UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 3, 2014 at 10:00 a.m.

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1. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION TO RECONSIDER 12-9-13 [74]

Tentative Ruling: The motion will be denied.

The debtors ask the court to reconsider its November 25, 2013 ruling granting in part the IRS's motion for relief from the automatic stay (DCN GPJ-1). See Dockets 70 & 79. An order was entered on that motion on December 12.

Fed. R. Civ. P. 59(a)&(e) provides as follows:

"(a) . . . (1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues–and to any party–as follows: (A) after a jury trial . . . ; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

. . .

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

But, in bankruptcy proceedings, Rule 59 is subject to Fed. R. Bankr. P. 9023, which provides that:

"Except as provided in this rule and Rule 3008 [pertaining to the allowance and disallowance of claims], Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment."

Thus, the deadline for filing a motion for new trial or to alter or amend a judgment and for the court to order sua sponte a new trial is 14 days after entry of the judgment.

Under Rule 59(a)(2), three grounds exist for the granting of a new trial in nonjury actions: manifest error of law, manifest error of fact, or newly discovered evidence. Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978); see also Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 n.4 (9th Cir. 2007) (citing Brown for the standard under Rule 59(a)(2) with approval). And, the burden of

proof is on the moving party. See Anglo-American Gen. Agents v. Jackson Nat. Life Ins. Co., 83 F.R.D. 41, 43 (N.D. Cal. 1979).

As to Fed. R. Civ. P. 60(b), it is made applicable here by Fed. R. Bankr. P. 9024, allowing the court to set aside or reconsider an order or a judgment for:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances." Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).

"[R]evisiting the issues already addressed 'is not the purpose of a motion to reconsider,' and 'advanc[ing] new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed' is likewise inappropriate." Van Skiver at 1243.

Generally, a motion for reconsideration should not be granted absent highly unusual circumstances, unless the trial court is presented with newly discovered evidence, clear error has been committed, or if there is an intervening change in the controlling law. Kona Enterprises, Inc. v. Estate of Bishop, 229 F3d 877, 890 (9th Cir. 2000); see also Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978). The debtors have not established any of these grounds.

The debtors' contention that they have "new-found evidence" is without merit. Their new-found evidence is actually legal arguments about the applicability of tax penalties and interest to their tax liability and the allowed extent of tax assessments. Exhibit A to the motion includes numerous citations to legal authorities pertaining to the assessment of taxes and penalties and interest on taxes. These arguments are not "newly-found evidence." Docket 74. They are simply arguments that should have been presented to the district court in the actions leading to the 1998 and 2009 judgments against the debtors. The debtors then have not presented new-found evidence warranting reconsideration of this court's order granting relief from the automatic stay.

Further, the debtors' other contentions in the motion revisits issues already addressed by the court in its ruling on the underlying motion. See Docket 70. And, there has been no change in the law that would affect the outcome of the motion for relief from the automatic stay.

Next, even if the court were to reconsider its order on the motion for relief from the automatic stay, the result would be identical.

The debtors contend that this court was wrong in concluding that they filed their response to IRS's accounting late, and was wrong in assessing the

debtors' evidence regarding the IRS's accounting. In addition, they argue that their now new-found evidence - or arguments challenging the accounting of the IRS - should be considered in the re-adjudication of IRS's motion.

The court disagrees. This court has adequately addressed all the issues in its ruling granting in part IRS's motion. See Docket 70.

First, the court was correct that the debtors' response to IRS's accounting was filed late. The debtors were required to file their response to the accounting on November 18, 2013. Docket 40. They filed it on November 19. Docket 64.

More important, the motion was not granted because the debtors' reply was late, The court addressed the merits of the motion and the debtors' defenses. Se Docket 70. This court directed the debtors to the district court. "The appropriate forum to bring any challenge of the movant's accounting is the district court, where the 1998 judgment for unpaid taxes was entered and where a further 2009 judgment was entered against the debtors that enforced the prior judgment and avoided certain real property transfers." Docket 70 at 2.

All questions about IRS's accounting raised by the debtors in Exhibit A to their motion should have been litigated - if they were not litigated already - in the court that entered judgments in 1998 and 2009 against the debtors, pertaining to their tax liability and the satisfaction of that liability, *i.e.*, the district court.

Exhibit A to the motion raises issues about their 1981, 1985 , 1986, 1987, 1988, and 1989 tax returns and/or tax liability. As to the 1981 tax liability, the issues arose in 1985. As to the 1985 tax liability, the issues arose in 1989, 1990, 2008 and 2010. As to the 1986 tax liability, the issues arose in 1987 and 1992. As to the 1987 tax liability, the issues arose in 1992. As to the 1988 tax liability, the issues arose in 1989, 1992, 2008. As to the 1989 tax liability, the issues arose in 1991 and 1992. See Docket 74, Ex. A to Motion.

In other words, just as the court stated in its ruling on the motion for relief from the automatic stay, the debtors should have raised and litigated these issues in one of the district court actions that adjudicated their tax liability. This court is not the court of court of appeals and the debtors cannot collaterally attack the findings, conclusions, and judgments of the district court in this court.

Notably, the debtors admit that they "have consistently raised objections to the IRS's numbers in the district court and throughout all their litigation." Docket 74 ¶ 10. If the district court has been rejecting the debtors' arguments with respect to the foregoing enumerated tax years, they cannot come before this court to relitigate what the district court has rejected or refused to consider in a effort to achieve a different outcome on the long running battle with the IRS.

Of course, the issues that would be decided by the district court do not encompass the dischargeability of the tax debt, *i.e.*, the debtors' in personam liability on the debt. They would encompass only the amount of IRS's claim and the property by which that claim is secured.

Third, as the court also noted in its ruling on the motion for relief from the automatic stay, "in the district court action leading to the 1998 judgment, the debtors had the opportunity to litigate both the interest and penalties

assessed on their outstanding tax debt. As the 1998 judgment specifically provides for interest, both pre and post 1998, the debtors cannot relitigate these issues again. This court will not allow the debtors to challenge or relitigate in this court issues already litigated or issues that could have been litigated in the district court. To the extent the above-issues were not litigated in the district court, res judicata bars the debtors from relitigating them now. The debtors cannot collaterally attack the district court's judgments here." Docket 74 at 2.

This motion makes no effort to address the applicability of the issue or claim preclusion to the debtors' present challenge to IRS's claim.

Fourth, given that the debtors have had two district court actions to present all their challenges to the amount of IRS's claim, given the applicability of issue and claim preclusion to any new challenges to IRS's claim, and given that the district court is the court where the debtors should be seeking to present newly-discovered evidence - assuming there is such - the court would still dispose of IRS's motion as it did, *i.e.*, grant it in part. See Docket 70. The IRS would still have a colorable claim against the debtors given the prior litigation between the parties in district court.

Finally, coupled with the lack of any prospect of reorganization - an issue on which the debtors have submitted no argument or evidence - the court was required to grant the motion under 11 U.S.C. § 362(d)(2). The court concluded in its ruling on the motion for relief from the automatic stay that "the debtors have not shown any realistic prospect of effective reorganization," under any circumstances. Docket 74 at 3. "The debtors' total monthly income, according to Schedule I, is $6,227, while their monthly expenses in Schedule J are $6,192, excluding the payment of rent or mortgage debt. In other words, the debtors have $35 with which to fund a chapter 11 plan." Docket 74 at 3. Also, besides feasibility, the court also identified serious good faith obstacles to the confirmation of a chapter 11 plan.

In summary, even if the court were to reconsider its ruling on the motion for relief from the automatic, it would reach the same result, granting IRS's motion in part.

2. 12-36824-A-7 916 ELECTRIC MOTION FOR
13-2310 INCORPORATED ABSTENTION
HOPPER V. WPCS INT'L.-SUISUN CITY INC. 1-3-14 [22]

Tentative Ruling: The motion will be granted in part and denied in part.

The defendant in this proceeding, WPCS International-Suisun City Inc., asks the court abstain. The motion also asks that the court determines that the subject claims are non-core.

The plaintiff, J. Michael Hopper, the trustee in the underlying chapter 7 case, opposes the motion, pointing out that there is no pending state court proceeding.

Abstention is not appropriate here. Abstention does not apply in the absence of a pending state proceeding. See Schulman v. California (In re Lazar), 237 F.3d 967, 981-82 (9th Cir. 2001) (holding that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding").

"Abstention can exist only where there is a parallel proceeding in state court.

That is, inherent in the concept of abstention is the presence of a pendent state action in favor of which the federal court must, or may, abstain." Sec. Farms v. Int'l Broth. of Teamsters, Chauffers, Warehousemen & Helpers, 124 F.3d 999, 1009 (9th Cir. 1997).

The court rejects the defendant's argument that the Lazar and Security Farms cases are distinguishable here because they involved removed actions. When Lazar held that 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2) do not apply when "there is no pending state proceeding," it did not qualify the rule's applicability only in removed actions. The same is true about the holding of the Security Farms case.

Lazar says, "we noted that '[a]bstention can exist only where there is a parallel proceeding in state court.'" Lazar at 981. The Lazar court does not qualify this rule to apply only in the context of removed actions.

More, such a qualification on the rule would make no sense. It is obvious that, once an action has been removed from state to federal court, there is no parallel proceeding in state court. The Lazar and Security Farms courts did not need to say that abstention does not apply in the absence of a pending state proceeding. They could have simply stated that abstention does not apply to removed actions. They did not.

The court will not abstain based on a lower bankruptcy court case pre-dating the Lazar and Security Farms cases. The court will not adopt the reasoning of World Solar Corp. v. Steinbaum, 81 B. R. 603 (Bankr. S.D. Cal. 1988). Regardless of what this court thinks about the rule - that abstention does not apply in the absence of a pending state proceeding - this court is required to follow Ninth Circuit precedent, such as the Lazar and Security Farms cases.

Finally, the court determines that the subject claims - including turnover of estate property, breach of contract (two claims), negligent misrepresentation, money owed, and unjust enrichment - are non-core.

Bankruptcy jurisdiction extends to four types of title 11 matters, including any or all cases "under title 11," any or all proceedings "arising under title 11," any or all proceedings "arising in a case under title 11," and any or all proceedings "related to a case under title 11." See Stoe v. Flaherty, 436 F.3d 209, 216 (3rd Cir. 2006); see also 28 U.S.C. §§ 1334, 157.

The first three types of title 11 matters are termed as core proceedings by 28 U.S.C. § 157(b)(1), which provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to- (A) matters concerning the administration of the estate; . . . (F) proceedings to determine, avoid, or recover preferences; . . . [and] (K) determinations of the validity, extent, or priority of liens."

On the other hand, "related to a case under title 11" proceedings are noncore, meaning that the bankruptcy court may not enter final orders or judgments in them. See 28 U.S.C. § 157(c)(1); see also 28 U.S.C. § 157(b)(3). This court is authorized only to submit proposed findings of fact and conclusions of law to the district court. It may enter appropriate orders and judgments only with the consent of all parties to the proceeding. 28 U.S.C. § 157(c)(1).

Cases "under title 11" are the only ones over which district courts have

original and exclusive jurisdiction. 28 U.S.C. § 1334(a). As to proceedings "arising under," "arising in," and "related to a case under title 11," district courts have original but nonexclusive jurisdiction, meaning that such cases may be initially brought in state court and then removed to federal court. See 28 U.S.C. § 1334(a) and (b).

A proceeding "arising under title 11" is one that "'invokes a substantive right provided by title 11.'" Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "'by its nature, could arise *only* in the context of bankruptcy case.'" Id. Finally, a proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate. Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.), 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing Fietz v. Great Western Savings (In Fietz), 852 F.2d 455, 457 (9th Cir. 1988)).

"A bankruptcy court's 'related to' jurisdiction is very broad, including nearly every matter directly or indirectly related to the bankruptcy." Wilshire Courtyard v. California Franchise Tax Board (In re Wilshire Courtyard), 729 F.3d 1279, 1287 (9th Cir. 2013) (quoting Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 868 (9th Cir. 2005)).

The only claim that could potentially be core is the turnover claim. All other claims are based on state law and are only related to the bankruptcy case. However, the turnover claim is not really a claim for turnover of estate property. It is merely a claim for the collection of proceeds under the terms of a contract between the debtor and the defendant. In that claim, the plaintiff has not identified specific property as being property of the estate. All the plaintiff is asking for in the turnover claim is a payment of $296,721.41 on account of a contract for services provided by the debtor to the defendant between August 28, 2009 until February 10, 2011. That is not a turnover claim and the court will not treat it as such.

The court concludes that all claims in the subject complaint are non-core. The motion will be granted in part and denied in part.

3.	12-36824-A-7 13-2310 HOPPER V. WPCS INTERNATIONAL- SUISUN CITY INC.	916 ELECTRIC INCORPORATED	STATUS CONFERENCE 10-1-13 [1]

Tentative Ruling: None.

4.	13-23711-A-7 13-2173 WELLS FARGO BANK, NATIONAL ASSOCIATION V. PERIZZOLO	ANGELA PERIZZOLO BLR-1	MOTION FOR SUMMARY JUDGMENT 12-20-13 [16]

Tentative Ruling: The motion will be denied in accordance with the court's ruling on the nearly identical related summary judgment motion in Adv. Proc. No. 13-2172 (DCN BLR-1), also being heard on this calendar.

5.	13-23711-A-7 13-2173 WELLS FARGO BANK, N.A. V. PERIZZOLO	ANGELA PERIZZOLO	STATUS CONFERENCE 5-21-13 [1]

Tentative Ruling: None.

6. 12-35330-A-12 BETTE SPAICH — STATUS CONFERENCE
12-2669 — 8-22-13 [63]
SPAICH V. ROTH ET AL

Tentative Ruling: None.

7. 12-35330-A-12 BETTE SPAICH — MOTION FOR
12-2669 BS-1 — ENTRY OF JUDGMENT
SPAICH V. ROTH ET AL — 1-3-14 [75]

Tentative Ruling: The motion will be granted.

The plaintiff, Bette Spaich, asks the court to enter a judgment pursuant to a settlement agreement between her and the defendants. All conditions to the settlement agreement have been met, except for the performances of Alfred Nevis and/or Cornelius Farms (required to deposit $400,000 into escrow) and John Roth (required to deposit a deed reconveyance and note cancellation in exchange for receipt of $400,000).

John Roth opposes the motion to the extent he would be required to reconvey the deed of trust and cancel the note - as prescribed in the settlement agreement - absent the deposit in escrow of the $400,000 by Alfred Nevis and/or Cornelius Farms, L.L.C. The $400,000 from Alfred Nevis and/or Cornelius Farms has not been deposited into escrow yet.

Standard Holdings, which assigned the deed and note to John Roth, and it is required to deposit a $50,000 assignment to John Roth (of a note) and it is also required to sign off on the deed reconveyance and note cancellation, has filed a non-opposition to the motion.

The court approved the settlement agreement on June 3, 2013. Docket 37. The settlement agreement provides that it is governed by California law. The agreement also defines itself as a stipulation in writing as defined by Cal. Civ. Proc. Code § 664.6, which provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

The agreement further provides: "The Parties acknowledge that each have submitted to the jurisdiction of the United States Bankruptcy Court and consent to entry of any appropriate Order or Judgment by such Court." Docket 79 at 21.

The obligations of Alfred Nevis, Cornelius Farms, and John Roth under the agreement are due. Alfred Nevis and Cornelius Farms signed the agreement on August 19, 2013 and John Roth signed the agreement on June 13, 2013. The plaintiff signed the agreement on May 15, 2013. The agreement requires performance on or before the 90th day following execution of the agreement.

Given the foregoing, the court will enter a judgment under Cal. Civ. Proc. Code § 664.6 to enforce the terms of the agreement. The judgment will be for specific performance of the agreement, directing Alfred Nevis, Cornelius Farms, and John Roth to perform their obligations under the agreement. The court will

not compel John Roth to perform absent performance by Alfred Nevis and Cornelius Farms. Clearly, escrow cannot close until Alfred Nevis and/or Cornelius Farms deposit tje $400,000 required by the agreement. This motion will be granted.

As a final note, the e-mail from Leslye Rossiter at North State Title, attached to John Roth's declaration, states that the only person who has not executed the settlement agreement is Jerry Sandefur. But, Mr. Sandefur will not be executing the settlement agreement because he is no longer counsel for Alfred Nevis or Cornelius Farms. The court granted motions for his withdrawal as their counsel on August 5, 2013. Dockets 57 & 58.

8. 13-25330-A-12 PAUL MENNICK — MOTION TO DISMISS OR CONVERT CASE 1-6-14 [35]
HSM-2

Tentative Ruling: The motion will be granted and the case will be dismissed.

Secured creditor PSB Credit Services, Inc., moves for dismissal because the debtor is not eligible for chapter 12 relief and there has been unreasonable delay that is prejudicial to creditors.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including - (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."

As to the challenge to the debtor's eligibility for chapter 12 relief, the movant complains that the debtor is a veterinarian and not a family farmer, that his services as a veterinarian are his primary source of income, and that he earns some income from leasing pasture land and as result is a landlord.

11 U.S.C. § 109(f) provides that only a family farmer or family fisherman with regular income may be a debtor under chapter 12. 11 U.S.C. § 101(18) defines a family farmer as an individual or individual and spouse engaged in a farming operation or a corporation or partnership in which more than 50% of the outstanding stock or equity is held by one family.

The debtor has produced evidence that 47.8% of his gross income is derived from "reproductive services" involving the breeding of animals such as horses and bulls and the "production" of semen and embryos that the debtor sells. In addition, the debtor derives 19.46% of his gross income from the boarding of animals. Also, 8.02% of the debtor's income is from fees for his storage of semen. Together, these sources of income account for over 76% of the debtor's aggregate gross income.

"The term 'farming operation' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21). This is not an exclusive list. Rinehart v. Sharp (In re Sharp), 361 B.R. 559, 564 (B.A.P. 10th Cir. 2007).

A debtor's business "raising horses for resale, boarding horses, training horses, renting horses and giving riding lessons to the general public" was a debtor eligible for chapter 12 relief. In re Showtime Farms, Inc., 267 B.R. 541, 543 (Bankr. E.D. Tex. 2000). In reaching its conclusion, Showtime noted that the debtor in that case had traditional farm facilities, conducted

traditional farm operations, and the operations were subject to the inherent risks of any farming operation, including fluctuating market prices, feed prices, uncertain weather, and disease and injury risks to the livestock. Id.

The debtor's reproductive services equate to the production, raising, boarding and sale of livestock products, livestock and ranch-type animals. By breeding the animals, the debtor is producing "livestock products" and animals in the form of semen and embryos. Those products and embryos are being stored, boarded and sold, as other livestock products and mature animals are boarded and sold.

The court is persuaded that the debtor's business - as described in his declarations - is sufficiently a farming operation to qualify the debtor for chapter 12 relief.

Nevertheless, assuming the court does not dismiss the case for other reasons, the court has some substantial questions about the debtor's business operations. In the event the case remains pending, the court may revisit eligibility before confirming a plan.

The debtor says that "[i]n addition to the income generated from the reproductive services, [he] earn[s] income as a veterinarian." Docket 68 at 4. In 2012, the debtor says that he "earned $24,531.00 from employment as a veterinarian in New Zealand." This was part of the debtor's $156,741 gross income for 2012. Id. He says then that "[i]n 2012 [he] was overseas [(presumably New Zealand)] only the first three (3) months and could not return [(presumably to New Zealand)] due to ongoing hearings" related to litigation he was having with a former tenant. Docket 68 at 7.

The foregoing statements, when taken together, imply that the debtor is away from his farming operations for much more than just three months of the year. Yet, the debtor's income from his overseas veterinary practice was only $24,531 or only 15.6% of the debtor's gross income in 2012 of $156,741. This begs a host of questions, including: how much of the year the debtor conducts his veterinary practice in New Zealand, who oversees and conducts the business operations at his local property while he is overseas, what justifies the debtor being away from his farming operations for an extended period when he generates so little income from his overseas veterinary practice, etc.?

The debtor filed a prior chapter 12 on January 26, 2006, which was dismissed on March 17, 2006. The court is not considering the 2006 bankruptcy filing in resolving this motion as it was over eight years ago.

On the other hand, this is the debtor's second bankruptcy case since February 15, 2013. The debtor filed a chapter 12 on February 15, 2013, Case No. 13-22070, which case was dismissed on April 9, 2013 due to the debtor's failure to file his bankruptcy schedules (A through J) and statements, including the statement of financial affairs. Dockets 3 & 18. The instant case was filed on April 18, 2013. A chapter 12 plan was filed on July 17, 2013, which was the 90th day after the petition filing date. Yet, that plan was not set for a confirmation hearing. Rather, the debtor waited until the instant motion and the movant's stay relief motion were filed on January 6, 2014, to file another chapter 12 plan and set a confirmation hearing on March 3, 2014.

In other words, the debtor has been in chapter 12 for little less than one year, without a confirmed plan and without making any payments to the movant or general unsecured creditors.

The debtor has raised several issues to explain his failure to move forward with plan confirmation. First, the debtor complains about having to prosecute litigation against the Peter Fracchia, who leased the real property from the debtor to raise livestock when the debtor was working overseas. The debtor had to file an action for eviction against Mr. Fracchia, assist in a criminal prosecution against Mr. Fracchia, and had to pursue Mr. Fracchia in bankruptcy cases filed in Oregon.

Second, the debtor complains that he has been working on completing an inventory of the semen he is storing, including semen held for third parties. He says that the inventory is nearly complete.

Third, the debtor complains that he must prepare missing or unfiled tax returns (2007 through 2011), which he will start doing once he has completed his work on the 2013 tax return.

The court is unclear as to how or why the foregoing issues have prevented the debtor from confirming a plan. All the dates referenced in the debtor's litigation with Mr. Fracchia are in 2011 and 2012. The litigation with Mr. Fracchia does not explain how or why the debtor has failed to prosecute this case in 2013.

As to the semen inventory and the tax returns, there is no explanation how or why those issues have prevented the debtor from moving forward with plan confirmation. He has not explained why he could not have obtained plan confirmation without the semen inventory and the missing tax returns.

More, the semen inventory and missing tax returns could have been completed long time ago, in early 2013, for instance. The debtor has not explained why he has waited so long to address these issues.

Finally, the court is not convinced that the debtor's creditors should bear the burden of waiting on the debtor to complete the inventory and the missing tax returns - assuming these prevented the debtor from confirming a plan - without receiving payments on account of their claims.

In short, there has been unreasonable delay by the debtor in obtaining plan confirmation. This delay has been prejudicial to creditors, including the movant and general unsecured creditors, as they have not received payments from the debtor in the last approximately one year. The motion will be granted and the case will be dismissed.

9. 13-25330-A-12 PAUL MENNICK — MOTION FOR RELIEF FROM AUTOMATIC STAY
HSM-1 — 1-6-14 [28]
PSB CREDIT SERVICES, INC. VS.

Tentative Ruling: The motion will be dismissed as moot because the case is being dismissed. The motion requests only prospective relief from stay.

10. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C. — MOTION TO APPROVE DISCLOSURE STATEMENT
CAH-7 — 12-23-13 [37]

Tentative Ruling: The motion will be granted.

The debtor asks for approval of its disclosure statement.

JPMorgan Chase Bank, whose claim for approximately $2.231 million is secured by a first deed on the debtor's real property in Auburn, California, opposes plan confirmation.

The court will not address plan confirmation objections until the confirmation hearing.

The motion will be granted and the disclosure statement will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

11. 13-23059-A-7 LENNART SCHAUMAN — MOTION FOR SUMMARY JUDGMENT
13-2172 BLR-1
WELLS FARGO BANK, N.A. V. SCHAUMAN — 12-20-13 [15]

Tentative Ruling: The motion will be denied.

The plaintiff, Wells Fargo Bank, seeks summary judgment on its 11 U.S.C. § 523(a)(2)(A) claim against the defendant, Lennart Christian Schauman, one of the debtors in the underlying bankruptcy case.

Summary judgement is appropriate when there exists "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252.

11 U.S.C. § 523(a)(2) provides that an individual is not discharged "from any debt for money . . ., to the extent obtained by - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff *justifiably* relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")).

The elements of 11 U.S.C. § 523(a)(2)(A) are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999). But, only justifiable reliance is required under 11 U.S.C. § 523(a)(2). Justifiable reliance is less demanding than the reasonable reliance required for actual

fraud under California law. See Field v. Mans, 516 U.S. 59, 61 (1995).

Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." In re Younie, 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997) (quoting Migra v. Warren City School Dist. Bd. Of Educ., 465 U.S. 75, 81 (1984)); Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). Collateral estoppel applies in dischargeability proceedings. In re Harmon, 250 F.3d at 1245.

Collateral estoppel requires that: (1) the issue sought to be precluded from litigation must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. In re Harmon, 250 F.3d at 1245 (citing Lucido v. Superior Court, 51 Cal.3d 335 (1990)).

Under California law, a judgment by default is as conclusive as to the issues asserted in the complaint as if an answer had been filed and the issues had been litigated. However, the California Supreme Court has placed two limitations on this rule. The first is that the defendant must have been aware of the litigation. The second limitation concerns which issues are actually litigated in actions resulting in default judgments. The California Supreme Court limited the principle that a defaulting defendant is presumed to admit all the facts which are well-pleaded in the complaint by allowing an issue to have preclusive effect only where the record shows an express finding upon the allegation for which preclusion is sought. See In re Harmon, 250 F.3d 1240 (9th Cir. 2001), citing In re Williams' Estate, 36 Cal.2d 289, 223 P.2d 248 (1950).

The rule, under California law, that for an issue in a default judgment to have collateral estoppel effect, the issue must have been "necessarily litigated" in the action resulting in the default judgment, imposes two separate conditions: the issue must have been "actually litigated" and it must have been "necessarily decided" by the default judgment. The principle that a defaulting defendant is presumed to admit all the facts which are well pleaded in the complaint is limited by allowing an issue to have preclusive effect only where the record shows an express finding upon the allegation for which preclusion is sought. The court's silence concerning a pleaded allegation does not constitute adjudication of the issue, for collateral estoppel purposes. See In re Harmon, 250 F.3d 1240 (9th Cir. 2001).

The motion is based on a state court judgment the plaintiff obtained against the defendant. The facts giving rise to the state court litigation and eventual judgment are as follows.

LCS was retained by Harry Levan to rebuild and restore a commercial building that had been damaged. According to an agreement between LCS and Mr. Levan, payments were to be made to LCS as construction progressed. The plaintiff is the mortgagee on the property.

After the property sustained damage, Mr. Levan and the plaintiff agreed that the insurance proceeds covering the losses from the damages would be paid to the plaintiff. Their agreement gave the plaintiff the authority to possess, manage, and distribute the insurance proceeds funding the construction work.

LCS began construction and requested progress payments from January 2012 through July of 2012 with no problems.

On or about July 25, 2012, LCS requested a progress payment in the amount of $119,000 to pay subcontractors and invoices that were due. LCS provided invoices and a draw/progress payment request to the plaintiff and Mr. Levan. The plaintiff issued a check of $119,000 to LCS on July 26, 2012. LCS wrote checks to subcontractors, but then stopped these payments, causing subcontractors to file mechanics' liens on the construction property.

On October 4, 2012, the plaintiff filed a state court action against the subject defendant, as well as other persons, pleading conversion, fraud, breach of contract, unjust enrichment, and unlawful business practices.

On February 2, 2013, the state court entered a default judgment in favor of the plaintiff against all defendants, stating that defendants must pay the plaintiff damages in the amount of $119,000 and costs in the amount of $590.00, the total judgment being $119,590.

The defendant filed the underlying chapter 7 bankruptcy case on March 7, 2013. On May 21, 2013, the plaintiff filed the instant complaint against the defendant asserting a single claim pursuant to 11 U.S.C. § 523(a)(2)(A). This motion for summary judgment, invoking the principles of issue preclusion based on the state court's default judgment.

The motion will be denied because there is no express finding upon the defendant's alleged fraud. The state court was silent on all of the issues implicated by 11 U.S.C. § 523(a)(2)(A).

The judgment awards $119,590 to the plaintiff against the defendants, including the defendant in this proceeding. The judgment does not identify the claims upon which the money judgment is based. There are five causes of action pleaded in the state court complaint, including breach of contract and unjust enrichment. This court cannot be certain that the $119,590 award is based on the fraud claim and not on the breach of contract claim, or any of the other claims.

The judgment is a form judgment, providing no narrative of the state court's findings of fact and conclusions of law. The state court made no express findings concerning the defendant's allegedly fraudulent actions so it could not be said that state court considered and decided any of the issues implicated by 11 U.S.C. § 523(a)(2)(A).

Finally, the court rejects the plaintiff's argument that the defendant has admitted that the state court's money judgment is based on the fraud claim. The plaintiff argues that the defendant admitted paragraph 7 of the complaint by failing to deny it. Paragraph 7 says that the defendant defrauded the plaintiff, the defendant did not contest the allegations in the state court complaint, and that, as a result, the state court entered a money judgment based on fraud allegations in the state court complaint.

The court rejects the plaintiff's mischaracterization. As noted above, this court cannot tell whether the state court entered the money judgment based on fraud, breach of contract, or any of the other claims asserted in the state court complaint. Also, the defendant's answer in this adversary proceeding does not admit that the state court's judgment was based on fraud, but merely admits that a money judgment was entered. Docket 7 at 2.

The plaintiff's motion mischaracterizes the allegations in paragraph 6 of the complaint as well. According to the motion, paragraph 6 states that "the judgment is based on 'fraud/theft of money.'" Yet, paragraph 6 states that "[t]he judgment is based on Wells Fargo's causes of action against Schauman, Perizzolo and LCS Development for conversion, fraud/theft of money, breach of contract, unjust enrichment, and unlawful business practices." Docket 1 at 2.

The motion will be denied.

12. 13-23059-A-7 LENNART SCHAUMAN — STATUS CONFERENCE
13-2172 — 5-21-13 [1]
WELLS FARGO BANK, N.A. V. SCHAUMAN

Tentative Ruling: None.

13. 13-28967-A-7 JESUS/EMMA GUTIERREZ — ORDER TO SHOW CAUSE
13-2294 — 1-10-14 [9]
GALLAGHER V. GUTIERREZ

Tentative Ruling: The complaint will be dismissed.

This order to show cause was issued due to the lack of prosecution of the complaint filed on September 18, 2013 by Dauna Gallagher.

The summons was reissued last on September 19, 2013 and was served only on counsel for the debtor and the chapter 7 trustee on September 23, 2013. Docket 7. No request for entry of default or other pleadings have been filed by the plaintiff since then. And, no one appeared at the status conference hearing on November 20, 2013. Docket 8.

Given the foregoing, the complaint will be dismissed.

14. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION TO APPROVE STIPULATION
LP-8 — 1-13-14 [310]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtor seeks approval of a stipulation with Deutsche Bank National Trust Company, the first deed holder on the debtor's Darley Drive property in Vallejo, California.

Under the terms of the stipulation:

- the debtors will make monthly adequate protection payments to DB in the

amount of $1,000, from July 1, 2012 until the case is dismissed or converted or a plan is confirmed;

- the amount of DB's claim is set at $248,237.27 for plan confirmation purposes;

- DB's claim will be treated as follows under the plan: amortized over 30 years, with monthly payments of $1,332.58, at 5% interest; and

- the debtors may use DB's cash collateral post-petition - in excess of the required payments - for reasonable expenses to maintain the property.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to move for approval of a compromise or settlement. Hence, on a motion by a debtor-in-possession and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given that the value of the property is $245,000, given that DB's original claim is listed at $619,258 in Schedule D (Docket 22), given that DB has made a post-petition advance for $3,237.27, and given the inherent costs, risks, delay and inconvenience of further litigation, the stipulation is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

15. 12-20874-A-11 MARK/JUANITA BALLARD — MOTION TO CONVERT OR DISMISS CASE 12-23-13 [139]
UST-2

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee moves for dismissal pursuant to 11 U.S.C. § 1112(b), arguing that the case is approximately two years old and the debtors have done nothing in the case for the last one year, except for filing monthly operating reports, and the debtors have not filed their plan and disclosure statement. In the alternative, the movant asks that a firm deadline for the filing of a plan and disclosure statement be set.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in

the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes [for example] (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (B) gross mismanagement of the estate; . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter . . . ." 11 U.S.C. § 1112(b)(4)(A), (B), (F). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

This case was filed on January 17, 2012 and the debtors have not filed a plan. While the debtors filed a disclosure statement, that statement was filed on January 6, 2014, and in response to this motion. A hearing to consider approval of the disclosure statement has been set for hearing on March 3, 2014.

The opposition does not explain why the debtors have done nothing during the last year to confirm a plan. More, while the opposition says that the debtors are making adequate protection payments to creditors and accumulating cash, the opposition is not supported by admissible evidence establishing these factual assertions. The opposition does not even make an effort to explain whether, why or how the debtors are planning to reorganize.

Based on the two-year age of this case and the absence of evidence from the debtors in support of their opposition to this motion, the court infers that there is no reasonable likelihood of reorganization.

The court also notes that this case is quite simple. The debtors own one real property. They do not live in it. The property is subject to two mortgages, for $490,083 and $49,995. The junior mortgage has been stripped off while the senior mortgage has been stripped down to the value of the property, $290,000. Also, the debtors have stripped down a $33,827 claim secured by an RV to $29,865. There are no other secured claims.

The delay in the prosecution of this case is inexcusable. This case should be a chapter 13 case. In chapter 13, the debtors would have had to file a plan within 15 days of filing the case and obtain confirmation approximately 45 days after the meeting of creditors. Payments would begin the month following the filing of a chapter 13 case.

The debtors easily satisfy the chapter 13 debt limits, *i.e.*, noncontingent, liquidated, unsecured debts of less than $383,175 and noncontingent, liquidated, secured debts of less than $1,149,525. The debtors' general unsecured claims in Schedule F are $93,225 and the debtors have no creditors in Schedule E. Their general unsecured claims, after taking into account the stripped off and stripped down claims, total approximately $348,000.

Nevertheless, the debtors have been in this chapter 11 for over two years, without any explanation why they have not filed a plan and disclosure statement and obtained plan confirmation. This delay is taking place while, at the least, general unsecured claims and the stripped portion of secured claims are not receiving any payments.

The court concludes that the debtors' delay is unreasonable and has been

prejudicial to creditors. This is cause for conversion or dismissal of the case.

As the debtors have accumulated over $66,000 in cash during the last two years, the court will convert the case to chapter 7 so that the cash can be administered to creditors. The motion will be granted.

16. 13-33582-A-11 RIVER CITY CAR WASH L.L.C. MOTION TO CONVERT OR DISMISS CASE
UST-1 1-8-14 [82]

Tentative Ruling: The motion will be granted and the case will be converted to chapter 7.

The U.S. Trustee asks the court to convert the case to chapter 7.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . . (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter . . . ." 11 U.S.C. § 1112(b)(4)(A), (F). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtor's sole source of income was the operation of two businesses, an oil change business and a car wash business. The property on which the debtor was operating the oil change business was foreclosed before the filing of the petition. As to the property on which the debtor has been operating the car wash business, this court granted a stay relief motion on January 8, 2014. Dockets 77 and 81. As the debtor no longer has property from which to operate its businesses, there is diminution of the estate and the absence of a reasonable likelihood of rehabilitation. This is cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

Another cause is the debtor's failure to file operating reports, even though this case has been pending since October 21, 2013. See 11 U.S.C. § 1112(b)(4)(F).

The case will be converted to chapter 7 because Schedule B lists $144,266 in personal property that is not encumbered, according to Schedule D. The motion will be granted.

By converting the case to chapter 7, the court is not precluding Mr. Carbonel from contesting the filing of this bankruptcy case. But, in this record, the court does not have sufficient evidence that this bankruptcy case was filed without authority and in breach of the debtor's operating agreement. Mr. Carbonel's references to the operating agreement and articles of incorporation are not helpful because such references are hearsay and the court does not have

them in the record. See Fed. R. Evid. 802.

17. 13-33582-A-11 RIVER CITY CAR WASH L.L.C. STATUS CONFERENCE
10-21-13 [1]

Tentative Ruling: None.