

**United States Bankruptcy Court
Central District of California
Riverside
Mark Houle, Presiding
Courtroom 301 Calendar**

Wednesday, April 17, 2024

Hearing Room 301

11:00 AM

6:22-13208 Cynthia June Allen

Chapter 7

#1.00 CONT. Motion/Notice of Amended Objection and Amended Objection to the Debtor's Claimed Homestead Exemption (Motion filed 12/28/22)

From: 5/17/31

*Date and time approved by Chambers

From: 1/18/23, 3/15/23, 4/12/23, 5/17/23, 10/18/23

EH__

[Tele. appr. Jeff Tchakarov, rep. movant, Justine Thede Occhipinti]

[Tele. appr. David Akindele Akintimoye, rep. Debtor]

Docket 31

Tentative Ruling:

4/17/24

Based on the status reports filed by the parties, the hearing on the objection to Debtor's homestead exemption is continued to 11:00 a.m. on October 16, 2024 as a holding date pending the outcome of Debtor's appeal in the related state court matter.

APPEARANCES WAIVED.

Party Information

Debtor(s):

Cynthia June Allen

Represented By
David Akindele Akintimoye

Movant(s):

Justine Thede Occhipinti, trustee of

Represented By
Melissa J Fassett

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Trustee(s):

Howard B Grobstein (TR)

Pro Se

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6:23-11535 Okaysou Corporation

Chapter 7

#2.00 Motion for Resolution of Disputed Trustee Election
Motion filed 3/22/24)

EH__

[Tele. appr. Vahe Khojayan, rep. Debtor]

[Tele. appr. Cameron Ridley, rep. Peter Anderson, U.S. Trustee]

[Tele. appr. Emi Shibata, rep. Etekcitey Corporation & Arovast Corporation]

Docket 187

Tentative Ruling:

4/17/2024

BACKGROUND

On April 17, 2023, Okaysou Corporation ("Debtor") filed a Chapter 11 voluntary petition. On July 7, 2023, UST filed a notice of appointment of committee of creditors holding unsecured claims (the "Committee). The Committee consisted of three members: Arovast Corporation ("Arovast"), Etekcitey Corporation ("Etekcitey") (collectively with Arovast, "Creditors"), and Cansail Fulfillment. Arovast and Etekcitey designated the same counsel to represent them on the Committee. On August 7, 2023, Arovast and Etekcitey each filed a proof of claim for an unsecured claim in the amount of \$1,933,326.22 relating to "[d]amages resulting from debtor's patent infringement." Section 7 of the proofs of claims states that "amount is under dispute in litigation matter"; no supporting evidence is attached to the claims. Debtor scheduled both claims as "unliquidated" and "disputed" and listed their amount as "unknown."

On December 1, 2023, the Committee filed a motion to appoint a Chapter 11 Trustee or convert the case to Chapter 7 (the "Conversion Motion"). On December 5, 2023, Amazon Capital Services, Inc. ("Amazon") filed a joinder to the Conversion Motion. The case was converted to Chapter 7 pursuant to order entered December 28, 2023.

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On January 2, 2024, UST filed a notice appointing Robert Whitmore ("Whitmore") as interim Chapter 7 Trustee. On March 8, 2024, UST filed a report of disputed election of trustee (the "Report"). The Report indicates that Creditors called for an election for Chapter 7 Trustee, and vote for Larry Simons to replace Whitmore. The Report further indicates that Debtor disputed Creditors eligibility to call for an election. Pursuant to FED R. BANKR. P. Rule 2003(d), the parties had fourteen days from the filing of the report to file a motion to resolve the dispute.

On March 22, 2024, Creditors filed a motion to resolve the disputed trustee election ("Creditors' Motion"). Creditors' Motion also requested substantive consolidation of the Debtor's estate with assets of insiders. Creditors' Motion was not set for hearing but was instead served on negative notice. On April 3, 2024, Amazon filed an objection to Creditors' Motion to the extent it requested substantive consolidation. On April 5, 2024, Debtor filed an opposition to Creditors' Motion and requested it be set for hearing.

On March 22, 2024, Debtor filed its own motion to resolve the disputed trustee election. Debtor argues that Creditors were ineligible to call for an election because their claims are disputed and unliquidated.

DISCUSSION

11 U.S.C. § 702 provides:

- (a) A creditor may vote for a candidate for trustee only if such creditor--
- (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;
 - (2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and

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(3) is not an insider.

(b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if--

(1) creditors holding at least 20 percent in amount of the claims of a kind specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for a trustee.

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

Section 702 is infrequently litigated and, as a result, there is only limited caselaw available to guide the Court's analysis. The critical question before the Court is: What information should the Court consider when determining whether a creditor's claim is disputed or liquidated?

As a preliminary matter, while UST has noted a split in caselaw regarding calculating the "universe of claims," that split only appears relevant in cases where a creditor has not filed a proof of claim. More specifically, some courts restrict voting to creditors who have filed proofs of claims, while other courts also include scheduled claims. *Compare In re Lake State Commodities, Inc.*, 173 B.R. 642 (Bankr. N.D. Ill. 1994) with *In re Michelex Ltd.*, 195 B.R. 993 (Bankr. W.D. Mich. 1996). *See also* 6 COLLIER'S ON BANKRUPTCY ¶ 702.03[2][a]-[b] (16th ed. 2021) (comparing the "restrictive" view with the "expansive" view). Here, because Creditors had filed proofs of claims by the time of the requested election, this distinction is irrelevant.

Instead, the Court must determine whether it should review the merits of the proofs of claim and, if so, whether Creditors proofs of claims are sufficient to establish

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eligibility to vote.

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While the Court acknowledges that there is little caselaw to guide its analysis, the limited caselaw supports the conclusion that Creditors were ineligible to request an election. In particular, the Court notes the analysis of the Bankruptcy Appellate Panel for the First Circuit:

Riemer argues the only way to disqualify a creditor who has filed a proof of claim is for a party in interest to object to the claim, and because no party in interest objected to its claims as unliquidated, Riemer was entitled to vote. As set forth above, a creditor is entitled to vote for a chapter 7 trustee only if the creditor has filed a proof of claim "evidencing a right to vote pursuant to § 702(a)" and no objection is made to the claim. Fed. R. Bankr. P. 2003(b)(3) (emphasis added). Thus, even in the absence of an objection to the proof of claim, a creditor will not be entitled to vote if its proof of claim does not evidence an "allowable, undisputed, fixed, liquidated, unsecured claim." See 11 U.S.C. § 702(a)(1). Here, the bankruptcy court, relying on the dialogue between the UST and Riemer at the election, and Riemer's failure to produce any documentation apportioning the claim amount between the Debtors, determined the proofs of claim did not sufficiently demonstrate liquidated claims.

In re A&E 128 N. Corp., 528 B.R. 190, 199 (B.A.P. 1st Cir. 2015). In accordance with the foregoing, the Court is of the opinion that a formal objection to claim is not required for the Court to find a creditor's claim to be disputed or unliquidated for purposes of § 702. It is simply impractical and illogical for the Court to require a party to anticipate the calling of an election of a trustee, file a claim objection for that purpose, and then request that the matter be heard on shortened time.

Turning to the proofs of claims filed by Creditors, it is clear that --- on their face --- the claims do not relate to a claim of the type that would make Creditors eligible to vote under § 702. Specifically, the proofs of claims themselves refer to the amount as "disputed." Additionally, "a debt is liquidated within the meaning of 702 if the amount due and the date on which it was due are fixed or certain, or when they are ascertainable by reference to (1) an agreement or (2) a simple formula." *In re*

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Centennial Textiles, Inc., 209 B.R. 31, 34 (Bankr. S.D.N.Y. 1997). Here, the claims being related to litigation regarding patent infringement, the amount is not fixed or certain, and is not ascertainable based on reference to an agreement or a simple formula. Furthermore, the Court notes that the copy of the district court complaint submitted as an exhibit to Debtor's Motion (not attached to the proof of claim) seems to make it apparent that the amount is unliquidated given that a calculation of Creditors' lost profits does not appear ascertainable by reference to a "simple formula."

TENTATIVE RULING

The Court is inclined to GRANT the motion and hold Creditors to be ineligible to request a trustee election under 11 U.S.C. § 702. Pursuant to the report of UST, Mr. Whitmore is to remain as Chapter 7 Trustee.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Okaysou Corporation

Represented By
Vahe Khojayan

Movant(s):

Okaysou Corporation

Represented By
Vahe Khojayan

Trustee(s):

Robert Whitmore (TR)

Pro Se

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6:23-13093 Geoffrey Kun Chou

Chapter 7

#3.00 CONT. Motion to Vacate Discharge Entered On January 17, 2024
(Motion filed 2/1/24)

From: 2/28/24

EH__

**[Tele. appr. Christine Fitzgerald, rep. creditor, MonsterPeeps, LLC and
Wozniak Distribution, LLC]**

[Tele. appr. Kelvin Lo, rep Debtor]

Docket 42

Tentative Ruling:

2/28/2024

BACKGROUND

On July 14, 2023, Geoffrey Chou ("Debtor") filed a Chapter 7 voluntary petition.

On August 8, 2023, Wozniak Distribution, LLC and MonsterPeeps LLC (collectively, "Creditors") filed a motion for relief from the automatic stay in order to continue pending state court litigation. The motion was granted pursuant to order entered August 29, 2023.

On October 5, 2023, the Court approved a stipulation between Debtor and Creditors to extend the §§ 523 and 727 deadlines until November 16, 2023. On November 16, 2023, the Court approved a second stipulation, further extending those deadlines until

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CONT... Geoffrey Kun Chou
January 13, 2024.

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On January 17, 2024, a discharge was entered for Debtor. On January 24, 2024, the Court entered an order approving a third stipulation between Debtor and Creditors that extended the deadlines under §§ 523 and 727 until February 26, 2024.

On February 1, 2024, Creditors filed a motion to vacate the discharge. Creditors' motion states that Creditors failed to timely seek to extend the relevant deadlines due to a calendaring error. The motion also states that Creditors contacted Debtor seeking to vacate the discharge, but Debtor did not agree to vacate the discharge.

DISCUSSION

Creditors argue that the discharge should be vacated pursuant to Rule 60(b)(1).

Unfortunately, Rule 60(b)(1) is not available in this situation. Rule 9006(b)(1) generally provides that statutory deadlines can be extended for cause if the request is made before the expiration of the deadline. If the request is made after the deadline is passed, then a showing of excusable neglect is required. Rule 9006(b)(3), however, explicitly removes certain deadlines from the purview of Rule 9006(b)(1) --- and thus removes the applicability of an excusable neglect argument. Instead, Rule 9006(b)(3) provides that the §§ 523 and 727 deadlines can only be extended pursuant to Rule 4007 and Rule 4004, respectively. Both of those rules --- excluding a Rule 4004(b)(2) exception not applicable here --- require that the request be made before the deadline has passed.

Because excusable neglect is not available to extend the Rule 4004 and 4007 deadlines after they have expired, it cannot serve as a basis to vacate a discharge that was entered due to those deadlines not being extended. *See, e.g., In re Borczyk*, 458 B.R. 468 (Bankr. N.D. Ill. 2011) (Stating "on expiration of the time fixed for

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CONT... Geoffrey Kun Chou

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objecting to discharge the court is **required** to grant debtor a discharge absent certain circumstances not applicable here. The language of the Rule is not discretionary" and finding Rule 60(b) inapplicable to a request to vacate discharge) (citation omitted) (emphasis added); *see also In re Mangundayao*, 313 B.R. 175, 177 (Bankr. S.D.N.Y. 2004) ("Most courts have concluded that Rule 60(b) cannot expand the limited statutory grounds for revoking discharge and confirmation orders, and limit the use of Rule 60(b) to the court's correction of its own errors. The leading case espousing this view is *In re Cisneros*, 994 F.2d 1426 (9th Cir. 1993).").

Therefore, based on the clear language of Rules 9006(b)(3), 4004(b), and 4007(c), the Court cannot vacate the discharge based upon the arguments presented by Creditors.

The Court takes no position on whether Debtor has or has not waived a timeliness defense to a potential § 523 or 727 action brought by Creditors.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Geoffrey Kun Chou

Represented By
Terrence Fantauzzi
Kelvin J Lo

Movant(s):

Wozniak Distribution, LLC

Represented By
Christine M. Fitzgerald

MonsterPeeps LLC

Represented By
Christine M. Fitzgerald

Trustee(s):

Larry D Simons (TR)

Pro Se

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6:23-13579 Starkeisha Sharnay Jester

Chapter 7

#4.00 Motion to Extend Time for Former Chapter 7 Trustee to Object to Debtor's Exemptions
(Motion filed 3/14/24)

EH__

[Tele. appr. Gianna Segretti, rep. creditor, University of Southern California]

Docket 21

Tentative Ruling:

4/17/2024

BACKGROUND

On August 10, 2023, Starkeisha Jester ("Debtor") filed a Chapter 7 voluntary petition. On November 20, 2023, Debtor received a discharge, and the case was closed the next day.

On January 25, 2024, the case was reopened upon the request of the University of Southern California ("Creditor"). On February 15, 2024, Creditor commenced an adversary proceeding against Debtor and Debtor filed amended schedules and a notice of the bankruptcy case.

On March 14, 2024, the former Chapter 7 trustee filed a motion to extend time to object to exemptions. The motion states that in the amended schedules, Debtor has listed claims against Creditor and asserted an exemption in those claims. The former Trustee has not yet been reappointed to the case.

DISCUSSION

FED. R. BANKR. P. Rule 4003(b)(1) provides:

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CONT... Starkeisha Sharnay Jester

Chapter 7

Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

Here, the motion indicates that the former Chapter 7 trustee is seeking to be reappointed to the case. The Court finds such circumstances to constitute cause for an extension.

Additionally, the Court deems Debtor's failure to oppose to be consent to the relief requested under Local Rule 9013-1(h).

TENTATIVE RULING

The Court is inclined to GRANT the motion, EXTENDING the deadline to file an objection to Debtor's exemptions until June 14, 2024.

APPEARANCES WAIVED. Movant to lodge order within seven days. If oral or written opposition is presented at the hearing, the hearing may be continued.

Party Information

Debtor(s):

Starkeisha Sharnay Jester

Represented By
Steven A Alpert

Movant(s):

Larry D Simons (TR)

Pro Se

Trustee(s):

Larry D Simons (TR)

Pro Se

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CONT... Starkeisha Sharnay Jester

Chapter 7

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6:23-16058 Arturo Escobedo Zazueta

Chapter 7

#4.10 CONT.Motion for 2004 Exam

From: 4/10/24

[Placed on calendar by order entered 3/22/24]

EH__

[Tele. appr. Richard W Snyder, rep. Merchants Acquisition Group LLC]

Docket 10

Tentative Ruling:

4/10/2024

BACKGROUND

On December 29, 2023, Arturo Zazueta ("Debtor") filed a Chapter 7 voluntary petition. This is a no-asset case.

On January 31, 2024, the 341(a) meeting of the creditors ("341(a) Meeting") was held.

On March 19, 2024, creditor Merchants Acquisition Group LLC filed a motion to examine a diamond bridal set ("Collateral") under Federal Rules of Bankruptcy Procedure 2004. The attached declaration and exhibit requested examination of any and all documents and records relating to the Collateral's possession, location, and disposition.

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CONT... Arturo Escobedo Zazueta

Chapter 7

On March 22, 2024, the matter was set for hearing.

On April 3, 2024, Merchants filed a supplement to the motion.

On April 8, 2024, an order of discharge was entered.

DISCUSSION

According to FRBP 2004, the Court may order the examination of any entity on motion of any party in interest. The scope of FRBP 2004 is rather broad. *See* 10 Levin and Sommer, *Collier on Bankruptcy*, ¶ 2004.01. Though the language in this rule is rather vague and the scope of the rule is exceptionally broad, the Court notes that Rule 2004 cannot be used for "purposes of abuse or harassment." *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984); *see also* 10 Levin and Sommer, *Collier on Bankruptcy*, ¶ 2004.01.

Though this is a no-asset case and Debtor has been discharged, the Court is inclined to allow an examination of the Collateral under FRBP 2004 based on the rule's expansive language and broad scope.

TENTATIVE RULING

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CONT... Arturo Escobedo Zazueta

Chapter 7

Based on the foregoing, the Court is inclined to GRANT the motion to authorize an examination under FRBP 2004.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Arturo Escobedo Zazueta

Represented By
James Patrick Doan

Movant(s):

Merchants Acquisition Group LLC

Represented By
Richard W Snyder

Trustee(s):

Charles W Daff (TR)

Pro Se

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8:24-10285 Philip H Inman

Chapter 13

#4.20 Motion to Withdraw as Attorney; Memorandum of Points and Authorities;
Declaration of Sunita N. Sood
(Motion filed 4/11/24)

[OST entered 4/12/24]

EH__

**[Tele. appr. Scott Schiff, rep. creditor, National Loan Acquisitions
Company]**

[Tele. Sunita Sood, rep. Debtor]

Docket 31

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Philip H Inman

Represented By
Sunita N Sood

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se

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2:00 PM

6:23-15109 Juana Erika Velasquez

Chapter 7

Adv#: 6:24-01009 Velasquez v. UNITED STATES DEPARTMENT OF EDUCATION

#5.00 CONT. STATUS CONFERENCE RE Complaint by Juana Erika Velasquez
against UNITED STATES DEPARTMENT OF EDUCATION

From: 4/10/24

EH__

Docket 1

***** VACATED *** REASON: ALIAS SUMMONS ISSUED 4/12/24**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Juana Erika Velasquez

Represented By
Lauren M Foley

Defendant(s):

UNITED STATES DEPARTMENT

Pro Se

Plaintiff(s):

Juana Erika Velasquez

Represented By
Lauren M Foley

Trustee(s):

Arturo Cisneros (TR)

Pro Se

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6:23-14734 Joshua Tongco

Chapter 11

Adv#: 6:23-01123 Tongco v. Blue Rock Capital Group et al

#6.00 CONT. Status Conference re: Complaint by Joshua Tongco against Blue Rock Capital Group, C T Corporation System. (\$350.00 Fee Charge To Estate). Nature of Suit: (91 (Declaratory judgment)),(21 (Validity, priority or extent of lien or other interest in property)),(11 (Recovery of money/property - 542 turnover of property)),(12 (Recovery of money/property - 547 preference)

From: 2/14/24

EH__

Docket 1

***** VACATED *** REASON: NOTICE OF VOLUNTARY DISMISSAL
OF CASE FILED 4/4/24**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Joshua Tongco

Represented By
Andy C Warshaw

Defendant(s):

Blue Rock Capital Group

Pro Se

C T Corporation System

Pro Se

Plaintiff(s):

Joshua Tongco

Represented By
Andy C Warshaw

Trustee(s):

Arturo Cisneros (TR)

Represented By
Arturo Cisneros

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CONT... Joshua Tongco

Chapter 11

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6:23-13579 Starkeisha Sharnay Jester

Chapter 7

Adv#: 6:24-01014 University Of Southern California v. Jester

#7.00 Status Conference re Complaint by University Of Southern California against Starkeisha Sharnay Jester. fraud as fiduciary, embezzlement, larceny)),(68 (Dischargeability - 523(a)(6), willful and malicious injury)),(65 (Dischargeability - other))

EH__

[Tele. appr. Gianna Segretti, rep. Plaintiff, University of Southern California]

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Starkeisha Sharnay Jester

Represented By
Steven A Alpert

Defendant(s):

Starkeisha Sharnay Jester

Pro Se

Plaintiff(s):

University Of Southern California

Represented By
Jennifer L Nassiri

Trustee(s):

Larry D Simons (TR)

Pro Se

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6:23-13947 Bobbie Jean Grant

Chapter 7

Adv#: 6:23-01116 Grant v. Grant

#8.00 CONT. Status Conference re Adversary case 6:23-ap-01116. Complaint by Jay Timothy Grant against Bobbie Jean Grant. (d),(e)),(64 (Dischargeability - 523(a)(15), divorce/sep property settlement/decre)),(67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny))

From: 1/17/24

EH__

[Tele. appr. Andrew Westover, rep. Plaintiff]

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bobbie Jean Grant

Represented By
Lara T Abuzeid

Defendant(s):

Bobbie Jean Grant

Pro Se

Plaintiff(s):

Jay Timothy Grant

Represented By
Andrew Lee Westover Sr

Trustee(s):

Todd A. Frealy (TR)

Pro Se

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6:22-14723 Better Nutritionals, LLC

Chapter 7

Adv#: 6:24-01015 Simons, Chapter 7 Trustee v. Hoffman et al

#9.00 Motion by Chapter 7 Trustee to Disqualify Debtor's Former Attorney from Defending an Action by the Estate due to Unwaived Conflict of Interest, with Proof of Service.
(Motion filed 3/27/24)

EH__

[Tele. appr. Keith Owens, rep. Plaintiff]

Docket 8

Tentative Ruling:

4/17/2024

BACKGROUND

On December 20, 2022, Better Nutritionals, LLC ("Debtor") filed a Chapter 11 voluntary petition. Prior to filing bankruptcy, in October 2022, Debtor retained Max Folkenflik ("Folkenflik"). The day before the bankruptcy was filed, Debtor filed a complaint against Goli Nutrition, Inc. ("Goli") in district court; Folkenflik was Debtor's counsel in that action.

On March 30, 2023, Debtor's case was converted to Chapter 7. On February 15, 2024, Trustee commenced an adversary proceeding against Sharon and Odelya Hoffman (the "Hoffmans").

On March 19, 2024, the Hoffmans filed a motion to dismiss the adversary proceeding (the "MTD"). On the caption page, the MTD listed Folkenflik and Shulman Bastian Friedman & Bui LLP ("Shulman") as "attorneys," presumably for the Hoffmans. Folkenflik's entry includes a parenthetical that states "applying for admission pro hac vice" and Shulman's entry contains a parenthetical that states "Local Counsel." The notice page is signed by Shulman and the motion itself is signed by Folkenflik. The Court has not yet received any application for admission pro hac vice and, therefore,

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CONT... Better Nutritionals, LLC

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only Shulman is listed as counsel of record for the Hoffmans.

On March 27, 2024, Trustee filed a motion to disqualify Folkenflik from representing the Hoffmans (the "Motion to Disqualify"). Trustee notes that Folkenflik represented Debtor both prepetition and postpetition and any representation of the Hoffmans against the Debtor's bankruptcy estate in this proceeding would be a conflict of interest. The Court has not received any opposition to the Motion to Disqualify.

DISCUSSION

Trustee cites extensively to the California Rules of Professional Conduct in the Motion to Disqualify. To wit:

Rule 1.9 Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or
 - (2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

"Because we apply state law in determining matters of disqualification, we must

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follow the reasoned view of the state supreme court when it has spoken on the issue." *In re Cnty. of L.A.*, 223 F.3d 990, 995 (9th Cir. 2000). The California Supreme Court has stated:

When disqualification is sought because of an attorney's successive representation of clients with adverse interests, the trial court must balance the current client's right to the counsel of its choosing against the former client's right to ensure that its confidential information will not be divulged or used by its former counsel.

City & Cnty. of S.F v. Cobra Solutions, Inc., 38 Cal. 4th 839, 846 (Cal. 2006). "In successive representation cases, disqualification of counsel is warranted under two situations: (1) the attorney in fact has adverse confidential information or (2) the attorney's acquisition of confidential information is presumed because the prior and present cases are substantially related." *Beltran v. Avon Prods., Inc.*, 867 F. Supp. 2d 1068, 1077 (C.D. Cal. 2012). "The substantial relationship test requires evidence supporting a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1081 (C.D. Cal. 2015) (quotation omitted).

Here, as outlined in the Motion to Disqualify, it appears clear that "information material to the evaluation, prosecution, settlement or accomplishment of the former representation" is "material to the evaluation, prosecution, settlement or accomplishment of the current representation." Specifically, the complaint that initiated this proceeding contains allegations relating to Debtor's negotiations with a potential buyer and the Hoffmans' decision to reject the proposed arrangement. During this period, Folkenflik served as counsel for Debtor and the Hoffmans. Information related to Folkenflik's representation of Debtor during these negotiations are clearly material to the breach of fiduciary duty causes of action related to the rejection of this deal.

Therefore, in accordance with the above, the Court is inclined to find that Trustee has sufficiently and clearly established that the successive representation creates a conflict

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that would warrant disqualification. The Court notes that because an application for admission pro hac vice has not been filed, Folkenflik is not actually counsel of record for the Hoffmans and, as such, any disqualification would appear to be premature. Nevertheless, the record of this proceeding evidences an intent to seek such admission. Because Local Rule 2090-1(b)(6) provides for such applications to be ruled on without notice or a hearing, the filing of the instant Motion to Disqualify would appear necessary in order to effectively oppose any such application.

The Court finds it unnecessary to address Trustee's argument that Folkenflik should also be disqualified as a potential witness in this proceeding, as reaching a conclusion on that issue would appear to require some speculation and factual findings beyond those necessary to find successive representation to be impermissible.

Finally, the Court notes that it deems failure to oppose to be consent to the relief requested pursuant to Local Rule 9013-1(h).

TENTATIVE RULING

To the extent Folkenflik is deemed to have appeared as counsel for Defendants in the adversary proceeding, the motion is GRANTED.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Better Nutritionals, LLC

Represented By
John N Tedford IV
Aaron E. DE Leest
Danielle R Gabai

Defendant(s):

Sharon Hoffman

Represented By
Leonard M Shulman

Odelya Hoffman

Represented By
Leonard M Shulman

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Plaintiff(s):

Larry D. Simons, Chapter 7 Trustee

Represented By
Michael A Sweet
Tinho Mang

Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays
David Wood
Tinho Mang
Michael A Sweet
Daniel A Lev

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6:22-14723 Better Nutritionals, LLC

Chapter 7

Adv#: 6:24-01015 Simons, Chapter 7 Trustee v. Hoffman et al

#10.00 Status Conference re Complaint by Larry D. Simons, Chapter 7 Trustee against Sharon Hoffman, Odelya Hoffman. (2) Breach of Fiduciary Duty - Duty of Care; (3) Breach of Duty of Good Faith and Fair Dealing; (4) Breach of Fiduciary Duty to Creditors - Trust Fund Doctrine; (5) Aiding and Abetting - Breach of Fiduciary Duty; and (6) Equitable Subordination Nature of Suit: (14 (Recovery of money/property - other))

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 5/15/24 BY ORDER
ENTERED 4/4/24**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Better Nutritionals, LLC

Represented By
John N Tedford IV
Aaron E. DE Leest
Danielle R Gabai

Defendant(s):

Sharon Hoffman

Pro Se

Odelya Hoffman

Pro Se

Plaintiff(s):

Larry D. Simons, Chapter 7 Trustee

Represented By
Michael A Sweet

Trustee(s):

Larry D Simons (TR)

Represented By
D Edward Hays

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David Wood
Tinho Mang
Michael A Sweet
Daniel A Lev

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6:16-14273 Allied Injury Management, Inc.

Chapter 11

#11.00 CONT Order (1) Setting Scheduling Hearing And Case Management Conference And (2) Requiring Status Report

(Post-Confirmation Status Conference)

From: 6/7/16, 8/30/16, 9/14/16, 10/20/16, 10/25/16, 12/6/16, 1/10/17, 2/28/17, 3/28/17, 5/30/17, 8/29/17, 11/28/17, 1/30/18, 4/10/18, 4/24/18, 6/26/18, 9/25/18, 11/27/18, 2/26/19, 4/10/19, 6/12/19, 8/28/19, 11/6/19, 2/12/20, 2/19/20, 4/29/20, 7/29/20, 9/30/20, 1/12/21, 3/30/21, 5/4/21, 7/20/21, 11/30/21, 4/26/22, 8/30/22, 4/5/23, 10/18/23

EH__

[Tele. appr. David Goodrich, chapter 7 trustee]

[Tele. appr. Mark S. Horoupian, rep. chapter 7 trustee]

Docket 7

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Allied Injury Management, Inc.

Represented By
Alan W Forsley

Trustee(s):

David M Goodrich (TR)

Represented By
Mark S Horoupian
Jason Balitzer
Victor A Sahn
Steven Werth

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6:22-14752 Brandon Michael McDowell

Chapter 7

Adv#: 6:23-01041 Capelouto v. McDowell

#12.00 Motion For Summary Judgment and Request for Judicial Notice
(Motion filed 1/8/24)

EH__

[Tele. appr. Baruch Cohen, rep. Plaintiff, Matt & Christine Capelouto]

Docket 20

Tentative Ruling:

4/17/2024

PROCEDURAL BACKGROUND

On December 21, 2022, Brandon McDowell ("Defendant") filed a Chapter 7 voluntary petition.

On February 15, 2023, Matt & Christine Capelouto ("Plaintiffs") were granted relief from stay to continue pending wrongful death litigation in state court.

On March 21, 2023, the Court approved a stipulation to extend the deadline for Plaintiffs to file a non-dischargeability action under § 523(a)(6) or (7). On May 11, 2023, Plaintiff commenced an adversary proceeding against Defendant. The complaint included two causes of action: (1) non-dischargeability under § 523(a)(6); and (2) denial of discharge under § 727(a).

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On July 21, 2023, Debtor's counsel was authorized to withdraw from representation. The main bankruptcy case was subsequently dismissed on October 19, 2023.

In the adversary proceeding, no appearance has been made on behalf of Defendant; Defendant's default was entered by the Court on July 31, 2023.

On January 8, 2024, Plaintiffs filed a motion for summary judgment seeking judgment on their nondischargeability claim.

FACTUAL BACKGROUND

Plaintiffs are the parents of Alexandra Capelouto ("Alex"). In December 2019, Defendant sold Alex pills that were represented to be Percocet/Oxycontin. The pills were counterfeit and contained a lethal dose of fentanyl. Alex took half of one of the pills and died.

Subsequently, in July 2022, Defendant pled guilty to possession with intent to distribute fentanyl. The plea agreement states that Defendant:

- (1) Knowingly and intentionally possessed fentanyl;
- (2) Knowingly and intentionally distributed fentanyl;
- (3) Knowingly and intentionally distribute fentanyl to Alex.

Defendant was sentenced to nine years in federal prison and is currently an inmate in San Pedro.

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In November 2021, Plaintiffs sued Defendant in state court pursuant to the Drug Dealer Liability Act. On December 19, 2023 --- approximately nine months after this adversary proceeding was commenced --- Plaintiffs were awarded a judgment in the amount of \$5,025,735. The state court judgment includes specific findings that are clearly intended to track the § 523(a)(6) standard applied in this proceeding:

Defendant Brandon Michael McDowell's selling harmful narcotics such as fentanyl, particularly under the false premise that they were prescription painkillers, was both extreme and outrageous, was intentional, done without just cause or excuse, willful and malicious, and was done with the specific intent to cause serious harm and injury to plaintiffs' decedent, Alexandra Capelouto, and/or was a categorically harmful activity, and that harm was substantially certain to occur as a result of his actions.

[Dkt. No. 20, Ex. 5].

LEGAL STANDARD

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. Rule 56(a) (incorporated into bankruptcy proceedings by FED. R. BANKR. P. Rule 7056).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts that show a genuine issue for trial. *Id.* at 324. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material fact...." *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). The court must conduct its analysis viewing the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All

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reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

11 U.S.C. § 523(a)(6) states the following:

- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
 - (6) for willful and malicious injury by the debtor to another entity or to the property of another entity

Regarding 11 U.S.C. § 523(a)(6), the Ninth Circuit has stated the following:

Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor may not discharge a debt for willful *and* malicious injury by the debtor to another entity or to the property of another entity. The malicious injury requirement is separate from the willful injury requirement. A "willful" injury is a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. A "malicious" injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse."

In re Barboza, 545 F.3d 702, 706 (9th Cir. 2008).

LEGAL ANALYSIS

As noted above, the Ninth Circuit has stated the following with regard to 11 U.S.C. § 523(a)(6):

Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor may not discharge a debt for willful *and* malicious injury by the debtor to another entity or to the property of another entity. The malicious injury requirement is separate from the willful injury requirement. A "willful" injury is a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. A "malicious" injury involves (1) a wrongful act, (2) done intentionally, (3) which

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necessarily causes injury, and (4) is done without just cause or excuse."

In re Barboza, 545 F.3d 702, 706 (9th Cir. 2008).

Given that Plaintiffs' sought and received a specific finding that appears designed to match up with the standard under § 523(a)(6), the critical question for the Court is whether --- and to what extent --- collateral estoppel applies.

Collateral estoppel can be applied in bankruptcy proceedings. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991) ("We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."). "Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the preclusive effect of a state court judgment in a subsequent bankruptcy proceeding is determined by the preclusion law of the estate in which the judgment was issued." *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001).

The Bankruptcy Appellate Panel has recently listed the threshold requirements for the application of collateral estoppel in California:

(1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was the same as, or in privity with, the party to the former proceeding.

In re Plyam, 530 B.R. 456, 462 (B.A.P. 9th Cir. 2015) (citing *Lucido v. Superior Ct.*, 51 Cal. 3d. 335, 341 (Cal. 1990); see also *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001) (listing the five factors). "If these threshold requirements are met, California courts will only apply issue preclusion 'if application of preclusion furthers the public policies underlying the doctrine.'" *In re Janian*, 2019 WL 9243073 at *4 (Bankr. C.D. Cal. 2019) (quoting *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)).

For the reasons set forth in the motion for the summary judgment and in the statement of uncontroverted facts and conclusions of law, filed on January 31, 2024, as docket number 22, it appears clear that the first, second, fourth, and fifth standards articulated in *Plyam* have been satisfied here.

Regarding the third requirement, however, Plaintiffs' argument as to how the issues here were necessarily decided is confusing at best. The relevant part of Plaintiffs' motion asserts the following:

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The issues surrounding Defendant's willful & malicious conduct were necessarily decided in the State Court Action & Judgment. As Plaintiffs demonstrated above, it is clear that: (1) they showed that all of its damages were a direct result of the willful & malicious conduct in their default prove up packet; (2) they only sought punitive damages in connection with their willful & malicious conduct claim.

[Dkt. No. 20, pgs. 14-15].

The Court cannot interpret this argument. It would be sufficient if the claims asserted by Plaintiffs in state court required the state court to make determinations that satisfied the standard under § 523(a)(6), but the motion for summary judgment does not actually appear to contain any discussion regarding the underlying causes of action in state court or what findings would be necessarily decided in that proceeding.

Additionally, the Court notes that there is a brief discussion on page 16 of the motion for summary judgment that could be construed as arguing that a punitive damage award can be collateral estoppel on a "willful and malicious" claim under § 523(a)(6). This section appears to rely on *In re Emmerson*, 2011 WL 3299852 (B.A.P. 9th Cir. 2011), but *Emmerson* does not reflect the state of appellate opinion on the issue. *See, e.g., In re Sangha*, 678 Fed. Appx. 561 (9th Cir. 2017) ("*In re Plyam* held that a California state court punitive damage award, standing alone, does not preclude relitigation of § 523(a)(6)'s 'willful' intent requirement.>").

As a result, Plaintiffs do not appear to have adequately established that the elements of a § 523(a)(6) claim were necessarily decided in state court. Specifically, as noted above, a punitive damage award is not sufficient on its own and Plaintiffs have not provided any evidence or argumentation regarding what findings were necessary to prevailing on its state law causes of action.

Tentative Ruling:

The Court is inclined to CONTINUE the matter for Plaintiffs to file a supplemental brief regarding the "necessarily decided" requirement of collateral estoppel.

APPEARANCES REQUIRED.

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Chapter 7

Debtor(s):

Brandon Michael McDowell Pro Se

Defendant(s):

Brandon Michael McDowell Pro Se

Plaintiff(s):

Matt & Christine Capelouto Represented By
Baruch C Cohen

Trustee(s):

Robert Whitmore (TR) Pro Se

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6:22-14752 Brandon Michael McDowell

Chapter 7

Adv#: 6:23-01041 Capelouto v. McDowell

#13.00 CONT. Status Conference re: Adversary case 6:23-ap-01041. Complaint by Matt & Christine Capelouto against Brandon Michael McDowell. willful and malicious injury)),(41 (Objection / revocation of discharge - 727(c),(d),(e)))

From: 8/30/23, 12/6/23

EH__

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Brandon Michael McDowell Pro Se

Defendant(s):

Brandon Michael McDowell Pro Se

Plaintiff(s):

Matt & Christine Capelouto Represented By
Baruch C Cohen

Trustee(s):

Robert Whitmore (TR) Pro Se

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6:23-12911 Shalena Denise Elise Armstrong

Chapter 7

Adv#: 6:23-01099 Red Target LLC dba SCJ Commercial Financial Servic v. Armstrong

#14.00 CONT. Status Conference RE: Complaint by Red Target LLC dba SCJ Commercial Financial Services against Shalena Denise Elise Armstrong. false pretenses, false representation, actual fraud)),(67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny)),(68 (Dischargeability - 523(a)(6), willful and malicious injury)

From: 12/6/23, 2/7/24

EH ____

Docket 1

***** VACATED *** REASON: DEFAULT JUDGMENT ENTERED 4/3/24**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Shalena Denise Elise Armstrong

Represented By
Keith Q Nguyen

Defendant(s):

Shalena Denise Elise Armstrong

Pro Se

Plaintiff(s):

Red Target LLC dba SCJ

Represented By
S Christopher Yoo

Trustee(s):

Larry D Simons (TR)

Pro Se

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6:21-14856 Li Yao and Hengli Rao

Chapter 7

#15.00 CONT. Chapter 7 Trustee's Notice of Objection and Objection to Debtor's Claim of Exemption
(Motion filed 5/24/23)

***Specially set**

From: 6/28/23, 7/27/23, 12/6/23

EH__

[Tele. appr. Kelvin Lo, rep. Defendant, Hengi Rao]

[Tele. appr. Anthony Friedman, rep. chapter 7 trustee]

Docket 49

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Li Yao

Represented By
Jonathan J. Lo

Movant(s):

Larry D Simons (TR)

Represented By
Anthony A. Friedman

Trustee(s):

Larry D Simons (TR)

Represented By
Anthony A. Friedman

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6:21-14856 Li Yao

Chapter 7

Adv#: 6:23-01050 Simons v. Rao

#16.00 CONT. Status Conference re Complaint by Larry D. Simons against Hengli Rao. (\$350.00 Fee Charge To Estate). - Complaint: (A) for Avoidance and Recovery of Fraudulent Transfer; (B) to Preserve Recovered Transfer for Benefit of Debtors Estate; (C) Sale of Interest of Co-Owner in Property of the Estate; and (D) Turnover of Property [11 U.S.C. § 544 and California Civil Code § 3439 et. seq.; 11 U.S.C. §§ 548, 550, and 551; and 11 U.S.C. §§ 363(h) and 542] - Nature of Suit: (14 (Recovery of money/property - other)),(13 (Recovery of money/property - 548 fraudulent transfer)),(31 (Approval of sale of property of estate and of a co-owner - 363(h))), (11 (Recovery of money/property - 542 turnover of property))

From: 7/27/23, 12/6/23

EH__

[Tele. appr. Kelvin Lo, rep. Defendant, Hengi Rao]

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Li Yao

Represented By
Jonathan J. Lo

Defendant(s):

Hengli Rao

Represented By
Jonathan J. Lo

Plaintiff(s):

Larry D. Simons

Represented By
Anthony A. Friedman

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Trustee(s):

Larry D Simons (TR)

Represented By
Anthony A. Friedman

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6:23-13800 Best Rock Quarry, Inc.

Chapter 11

#17.00 Cont. Order to Show Cause why Case Should not be Dismissed or Converted

From: 3/27/24

EH__

[Tele. appr. Caroline Djang, Subchapter V Trustee]

[Tele. appr. Ali Matin, rep. Office of The United States Trustee]

Docket 44

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Best Rock Quarry, Inc.

Represented By
Lazaro E Fernandez

Trustee(s):

Caroline Renee Djang (TR)

Pro Se

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6:23-13800 Best Rock Quarry, Inc.

Chapter 11

#18.00 CONT. Order (1) Setting Scheduling Hearing and Case Management Conference And (2) Requiring Status Report

From: 10/3/23, 12/12/23, 2/13/24, 3/27/24

EH__

[Tele. appr. Caroline Djang, Subchapter V Trustee]

[Tele. appr. Ali Matin, rep. Office of The United States Trustee]

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Best Rock Quarry, Inc.

Represented By
Lazaro E Fernandez

Trustee(s):

Caroline Renee Djang (TR)

Pro Se

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8:24-10712 Robert E. Munck

Chapter 13

#19.00 CONT. Notice of Motion and Motion in Individual Case for Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate at 54 Via Bacchus, Aliso Viejo, CA 92656 , Declaration of Debtor, with attached proof of service.
(Motion filed 3/28/24)
(Amended Notice of Motion filed 4/1/24)

From: 4/11/24

MOVANT: ROBERT E. MUNCK

EH__

[Tele. appr. Linda Conway, rep. chapter 13 trustee]

Docket 10

Tentative Ruling:

4/11/2024

**Service: Improper
Opposition: None**

Debtor had a previous case dismissed on March 15, 2024, less than one year prior to the instant petition date. The previous case was dismissed because Debtor failed to make plan payments. Therefore, the instant case was presumptively filed in bad faith pursuant to 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith also arises under 11 U.S.C. § 362(c)(3)(C)(i)(III) because there is no evidence of a substantial change in Debtor's financial or personal affairs since the dismissal of her last bankruptcy case. Section 362(c)(3)(C) requires that the presumption of bad faith be rebutted by "clear and convincing" evidence.

Here, Debtor has not supported his motion to continue the automatic stay with any evidence to rebut the presumption of bad faith. The motion states that the Debtor's

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CONT...

Robert E. Munck

Chapter 13

failure to make plan payments was due to a miscommunication as to the due date of the plan payment but does not substantiate this claim with any detail, nor does Debtor provide any detail as to his health condition so as to establish by clear and convincing evidence that he can confirm and consummate a plan.

Based on the foregoing, the Court is inclined to DENY the motion to continue the automatic stay.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Robert E. Munck

Represented By
W. Derek May

Trustee(s):

Amrane (SA) Cohen (TR)

Pro Se