

- Exhibit A to the Disclosure Statement does not currently support the Trustee's calculation of \$595,839 in total general unsecured claims and is confusing to creditors. A column should be added for the amount of each allowed claim that is receiving a distribution under the Plan as a part of Class 6. This column should be totaled.
- The distributions to Class 6 should be consistent between the Plan and the Disclosure Statement. Currently, the percentage distribution is 12.96% in the Plan and on Exhibit E to the Disclosure Statement and 13.6% in the Disclosure Statement. The overall distribution to Class 6 is \$77,221 page 6 of the Plan and \$55,100 in footnote 6 of page 6 of the Plan.
- Part 5 of the Disclosure Statement ("Feasibility") is meaningless for two reasons: (1) Uses of Cash on the Effective Date exceed Sources of Cash on the Effective Date by \$200,000 and (2) it does not even attempt to demonstrate post-Effective Date feasibility.
- Exhibit E of the Disclosure Statement, which is the liquidation analysis and which also gives the best information on the amount of claims in the respective classes and on the sources and uses of cash, should be clearer. The eighth line item "Estimated Administrative and Priority Tax Claims" appears to contain only Priority Tax Claims (while the administrative claims are listed above). The seventh line item, a subtotal of "Proceeds available for distribution to all creditors" is unnecessary and adds confusion.
- Part 3 of the Disclosure Statement indicates \$50,000 of "Other sources of funding" in subpart D from non-exempt interest from retirement

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plans [see *also* Plan p. 9]. This \$50,000 does not flow into Exhibit E or into the calculation of cash available to pay creditors.

These issues, as well as several other inconsistencies in the Plan and Disclosure Statement identified in the Debtors' Opposition, leave the Court without confidence in the Trustee's financial data supporting the Plan.

Legal Analysis: Confirmability

On its face, three of the most substantive requirements for confirmability do not present issues relevant to the approval of a disclosure statement. However, the Plan currently appears to lack feasibility, such that the Disclosure Statement cannot be approved.

- **1129(a)(7) – Best Interests of Creditors Test**  
The only impaired classes are general unsecured claims (Class 6) and subordinated unsecured (Classes 7 & 8). As set forth in Exhibit E to the Disclosure Statement, the Plan will pay more to general unsecured creditors than a chapter 7 liquidation would. Subordinated creditors will receive nothing under either.
- **1129(a)(8) – Each impaired class must accept or be crammed down**  
The Plan can be crammed down on each of the impaired classes (6, 7, & 8, because the classes junior to them will receive nothing under the Plan.
- **1129(a)(10) – at least one impaired class votes yes**  
It is not yet clear whether one of the impaired classes will vote yes, but this is not the type facial unconfirmability that should block approval of a disclosure statement.
- **1129(a)(11) – feasibility**  
Given the amount of administrative expenses and the assets currently in the estate, the complete payment of administrative expenses and any payment to general unsecured creditors would need to come out of the Debtors' future disposable income.  
Unfortunately, the Trustee's projections of future disposable income appear to suffer from some major deficiencies. Projected expenses are substantially understated, as detailed in the Debtors' Opposition. Even worse, the \$325,000 of projected disposable income over the life of the Plan assumes a \$600/month increase in 2020 (from \$3800/month to \$4440/month) and a **\$2,600** increase in 2022 (from

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\$4400/month to \$7000/month). The Trustee offers no explanation for these increases. Class 6 general unsecured creditors will receive only the last \$12,000-13,000 of the \$325,000, which means they would be paid only out of this wholly unwarranted \$2600/month increase in the last nine months of the Plan.

In fact, the unsecured creditors' \$13,000 would come from the **last two months** of income in this six-year Plan – in November and December of 2022. Mr. Johnson is 68 years old and has stated that he intends to retire by June 17, 2018. The undisclosed reality of this Plan is that it almost certainly will provide no payment to unsecured creditors.

**Conclusion**

This Disclosure Statement cannot be approved, due to problems of disclosure and feasibility. The question is where this case should go from here. The disclosure issues could presumably be fixed, but the feasibility of any plan of reorganization in this case is questionable.

According to the DS, the estate has about \$245,000 in administrative expenses (professional fees) and \$210,000 in priority tax claims. The estate has assets (mostly cash) of about \$250,000. Thus, there is shortfall of about \$200,000 before administrative and priority tax claims could be paid in full.

The only other source of funding is the Debtors' future disposable income. (And in fact, if any unsecured creditors objects to a plan of reorganization, the Debtors would be required to contribute the value of five years of projected disposable income under §1129(a)(15) for the plan to be confirmed.) However, Mr. Johnson is 68 and plans to retire in 2018. Even if he were willing to work longer, his ability to do so is very far from certain. Thus, a potential plan might utilize some future income, but far less than the \$325,000 in the Plan (which was based on 6 years, understated expenses, and unwarranted income increases) and most likely less than the \$200,000+ needed to pay administrative and priority tax claims in full.

The alternative is conversion to chapter 7. The \$250,000 in the estate would pay the chapter 7 administrative expenses and most but not all of the chapter 11 administrative expenses. The priority tax claims would remain unpaid and most likely become non-dischargeable under §523(a)(1).

The parties should come to Court prepared to discuss these alternatives and the future of this case.

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**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  
Michael T Delaney  
Fahim Farivar  
Andrew P Altholz  
Gavin L Greene  
Leslie A Cohen

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**#14.00** 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; 10/25/16

Docket No: 379

**Tentative Ruling:**

Superceded by cal. #13

**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  
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Fahim Farivar

**Trustee(s):**

Jeffrey I Golden (TR)

Represented By  
Jeffrey I Golden (TR)  
Ashley M McDow

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**Robert Vilas Johnson and Linda Joyce Johnson**

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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**

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**#15.00** 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; 10/25/16

Docket No: 196

**Tentative Ruling:**

Is this concluded?

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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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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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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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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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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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.

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

**Debtor(s):**

Robert Vilas Johnson

Represented By  
Andrew P Altholz  
Gavin L Greene  
Ashley M McDow

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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**

**#16.00** 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; 10/25/16

Docket No: 1

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

Robert Vilas Johnson

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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)

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**Robert Vilas Johnson and Linda Joyce Johnson**

**Chapter 11**

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**

**Chapter 11**

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

▪  
**#17.00** 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; 10/25/16

Docket No: 1

**Tentative Ruling:**

What next?

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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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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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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**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

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

Tuesday, December 06, 2016

Hearing Room 303

10:00 AM

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

**Chapter 11**

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

■

**#18.00** 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; 10/25/16

Docket No: 1

**Tentative Ruling:**

What next?

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

**Chapter 7**

Adv#: 1:16-01142 Shoemaker v. Levene, Neale Bender Yoo & Brill et al

■  
**#19.00** Motion for Remand of Action to State Court

Docket No: 19

**Tentative Ruling:**

**Background**

On May 25, 2010, Shoemaker filed a voluntary Chapter 7 petition before Judge Donovan (2:10-bk-30910-TD). Alfred H. Siegel was appointed chapter 7 trustee (the "Trustee").

On September 21, 2011, the Trustee filed a report of no distribution. On June 20, 2012, Shoemaker filed amended schedules in which he asserted that he had real property assets of \$32,500 and personal property assets of \$12,290,946.76, primarily comprised of claims against other parties (the "Adversarial Claims") (bk. dkt. #64). On July 20, 2012 the Trustee withdrew his report of no distribution (bk. dkt. #66).

On May 16, 2013, at the request of the Trustee in the Shoemaker chapter 7 case, the Court gave notice of possible dividend and set a claims bar date (bk. dkt. #68).

On November 26, 2013, the Trustee filed an application to employ Brett Lewis as his special counsel to pursue possible litigation to collect the Adversarial Claims (bk. dkt. #71). The order to employ was entered on January 24, 2014 (bk. dkt. #79).

On January 8, 2014, the Trustee filed an application to employ Levene, Neale, Bender, Yoo & Brill ("LNBY&B") as his general counsel (bk. dkt. #74). This application was denied by order dated February 12, 2014 (bk. dkt. #83). On April 1, 2014, the Trustee again filed an application to employ LNBY&B as his general counsel nunc pro tunc effective July 13, 2012. (bk. dkt. #86). The order to employ was entered on August 7, 2014 (bk. dkt. #97).

On November 18, 2014, Shoemaker's chapter 7 case was transferred to the San Fernando Valley Division and reassigned to Judge Mund (1:14-bk-

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**Chapter 7**

15182-GM). On December 1, 2014, Lewis, on behalf of the Trustee, commenced 27 adversary proceedings in Shoemaker's chapter 7 case, in an attempt to collect the Adversarial Claims, but this litigation has for the most part concluded with only a minimal amount collected.

On July 28, 2016, Shoemaker filed a complaint in Los Angeles Superior Court (the "Complaint") against the Trustee; LNBY&B; one of LNBY&B's partners, Anthony Friedman ("Friedman"); and Lewis (collectively, the "Defendants") asserting the following causes of action:

- First: Fraud against Siegel, LNBY&B, and Friedman
- Second: Negligent Misrepresentation against Siegel, LNBY&B, and Friedman
- Third: Breach of Fiduciary Duty against Siegel, LNBY&B, and Friedman
- Fourth: Breach of Fiduciary Duty against Lewis
- Fifth: Negligence against Siegel, LNBY&B, and Friedman
- Sixth: Breach of Fiduciary Duty against Lewis

The Complaint seeks \$40 million in compensatory damages, as well as punitive damages, prejudgment interest, and attorney's fees.

On October 7, 2016, LNBY&B and Friedman removed this action from Superior Court to this Court, thereby commencing this adversary proceeding. Shoemaker has filed this motion to remand this adversary proceeding to Superior Court. The Defendants have all filed motions to dismiss this proceeding, which will be heard at the same time as this motion.

Shoemaker has filed a first Amended Complaint ("FAC") that drops the second cause of action for Negligent Misrepresentation against Siegel; LNBY&B; and Friedman, the fifth cause of action for Negligence against Siegel; LNBY&B; and Friedman, and the duplicative sixth cause of action for Breach of Fiduciary Duty against Lewis. Thus, the FAC states the following causes of action:

- First: Fraud against Siegel
- Second: Fraud against LNBY&B and Friedman
- Third: Breach of Fiduciary Duty against Siegel, LNBY&B, and Friedman

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Fourth: Breach of Fiduciary Duty against Lewis  
Lewis has filed an objection to the FAC as untimely under Fed. R. Civ. P. 15.  
This objection is considered with the Motions to Dismiss.

**Motion**

Removal is statutorily, rather than constitutionally, derived.  
Thus, removal statutes should be construed restrictively and the removing  
defendant has the burden of establishing grounds for removal and that it has  
complied with procedural requirements.

Given the foregoing, this proceeding should be remanded because:

1. Defendants' sole basis for removal was that the State Action sought relief against them "solely in connection with the performance of their duties as counsel for the Trustee . . . ." However, the Complaint alleges that the Defendants committed fraud, which is outside the scope of their duties as counsel to the Trustee. *In re Cochise Coll. Park, Inc.*, 703 F.2d 1339 (9th Cir. 1983); *Leonard v. Vrooman*, 383 F.2d 556 (9th Cir. 1967)
2. Removal is unconstitutional because Shoemaker is entitled to an Article III court to preserve his right to a jury trial under the 7<sup>th</sup> Amendment.
3. The removal was procedurally defective. Remand may be ordered for lack of subject matter jurisdiction or "a defect in removal procedure." 28 U.S.C. §1447(c). All defendants in the state action must join in notice of removal. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999); *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998), as amended (July 28, 1998). At the very least, the removing parties' attorney must certify that the remaining defendants consent to removal. *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009). LNBY&B failed to join all Defendants or even have counsel certify that all Defendants have consented.

**LNBY&B and Friedman Opposition**

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This case was not removed under 28 U.S.C. §1446; it was removed under §1452(a), which does not require the consent of the other defendants.

This action – a claim against the Trustee and his counsel - is a core proceeding, because it arises in a case under title 11 (*i.e.*, it would not exist but for the bankruptcy case). *In re Harris Pine Mills*, 44 F.3d 1431, 1437 (9th Cir. 1995) is dispositive on the point that claims against the trustee for conduct intertwined with the administration of the estate is a core proceeding. Core proceedings should ordinarily be retained by the bankruptcy court. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 171 (1st Cir. 1987). This particular proceeding should also be retained because it implicates the integrity of the bankruptcy process and the administration of the estate.

The Plaintiff's right a jury trial is not dispositive of remand. Bankruptcy courts are authorized to conduct jury trials with the consent of all parties. Even in the absence of consent, the Court may adjudicate all pre-trial issues and send the case to the District Court for trial.

Shoemaker's authorities for the proposition that suits for fraud against the Trustee do not require the prior permission of the bankruptcy courts are irrelevant to remand and factually distinguishable (*i.e.*, they involved trustees taking property that did not belong to the estate.)

**Trustee Opposition**

LNBY&B filed the notice of removal under §1452(a) (as an action related to the Debtor's bankruptcy case), not the general removal statute of § 1446. Thus any one defendant may remove the action and the removal was proper.

In any event, remand would be futile because the state court lacks jurisdiction over this core proceeding. This proceeding is core as it would have no existence outside bankruptcy. Furthermore, it is well settled that actions against trustees are core proceedings, in great part because the bankruptcy court must be able to police its professionals.

**Lewis Opposition**

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The notice of removal is not defective because the consent of all defendants is not necessary under 28 U.S.C. §1452(a).

Remand would be futile, because the Superior Court lacks jurisdiction over lawsuits against a bankruptcy trustee filed without leave of the Bankruptcy Court, under the *Barton* doctrine. The Ninth Circuit has held that remand should be denied when it is futile.

Even if Shoemaker has the right to a jury trial, this Court can retain this proceeding for pre-trial matters and it can be transferred to the district court for trial.

**Reply to LNBY&B and Friedman Opposition**

The Complaint contends that the Trustee and his counsel were acting outside the scope of their authority. The Notice of Removal was premised on the misrepresented fact that the Complaint sought relief against the defendants “solely in connection with their performance of their duties as counsel for the Trustee.” Thus:

1. There is no basis for removal under 28 U.S.C. §1452(a).
2. This proceeding is not a core proceeding and this Court lacks jurisdiction over this proceeding.
3. Leave of this Court is not required to bring this action.

This proceeding should be remanded back to state court or transferred to District Court.

**Reply to Lewis Opposition**

This Reply is identical to the Reply to the LNBY&B and Friedman Opposition, with one additional paragraph:

Lewis cites cases that make a trustee and his counsel liable, thus helping to prove Shoemaker’s point that there are exceptions to a trustee’s quasi-judicial immunity.

**Analysis**

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Removal

The decisions Shoemaker cites as authority for the requirement that all defendants must join in removal were all cases involving removal decided under 28 U.S.C. §1446. *Proctor*, 584 F.3d 1225; *Prize Frize*, 167 F.3d at 1266; *Parrino*, 146 F.3d at 703. Section 1446 does indeed require that “all defendants who have been properly joined and served must join in or consent to the removal of the action.” 28 U.S.C. §1446(b)(2)(a). However, this proceeding was removed from state court under 28 U.S.C. 1452, which provides:

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452. Section 1452(a) does not require unanimity among the defendants. *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 770 (7th Cir. 2011); *California Public Employees' Retirement System v. WorldCom, Inc.*, 368 F.3d 86, 103 (2d Cir.2004), *cert. denied*, 543 U.S. 1080 (2005); *Creasy v. Coleman Furniture Corp.*, 763 F.2d 656, 660 (4th Cir. 1985). *But see Orion Ref. Corp. v. Fluor Enterprises, Inc.*, 319 B.R. 480, 485 (E.D. La. 2004). It only requires that the District Court (which automatically refers the case to the Bankruptcy Court) has jurisdiction over the removed action under 28 U.S.C. § 1334.

This Court (through the District Court) does have such jurisdiction. Section 1334(b) does grant the District Court “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” This adversary proceeding is one “arising in a case under title 11.”

A civil proceeding “arises in” a Title 11 case when it is not created or determined by the bankruptcy code, but where it would have no existence outside of a bankruptcy case. *Harris Pine Mills*, 44 F.3d at

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1435. A state law contract claim could exist independent of a bankruptcy case, but “an action against a bankruptcy trustee for the trustee's administration of the bankruptcy estate could not.” *Id.* at 1437.

In Harris Pine Mills, the plaintiff sued the bankruptcy trustee and the trustee's agents in Oregon state court. *Id.* at 1434. The plaintiff alleged state law tort claims consisting of fraud, negligence, and negligent misrepresentation surrounding the trustee's sale of one of the estate assets the plaintiff unsuccessfully attempted to purchase. *Id.* The trustee removed the case to federal district court, and sought to have the case referred to the bankruptcy court. *Id.* Plaintiff objected and moved to remand the case back to state court. *Id.* The district court denied the motion to remand and determined that it had jurisdiction under § 1334(b) because the state law claims arose in the bankruptcy case. *Id.* We affirmed. *Id.* at 1438.

Because the plaintiff sued the bankruptcy trustee for the trustee's conduct in administering the bankruptcy estate, the state law claims arose in the bankruptcy case and were subject to federal jurisdiction. *Id.*

Here, although this is a state law cause of action, Harris's claim arose in his bankruptcy case because it could not exist independently of his bankruptcy case. Harris alleged that Wittman, the bankruptcy trustee, breached the Settlement Agreement by selling bankruptcy estate assets that she had agreed not to sell, in exchange for Swain's release of his claims against the estate and his assumption of other estate liabilities that Harris alleges were already released by the Settlement Agreement. Harris's claim is similar to the state law tort claims in Harris Pine Mills. Therefore, Harris's state law contract claim arose in his bankruptcy case, and it could be referred to the bankruptcy court.

*Harris v. Wittman (In re Harris)*, 590 F.3d 730, 737–38 (9th Cir. 2009), cert. denied, 560 U.S. 966 (2010). Like the fraud claim in *Harris Pine Mills*, Shoemaker's tort claims are a core matter. The alleged fraud, misrepresentation, negligence, and breach of fiduciary duty occurred during

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the Trustee's administration of this estate and could not have occurred outside of Shoemaker's bankruptcy case. This Court has jurisdiction under § 1334(b) and the prerequisites for removal in §1452(a) have been met.

Relying heavily on *Leonard* and *Cochise College Park*, Shoemaker argues that: (i) by committing fraud and other intentional torts, the Trustee and his counsel acted beyond the scope their authority, (ii) leave of the bankruptcy court is not required to sue a bankruptcy trustee when he acts in excess of his authority, and (iii) this Court lacks jurisdiction over suits against a trustee acting in excess of his authority (and thus presumably §1452(a) is inapplicable). *Cochise College Park* did hold that a trustee's negligent and fraudulent misrepresentations were not authorized by the bankruptcy court. *Leonard* did hold that leave of the bankruptcy court is not required to sue a bankruptcy trustee acting in excess of his authority. However, there are numerous problems with Shoemaker's argument.

One, the removal of this action to this Court has resolved the need for leave of this Court and the *Barton* doctrine is irrelevant to this analysis of the issues of removal and remand. Thus, the direct holding of *Leonard* is irrelevant to this motion. *Cochise Park* deals with trustee liability, not bankruptcy court jurisdiction, so it also is not directly relevant to this motion.

Two, *Leonard* and *Cochise Park* were decided under the Bankruptcy Act, under a no longer applicable statute governing trustee liability, not under the Bankruptcy Code and the jurisdiction and removal statutes that are relevant to this motion. Further, the *Leonard* and *Cochise Park* decisions do not speak directly to bankruptcy court jurisdiction. They are concerned with the authority of the bankruptcy court to enjoin state lawsuits and the liability of a bankruptcy trustee.

Finally, and most importantly, the Trustee and his counsel were not acting outside the scope of their authority. The allegations in the Complaint (and the FAC) all deal with the defendants' actions in the role of trustee and counsel to the trustee: retaining counsel, litigating the estate's claims, and making statements - in and out of court - about such retention, litigation, and claims. These activities may have been done tortuously as the Complaint alleges, but they were not activities outside the scope of their authority.

In his reply, Shoemaker argues that he has removed all claims of negligence in the FAC, so only intentional torts remain and intentional torts are outside the scope of the trustee's authority. In other words, Shoemaker maintains that any intentional wrongdoing by a trustee is outside the scope of

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the trustee's authority and thus any and all lawsuits against the trustee alleging intentional torts are outside of bankruptcy court jurisdiction and may be brought in state court without leave of the bankruptcy court. Of course, this is contrary to the Ninth Circuit decision in *Maitland v. Mitchell (Harris Pine Mills)*, 44 F.3d 1431, 1435 (9<sup>th</sup> Cir. 1995), that, among other things, found that a state law claim for fraud against a bankruptcy trustee was a core proceeding. See also *In re Davis*, 312 B.R. 681, 687–88 (Bankr. D. Nev. 2004) ("Counterdefendants made false and defamatory statements about [the Debtors] in the course of administering the estate. Any such statements were clearly within the scope of their duties as court appointed officers.")

The Ninth Circuit's most recent statement on the issue does not draw Shoemaker's distinction between intentional and non-intentional conduct. In the Ninth Circuit's analysis, all claims against a trustee or other court-appointed officials are core proceedings, with good reason:

Where a post-petition claim was brought against a court-appointed professional, we have held the suit to be a core proceeding. *Ferrante*, 51 F.3d at 1476 (core proceeding where successor trustee brought breach of fiduciary duty claim against predecessor trustee); *Harris Pine Mills*, 44 F.3d at 1438 (core proceeding where state-law claim was brought against trustee). All of our sister circuits are in accord. *Baker v. Simpson*, 613 F.3d 346, 350 (2d Cir.2010) (core proceeding where debtor brought malpractice claim against bankruptcy counsel); *Grausz v. Englander*, 321 F.3d 467, 471 (4th Cir.2003) (same); *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 932 (5th Cir.1999) (core proceeding where debtor brought state-law claim against court-appointed accountant for its examiner); *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1244 (3d Cir.1994) (core proceeding where debtor brought malpractice claim against bankruptcy counsel); *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 483 n. 4 (6th Cir.1992) (where debtor brought claim against trustee and lender, core proceeding against trustee but not against lender).

*Southmark Corp.* explained the rationale:

A *sine qua non* in restructuring the debtor-creditor relationship is the court's ability to police the fiduciaries, whether trustees or debtors-in-possession and other court-appointed professionals, who are responsible for managing the debtor's estate in the best

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interest of creditors. The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor's estate are performing their work, conscientiously and cost-effectively. Bankruptcy Code provisions describe the basis for compensation, appointment and removal of court-appointed professionals, their conflict-of-interest standards, and the duties they must perform. See generally 11 U.S.C. §§ 321, 322, 324, 326–331.

163 F.3d at 931.

In this case, the employment of Chandler by the Committee was approved by the bankruptcy court and governed by 11 U.S.C. § 1103. Chandler's compensation was also approved by the court and governed by 11 U.S.C. §§ 328, 330, 331. His duties pertained solely to the administration of the bankruptcy estate. The claim asserted by Plaintiffs was based solely on acts that occurred in the administration of the estate. Therefore, the lawsuit falls easily within the definition of a core proceeding.

Plaintiffs argue that their action cannot be a core proceeding because it is predicated on state law. However, the governing statute clearly states that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3).

Plaintiffs also argue that their claim does not invoke any right created by federal bankruptcy law and it does not affect, or even involve, the administration of Colusa's estate. However, "arising in" jurisdiction does not require that the matter be "based on any right expressly created by title 11." *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037, 1055 (9th Cir.2010) (internal quotation marks omitted). Instead, the matter must "have no existence outside of the bankruptcy" case. *Id.* (internal quotation marks omitted). That is the case here. The basis for the claim occurred within the administration of the estate. Any alleged duties arose from obligations created under bankruptcy law. The claims have effectively called into question the administration of the estate. Thus, this particular legal malpractice claim is inseparable from the bankruptcy case.

Plaintiffs argue that the claim will not affect estate administration. But the key inquiry is not whether the claim will affect

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the administration of the bankruptcy, but instead whether the claim arose in a case under title 11. *Baker*, 613 F.3d at 350. *Additionally, courts have been less concerned with the identity of the party bringing the claim and more concerned with the identity and function of the party against whom the claim is brought. Southmark Corp.*, 163 F.3d at 931.

*For these reasons, we conclude that the district court correctly determined that the bankruptcy court had jurisdiction over the lawsuit as a core proceeding and that the bankruptcy court did not err in denying the remand motion.*

*Schultze v. Chandler*, 765 F.3d 945, 948–50 (9th Cir. 2014), as amended (Aug. 1, 2014).

Accordingly, removal of this proceeding was proper under §1452(a).

Remand

However, §1452(b) provides for equitable remand of a removed action

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.

An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. §1452(b). It is in this context that Shoemaker's demand for a jury trial must be considered. A recent decision concisely explained the "factors" used to determine whether there are "equitable ground[s]" for remand.

The "any equitable ground" standard is not statutorily defined.

Accordingly, case law has imported the "factors" governing discretionary abstention to assist with the remand decision. See *In re Enron Corp.*, 296 B.R. 505, 508–9 (C.D.Cal.2003)(importing the discretionary abstention factors into the remand analysis and affirming the bankruptcy court's remand to state court of two of the over 100 securities actions filed nationwide instead of transferring venue to the New York bankruptcy court). The imported factors are:

(1) the effect or lack thereof on the efficient administration of the

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estate if the Court recommends [remand or] abstention; (2) extent to which state law issues predominate over bankruptcy issues; (3) difficult or unsettled nature of applicable law; (4) presence of related proceeding commenced in state court or other nonbankruptcy proceeding; (5) jurisdictional basis, if any, other than §1334; (6) degree of relatedness or remoteness of proceeding to main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden on the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of nondebtor parties; (13) comity; and (14) the possibility of prejudice to other parties in the action.

*Enron*, 296 B.R. at 508, n. 2; see also *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir.1990)(citing to a Texas bankruptcy case which articulates a similar list). While these factors assist a court's remand decision, they do not control it. The standard remains "any equitable ground."

*In re Roman Catholic Bishop of San Diego*, 374 B.R. 756, 761-62 (Bankr. S.D. Cal. 2007).

In this case, these "equitable factors" strongly favor this court's retention of this proceeding. As set forth above, this Court has a strong jurisdictional basis for hearing the matter. All of the facts underlying the Complaint were in proceedings before this Court and the Court has deep familiarity with these facts and their context. This action directly related to Shoemaker's bankruptcy case. All of the parties were participants – the debtor and court-approved professionals - in Shoemaker's bankruptcy. The Court takes a strong interest in the conduct of the professionals practicing before it. There are no related proceedings in the state court. Given the

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Court's familiarity with the facts of these proceeding, it will be most efficient for this Court to hear the matter. Given the demands on the Superior Court, the matter will most likely be resolved more quickly in this Court and the Court sees no reason to further burden the Superior Court with a case based solely on claims of misbehavior in bankruptcy court. It will not be an undue burden on this Court.

Only Shoemaker's demand for a jury trial weights in favor of remand, and this factor is not dispositive. If Shoemaker has a right to a jury trial and it is determined that the trial must take place in an Article III court, this Court may retain this matter for pre-trial purposes and then transfer it to the District Court for trial. The Ninth Circuit has stated (in a case involving potential withdrawal of the reference) that this method is acceptable and even preferred:

Universally these courts have all reached the same holding, that is, a Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court. *E.g., City Fire Equip. Co.*, 125 B.R. at 646-50. *Instead, the bankruptcy court is permitted to retain jurisdiction over the action for pre-trial matters. E.g., In re Stansbury Place*, 13 F.3d at 128. *As these courts have explained, two rationales justify this holding.*

*First, allowing the bankruptcy court to retain jurisdiction over pre-trial matters, does not abridge a party's Seventh Amendment right to a jury trial. See City Fire Equip. Co.*, 125 B.R. at 649; *accord Jobin v. Kloepfer (In re M & L Bus. Mach. Co.)*, 159 B.R. 932, 934-35 (D.Colo.1993); *Stein v. Miller*, 158 B.R. 876, 879-80 (S.D.Fla.1993). *A bankruptcy court's pre-trial management will likely include matters of "discovery," "pre-trial conferences," and routine "motions," which obviously do not diminish a party's right to a jury trial. See In re M & L Bus. Mach. Co.*, 159 B.R. at 934. *Moreover, even if a bankruptcy court were to rule on a dispositive motion, it would not affect a party's Seventh Amendment right to a jury trial, as these motions merely address whether trial is necessary at all. See Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 & n. 6 (9th Cir.1974) ("*[S]ummary judgment is granted as a matter of law where there is no*

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genuine issue of material fact, and, therefore, the province of the jury, fact finding, is not invaded.") (emphasis in original); City Fire Equip. Co., 125 B.R. at 649 ("While motions to dismiss and motions for summary judgment may be dispositive, they do not impact on the right to a jury trial. They merely involve legal issues as to whether any trial is necessary.... The granting of such motions does not deprive a party of a right to a jury trial.") (last emphasis added).

Second, requiring that an action be immediately transferred to district court simply because of a *jury trial right* would run counter to our bankruptcy system. See In re Conseco Finance Corp., 324 B.R. at 55; ERC Indus., Inc. v. Nat. Union Fire Insr. Co. (In re Kenai Corp.) 136 B.R. 59, 61(S.D.N.Y.1992). Under our current system Congress has empowered the bankruptcy courts to "hear" Title 11 actions, and in most cases enter relevant "orders." § 157(b)(1), (c)(1); see also In re W. Asbestos Co., 313 B.R. 859, 862 (N.D.Cal.2004) (§ 157(b)(1)); Hassett v. BancOhio Nat'l Bank (In re CIS Corp.), 172 B.R. 748, 763-64 (S.D.N.Y.1994) (§ 157(c)(1)). As has been explained before, this system promotes judicial economy and efficiency by making use of the bankruptcy court's unique knowledge of Title 11 and familiarity with the actions before them. See, e.g., City Fire Equip. Co., 125 B.R. at 649; Douglas, Inc., 170 B.R. at 170; Barlow & Peek, Inc. v. Manke Truck Lines, Inc., 163 B.R. 177, 179(D.Nev.1993). Accordingly, if we were to require an action's immediate transfer to district court simply because there is a *jury trial right* we would effectively subvert this system. In re Kenai Corp., 136 B.R. at 61("A rule that would require a district court to withdraw a reference simply because a party is entitled to a jury trial, regardless of how far along toward trial a case may be, runs counter to the policy favoring judicial economy that underlies the statutory scheme...."). Only by allowing the bankruptcy court to retain jurisdiction over the action until trial is actually ready do we ensure that our bankruptcy system is carried out. E.g., Disbursing Agent of Murray F. Hardesty Estate v. Severson (In re Hardesty ), 190 B.R. 653, 657 (D.Kan.1995).

We find the holding reached by the great majority of courts to have addressed this issue convincing and adopt it here. A valid right to a Seventh Amendment jury trial in the district court does not mean the bankruptcy court must instantly give up jurisdiction and that the action

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*must be transferred to the district court. Instead, we hold, the bankruptcy court may retain jurisdiction over the action for pre-trial matters.*

*In re Healthcentral.com*, 504 F.3d 775, 787–88 (9th Cir. 2007). Accordingly, the factors governing equitable remand strongly favor this Court retaining this proceeding.

**Recommended ruling:** Motion denied.

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

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Defendant(s):**

Anthony A Friedman

Represented By  
Anthony A Friedman  
Jason Wallach

Levene, Neale Bender Yoo & Brill

Represented By  
Jason Wallach

Bret David Lewis

Represented By  
Bret D Lewis

**Movant(s):**

Mark Alan Shoemaker

Pro Se

**Plaintiff(s):**

Mark Alan Shoemaker

Pro Se

**Trustee(s):**

Alfred H Siegel (TR)

Pro Se

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

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Adv#: 1:16-01142 Shoemaker v. Levene, Neale Bender Yoo & Brill et al

■

**#20.00** Motion to Dismiss Complaint Pursuant  
to FRCP 12(b)(6) and FRBP 7012  
filed by Defendants Levene, Neale, and anthony Friedman  
  
fr. 11/15/16

Docket No: 7

**Tentative Ruling:**

Background

On May 25, 2010, Shoemaker filed a voluntary Chapter 7 petition before Judge Donovan (2:10-bk-30910-TD). Alfred H. Siegel was appointed chapter 7 trustee (the "Trustee").

On September 21, 2011, the Trustee filed a report of no distribution. On June 20, 2012, Shoemaker filed amended schedules in which he asserted that he had real property assets of \$32,500 and personal property assets of \$12,290,946.76, primarily comprised of claims against other parties (the "Adversarial Claims") (bk. dkt. #64). On July 20, 2012 the Trustee withdrew his report of no distribution (bk. dkt. #66).

On May 16, 2013, at the request of the Trustee, the Court gave notice of possible dividend and set a claims bar date (bk. dkt. #68).

On November 26, 2013, the Trustee filed an application to employ Brett Lewis as his special counsel to pursue possible litigation to collect the Adversarial Claims (bk. dkt. #71). The order to employ was entered on January 24, 2014 (bk. dkt. #79).

On January 8, 2014, the Trustee filed an application to employ Levene, Neale, Bender, Yoo & Brill ("LNBY&B") as his general counsel (bk. dkt. #74). This application was denied by order dated February 12, 2014 (bk. dkt. #83). On April 1, 2014, the Trustee again filed an application to employ LNBY&B as his general counsel *nunc pro tunc* effective July 13, 2012. (bk. dkt. #86). The order to employ was entered on August 7, 2014 (bk. dkt. #97).

On November 18, 2014, Shoemaker's chapter 7 case was transferred to the San Fernando Valley Division and reassigned to Judge Mund (1:14-bk-15182-GM). On December 1, 2014, Lewis, on behalf of the Trustee,

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commenced 27 adversary proceedings in Shoemaker's chapter 7 case, in an attempt to collect the Adversarial Claims, but this litigation has for the most part concluded with only a minimal amount collected.

On July 28, 2016, Shoemaker filed a complaint in Los Angeles Superior Court (the "Complaint") against the Trustee, LNBY&B, one of Levene Neale's partners, Anthony Friedman ("Friedman"), and Lewis (collectively, the "Defendants"), asserting the following causes of action:

- First: Fraud against Siegel, LNBY&B, and Friedman
- Second: Negligent Misrepresentation against Siegel, LNBY&B, and Friedman
- Third: Breach of Fiduciary Duty against Siegel, LNBY&B, and Friedman
- Fourth: Breach of Fiduciary Duty against Lewis
- Fifth: Negligence against Siegel, LNBY&B, and Friedman
- Sixth: Breach of Fiduciary Duty against Lewis

The Complaint sought \$40 million in compensatory damages, as well as punitive damages, prejudgment interest, and attorney's fees.

On October 7, 2016, LNBY&B and Friedman removed this action from Superior Court to this Court, thereby commencing this adversary proceeding. The Defendants have all filed motions to dismiss this proceeding.

LNBY&B and Friedman Motion to Dismiss

The Complaint is premised on alleged actions and/or omissions of the Defendants as the court-appointed bankruptcy trustee and court-approved counsel to that trustee in Shoemaker's chapter 7. The Trustee and his representatives can only be sued with the permission of the Court on whose behalf they are deemed to act. *In re Crown Vantage, Inc.*, 421 F.3d 963 (9th Cir. 2005); *In re Castillo*, 297 F.3d 940 (9th Cir. 2002), as amended (Sept. 6, 2002); *In re DeLorean Motor Co.*, 991 F.2d 1236 (6th Cir. 1993). Shoemaker has neither sought nor obtained the approval of this Court to sue the Trustee and his attorney, as is judicially noticeable from the Court's docket. Thus, under the *Barton Doctrine*, this action must be dismissed.

If Shoemaker seeks to amend the Complaint so that he might obtain the Court's permission, his request should be denied. The Trustee enjoys absolute immunity for discretionary acts in the administration of the estate, and that same immunity is enjoyed by a trustee's counsel.

Furthermore, the statements at the core of the fraud cause of action

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were made in court and are thus absolutely privileged under Cal. Civ. Code § 47(b).

All of the alleged conduct and statements relating to the adversary proceedings were undertaken in court such that the present action could be subject to an anti-SLAPP motion.

The negligence claim cannot be maintained because counsel for the Trustee owes no duty of care to the Debtor. *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000); *Chang v. Lederman*, 172 Cal. App. 4th 67 (2009).

Lewis Motion to Dismiss

Lewis was appointed special litigation counsel on the express agreement that Shoemaker would assist Lewis in prosecuting the Adversarial Claims and on the basis of Shoemaker's representation that the Adversarial Claims were worth millions of dollars. Shoemaker expressly acknowledged that there was no attorney-client relationship between Lewis and Shoemaker. The Adversarial Claims were all dismissed, with the net amount realized by the estate the *de minimus* sum of \$5,000.

Where a plaintiff's injury is caused by the actions of an attorney, the cause of action is legal malpractice, regardless of the cause pled.

A breach of fiduciary duty action against an attorney requires an attorney-client relationship. Without an attorney-client relationship, there is no fiduciary duty. Shoemaker has expressly acknowledged that there is no attorney-client relationship between him and Lewis.

The attorneys for a bankruptcy trustee, like the trustee himself, are entitled to quasi-judicial immunity. This requires a plaintiff to seek leave of the court before commencing an action against the trustee or his counsel, under the *Barton* doctrine. Shoemaker has neither sought nor obtained such permission from this Court.

Shoemaker has no standing to pursue claims against Lewis, only the Trustee has standing. A bankruptcy trustee is a separate legal entity that neither represents the debtor nor owes the debtor any fiduciary obligations. As the Trustee's attorney, Lewis had no attorney-client relationship with Shoemaker and owed Shoemaker no fiduciary duty. Lewis' sole duty ran to the Trustee.

The causes of action against Lewis – the Fourth and Sixth – should be dismissed for indefiniteness. Their central premise is that Lewis cut some

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sort of “deal” with the defendants in the adversary actions, but with no further detail provided. This falls far short of *Twombly*’s requirement that the complaint provide “enough facts to state a claim to relief that is plausible on its face.”

The Complaint’s sixth cause of action is entirely identical to the fourth cause of action and thus should be dismissed as duplicative.

Shoemaker is not entitled to punitive damages. Cal. Civ. Code §3294 states that in matters not arising from contract, a defendant must be “guilty of oppression, fraud, or malice” for punitive damages to be appropriate. Neither breach of fiduciary duty nor constructive fraud alone is sufficient for a punitive damage award.

The Complaint should be dismissed without leave to amend. Leave to amend should be freely granted, unless amendment would be futile. In this case, amendment would be futile because Shoemaker lacks the standing to bring a claim for breach of fiduciary duty against Lewis. This defect cannot be cured.

Finally, the Court should issue an order to show cause why Shoemaker should not be subject to Rule 11 sanctions for seeking \$40 million in damages based on a fanciful and ridiculous conspiracy theory.

Trustee’s Motion to Dismiss

A party may not commence a lawsuit against a chapter 7 trustee without first obtaining leave of the Bankruptcy Court, under the *Barton* doctrine. Shoemaker has not sought leave of this Court and thus lacks standing to pursue an action against the Trustee and his professionals. Removal to bankruptcy court does not cure this defect, because the Trustee has already been forced to expend resources - estate and personal - defending against an action that never should have been brought: *In re Summit Metals, Inc.*, 477 B.R. 484, 498 (Bankr. D. Del. 2012)(quoting *In re Herrera*, 472 B.R. 839, 853-54 (Bankr. D.N.M. 2012)).

The Complaint should be dismissed with prejudice, because the Trustee is entitled to immunity from suit “for actions that are functionally comparable to those of judges, *i.e.*, those functions that involve discretionary judgment.” *In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002), as amended (Sept. 6, 2002) (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993)). The Courts accordingly do not impose liability on trustees for mistakes in business judgment when the trustee is acting within court

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authorization, such as here.

The Trustee's decision to hire Lewis is clearly an exercise of business judgment and covered by the Trustee's immunity, so Shoemaker couches his claims as fraud, misrepresentation, and the intentional failure to diligently prosecute claims. However, these are merely legal conclusions. Shoemaker does not and cannot point to a single, actual misrepresentation. The Trustee never represented that he believed the claims were valid or invalid, only that they could be valid (based to great extent on Shoemaker's own representations).

Shoemaker's allegations make no sense. He essentially alleges that the Trustee believed that the claims were valueless but nonetheless retained Lewis as special counsel to investigate and prosecute them -- to ensure that Shoemaker would not prosecute him for breach of fiduciary duty. This basically boils down to the assertion that the Trustee -- despite his (alleged) personal beliefs -- investigated assets of the estate to ensure a full analysis. This is proper conduct by a trustee.

Thus, the Trustee (a non-lawyer) reasonably exercised his business judgment to retain counsel to investigate and possibly pursue these claims. He would have been in breach of his duty if he had not retained counsel to investigate the claims. Shoemaker is unhappy with the result of that retention, but the Trustee's actions are subject to immunity.

**Opposition:** Shoemaker has not filed any opposition to the motions [as of November 28, 2016].

**First Amended Complaint:** Shoemaker has, however, filed a first Amended Complaint ("FAC") that drops the second cause of action for Negligent Misrepresentation against Siegel, LNBY&B, and Friedman, the fifth cause of action for Negligence against Siegel, LNBY&B, and Friedman, and the duplicative sixth cause of action for Breach of Fiduciary Duty against Lewis. Thus, the FAC states the following causes of action:

- First: Fraud against Siegel
- Second: Fraud against LNBY&B and Friedman
- Third: Breach of Fiduciary Duty against Siegel, LNBY&B, and Friedman
- Fourth: Breach of Fiduciary Duty against Lewis

Lewis has filed an objection to the FAC as untimely under Fed. R. Civ. P. 15.

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**Analysis**

FAC

The FAC was untimely under Fed. R. Civ. P. 15(a)(1), because it was filed more than 21 days after the Defendants' motions to dismiss under Fed. R. Civ. P. 12(b). The FAC was filed on November 14, while the Defendants' motions to dismiss were filed on October 14 and 19.

The Court will not grant leave to amend under Fed. R. Civ. P. 15(a)(2) with respect to the FAC. The amendments in the FAC are benign: they eliminate problematic causes of action that will be dismissed by this Court in any event (as set forth below). However, any amended complaint in this action will require further amendments not in the FAC (also as set forth below). Granting leave to file the FAC at this time will not avoid the need for another amended complaint and will only complicate the litigation of these motions to dismiss.

Standards for Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)

"A motion to dismiss [pursuant to Rule 12(b)(6)] will only be granted if the complaint fails to allege enough facts to state a claim to relief that is plausible on its face." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation marks omitted)(citing, *inter alia*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009)). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (citations omitted). "[F]acts must be alleged to sufficiently apprise the defendant of the complaint against him . . ." *Kubick v. Fed. Dep. Ins. Corp. (In re Kubick)*, 171 B.R. 658, 660 (9th Cir. B.A.P. 1994).

Federal Rule of Civil Procedure 9(b) imposes heightened pleading requirements for claims of fraud. Under Rule 9(b), a plaintiff "must state with particularity the circumstances constituting fraud," but can allege generally "[m]alice, intent, knowledge, and other conditions of a person's mind." Rule 9 (b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute fraud so that they can defend against the charge and not just deny that they have done

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anything wrong. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity. *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir. 1993).

While the consideration of materials beyond the pleadings is generally not appropriate in a motion to dismiss (and may convert a motion to dismiss to a motion to summary judgment pursuant to Fed. R. Civ. P. 12(d)), the court considering a motion to dismiss may take judicial notice of matters of public record:

"As a general rule, [courts] may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) (citation and quotation marks omitted). "[Courts] may, however, consider materials that are submitted with and attached to the Complaint." *Id.* at 999 "[Courts] may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Id.* (citation omitted). "Pursuant to Federal Rule of Evidence 201, [courts] may also take judicial notice of matters of public record, but not of facts that may be subject to reasonable dispute.

*Retrophin, Inc. v. Questcor Pharm., Inc.*, 41 F. Supp. 3d 906, 911 (C.D. Cal. 2014).

Courts routinely take judicial notice of their own court records. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir.2006); see also *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed.Cir.1997) (citing 21 Wright & Graham, Federal Practice & Procedure § 5106, at 505 (1977) (" '[T]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records.' ")).

*Dunlap v. Neven*, 2014 WL 3000133, at \*5 (D. Nev. June 30, 2014).

Leave of Court to Sue

The Complaint's allegations against the Defendants arise out their actions (or inactions) as the trustee of Shoemaker's chapter 7 estate and the attorneys for that trustee. Thus, the Complaint cannot be brought without prior leave of this Court, which was not sought, let alone obtained. "The

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requirement of obtaining leave from the appointing court to sue a trustee is long-standing. See *Barton v. Barbour*, 104 U.S. 126, 129, 26 L.Ed. 672 (1881).” *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 945 (9th Cir. 2002), as amended (Sept. 6, 2002); see also *Beck v. Ft. James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005). This is equally true for counsel to the Trustee. “We hold, as a matter of law, counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets.” *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993).

However, removal of this action to this Court has essentially cured the *Barton* defect:

absent leave of the appointing court, the *Barton* doctrine denies subject matter jurisdiction to all forums except the appointing court. The *Barton* doctrine is a practical tool to ensure that all lawsuits that could affect the administration of the bankruptcy estate proceed either in the bankruptcy court, or with the knowledge and approval of the bankruptcy court. The *Barton* doctrine is not a tool to punish the unwary by denying any forum to hear a claim when leave of the bankruptcy court is not sought. When Harris's case was removed to the appointing bankruptcy court, all problems under the *Barton* doctrine vanished. Therefore, the district court erred in affirming the bankruptcy court's dismissal of Harris's suit for lack of subject matter jurisdiction under the *Barton* doctrine.

*Harris v. Wittman (In re Harris)*, 590 F.3d 730, 742 (9th Cir. 2009). Thus, I must consider whether other grounds for dismissal exist.

Immunity

Determining whether the Defendants' actions are protected by quasi-judicial immunity is a two-step process:

Consistent with *Antoine* 's teachings, we must first inquire as to the immunity historically accorded a bankruptcy trustee at common law, during the development of the common-law doctrine of judicial immunity. We next consider whether the particular functions of the bankruptcy trustee at issue in this case . . . . are functions involving the exercise of discretionary judgment. *Id.* at 436, 113 S. Ct. 2167.

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*Castillo*, 297 F.3d at 949. The Ninth Circuit in *Castillo* has answered the first question with respect to the Trustee, holding trustees can have quasi-judicial immunity for at least some of their actions. *Castillo*, 297 F.3d 953; see also *Virtue v. Zamora (In re Cont'l Coin Corp.)*, 380 B.R. 1, 10 (Bankr. C.D. Cal. 2007), *aff'd*, 2009 WL 2589635 (C.D. Cal. Aug. 21, 2009), *appeal dismissed*, 416 Fed. Appx. 612 (9<sup>th</sup> Cir. 2011).

"The doctrine of judicial immunity also applies to court approved attorneys for the trustee." *Harris*, 590 F.3d at 742 (citing *Smallwood v. United States*, 358 F. Supp. 398, 404 (E.D.Mo.1973), *aff'd mem.*, 486 F.2d 1407 (8th Cir.1973)); see also *DeLorean*, 991 F.2d at 1241 ("counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets" for *Barton* doctrine purposes).

With respect to the functionality prong, the retention and supervision of attorneys does involve the exercise of discretionary judgment such that the trustee is entitled to immunity. See *Bennett v. Williams*, 892 F.2d 822, 823–25 (9th Cir. 1989)(trustee entitled to immunity in hiring and supervising a property manager). That immunity is not absolute, however. Although the precedent in the Ninth Circuit is somewhat confusing, the consensus is growing that a trustee (and presumably his/her attorneys) are immune from liability for negligence, but not intentional acts or gross negligence. See *generally Cont'l Coin Corp.*, 380 B.R. at 16.

Attorney's Duty to Shoemaker: Fiduciary Duty, Negligence

Such immunity is of less import to the attorneys, because Shoemaker lacks the standing to bring breach of fiduciary duty or malpractice actions against the attorneys to the Trustee. Only the Trustee may bring such a suit: Richardson lacks standing to sue . . . Womble Carlyle as counsel to the Trustee . . . Richardson cannot bring suit against Womble Carlyle in its official capacity as Trustee's counsel, because only the Trustee has the authority to do so. See *In re Cont'l Coin Corp.*, 380 B.R. 1, 16 (Bankr.C.D.Cal.2007), *aff'd*, No. CV 08–0093(PA), 2009 WL 2589635 (C.D. Cal. Aug. 21, 2009) (holding that the "trustee's attorney in this case does not owe a statutory or fiduciary duty to the creditors of the estate. The attorney's duties are to the trustee.") (quoting *Wolf v. Kupetz (In re Wolf & Vine, Inc.)*, 118 B.R. 761, 771

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(Bankr.C.D.Cal.1990) (noting that while a trustee owes a fiduciary duty to creditors, the attorneys for the trustee do not).

*Richardson v. Monaco (In re Summit Metals, Inc.)*, 477 B.R. 484, 501–02 (Bankr. D. Del. 2012). Only the trustee can assert a breach of fiduciary duty or malpractice claim against attorneys retained by the trustee.

A trustee's counsel owes no fiduciary duty to creditors. *Wolf v. Kupetz (In re Wolf & Vine, Inc.)*, 118 B.R. 761, 771 (Bankr.C.D.Cal.1990).

Moreover, because no attorney-client relationship exists between Virtue and the Trustee's counsel, Virtue lacks standing to sue the Trustee's counsel for malpractice. In California, legal malpractice claims cannot be assigned. *Kracht v. Perrin, Gartland & Doyle*, 219 Cal.App.3d 1019, 1022-23, 268 Cal.Rptr. 637 (1990).

*Cont'l Coin.*, 2009 WL 2589635, at \*8; see also *In re Macco Props., Inc.*, 540 B.R. 793, 886 (Bankr. W.D. Okla. 2015) ("Counsel was retained and authorized to act as attorney for Trustee, and as such, Counsel had duties only to its client (Trustee) and the Court. Counsel does not owe fiduciary duties to the creditors, equity holders or any other constituent or beneficiary of the estate.").

Litigation Privilege

California's litigation privilege is broad and bars the use of any communications made during or in connection a judicial proceeding:

California courts and the California legislature have long recognized that any alleged communications made during or in connection with judicial proceedings-including arbitration-are absolutely privileged. Such communications may not form the basis of any subsequent claim against the proponent. "For well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from tort liability by the privilege codified as section 47(b)." *Rubin v. Green*, 4 Cal. 4th 1187, 1193, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993).

The California Supreme Court has outlined the parameters of the privilege:

The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation

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to the action.

*Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365 (1990) (emphasis added).

. . . . Thus California's litigation privilege applies to the contents of all pleadings and process involved in any judicial proceeding, including private contractual arbitration proceedings.

*Rasidescu v. Midland Credit Mgmt., Inc.*, 496 F. Supp. 2d 1155, 1159–60 (S.D. Cal. 2007). The litigation privilege covers allegedly fraudulent statements. See, e.g.,

*Rubenstein v. Rubenstein*, 81 Cal. App. 4th 1131, 1147 (Cal. Ct. App. 2000) ("the absolute litigation privilege of Civil Code section 47, subdivision (b), bars derivative tort actions and "applies to all torts other than malicious prosecution, including fraud, negligence and negligent misrepresentation") (citations omitted); *Boston v. Nelson*, 227 Cal. App. 3d 1502 (Cal. Ct. App. 1991). Accordingly, Shoemaker's claims may not be based on statements made on the record in this Court, pleadings before this Court, or even statement made in relation to Shoemaker's chapter 7 or the related adversary proceedings. The Complaint's fraud and breach of fiduciary duty claims are almost entirely on such statements, which must be stricken from any complaint.

Defendants also argue that the claims against FNMC and CMI should be dismissed based on the litigation privilege. The only claims against FNMC and CMI that are solely based on alleged statements made during judicial proceedings are Plaintiffs' claims for fraud based on alleged misrepresentations made in the bankruptcy court (claim two), and fraud on the court (claim eleven). As to these claims, Plaintiffs allege that Defendants made many false statements on many occasions to the Bankruptcy Court in the Southern District of California and to the San Diego County Superior Court. These allegations fail to meet the particularity requirement of rule 9(b) of the Federal Rules of Civil Procedure. Additionally, these statements were all made in judicial proceedings by participants authorized by law to achieve the objects of the litigation, and had a connection to the action. Therefore, these statements are privileged regarding Plaintiffs' claims for fraud based on alleged misrepresentations made in the bankruptcy court and fraud on the court. Accordingly, the Court grants Defendants motion to dismiss Plaintiffs' claims for fraud based on alleged misrepresentations made

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in the bankruptcy court and fraud on the court.

Moreover, it appears this defect is not curable by amendment. Accordingly, the Court grants Defendants' motion to dismiss these claims with prejudice.

*Whitty v. First Nationwide Mortg. Corp.*, 2007 WL 628033, at \*9 (S.D. Cal. Feb. 26, 2007).

Sufficiency of Allegations

The Complaint does contain a short statement of facts that gives the Defendants notice of Shoemaker's claims and thus meets the relatively liberal standards for Fed. R. Civ. P. 8(a)(2). The first cause of action also meets the heightened pleading requirements for claims of fraud under Fed. R. Civ. P. 9 (b), by "stat[ing] with particularity" the alleged material representations, their falsity, and Shoemaker's reliance.

Conclusion

The identical Breach of Fiduciary Duty claims against Lewis (Fourth and Sixth causes of action) and the Breach of Fiduciary Duty claim against LNBY&B and Friedman (part of the Third cause of action) should be dismissed with prejudice. As attorneys for the Trustee, Lewis, LNBY&B, and Friedman have no fiduciary duty to Shoemaker.

Shoemaker likewise lacks the standing to bring a malpractice action against the Trustee's attorneys, so the Fifth cause of action for Negligence should be dismissed with prejudice as to LNBY&B and Friedman.

The Trustee's quasi-judicial immunity means that he cannot be sued for negligence, only gross negligence and intentional torts, so the Fifth cause of action for Negligence and the Second cause of action for Negligent Misrepresentation should be dismissed with prejudice as to the Trustee. The Trustee's attorneys have the same quasi-judicial immunity and thus are protected against suits for negligence, barring the Second cause of action for Negligent Misrepresentation as to LNBY&B and Friedman, which will also be dismissed with prejudice. (This immunity also presents a further bar to the Fifth cause of action for Negligence as to LNBY&B and Friedman, which was dismissed above.)

This leaves only (i) the First cause of action for Fraud against the Trustee, LNBY&B, and Friedman and (ii) the Third cause of action for Breach of Fiduciary Duty against the Trustee (but only to the extent that it is based on

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gross negligence or intentional conduct). The Court will give Shoemaker leave to file an amended complaint with these two causes of action. However, allegations based on statements made in the courtroom, in pleadings filed with this Court or otherwise in relation to Shoemaker's chapter 7 and surrounding litigation cannot be the basis of such claims due to the litigation privilege.

The Court is mindful of Lewis's request that the Court issue an order to show cause due to the frivolity of the Complaints allegations and the \$40 million sought in the Complaint. \$40 million initially strikes the Court as an arbitrary and unsupportable amount of damages, especially given Shoemaker's own valuation of approximately \$12 million in assets in his amended schedules. The Court would consider issuing such an order to show cause, but only upon a separate motion by one of the parties.

**Party Information**

**Debtor(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Defendant(s):**

Bret David Lewis

Represented By  
Matthew E Hess

Anthony A Friedman

Represented By  
Anthony A Friedman  
Jason Wallach

Levene, Neale Bender Yoo & Brill

Represented By  
Jason Wallach

**Movant(s):**

Anthony A Friedman

Represented By  
Anthony A Friedman  
Jason Wallach

Levene, Neale Bender Yoo & Brill

Represented By  
Jason Wallach

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**Plaintiff(s):**

Mark Alan Shoemaker

Pro Se

**Trustee(s):**

Alfred H Siegel (TR)

Pro Se

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

**Chapter 7**

Adv#: 1:16-01142 Shoemaker v. Levene, Neale Bender Yoo & Brill et al

■  
**#21.00** Motion to Dismiss Complaint  
filed by Defendant Alfred H. Siegel

fr. 11/15/16

Docket No: 14

**Tentative Ruling:**

See Calendar #20.

**Party Information**

**Debtor(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Defendant(s):**

Bret David Lewis

Represented By  
Matthew E Hess

Anthony A Friedman

Represented By  
Anthony A Friedman  
Jason Wallach

Levene, Neale Bender Yoo & Brill

Represented By  
Jason Wallach

**Plaintiff(s):**

Mark Alan Shoemaker

Pro Se

**Trustee(s):**

Alfred H Siegel (TR)

Pro Se

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

**Chapter 7**

Adv#: 1:16-01142 Shoemaker v. Levene, Neale Bender Yoo & Brill et al

■  
**#22.00** Motion to Dismiss Adversary Proceeding  
filed by Defendant Bret D. Lewis

fr. 11/15/16

Docket No: 10

**Tentative Ruling:**

See Calendar #20.

**Party Information**

**Debtor(s):**

Mark Alan Shoemaker

Represented By  
William H Brownstein

**Defendant(s):**

Bret David Lewis

Represented By  
Matthew E Hess

Anthony A Friedman

Represented By  
Anthony A Friedman  
Jason Wallach

Levene, Neale Bender Yoo & Brill

Represented By  
Jason Wallach

**Movant(s):**

Bret David Lewis

Represented By  
Matthew E Hess

**Plaintiff(s):**

Mark Alan Shoemaker

Pro Se

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**Trustee(s):**

Alfred H Siegel (TR)

Pro Se

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

**Chapter 7**

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

▪  
**#23.00** 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, 10/25/16; 10/18/16; 11/1/16; 11/15/16

Docket No: 1

**Tentative Ruling:**

Defendant wants to file a motion for summary judgment. Plaintiff wants to proceed to trial. The motion for summary judgment is to be filed by 12/31/16. It is to be heard on February 21, 2017 at 10:00 a.m. If the motion is not timely filed, it will not be considered and Plaintiff is to immediately begin preparing the pretrial order per the local rules (7016-1). Time limits are to be strictly followed by both sides.

The Status Conference will be continued as a Pretrial Conference to February 21, 2017 at 10:00 a.m.

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.

prior tentative ruling (11/15/16)

The deposition of William Brownstein is to take place at 10:00 in the UST office. What else remains to be done before trial? The discovery cutoff has passed except as to that deposition. Continue without appearance to 12/6/16 at 10:00 a.m.

prior tentative ruling (6/7/16)

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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 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

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Peter C Anderson

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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

**US Trustee(s):**

United States Trustee (SV)

Pro Se

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**1:16-10443 Michel Kanaan Kanaan**

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Adv#: 1:16-01077 Seyedan v. Kanaan et al

■  
#24.00 Motion to Dismiss Adversary Proceeding

fr. 8/17/16 (VK calendar); 8/30/16, 11/15/16

Docket No: 5

**Tentative Ruling:**

On 11/9/16 the Court ordered the documents provided by Ms. Dishbak to be filed under seal and that counsel for Plaintiff file a confidentiality agreement so that he could be provided with a copy of the Dishbak declaration. Mr. Garber had two weeks after he received the declaration to respond and Mr. Dishbak would have one week after that to reply. As to 11/27, no response has been received in chambers. Thus, **this hearing will be continued without appearance to January 17, 2017 at 10:00 a.m.**

prior tentative ruling (8/30/16):

Debtor/defendant Michel Kanaan ("Debtor") moves for dismissal of this adversary proceeding on the grounds that the complaint was filed after the Fed. R. Bankr. P 4007(c) deadline for filing complaints to determine dischargeability under Bankruptcy Code §523(a)(2), (a)(4), and (a)(6).

Service: appears to be in order.

Background:

Debtor filed for chapter 7 relief on February 16, 2016. The first §341 (a) meeting of creditors was held on March 18, 2016. [bc dkt. 6]

Prior to the commencement of Debtor's chapter 7, Plaintiff Maryam Seyedan ("Plaintiff") had brought an action against the Debtor (and some affiliated corporations) in California Superior Court for the County of Los Angeles ("Superior Court"), asserting breach of contract, fraud, and breach of fiduciary duty.

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Plaintiff and her Superior Court counsel Jeffrey Spitz were each served with notice of the Debtor's chapter 7 filing on February 18 or 19. [bc dkt. 7] This notice [Official Bankruptcy Form 309A] included notice that the §341(a) meeting of creditors would be March 18, 2016 and that the deadline to "challenge whether certain debts are dischargeable" was May 17, 2016. [bc dkt. 7 at ¶7, ¶9]. On March 2, 2016, Mr. Spitz filed a request for notice on behalf of the Plaintiff in the Debtor's chapter 7. [bc dkt.15] On April 29, 2016, the Plaintiff's bankruptcy counsel Donna Dishbak filed a request for courtesy notice in the Debtor's chapter 7 case. [bc dkt. 22]

Debtor's Motion to Dismiss

The Debtor moves to dismiss this adversary proceeding under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, because the complaint commencing this proceeding was filed after the deadline set by Rule 4007(c) for complaints to determine dischargeability under Bankruptcy Code §523(a)(2), (a)(4), and (a)(6). This deadline is 60 days after the first §341(a) meeting on March 18, 2016, which was May 17, 2016. The complaint was filed on May 19, 2016.

The Plaintiff and her counsel received notice of the chapter 7 filing, including notice of the deadline for filing dischargeability complaints. Furthermore, both of the Plaintiff's counsel filed requests for notice in the chapter 7, in each case well prior to that deadline. Thus, there is no question that the Plaintiff had notice of the Debtor's chapter 7 in time to file a complaint before the May 17 deadline.

Courts are split as to whether a court loses jurisdiction to hear a nondischargeability complaint filed after the deadline. Courts within the Ninth Circuit have held that the rule is subject to doctrines of waiver, equitable tolling, and estoppel (thereby implying that it is not jurisdictional). However, none of these doctrines are applicable to this situation where the Plaintiff clearly had notice well before the deadline and the issue has been raised in this motion to dismiss.

The other defendants are corporations, which cannot receive a

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discharge in any event, so a §523(a) action is meaningless against them. Furthermore, this court lacks personal jurisdiction over these defendants.

Opposition

The Plaintiff opposes and asserts that "[e]xtraordinary factors suddenly intervened which lead [sic] to the complaint being filed 2 days after the deadline." [dkt. 17, 3:7] Alternatively, excusable neglect can be considered. The Plaintiff also wishes to conduct a 2004 exam to ascertain if a §727(d) action to revoke discharge has any factual basis. That deadline does not expire until May 2017.

As to the inclusion of the corporate defendants, "such defendants were named so as to potentially enforce any judgment against such alter egos of the Debtor."

As to extraordinary circumstances, Courts allow this, typically when they are out of the hands of the respondent. Anwar v. Johnson, 720 F.3d 1183 (9<sup>th</sup> Cir. 2013). Here there were "very personal life and death matters in the life of the Plaintiff's attorney, which were both sudden and unexpected and are tantamount to an act of god." [Because of their personal nature, the Plaintiff's attorney has submitted, under seal, a declaration describing these extraordinary circumstances.] These were so severe that they were not just excusable neglect, although that should be available under FRBP 9024.

Respondent then goes into an extensive analysis as to why the Court can apply excusable neglect in this case even though the Ninth Circuit BAP has ruled otherwise: In re Santos, 112 B.R. 1001 (BAP 9<sup>th</sup> Cir. 1990).

Finally, Ms. Dishbak asks for leave to amend to add a cause of action under §727 within one year after entry of the discharge. She wishes to take a 2004 examination to ascertain evidence to support this.

Reply

Anwar v. Johnson, in fact, stands for the proposition that there is no equitable exception from Rule 4007(c)'s filing deadline. The fact that the plaintiff filed only an hour late and had difficulty with the electronic filing

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system was irrelevant in that case. The Plaintiff latches onto the partial phrase "absent unique and exceptional circumstances" but that phrase was not part of the court's holding.

The burden of establishing an equitable exception is on the Plaintiff and Ms. Dishbak does not describe her "unique and exceptional circumstances." Debtor's counsel must be informed of these circumstances for the Debtor to have an opportunity to defend himself.

The Plaintiff had hired a bankruptcy attorney prior to the Debtor's filing: Ms. Dishbak had ample time to prepare and file a non-dischargeability complaint. Four days prior to the 4007(c) deadline, Debtor's counsel had a networking lunch with Ms. Dishbak, who appeared relaxed. It appears that the catastrophic event occurred after that lunch. A solo practitioner, like Ms. Dishbak, who procrastinates until the statute of limitations is upon them unnecessarily courts danger: Ms. Dishbak's failure to meet the deadline is her own fault.

Rule 60 cannot be used to excuse non-compliance with the Rule 4007 (c) deadline. Rules 4007(c) and 9006(b) make it quite clear that the deadline to file a non-dischargeability complaint may be extended only by a request for cause made within the original period and the court has no discretion to order otherwise. Rule 60 cannot be used as an "end run" around this requirement.

Even if Rule 60(b) were applicable, the Plaintiff has not stated adequate grounds for relief. First, Rule 60(b) provides relief from judgments, orders, or proceedings, there is no judgment or order here. Second, the Plaintiff has not stated any cause for relief: Debtor has not seen any evidence and in any event Ms. Dishbak's procrastination was *per se* negligence.

Whatever cataclysmic event occurred, it was not an "act of god," which might possibly excuse her late filing. In a decision dealing with a late-filed claims, In re Edelman, 237 B.R. 146 (9<sup>th</sup> Cir. B.A.P. 1999), the BAP held that Rule 9006(b)(3) does not recognize an act of god exception (in response to a lawyer's argument that he was prevented from reaching his office for a week after the Northridge earthquake). In any event, acts of god are defined by case law and are extraordinary events of nature that have widespread impact.

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With all due respect, Ms. Dishbak's personal matters do not meet that definition.

There is no basis for allowing the Plaintiff to amend her complaint to bring a denial of discharge action. The deadlines to object to discharge under Rule 4004(b)(1) and (b)(2) have expired. It is far too late for the Plaintiff to conduct a Rule 2004 exam (as she argues she would like to do) to determine if there are grounds for denial of discharge. Even if there were cause to extend the time to file a complaint for denial of discharge, a request for extension must be made by motion, not in an opposition to another motion.

Debtor also filed the declaration of his Superior Court counsel, Monica Mihell, who stated that she discussed the possibility of the Debtor's filing for bankruptcy relief at a Feb. 8, 2016 mandatory settlement conference in the Superior Court action, at which the Plaintiff and Mr. Spitz were present and participating. Ms. Mihell was told by Mr. Spitz and/or the Plaintiff that, in the case of such a bankruptcy, they would file a complaint for non-dischargeability. This complaint was mentioned by Plaintiff's counsel at least one more time and, thus, had been under contemplation since at least February 2016.

Analysis

This proceeding seeks a determination that the Plaintiff's claims against the Debtor are non-dischargeable under Bankruptcy Code §523(a)(2), (a)(4), and/or (a)(6). Thus, it is governed by §523(c). Rule 4007(c) sets the deadline for filing a complaint under §523(c): 60 days after the first §341(a) meeting.

**(c) Time for filing complaint under § 523(c) in a chapter 7 liquidation, chapter 11 reorganization, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case; notice of time fixed**

Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors

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under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007. Rule 9006(b)(3) requires that any extension of that 60 day period only be granted pursuant to Rule 4007(c), *i.e.*, by motion made before the 60-day period had elapsed. In this case, there is no dispute that May 17, 2016 was the last day to file a complaint under Rule 4007(c), that Plaintiff had an appropriate amount of notice of this case and this deadline, that the Plaintiff had not sought an extension of the time to file a complaint under §523(c) by May 17, 2016, and that the complaint was filed on May 19, 2016. Thus, the Plaintiff is seeking to be excused from the deadline or a retroactive extension of the deadline.

However, under Rules 4007(c) and 9006(b)(3), the deadline for filing a complaint under §523(a)(2), (a)(4), and/or (a)(6) is strictly enforced:

Thus, by its terms, the rule requires creditors such as Anwar to file nondischargeability complaints within sixty days of the creditors' meeting. A creditor may move to extend the deadline for cause—as Anwar successfully did once—but "[t]he motion shall be filed before the time has expired." *Id.* Reinforcing the statement that creditors must move for extensions of FRBP 4007(c)'s filing deadline before the time for filing has expired, FRBP 9006(b)(3) states that bankruptcy courts may extend this deadline "only to the extent and under the conditions stated in" FRBP 4007(c) itself. Fed. R. Bankr. P. 9006(b)(3). This requirement distinguishes FRBP 4007(c)'s deadline from most others set by the bankruptcy rules, which bankruptcy courts may extend at any time upon a showing of good cause or excusable neglect. Fed. R. Bankr. P. 9006(b)(1).

Consistent with the plain language of FRBP 4007(c) and 9006(b)(3), we have repeatedly held that the sixty-day time limit for filing nondischargeability complaints under 11 U.S.C. § 523(c) is "strict" and,

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without qualification, "cannot be extended unless a motion is made before the 60-day limit expires." In re Kennerley, 995 F.2d at 146 (citing Anwiler v. Patchett (In re Anwiler), 958 F.2d 925 (9th Cir.1992)); see also, e.g., Classic Auto Refinishing, Inc. v. Marino (In re Marino), 37 F.3d 1354, 1358 (9th Cir.1994); Jones v. Hill (In re Hill), 811 F.2d 484, 486 (9th Cir.1987). Accordingly, Anwar was not entitled to a retroactive extension of the filing deadline based on equitable considerations or a local rule of bankruptcy procedure that purports to grant the bankruptcy court discretion to excuse untimely filings.

Anwar v. Johnson, 720 F.3d 1183, 1186–87 (9th Cir. 2013); see also Willms v. Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013); In re Kennerley, 995 F.2d at 146. Thus, the Court is prohibited from retroactively extending the deadline (or otherwise excusing the late filing) based on "excusable neglect" or other equitable grounds. See Schunck v. Santos (In re Santos), 112 B.R. 1001 (9th Cir. B.A.P. 1990)( excusable neglect under Rule 60(b) is not available to extend the Rule 4007(c) deadline for filing a nondischargeability complaint); Osborn v. Ricketts (In re Ricketts), 80 B.R. 495 (9th Cir. B.A.P. 1987)(same).

(The Plaintiff argues that these BAP decisions rely on a mistaken interpretation of the Ninth Circuit decision in In re Magouirk, 693 F.2d 948 (9th Cir. 1982). This argument is mistaken: while Magouirk did hold that excusable neglect in failing to file a timely nondischargeability complaint should be evaluated under the standards applied to Rule 60(b), it did so under the old bankruptcy rules, which gave the bankruptcy judge ample discretion to extend the time to file a nondischargeability action using an "excusable neglect" standard.)

However, the Ninth Circuit in Anwar and Willms left room to excuse late filing in unique or extraordinary circumstances:

We acknowledge that the U.S. Supreme Court has not expressly addressed whether FRBP 4007(c)'s filing deadline admits of any equitable exceptions and that lower courts are divided on the issue. We need not, and do not, reach the question of whether external forces that prevented any filings—

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such as emergency situations, the loss of the court's own electronic filing capacity, or the court's affirmative misleading of a party—would warrant such an exception.

Anwar, 720 F.3d at 188 n.6.

On occasion, we have suggested that " 'unique' or 'extraordinary' circumstances" might allow an untimely § 523(a)(2) complaint to stand. [*Allred v. Kennerley*, 995 F.2d 145, 47 (9th Cir.1993) ]; see also *Anwar v. Johnson*, 720 F.3d 1183, 1187 (9th Cir.2013)(*"[A]bsent unique and exceptional circumstances ..., we do not inquire into the reason a party failed to file on time in assessing whether she is entitled to an equitable exception from [Bankruptcy Rule] 4007(c)'s filing deadline...."*). But *"the validity of the doctrine remains doubtful" and "would appear to be limited to situations where a court explicitly misleads a party."* *Kennerley*, 995 F.2d at 147–48.

*Wilms*, 723 F.3d at 1103.

*It is important to note that the Ninth Circuit is merely leaving open the possibility that unique or extraordinary circumstances might excuse the late filing of a §523(c) complaint. In some cases, courts have called it doubtful or noted it appears to be limited to situations where the court misled a party. Other cases, however, like Anwar, have not limited the "unique circumstances doctrine" to court misfeasance. Anwar, 720 F.3d at 188 n.6 ("emergency situations, the loss of the court's own electronic filing capacity, or the court's affirmative misleading of a party"); In re Schwartz, 592 F. App'x 605, 605–06 (9th Cir. 2015)("that an emergency situation prevented the filing, or that a court explicitly misled him"). This has led the Ninth Circuit B.A.P. to recently describe the doctrine as being "in a state of flux" and "unsettled." In re Radakovich, 2014 WL 4676009, at \*6–7 (B.A.P. 9th Cir. Sept. 19, 2014).*

Although Rule 60(b)(6) is not directly applicable to extensions of rule 4007(c)'s 60-day period, it also provides relief only in "extraordinary circumstances." Such extraordinary circumstances have included an attorney's disability preventing him from representing his client in any

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meaningful way:

In *Vindigni v. Meyer*, 441 F.2d 376 (2d Cir. 1971), relief was justifiable where there was "the unusual fact of the complete disappearance of plaintiff's attorney." *Id.* at 377. In the present case we have the possibly unique fact of what we may term the "constructive disappearance" of defendants' attorney, who was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, and who had made himself unavailable even to the trial judge.

It is this behavior of Newman which in part sets this case apart from *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). In *Link*, which was not a Rule 60(b) case, the Supreme Court, by a vote of four to three, affirmed the district court's sua sponte dismissal of a diversity negligence action for failure to prosecute. Justice Harlan, writing for the Court, found that:

There is certainly no merit to the contention that dismissal of petitioner's claim because of the counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

*Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955. 370 U.S. at 633-34, 82 S.Ct. at 1390. But the Court noted that there was nothing "to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect." *Id.* at 636, 82 S.Ct. at 1391. Such was not the case here. Newman's default was not the result of his

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having taken on too many cases to give proper attention to this one (see Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967); \*35 Cline v. Hoogland, 518 F.2d 776, 778 (8th Cir. 1975)); but instead was engendered by a mental illness which manifested itself to his clients only after they had relied on him for months.

14 As to the conduct of the Ciramis, they allege reasonable attempts by them and others on their behalf, as well as attempts by Judge Bruchhausen, to contact Newman. We note incidentally that on the papers before us these Rule 60(b) movants do not appear to have been themselves neglectful. If they had been, their motion would be cognizable not under Rule 60(b)(6) but under Rule 60(b) (1). Certainly, their conduct is not explainable as "inadvertence, indifference, or careless disregard of consequences," Klapprott v. United States, supra, 335 U.S. at 613, 69 S.Ct. at 389; quite the contrary, their "allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect on (their) part." Id. And cf. L. P. Steuart, Inc. v. Matthews, 117 U.S.App.D.C. 279, 280, 329 F.2d 234, 235 (D.C.Cir. 1964), where a successful Rule 60(b)(6) movant, whose former counsel filed an affidavit that he had been "beset with personal problems," "made affidavit that he (movant) and others in his behalf, made 'numerous inquiries of' his former counsel who 'refused to answer such inquiries' and assured (movant) 'from time to time' that 'the case was proceeding and that settlement of it would be made soon.' "

United States v. Cرامي, 563 F.2d 26, 34–35 (2d Cir. 1977). The Ninth Circuit has also found that such virtual abandonment of a client can constitute "extraordinary circumstances" justifying relief:

Having held that an attorney's gross negligence may constitute "extraordinary circumstances" under Rule 60(b)(6), we now proceed to apply this rule to the case at hand. Upon review of the record, it is clear

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that in this case "extraordinary circumstances" justify the granting of relief from the default judgment. Salmonsens virtually abandoned his client by failing to proceed with his client's defense despite court orders to do so.

Cnty. Dental Servs. v. Tani, 282 F.3d 1164, 1170 (9th Cir. 2002), as amended on denial of reh'g and reh'g en banc (Apr. 24, 2002). See also DeBonavena v. Conforte, 88 F.R.D. 710 (D.Nev.1981), a case decided under Rule 60(b)(6), for the proposition that depression can be a legitimate reason for an attorney's failure to adhere to a filing deadline.

Although it is hard to imagine something personal to Ms. Dishbak that would qualify under the strict standard set forth by Anwar, the Court has no information as to what she asserts was the reason for the late filing. Thus, she is to provide the Court with a declaration and any other relevant evidence. This can be sent or delivered to my chambers. It is not to be filed at this time. Once I have reviewed it, I will file it under seal. If I rule that it does not meet the standard to accept this complaint, it will remain under seal and Mr. Garber will not have access unless Ms. Dishbak files an appeal of my ruling. If, after I review the declaration, etc. I do rule in Plaintiff's favor or if Ms. Dishbak takes an appeal from my determination that it does not provide a defense to this motion, I will place the material under seal, but will grant access to Mr. Garber if (and when) he signs a confidentiality agreement.

As to seeking to amend this complaint to add a cause of action under §

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727(d), that must be filed as a separate complaint.

As to dismissing the corporate defendants, that motion is granted.

They are not Debtors in this court and even if they were, they are not entitled to a discharge.

**Party Information**

**Debtor(s):**

Michel Kanaan Kanaan

Represented By  
Richard Mark Garber

**Defendant(s):**

Beauty Live Forever, Inc.

Represented By  
Richard Mark Garber

Oilan, Inc.

Represented By  
Richard Mark Garber

Does 1 Through 50, Inclusive

Represented By  
Richard Mark Garber

Michel Kanaan Kanaan

Represented By  
Richard Mark Garber

KANAAN INTERNATIONAL, INC.

Represented By  
Richard Mark Garber

Beauty Illusions, Inc.

Represented By  
Richard Mark Garber

**Plaintiff(s):**

Maryam Seyedan

Represented By  
Donna R Dishbak

**Trustee(s):**

David Seror (TR)

Pro Se

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**1:16-10443 Michel Kanaan Kanaan**

**Chapter 7**

Adv#: 1:16-01077 Seyedan v. Kanaan et al

■

**#25.00** Status conference re: complaint objecting to discharge of debt under 11 U.S.C. sec. 523(a)(2), (a)(4) and (a)(6)

fr. 7/20/16 (VK calendar); 8/30/16, 11/15/16

Docket No: 1

**Tentative Ruling:**

Continued without appearance to January 17, 2017 at 10:00 a.m.

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

**Debtor(s):**

Michel Kanaan Kanaan

Represented By  
Richard Mark Garber

**Defendant(s):**

Beauty Live Forever, Inc.

Pro Se

Oilan, Inc.

Pro Se

Does 1 Through 50, Inclusive

Pro Se

Michel Kanaan Kanaan

Pro Se

KANAAN INTERNATIONAL, INC.

Pro Se

Beauty Illusions, Inc.

Pro Se

**Plaintiff(s):**

Maryam Seyedan

Represented By  
Donna R Dishbak

**Trustee(s):**

David Seror (TR)

Pro Se

David Seror (TR)

Pro Se

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**US Trustee(s):**

United States Trustee (SV)

Pro Se

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**1:16-11387 Real Estate Short Sales Inc**

**Chapter 11**

**#26.00** Motion to be Relieved as General Insolvency  
Counsel for Debtor and Debtor in Possession

Docket No: 85

**Tentative Ruling:**

The Orantes Law Firm (OLF) seeks to be relieved as counsel in this case. The Debtor owns two properties (Chatsworth and Berendo). Lately the circumstances between the Debtor and OLF has changed and OLF can no longer ethically or financially represent the Debtor. The ethics portion arised from a conflict of interest, though that is no explained. Apparently the Debtor has not been paying in accordance with the retainer agreement. There are also some difficulties in communication.

This was set on shortened time in order to allow the Debtor sufficient time to find new counsel and meet the deadlines such as filing its plan of reorganization.

The Debtor does not oppose, but wants sufficient time to employ new counsel. Let's discuss a reasonable deadline to employ new counsel. What other deadlines are set?

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

Real Estate Short Sales Inc

Represented By  
Giovanni Orantes

**Movant(s):**

Real Estate Short Sales Inc

Represented By  
Giovanni Orantes

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

**Chapter 11**

**#26.01** Debtor's Emergency Motion For Order Authorizing The Debtor To Obtain Additional Post-Petition Financing From The Spiegel Family Trust and To Authorize The Debtor To Enter Into An Amendment To The Financing Agreement

Docket No: 147

**Tentative Ruling:**

The initial financing motion provided for a revolving loan of up to \$35,000. This loan has now been used and the Debtor needs another line of working capital for an additional amount of \$65,000. Of this, about \$40,000 will be used to pay for inventory for faucets to fulfill a large customer's needs. The Debtor also seeks to extend the maturity date of the initial loan to 2/28/17 or the effective date of the Plan, whichever is earlier.

Prepetition the Debtor was unable to get an unsecured loan. This is the best loan terms available. It comes from the Spiegel Family Trust, whose Trustees are the parents of the president Scott Spiegel.

This would be a revolving line of credit of up to \$100,000 secured by a lien on the Debtor's assets. This will be a junior lien for HSBC. Interest is at 5% for five months.

NO OPPOSITION AS OF 11/30.

I assume that this is not a new \$100,000, but is a continuation of the prior \$35,000 plus a new \$65,000. If so, grant the motion.

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

**Debtor(s):**

The Automart, Inc.

Represented By  
Blake J Lindemann  
Jonathan Shenson  
Lauren N Gans

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

**Chapter 11**

**#27.00** First Amended Disclosure Statement Describing  
The Automart's Chapter 11 Plan of Reorganization

Docket No: 138

**Tentative Ruling:**

Disclosure statement was conditionally approved by order entered on 10/26/16. The appropriate amendments have been made. Give final approval to the disclosure statement.

Tentative ruling from 10/11/16:

Per the disclosure statement: This is a family-business that designs, imports, and sells high quality kitchen and bath products. In 2000, the Debtor decided to focus on the marine industry, designing products uniquely suited for boats and the salt air.

Starting in 2005, Debtor began importing and selling uniquely designed, private label folding bicycles that can be compactly stored on boats and used no shore. Its sole customer was West Marine Products, which is a chain of 350 retail boating stores. In 2013 the Consumer Product Safety Commission recalled two of the models of bicycles based on West Marine's claim that three of the bicycles had cracked frames due to welding errors. Debtor believes that this was a bad faith, arbitrary, and overbroad recall by West Marine. The relations and actions by West Marine are laid out in detail. Eventually West Marine stopped paying for the bicycles and for the faucets and sinks and on March 25, 2016, West Marine filed an action against Debtor and its principal in the LASC. Defendants filed a demurrer and on June 5, 2016, Automart filed this chapter 11 case. The superior court case has been removed to this court.

The effectiveness of the Plan is not dependant on the outcome of the litigation.

The Debtor plans to wind-down its bicycle business and reorganize around its

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Chapter 11

core marine OEM and consumer business. The Spiegel Family Trust will provide \$25,000 cash on the effective date and make loans and other financial contributions to the Debtor. In turn, it will receive new equity on the Debtor. the loans could aggregate as much as \$50,000, with compound interest of 5% for a five year period. Scott Spiegel will continue to receive the same salary as on the petition date and will receive 51% of the shares of the Reorganized Debtor on the effective date and the additional 49% over three years as additional consideration for acting as president.

There are 7 classes:

class 1 - HSBC - can vote **(the loan terms are being slightly modified)**

class 2 - Other Secured Claims - deemed to accept **(the Debtor has the option of treatment. Why is this deemed to accept?)**

class 3 - Priority Claims - can vote **(p. 26 says that this is unimpaired, and is entitle to vote)**

class 4 - Trade Claims - can vote **(will be paid in full within 90 days of the effective date or 14 days after the claim is allowed. Full amount about \$12,000)**

class 5 - General Unsecured Claims other than Trade Claims - can vote **(class 5 and 6 creditors will share pro rata a \$120,000 Note to be issues by the Reorganized Debtor. This note will be paid in quarterly installments of \$6,250 for five years. The Debtor is analyzing whether it can equitably subordinate the West Marine Claims, which would then not share in these payments).**

class 6 - Chase - can vote **(Chase shares in the note, but the Reorganized Debtor can reinstate the Chase claim to make it unimpaired or provide a different treatment if Chase and the Debtor agree. If that happens, the Note proceeds that would go to class 6 will go to class 5). court - what is the basis for separate classification of Chase?**

class 7 - equity - deemed to reject **(The equity holder is A2Z Ventures and its interest will be extinguished.)**

No opposition received as of 10/6/16. If there is none received after that date, approve the disclosure statement and set for confirmation hearing.

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**Debtor(s):**

The Automart, Inc.

Represented By  
Blake J Lindemann  
Jonathan Shenson  
Lauren N Gans

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

**Chapter 11**

**#27.01** First Amended Chapter 11 Plan

Docket No: 137

**Tentative Ruling:**

At the 10/11/16 hearing, the Court approved the disclosure statement with modification. The last day to vote/object is 11/23/16. The confirmation hearing was scheduled for 10/6/16.

On 10/26/16, Debtor filed its First Amended Disclosure Statement. Modifications were made to the following classes of claims (modification noted in bold):

- Class 2- Other Secured Claims- **Impaired- Entitled to Vote**
- Class 3- Priority Claims- **Impaired-** Entitled to Vote

Also, the Class 1 claim (HSBC Secured Claim), has a modification. The Debtor agrees to pay all attorneys' fees in the amount of **\$7,800** within 180 days after the Effective Date of the Plan. Debtor agrees not to object to these fees. The monthly payments on the loan will not be less than **\$3,400, interest to remain at the contract rate.**

On December 1, the Debtor filed a supplement with an amendment to the plan and a copy of the financing agreement.

No party in interest has objected to the Plan. All voting parties have accepted the Plan. Thus, the Plan has been accepted by classes 1 and 4.

**Party Information**

**Debtor(s):**

The Automart, Inc.

Represented By  
Blake J Lindemann  
Jonathan Shenson

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Lauren N Gans

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

**Chapter 11**

**#28.00** Status and Case Management Conference

fr. 10/11/16

Docket No: 1

**Tentative Ruling:**

Nothing further received as of

prior tentative ruling (10/11/16)

Per the status report filed 9/27/16, Debtor has the consensual use of cash collateral from its secured lender. It has assumed the major contracts to which it is a party - namely the real property lease and the third party reps sales agreements. On 9/6/16 it filed a motion to extend the exclusivity periods and there has been not opposition.

The disclosure statement was filed on 9/2. Debtor has reached an informal agreement with HSBC as to the HSBC claims and when the stipulation is completed, that will avoid any confirmation objections.

The West Marine Inc. v. Automart adversary is moving forward.

The Debtor is current with the requirements of the UST.

*Trail this with the disclosure statement/plan hearings.*

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

The Automart, Inc.

Represented By

Blake J Lindemann

Blake J Lindemann

Blake J Lindemann

Blake J Lindemann

Jonathan Shenson

Jonathan Shenson

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Jonathan Shenson  
Jonathan Shenson  
Lauren N Gans  
Lauren N Gans  
Lauren N Gans  
Lauren N Gans

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

**Chapter 11**

**#29.00** Trustee's Motion for Order Converting Chapter  
11 Case to Chapter 7.

Docket No: 192

**\*\*\* VACATED \*\*\* REASON: Order ent continuing hrg to 3/28/17 at  
10:00 a.m. - jc**

**Tentative Ruling:**

- NONE LISTED -

**Party Information**

**Debtor(s):**

Massoud Aaron Yashouafar

Represented By  
C John M Melissinos

Solyman Yashouafar

Represented By  
Mark E Goodfriend

Solyman Yashouafar

Represented By  
Mark E Goodfriend

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Jeremy V Richards

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

**Chapter 11**

**#30.00** Motion to Reconsider, Alter, Amend  
or Modify Order Granting Relief from Stay

Docket No: 222

**\*\*\* VACATED \*\*\* REASON: Advanced to 11/18/16 at 10:00 a.m. - see  
order ent 11/10/16 dkt. 226 - jc**

**Tentative Ruling:**

- NONE LISTED -

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

Massoud Aaron Yashouafar

Represented By  
C John M Melissinos  
Brian L Davidoff

Solyman Yashouafar

Represented By  
Mark E Goodfriend

Solyman Yashouafar

Represented By  
Mark E Goodfriend

**Movant(s):**

Solyman Yashouafar

Represented By  
Mark E Goodfriend

**Trustee(s):**

David Keith Gottlieb (TR)

Represented By  
Jeremy V Richards  
John W Lucas

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**1:16-12255 Solyman Yashouafar**

**Chapter 11**

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

fr. 9/1/16(xfr from Judge Tighe's calendar), 9/27/16,  
10/11/16; 10/26/16; 11/15/16

Docket No: 1

**Tentative Ruling:**

The Receiver filed an emergency motion, but this has been resolved in that he withdrew his motion in the district court. Thus, not appearance is needed. If no one appears, I will continue the status conference to March 20, 2017 at 10:00 a.m. If there are things to discuss at this time, please appear on 12/6 and we can deal with them.

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

Solyman Yashouafar

Pro Se

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

**Chapter 11**

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

fr. 10/25/16; 11/15/16

Docket No: 128

**Tentative Ruling:**

Nothing further received as of 11/29/16. This was continued at the request of the parties who were trying to work something out.

prior tentative ruling (11/15/16)

**Service:** Service on Brian Davidoff at Greenberg Glusker is proper. However, service on the Debtor is at an Encino address. Per the docket, Debtor's address is 910 North Rexford Drive, Beverly Hills, CA 90210.

**Motion:**

By way of this Motion, Creditor Howard L. Abselet ("Abselet") seeks an order from the Court disqualifying Greenberg Glusker Fields Claman & Machtinger ("Greenberg Glusker") as counsel for Debtor Massoud Yashouafar ("Massoud" or "Debtor") due to Greenberg Glusker's previous consultations with Abselet.

Abselet explains that from August 2014 through June 2015, he and his brother consulted with Greenberg Glusker regarding a dispute involving the Debtors. Specifically, the dispute relates to the handling of certain claims reserves created under a Chapter 11 plan in the Roosevelt Lofts bankruptcy case. According to a settlement agreement, certain amounts of those reserves were supposed to be paid to Abselet but were paid to other creditors of the Debtors. Abselet discussed this dispute with Glen Rothstein of Greenberg Glusker. In addition, Ms. Conniff, Abselet's New York counsel, and Mr. Rothstein conferred regarding the Abselet issues, including issues

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relating to enforcing the Abselet judgment against Debtors. Ultimately, Abselet did not retain Greenberg Glusker. Greenberg Glusker now represents Massoud in his Chapter 11 bankruptcy case.

Abselet argues that based on the consultations he had with Mr. Rothstein of Greenberg Glusker, Greenberg Glusker should be disqualified from representing Massoud. Abselet relies on Rule 3-310(E) of the Professional Rules of Conduct whereby an attorney should not "accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." See, Motion, p. 5. Abselet asserts that a substantial relationship exists between Abselet's consultation and Greenberg Glusker's representation of Massoud because the matters discussed in each situation deal with the same set of circumstances. Therefore, Abselet contends that once a substantial relationship is established, a conclusive presumption that the former client provided confidential information to counsel arises. *Global Van Lines, Inc. v. Superior Court*, 144 Cal. App. 3d 483, 489 (1983).

Abselet then asserts that the fact that he did not ultimately retain Greenberg Glusker does not change the analysis. Greenberg Glusker should still be disqualified. Abselet contends the seminal case is *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4<sup>th</sup> 1135 (1999) whereby the Supreme Court found that even preliminary consultations that do not result in engagement may be entitled to protection. In *Speedee Oil Change Systems*, the court indicated that the "primary concern is whether and to what extent the attorney acquired confidential information. That question is not necessarily answered by the amount of time involved. Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences." Motion, p. 10; Citing, *Speedee Oil Change Systems*, 20 Cal. 4<sup>th</sup> at 1147-1148. Thus, since Abselet's counsel consulted with Mr. Rothstein, Greenberg Glusker's representation of Debtor will prejudice Abselet. Abselet argues protection of Abselet's confidences

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outweighs Debtor's right to counsel in this instance. Therefore, the Court should disqualify Greenberg Glusker as counsel for Debtor Massoud.

**Opposition:**

Greenberg Glusker opposes Abselet's Motion for Disqualification. Greenberg Glusker argues that (1) Abselet has not established an attorney-client relationship between Greenberg Glusker and Abselet; (2) Greenberg Glusker did not receive any confidential information concerning Abselet; and (3) the balance of interests does not warrant Greenberg Glusker's disqualification.

First, Greenberg Glusker contends that Abselet's reliance on the SpeeDee Oil substantial relationship test falls short of satisfying one of the two key elements of the test. Greenberg Glusker contends that Abselet solely focuses on whether confidential information was disseminated to Mr. Rothstein. The firm argues that Abselet fails to address the second element which is necessary to establish an attorney client relationship. That element involves a client securing the advice of the attorney. Greenberg Glusker contends that Abselet's Motion fails to assert that Ms. Conniff secured Mr. Rothstein's advice. In fact, Greenberg Glusker contends that this case is more similar to the case of *In re Marriage of Zimmerman*, 16 Cal.App.4<sup>th</sup> 556 (1993) where the court denied a motion to disqualify due to the limited nature of the contact between the potential client and attorney. Here, the firm asserts it received no confidential information; the communications with Mr. Rothstein were brief; Mr. Rothstein referred Abselet to another attorney; and Mr. Rothstein cannot recall the conversation nor does he have any notes regarding the conversation.

Second, Greenberg Glusker contends that it did not receive any confidential information concerning the Abselet matters. In support of this, the firm asserts that the two attorneys who have submitted declarations in support of the Motion, Mr. Kim and Mr. Hernquist, do not claim to have given Mr. Rothstein confidential information. Moreover, Ms. Conniff, the New York

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attorney, contends that she had a lengthy conversation with Mr. Rothstein regarding Abselet matters. However, Mr. Rothstein does not recall the conversation nor does he have any notes or time sheets that reflect this conversation. Further, Ms. Conniff did not submit a time sheet to prove this conversation occurred. Thus, Abselet has failed to provide evidence that Greenberg Glusker, in fact, obtained confidential information through Mr. Rothstein.

Finally, Greenberg Glusker asks the Court to carefully balance the competing interests before ruling on this Motion. Here, Debtor has limited resources to hire alternative counsel. This is a complex bankruptcy case with an appointed trustee. According to Greenberg Glusker, disqualifying the firm will just play into Abselet's "massive" litigation strategy.

Greenberg Glusker asks the Court to deny the Motion to Disqualify.

**Reply**

[Please remember to file a copy of this in the Massoud case. These are being jointly administered and are not consolidated and this piece only refers to Massoud.]

The Reply really only repeats what is in the motion. That Greenberg Glusker obtained confidential information and that is enough. And that the whole firm is disqualified.

**Analysis:**

**Legal Standards for Disqualification**

"In order to determine whether to disqualify counsel, the Court applies California law." *Layer2 Communs. Inc. v. Flexera Software LLC*, 2014 U.S. Dist. LEXIS 77693, \*14 (N.D. Cal. June 5 2014); (citing *Gotham City Online*,

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*LLC v. Art.com, Inc.*, 2014 U.S. Dist. LEXIS 33680, \*2 (N.D. Cal. Mar. 13, 2014)). In *Layer2 Communs.*, the District Court provided:

"A court should examine a motion to disqualify counsel carefully to ensure that literalism does not deny the parties substantial justice. Thus, a court must balance such varied interests as a party's right to chosen counsel, the interest in representing a client, the burden placed on a client to find new counsel, and the possibility that tactical abuse underlies the disqualification motion. An order of disqualification of counsel is a drastic measure, which courts should hesitate to impose except in circumstances of absolute necessity. The moving party, therefore, carries a heavy burden and must satisfy a high standard of proof. To be justified, a motion to disqualify must be based on present concerns and not concerns which are merely anticipatory and speculative." *Layer2 Communs.*, 2014 U.S. Dist. LEXIS 77693, \*15.

The court in *SpeeDee Oil Change Systems* acknowledged that "in considering whether an attorney-client relationship has reached a point where the attorney can be subject to disqualification for a conflict of interest, we begin with the relationship's early stages." *SpeeDee Oil Change Systems*, 20 Cal. 4<sup>th</sup> at 1147. "When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie." *Id. at 1148*. Thus, "even the briefest conversation between lawyer and client can result in the disclosure of confidences." *Id.* ; *Citing, Novo Therapeutisk, etc. v. Baxter Travenol Lab.*, 607 F.2d 186, 195 (7<sup>th</sup> Cir. 1979).

**Is Disqualification Appropriate?**

Here, based on the Declaration of Diane Conniff, it would appear the discussions between Ms. Conniff and Mr. Rothstein involved confidential information pertinent to any ongoing and potential Abselet/Debtor litigation. During the initial meeting with Mr. Rothstein, Ms. Conniff declares that they discussed, among other things, the pursuit of Debtors' partnership interests in

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ECPLP; the claims against Levene Neale; and the theories surrounding any collection efforts against Debtors. *Declaration of Dianne Conniff in Support of Motion by Creditor Howard L. Abselet to Disqualify Greenberg Glusker as Counsel for Debtor Massoud Aaron Yashouafar*, p. 3. Based on Ms. Conniff's description of the communications, it is more than likely confidential information was disseminated to Mr. Rothstein. The Court, at this juncture, is not aware of any screening procedures the Greenberg Glusker firm may or may not have initiated to prevent any inadvertent disclosures of the confidential communications. There is a presumption that client confidences are shared within a firm. Thus, regardless of Abselet's failure to retain Greenberg Glusker, unless the firm can rebut the assertion that client confidences were discussed, the Court cannot allow Greenberg Glusker's representation of Debtor Massoud as his interest is directly adverse to Abselet's. Without a rebuttal of this presumption, the disqualification of one attorney extends vicariously to the entire firm. *SpeedDee Oil Change Systems*, 20 Cal. 4<sup>th</sup> at 1153.

In an attempt to rebut Abselet's assertion that confidential information was discussed between Ms. Conniff and Mr. Rothstein, the firm argues that Mr. Rothstein does not recall this conversation with Ms. Conniff nor does he have notes or billing time sheets that evidence this telephonic conversation. Greenberg Glusker compares this scenario to the case of *In re Marriage of Zimmerman* where the court denied the motion to disqualify because movant failed to show that her preliminary consultation with counsel (who failed to recall the conversation or take notes) resulted in the attorney's acquisition of confidential information related to the litigation.

Here, it appears we have a "he said, she said" situation. In support of disqualification, Ms. Conniff cites to specific topics and theories that were discussed in this initial conversation. Contrary to Ms. Conniff's recitation, Mr. Rothstein contends that he has "never spoken with Ms. Conniff directly at any time, and specifically about any of the matters or issues she incorrectly claims she closely examined" him about. *Declaration of Mr. Rothstein*, p. 10. Mr.

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Rothstein contends he reviewed his records and files and cannot find any notes or emails that memorialize this conversation with Ms. Conniff .

Based on Ms. Conniff's declaration, the Court would be inclined to find that the conversation between Ms. Conniff and Mr. Rothstein went beyond a peripheral nature and established a degree of confidentiality that goes beyond the contact described in *Zimmerman*. However, since Mr. Rothstein claims he has no recollection of the telephone conversation, the Court will require Ms. Conniff to provide the Court with further evidence of this conversation. Notes of the conversation(s), billing records, or phone bills would be adequate. Should Ms. Conniff be unable to provide the Court with further evidence, the Court may require an evidentiary hearing so that Ms. Conniff and Mr. Rothstein can provide testimony in court.

Finally, the Court agrees with Abselet that the disqualification of Greenberg Glusker does not present undue hardship upon Debtor. Unlike the *Zimmerman* case, Greenberg Glusker has been Debtor's counsel for a very limited time. There are many firms in the Southern California area that are equipped to handle Debtor's bankruptcy case. Therefore, should the Court find that confidential information was disseminated to the firm by virtue of Ms. Conniff's discussions with Mr. Rothstein, the Court will disqualify Greenberg Glusker from representing Debtor.

<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

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#33.00 Status Conference re: chapter 11 case  
fr. 9/27/16, 10/25/16; 10/26/16; 11/15/16

Docket No: 1

**Tentative Ruling:**

Joint administration with Solyman Yashouafar case. Continue to 3/28/17 at 10:00 a.m.

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

Massoud Aron Yashouafar

Pro Se