

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:15-12278 Morgan Drexen, Inc.

Chapter 7

#1.00

CONT'D STATUS CONFERENCE Hearing RE: Scheduling And Case Management Conference
(Petition filed 4/30/2015)
[Case tranferred from CB on 7/21/2020]

FR: 6-10-15; 6-24-15; 7-27-15; 1-24-17; 7-25-17; 12-12-17; 6-5-18; 8-14-18; 11-6-18; 2-26-19; 5-7-19; 9-24-19; 12-3-19; 4-7-20; 7-7-20; 9-8-20; 9-23-20; 1-27-21

Docket 1

Tentative Ruling:

APPEARANCES NOT REQUIRED.

Continue the status conference to December 15, 2021 at 9:00 a.m. to give the Trustee additional time to bring this case to closure.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Morgan Drexen, Inc.

Represented By
Paul R Shankman

Trustee(s):

Jeffrey I Golden (TR)

Represented By
Thomas H Casey
Kathleen J McCarthy
Reem J Bello
Beth Gaschen

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:18-10905 Michael William Devine

Chapter 7

Adv#: 8:19-01095 The United States Trustee For Region 16 v. Devine

#2.00

CONT'D STATUS CONFERENCE Hearing RE: Complaint Objecting To Discharge Of Debtor Pursuant to 11 U.S.C. Section 72711 U.S.C. Section 727 (Complaint filed 5/28/19) (PTC set at S/C held 8-14-19)

FR: 8-14-19; 3-18-20; 6-24-20; 8-26-20; 11-30-20; 2-10-21; 4-21-21

Docket 1

Tentative Ruling:

APPEARANCES REQUIRED.

The pretrial conference was continued a number of times because of the pandemic. As a result, the Court still does not have a pretrial order. The Court will continue the pretrial conference to September 15, 2021 at 9:00 a.m. to give the parties an opportunity to meet and confer pursuant to LBR 7016-1 and to file a joint proposed pretrial order or stipulation.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Michael William Devine

Represented By
Christopher J Langley

Defendant(s):

Michael William Devine

Represented By

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

CONT... Michael William Devine

Chapter 7

Christopher J Langley
Donald W Reid

Plaintiff(s):

The United States Trustee For

Represented By
Frank Cadigan

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:20-10096 Michael Allan Barnum

Chapter 7

Adv#: 8:20-01053 Boards of Trustees of the National Elevator Indust v. Barnum

#3.00

CONT'D Hearing RE: Plaintiff Creditor's Motion For Summary Judgment
(Motion filed 6-2-21)

FR: 7-14-21

Docket 13

Tentative Ruling:

APPEARANCES REQUIRED.

Debtor-defendant Michael Barnum ("Mr. Barnum") was the sole owner and controlling officer of Southcoast Elevator and Escalator Co., Inc. ("Southcoast"). Southcoast failed to pay over employee elective 401(k) plan deferrals and employee contributions to a health plan (the "Unpaid Trust Funds"). The trustees of the 401(k) plan and health plan ("Plaintiffs") commenced an adversary proceeding for a judicial determination that certain of Mr. Barnum's obligations to the Plaintiffs are excepted from discharge under 11 U.S.C. § 523(a)(4) because they constitute "defalcation while acting in a fiduciary capacity." Plaintiffs move for summary judgment on this issue (the "Motion").

Plaintiffs contend they are entitled to prevail based upon a key Eight Circuit case, *U.S. Department of Labor v. Harris (In re Harris)*, 561 B.R. 726 (8th Cir. 2017). *Harris* interprets and applies a controlling Supreme Court case on the issue of defalcation in a bankruptcy discharge context, *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013). *Bullock* is notable for its ruling that "defalcation" in this context "includes a culpable state of mind requirement . . . We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." 569 U.S. at 269.

For purposes of deciding the Motion, the Court will assume (without deciding or

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

CONT... Michael Allan Barnum

Chapter 7

determining) that *Harris* correctly applies Supreme Court precedent in *Bullock*.

The key language in *Harris* is as follows: "{T]he Debtor committed defalcation as that term is used in § 523(a)(4) when he knowingly failed to remit employee contributions to HealthPartners and instead knowingly used those funds to pay for other corporate expenses But the Debtor misses the issue, which is his state of mind between March 26 and March 31, when he chose not to pay approximately \$55,000 to maintain the employees' health insurance, despite having more than \$70,000 available during that time There is no genuine issue as to these facts." 561 B.R. at 736-37 (underscoring added by this Court).

Based upon the foregoing, it is clear under *Harris* that three necessary elements of a section 523(a)(4) action for defalcation are (1) knowledge that trust funds are unpaid and owing, (2) a failure to pay over such trust funds, and (3) having the present ability to pay over such trust funds because there is sufficient cash available to do so.

The Court's focus here is on the third required element. Plaintiffs attempt to show in the Motion that Mr. Barnum had the ability to pay the Unpaid Trust Funds by pointing to Southcoast's revenues during the relevant months when wages were paid and Unpaid Trust Funds were not paid over: August 2016 -- \$245,470.55; September 2016-- \$83,242.36; October 2016--\$192,118.00. Additionally, Southcoast had \$62,963.00 in revenues in November 2016. These amounts far exceed the amount of the Unpaid Trust Funds, so it would appear on first impression that Mr. Barnum in fact had the financial wherewithal (through Southcoast) to make the required payments.

Mr. Barnum alleges in his declaration in opposition to the Motion that Southcoast's short-term financing was provided by Pearl Capital, New Era Lending and Royal Finance Group. These lenders, according to Mr. Barnum's sworn declaration, had "access to Southcoast's checking account to make daily withdrawals." Thus, it does not follow that merely because Southcoast received a certain amount of gross revenues during a given month, it had full power and control over such revenues. The short-term lenders, making daily withdrawals, could have removed such funds before Mr. Barnum could have used them to pay the Unpaid Trust Funds. In such event, Mr. Barnum would not have had the ability to pay the Unpaid Trust Funds.

Mr. Barnum's declaration goes on to allege the financially crippling effects of the

**United States Bankruptcy Court
Central District of California
Santa Ana
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Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

CONT... **Michael Allan Barnum**

Chapter 7

short-term lenders' daily withdrawals: "Allowing the lenders daily access to Southcoast's accounts crippled its cashflow and made it extremely difficult to keep up with its obligations, including the payment obligations to the Plaintiffs."

It may be that, notwithstanding such daily withdrawals by the lenders, Southcoast still had the ability to pay some or all the Unpaid Trust Funds. However, that is not shown by the Motion. Plaintiffs have the burden of proof on this issue, and they have failed to meet it. The Court has searched the Motion and its supporting declarations in vain for the bank statements showing Southcoast checking account activity during the period August through October 2016. This is a genuine issue of material fact that precludes the grant of summary judgment to Plaintiffs. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The Motion is denied. The Court will set a further status conference in this case for October 20, 2021 at 9:00 a.m. An updated status report is due October 6, 2020.

MR. BARNUM TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Michael Allan Barnum

Represented By
Andrew S Bisom

Defendant(s):

Michael Allan Barnum

Represented By
Andrew S Bisom

Plaintiff(s):

Boards of Trustees of the National

Represented By
Laurie A Traktman
Benjamin M ODonnell

Trustee(s):

Jeffrey I Golden (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
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Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:20-11795 Byron York Priestley

Chapter 7

Adv#: 8:20-01159 Priestley v. 20 CAP FUND I, LLC et al

#4.00

CONT'D STATUS CONFERENCE Hearing RE: Complaint for:

1. Violation of the Automatic Stay
2. Injunctive Relief
3. Declaratory Relief
(Complaint filed 11-5-20)
(Another Summons Issued 12-8-20)

FR: 2-24-21

Docket 1

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will issue the following scheduling order:

All discovery shall close on June 30, 2022.

All discovery motions shall be heard before July 31, 2022.

All pretrial motions (except motions in limine) shall be heard before August 31, 2022.

Pretrial conference is set for September 14, 2022 at 10: a.m. An updated status report is due August 31, 2022.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Byron York Priestley

Represented By

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

CONT... Byron York Priestley

Chapter 7

Anerio V Altman

Defendant(s):

20 CAP FUND I, LLC

Pro Se

FCI Lender Services, Inc.

Pro Se

Plaintiff(s):

Byron York Priestley

Represented By
Anerio V Altman

Trustee(s):

Richard A Marshack (TR)

Pro Se

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:20-12016 Robert Chester Underwood

Chapter 11

#5.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 7/17/2020)

FR: 9-23-20; 2-10-21

Docket 14

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into the Debtor's compliance with UST guidelines and requirements.

Next status conference: October 20, 2021 at 9:00 a.m. An updated status report is due October 6, 2021.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Robert Chester Underwood

Represented By
Michael Jones

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

9:00 AM

8:20-12027 2724 Ocean Blvd, LLC

Chapter 11

#6.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Chapter 11 Petition filed on 7/20/2020)

FR: 9-23-20; 1-27-21

Docket 11

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into the Debtor's compliance with UST guidelines and requirements.

Next status conference: November 3, 2021 at 9:00 a.m. An updated status report is due October 20, 2021.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

2724 Ocean Blvd, LLC

Represented By
Jeffrey I Golden

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:19-10212 Hill Concrete Structures

Chapter 11

#1.00

CONT'D POST-CONFIRMATION STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case; And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 1/18/19)

FR: 3-20-19; 6-19-19; 11-13-19; 3-25-20; 6-29-20; 8-26-20; 11-18-20; 11-30-20

Docket 8

Tentative Ruling:

APPEARANCES NOT REQUIRED.

The Debtor's status report was very helpful to the Court. The Court will continue the status conference to January 26, 2022 at 9:00 a.m. An updated status report is due January 12, 2022.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Hill Concrete Structures

Represented By
Michael Jones
Sara Tidd

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#2.00

CONT'D STATUS CONFERENCE Hearing RE: (1) Status Of Chapter 11 Case;
And (2) Requiring Report On Status Of Chapter 11 Case
(Petition filed 12-4-20)

FR: 2-10-21, 4-7-21; 5-12-21; 7-14-21

Docket 1

Tentative Ruling:

APPEARANCES REQUIRED.

The Court will inquire into the Debtor's compliance with UST guidelines and requirements.

Next status conference: November 3, 2021 at 9:00 a.m. An updated status report is due October 20, 2021.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
RONALD CLIFFORD

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#3.00

CONT'D Hearing RE: First Amended Disclosure Statement Describing Heartwise, Inc's First Amended Chapter 11 Plan of Reorganization (D.S. and Plan filed 3-20-21) (Amended D.S. and Plan filed 5-5-21)

FR: 5-12-21; 7-14-21

Docket 202

Tentative Ruling:

APPEARANCES NOT REQUIRED.

The Court will continue the Disclosure Statement hearing to September 1, 2021 at 2:00 p.m. for the reasons set forth in Debtor's Reply, Docket No. 326.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
Ronald Clifford

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#4.00

CONT'D Hearing RE: Amended Motion of Robinson Pharma, Inc. for an Order Granting: (i) Allowance and Payment of Administrative Expense Claims Pursuant to 11 U.S.C. 503(b)(9) and (ii) Setoff Against Deposit (Motion filed 2-15-21)

FR: 3-8-21; 3-24-21; 4-7-21; 5-12-21; 7-14-21

Docket 76

Tentative Ruling:

APPEARANCES REQUIRED.

Grant. Robinson-Pharma has made a sufficient showing that it is entitled to entry of an order allowing and authorizing and directing payment of its Section 503(b)(9) (claim) and permitting Robinson-Pharma to offset such amounts against its deposit for the reasons set forth in Robinson-Pharma's amended notice of motion and replies. Evidentiary objections to the Declaration of Elaine Phan are overruled.

ROBINSON-PHARMA TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
Ronald Clifford

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#5.00

CONT'D Hearing RE: Motion to Appoint a Chapter 11 Trustee
(Motion filed 2-11-21)

FR: 3-8-21; 3-24-21; 4-7-21; 5-12-21; 7-14-21

Docket 67

Tentative Ruling:

APPEARANCES REQUIRED.

Creditor Vitamins Online, Inc. ("Vitamins Online") moves for entry of an order appointing a chapter 11 trustee (the "Motion"). Vitamins Online argues that "cause" exists to appoint a trustee in this case because (1) debtor and debtor in possession Heartwise, Inc. ("Heartwise") suffers from irreconcilable conflicts of interest, (2) Heartwise has committed fraud, dishonesty, incompetence and gross mismanagement, and (3) this case was filed in bad faith and as part of a litigation tactic. Heartwise opposes the Motion.

The Office of the United States Trustee ("UST") filed a statement of position supporting the appointment of a chapter 11 trustee on the grounds that Heartwise transferred millions of dollars to related entities on the eve of the filing of the bankruptcy petition and engaged in other transactions resulting in substantial pre-bankruptcy payments to related entities.

Heartwise is engaged in the business of selling health and nutritional supplements. Its business model is to purchase product in bulk from Robinson Pharma, Inc. ("RP") and to sell such product using the services of a marketing company named Alpha Health Research aka DRM ("DRM"). DRM also provides management services to Heartwise.

The appointment of a chapter 11 trustee for cause under 11 U.S.C. § 1104(a) is an

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

CONT...

Heartwise, Inc.

Chapter 11

extraordinary remedy in a chapter 11 case. *Cajun Elec. Power Co-op, Inc.*, 69 F.3d 746,749 (5th Cir. 1995). There is a strong presumption that a debtor should remain in possession absent a showing of need for the appointment of a trustee. *Id.* Vitamins Online has the burden of proof on the existence of cause for appointment of a chapter 11 trustee. *In re LHC, LLC*, 497 B.R. 281, 291 (Bankr. N.D. Ill. 2013).

Vitamins Online has failed to overcome the presumption that Heartwise should remain in possession of the bankruptcy estate and has failed to make a sufficient showing that "cause" exists to appoint a chapter 11 trustee. Allegations of Heartwise's alleged incompetence and gross mismanagement ring hollow in light of information in Heartwise's monthly operating reports showing that Heartwise's cash balances have risen from \$1,749,762.66 (December 2020 MOR, filed January 15, 2021) to \$3,642,493.91 (June 2021 MOR, filed July 15, 2021). Cumulative profits according to the June MOR are at a high level -- \$3,519,271. The Court is not persuaded that anything close to gross mismanagement or incompetence is present here.

Vitamins Online and the UST point to transfers of millions of dollars of cash from Heartwise to RP, a related company (Heartwise's CEO and 51 percent owner, Mr. Nguyen, is also the CEO of RP, and his adult daughter owns 100 percent of RP's stock), and to DRM and allege that such transfers are fraudulent. RP and DRM are major suppliers of goods and services to Heartwise. After a judgment in the approximate amount of \$9 million was entered in favor of Vitamins Online and against Heartwise in United States District Court for the District of Utah, it was reasonable and prudent for RP and DRM to protect themselves by requiring Heartwise to make deposits to provide protection for costs such entities were likely to incur in providing goods and services to a customer who had just become subject to a very large judgment. Indeed, it would have been foolish under the circumstances for RP and DRM **not** to have taken steps to protect themselves. Although RP is related to Heartwise in terms of ownership and management, a third party completely unrelated to Heartwise likely would have acted to protect itself in a similar fashion once such a large judgment was entered against Heartwise. Vitamins Online and the UST have failed to show how the amounts of the deposits in question are disproportionate to the value of the on-going goods and services provided by RP and DRM to Heartwise.

Vitamins Online has failed to make a sufficient showing of a bad faith filing by

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

CONT...

Heartwise, Inc.

Chapter 11

Heartwise. A corporation of Heartwise's size facing a newly-entered \$9 million judgment in favor of a business competitor might logically conclude that a bankruptcy filing is necessary to prevent the dismemberment of its business. The Court takes judicial notice of its own docket in this case. The docket shows beyond any shadow of a doubt that Vitamins Online has been very vigorous in asserting and prosecuting what it sees as its rights. It would have been logical for Heartwise to conclude that Vitamins Online, having obtained a \$9 million judgment, would not have slept on its rights as a judgment creditor and that prompt action by Heartwise in the form of a bankruptcy filing was necessary to protect its business from destruction. Chapter 11 provides companies with a breathing spell from creditors and a fair opportunity to reorganize rather than to face destruction from creditor collection activity. That is what is occurring here. Heartwise's filing is not made in bad faith. Heartwise's prompt filing of a proposed chapter 11 plan and disclosure statement is additional powerful evidence that its purpose here is to reorganize and not merely to hold Vitamins Online at bay indefinitely until some good development turns up.

Vitamins Online's request for judicial notice is granted.

Vitamins Online's evidentiary objection to paragraph 4 of the Declaration of Ronald A. Clifford (the "Clifford Declaration") in support of Heartwise's opposition to the Motion is sustained under Rule 408(a) of the Federal Rules of Evidence. Its objections to the documents attached to the Clifford Declaration are sustained on foundation grounds.

The Motion is denied for the reasons set forth above.

HEARTWISE, INC. TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
Ronald Clifford

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#6.00

CONT'D Hearing RE: Evidentiary Objection and Motion to Strike, of Judgment Creditor Vitamins Online, Inc., to Attachments to Heartwise, Inc.'s Response to Further Briefing Filed 5-5-21 RE: Appointment of Chapter 11 Trustee, Because Those Attachments Are Not Authenticate (Objection and Motion filed 5-6-21)

FR: 5-12-21; 7-14-21

Docket 208

Tentative Ruling:

APPEARANCES REQUIRED.

An attorney who makes a factual argument in a motion without an accompanying declaration providing evidentiary support for such argument is at risk that the Court will determine that it is insufficient evidentiary support for the motion. However, that is not a basis for striking the motion or the portion of the motion that is unsupported by evidence. The objections are overruled.

HEARTWISE, INC. TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
RONALD CLIFFORD

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#7.00

CONT'D Hearing RE: Objection of Judgment Creditor Vitamins Online, Inc. to Heartwise, Inc.'s Amended Disclosure Statement (with Amended Plan) Being Heard on 5/12/21, Because That is Untimely; CD CA LBR 3017-1(a) and (b) Require a Disclosure Statement Be Filed 42 Days Before Hearing Date, and That Parties Wishing to File Objections Have Until 14 Days Before Hearing to File Objections
(Objection filed 5-6-21)

FR: 5-12-21; 7-14-21

Docket 207

Tentative Ruling:

APPEARANCES REQUIRED.

The objection to the timelines of the amended disclosure statement is overruled on the ground that the Court has continued the date of the disclosure statement hearing to a date that complies with all the requirements set forth in the FRBP and this Court's LBRs.

COURT TO PREPARE ORDER.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
RONALD CLIFFORD

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Mark Wallace, Presiding
Courtroom 6C Calendar**

Wednesday, July 21, 2021

Hearing Room 6C

2:00 PM

8:20-13335 Heartwise, Inc.

Chapter 11

#8.00

CONT'D Hearing RE: Second Evidentiary Objection and Motion to Strike, of Judgment Creditor Vitamins Online, Inc., to Specified Text in Heartwise, Inc's Response Filed 5-5-21 (Opposing Appointment of Chapter 11 Trustee), Because the Text Objected to is Not Supported by Any Declaration, It is Argument Only
(Objection and Motion filed 5-7-21)

FR: 7-14-21

Docket 211

Tentative Ruling:

APPEARANCES REQUIRED.

Deny. A litigant is entitled to make legal and factual arguments in the text of its motion. That a party opposing the motion happens to disagree with such arguments is not grounds for striking them.

HEARTWISE, INC. TO LODGE ORDER VIA LOU WITHIN 7 DAYS.

Party Information

Debtor(s):

Heartwise, Inc.

Represented By
RONALD CLIFFORD