

UNITED STATES BANKRUPTCY COURT
DEPARTMENT 1
JUDGE MARGARET M. MANN, PRESIDING
THURSDAY, APRIL 16, 2015

10:00 AM

1 - 11-16867-MM Ch 7 SIMON P & ALICIA IRENE DEARN

ADV: 12-90011 REJEANNE BERNIER v. ALICIA DEARN

STATUS CONFERENCE ON ORDER REGARDING MOTION TO DISMISS AND
MOTION TO ABSTAIN FROM HEARING ADVERSARY PROCEEDING (fr.
1/29/15)

ATTORNEY: ROBERT ORTIZ (ALICIA DEARN)

OTHER: REJEANNE BERNIER

2 - 12-13570-MM Ch 7 RSP INSURANCE SERVICES

- 1) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT
OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant for Chapter 7 Trustee, for fees of \$4,400.00 and expenses of \$505.62; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

- 2) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT
OF EXPENSES FOR FINANCIAL LAW GROUP, ATTORNEY FOR TRUSTEE

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Financial Law Group, Attorneys for Chapter 7 Trustee, for fees of \$7,182.00 and expenses of \$38.86; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Financial Law Group may upload an order granting the Application in full as requested.

ATTORNEY: PAUL STALEY (RSP INSURANCE SERVICES)

3 - 13-06207-MM Ch 7 SOLEDAD L. MANALO

- 1) FIRST INTERIM APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR SQUAR, MILNER, PETERSON, MIRANDA & WILLIAMSON, LLP, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Squar, Milner, Peterson, Miranda & Williamson LLP, Forensic Accountants to the Estate, for fees of \$10,639.50 and expenses of \$0.00; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Squar, Milner, Peterson, Miranda & Williamson LLP may upload an order granting the Application in full as requested.

- 2) FIRST INTERIM APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR CHRISTOPHER BARCLAY, TRUSTEE

Tentative Ruling: The Court having considered the Application for Interim Professional Compensation (the "Application") filed by Christopher Barclay, Chapter 7 Trustee, for fees of \$25,000 and expenses of \$2,302.05; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Christopher Barclay may upload an order granting the Application in full as requested.

- 3) FIRST INTERIM APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR LISSEBECK LAW, ATTORNEY FOR TRUSTEE

Tentative Ruling: The Court having considered the Application for Interim Professional Compensation (the "Application") filed by Yosina M. Lissebeck, Attorney for Chapter 7 Trustee, for fees of \$11,766.00 and expenses of \$14.54; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Yosina M. Lissebeck may upload an order granting the Application in full as requested.

- 4) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR HURON CONSULTING SERVICES, INC.

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by Huron Consulting Services, Inc. dba Huron Legal, Computer/Forensic Information Consultants to Chapter 7 Trustee, for fees of \$1,549.00 and expenses of \$0.00; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. Huron Consulting Services, Inc. dba Huron Legal may upload an order granting the Application in full as requested.

- 5) FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR NATIONAL FRANCHISE SALES, INC.

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by National Franchise Sales, Inc., Franchise Business Broker to Chapter 7 Trustee, for fees of \$5,000.00 and expenses of \$0.00; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. National Franchise Sales, Inc. may upload an order granting the Application in full as requested.

- 6) MOTION AUTHORIZING INTERIM DISTRIBUTION FILED BY TRUSTEE

Tentative Ruling: Based on the Chapter 7 Trustee's unopposed motion and declaration, the Court grants the motion to make an interim distribution pursuant to section 105 and 726(a) of the Bankruptcy Code and Bankruptcy Rule 3009: (1) authorizing the Trustee to pay allowed interim chapter 7 administrative claims; 2) authorizing the Trustee to pay the allowed priority tax claim of the Internal Revenue Service in full; and (3) authorizing the Trustee to make an interim distribution of up to 45% to the Estate's general unsecured creditors with timely filed and allowed claims against the Estate. The Chapter 7 Trustee may upload an order and appearances are excused.

TRUSTEE: CHRISTOPHER R. BARCLAY
ATTORNEY: CRAIG E. DWYER (SOLEDAD MANALO)

10:00 AM

4 - 14-02145-MM Ch 7 SANDRA ADELE JENKINS

FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant for Chapter 7 Trustee, for fees of \$640.00 and expenses of \$134.71; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

ATTORNEY: DANIEL WIEDECKER (SANDRA JENKINS)

5 - 14-05153-MM Ch 7 KEVIN M. CONNORS

FIRST AND FINAL APPLICATION FOR COMPENSATION & REIMBURSEMENT OF EXPENSES FOR DEAN JOHNSON, ACCOUNTANT

Tentative Ruling: The Court having considered the Application for Final Professional Compensation (the "Application") filed by R. Dean Johnson, Accountant for Chapter 7 Trustee, for fees of \$886.00 and expenses of \$114.04; No opposition having been timely filed and good cause appearing; The Application is granted and appearances are excused. R. Dean Johnson may upload an order granting the Application in full as requested.

ATTORNEY: WILLIAM F. MCDONALD (KEVIN CONNORS)

10:00 AM

6 - 14-05235-MM Ch 7 MARY A TOOTIKIAN

OPPOSITION TO TRUSTEE'S NOTICE OF INTENDED ACTION FILED BY DEBTOR

Tentative Ruling: Although this matter has been consolidated with the adversary proceeding (Case #15-90048), the Court will treat this hearing as a status conference in the consolidated case. Because a motion for relief from stay involving this property is also pending, and the Trustee needs to resolve ownership of the property as soon as possible, the Court intends to establish expedited pretrial proceedings.

The parties are directly to be prepared to address proposed deadlines for the following matters at the hearing:

1. Establishment of a shortened deadline for filing an answer;
2. Dispositive motion cut off dates;
3. Discovery cut off dates;
4. Filing of a stipulated pretrial order;
5. Deadline for submission of all evidence regarding each party's case in chief by declaration;
6. Briefing regarding what appears to be the applicable law that will govern this matter; and
7. Trial dates.

The applicable law is to apply 11 U.S.C. §541. The Debtor's interest in the property and hence, the trustee's, is determined under state law; here, Oregon law. While Debtor has legal title to the property, Debtor's daughter claims ownership under a resulting trust. *Certified Mortg. Co. v. Shepherd*, 115 Or.App. 228, 234 (Or. Ct. App. 1992). This resulting trust claim is based upon the daughter's purchase of the property through an inheritance and making the payments on the loan; although the Trustee disputes that the inheritance was received by the daughter. He claims Debtor was the source of the downpayment. Trustee also claims that Debtor testified that title to the house was put in her name other than the daughter's name, because titling the property in the daughter's name would have deprived the daughter of her federal disability income. Oregon case law on point regarding these issues include *Smith v. Barnes*, 129 Ore. 138, 152 (Or. 1929) and *North Pacific Lumber Co. v. Oliver*, 286 Ore. 639 (Or. 1979) (same). Additionally, the "unclean hands doctrine" bars a party from recovery on an otherwise valid claim if that party has engaged in misconduct in connection with the matter for which relief is sought. *Vukanovich v. Kine*, 268 Ore. App. 623, 639 (2015).

ATTORNEY: PHILIP H. DYSON (LEONARD ACKERMAN, TRUSTEE)
ATTORNEY: JEFFERY S. STYERS (MARY TOOTIKIAN)

10:00 AM

7 - 14-08384-MM Ch 7 MARK STEPHEN BUCKMAN

MOTION FOR RELIEF FROM STAY, RS #BB-2 FILED BY NEIL CAMPBELL

Tentative Ruling: The motion for relief from stay seeks to enable the parties to return to state court to confirm an arbitration award. This arbitration award contains findings that both parties claim are dispositive of the nondischargeability action filed by Campbell against Buckman on preclusion grounds.

The Court will grant stay relief because it cannot apply preclusion principals to the arbitration award unless the award is final. In California, the state in which the Judgment was entered, collateral estoppel applies if five threshold elements are met: (1) identical issue; (2) actually litigated in the former proceeding; (3) necessarily decided in the former proceeding; (4) former decision final and on the merits; and (5) party against whom preclusion sought either the same, or in privity with, party in former proceeding. *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824 (B.A.P. 9th Cir. 2006). The Court is aware that pending in this Court is an adversary proceeding, Case No. 15-90042, in which Debtor has filed a motion to dismiss asking the Court to find that award preclusive of the claims here. However, ruling on those claim would be premature without stay relief so that the finality of the award can be determined.

Relief from the stay will be granted to enable the arbitration award to become final. Debtor's motion to dismiss will be continued to June 25, 2015 at 10:00 a.m., Department 1.

Phillip Spencer in adversary proceeding #15-90039 has filed a motion to consolidate that adversary with the adversary in this case (#15-90042) so all parties should also be prepared to discuss this.

The Court will hear this matter.

ATTORNEY: GREGORY S. HOOD (MARK BUCKMAN)
ATTORNEY: BRIDGET BURNS (NEIL CAMPBELL)

10:00 AM

8 - 14-09514-MM Ch 7 PHILLIP MICHAEL SPENCER

MOTION FOR RELIEF FROM STAY, RS #BB-2 FILED BY NEIL CAMPBELL

Tentative Ruling: The motion for relief from stay seeks to enable the parties to return to state court to confirm an arbitration award. This arbitration award contains findings that both parties claim are dispositive of the nondischargeability action filed by Campbell against Spencer on preclusion grounds.

The Court will grant stay relief because it cannot apply preclusion principals to the arbitration award unless the award is final. In California, the state in which the Judgment was entered, collateral estoppel applies if five threshold elements are met: (1) identical issue; (2) actually litigated in the former proceeding; (3) necessarily decided in the former proceeding; (4) former decision final and on the merits; and (5) party against whom preclusion sought either the same, or in privity with, party in former proceeding. *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824 (B.A.P. 9th Cir. 2006). The Court is aware that pending in this Court is an adversary proceeding, Case No. 15-90039, in which Debtor has filed a motion to dismiss asking the Court to find that award preclusive of the claims here. However, ruling on those claims would be premature without stay relief so that the finality of the award can be determined.

Relief from the stay will be granted to enable the arbitration award to become final. Debtor's motion to dismiss will be continued to June 25, 2015 at 10:00 a.m., Department 1.

Debtor has also filed a motion to consolidate adversary proceeding (#15-90039) with the adversary proceeding of Mark Buckman (#15-90042) so all parties should be prepared to discuss this.

The Court will hear this matter.

ATTORNEY: GREGORY S. HOOD (PHILLIP SPENCER)
ATTORNEY: BRIDGET BURNS (NEIL CAMPBELL)

9 - 15-00036-MM Ch 7 DANNY R & IRENE MCDONALD

MOTION FOR RELIEF FROM STAY, RS #AMM-1 FILED BY COMERICA BANK

Tentative Ruling: The Court will hear this matter.

ATTORNEY: DANNY R. MCDONALD (DANNY & IRENE MCDONALD)
ATTORNEY: ANGIE MARTH (COMERICA BANK)

10 - 15-01642-MM Ch 7 CANDICE COURTEAU WALKER

MOTION FOR RELIEF FROM STAY, RS #CMR-1 FILED BY HENRY WALKER

ATTORNEY: STEVEN M. BENSON (CANDICE WALKER)
ATTORNEY: CHRISTINE RELPH (HENRY WALKER)

11:00 AM

1 - 10-07659-MM Ch 11 JAMES MARVIN ROTH

ADV: 11-90147

ANICE PLIKAYTIS v. DEBRA ROTH & TALMADGE MANAGEMENT CORPORATION

(DR) PRE-TRIAL STATUS CONFERENCE (fr. 1/29/15)

Tentative Ruling: Continued June 25, 2015 at 2:00 p.m., Department 1 to allow Chapter 7 Trustee to file a properly noticed motion for summary judgment for that date. Appearances at the April 16, 2015 hearing are excused.

ATTORNEY: SCOTT A. MCMILLAN (ANICE PLIKAYTIS)
ATTORNEY: BEN-THOMAS HAMILTON (DEBRA ROTH)

2 - 10-07659-MM Ch 11 JAMES MARVIN ROTH

ADV: 12-90346

ANICE PLIKAYTIS v. MERCATOR FINANCIAL GROUP, INC. & WEST VALLEY FINANCIAL MANAGEMENT, INC.

(MERCATOR) PRE-TRIAL STATUS CONFERENCE (fr. 1/29/15)

Tentative Ruling: Continued June 25, 2015 at 2:00 p.m., Department 1 to allow Chapter 7 Trustee to review the propounded discovery. Appearances at the April 16, 2015 hearing are excused.

ATTORNEY: JOHN W. CUTCHIN (WEST VALLEY FINANCIAL MANAGEMENT, INC., MERCATOR FINANCIAL GROUP, INC.)
ATTORNEY: SCOTT A. MCMILLAN (ANICE PLIKAYTIS)

3 - 13-04909-MM Ch 7 DEBRA ANN ROTH

ADV: 13-90204

ANICE M PLIKAYTIS v. DEBRA ANN ROTH

PRE-TRIAL STATUS CONFERENCE

Tentative Ruling: The Court has reviewed Mr. McMillan's status report dated April 13, 2015. While the Court understands that proceedings are scheduled in July 2015 to address the equitable claims involving the dissolution of Talmadge East in the cross complaint, the Court does not understand why that would delay entry of judgment on the Complaint by liquidating the claims as between Debra Roth and Anice Plikaytis. The proceedings on the cross complaint are now limited to simply actions between non-debtor parties involved in Talmadge East.

At the hearing, the parties are to address the progress of the state court entry of judgment on Debra Roth's claims against Anice Plikaytis as asserted in the complaint filed in the state court action. This Court granted stay relief for that purpose in this case on December 16, 2013, and has abstained from considering the claims in this adversary proceeding relating to the state court action until that judgment has been entered.

The Court will hear the matter.

ATTORNEY: SCOTT A. MCMILLAN (ANICE M PLIKAYTIS)
ATTORNEY: L. SCOTT KEEHN (DEBRA ANN ROTH)

Tentative Ruling: **Factual Background**

Michael London ("London") as the former CEO of Debtor Pure Fitness Carlsbad, Inc. ("Debtor"), brings this motion for a stay pending appeal ("Stay Motion") of this Court's appointment of a Chapter 11 trustee. The Court appointed Leslie Gladstone, Chapter 11 trustee ("Trustee") on July 22, 2014, due to substantial inaccuracies in the Debtor's financial disclosures, inter-company transfers, gross mismanagement, and financial incompetence during the time that it was managed by London. Docket # 125. London moved for reconsideration of the appointment of the Trustee which the Court denied on September 11, 2014. London then filed a notice of appeal on September 24, 2014 in the name of the Debtor even though his authority to act for Debtor had been terminated by the appointment of the Trustee.

Not until December 29, 2014 did London seek a stay at the District Court. No stay was granted because the motion had not yet been filed or considered by this Court. PureFitness Carlsbad Inc. v. US Trustee (In re PureFitness Carlsbad), Case No. 14-02273, Docket #20 (SD Cal. 2015). Over a month later on March 21, 2015, London in the name of the Debtor filed this motion to temporarily stay the appointment of the Chapter 11 trustee.

London argues in support of the Stay Motion that the appointment of the Trustee was error, blaming his attorney and accountant for the Debtors' admitted failure to operate and reorganize in accordance with its fiduciary duties imposed under bankruptcy law. London also laments that Debtor will suffer irreparable error if a stay is not granted because the Trustee is ruining his business and that creditors will be paid less than they would have if he was still operating the Debtor. The Stay Motion is opposed by the United States Trustee ("UST") who relies upon the record in this case. The UST also attached the Trustee's declaration filed after her appointment averring that several improvements have been made to the operations of Debtor, including bringing accounts current, membership has been stable, and the club has been profitable. The Trustee has also averred she is currently pursuing a sale of the business that has engendered substantial interest from several prospective buyers.

Legal Standard for Stay Pending Appeal

Whether to grant a stay pending appeal involves consideration of the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparable injured absent a stay; (3) whether the issuance of the stay will substantially injure other parties interest in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); also see *In re Lindsey*, 2009 WL 7751414, at *2 (B.A.P. 2009) (noting the application of the *Nken* factors to motion for stay of an order by bankruptcy court). The chance of success on the merits must be "better than negligible" and the movant must show that there is more than the mere possibility of injury to the party. See *id.* at 434 (the first two factors are the most critical and success on the merits "must be better"). The movant has the burden of proof on all prongs and his or her failure to satisfy a prong of the standard causes the failure of the entire motion. See *Ohanian v. Irwin*, 338 B.R. 839, 843 (Bankr E.D. Cal. 2006) (citing *In re Deep*, 288 B.R. 27, 30 (N.D.N.Y. 2003)). The elements of the test are balanced so that a stronger showing of one element balances out a weaker showing of another element. *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Probability of Success on the Merits

London must make a "strong showing" that he or she is likely to succeed on appeal. *Nken*, 556 U.S. at 426. At minimum there must be a showing of that there is a "substantial case for relief on the merits" and that there is more than a mere possibility of relief. *Leiva-Perez v. Holder*, 640 F.3d 962, 966-67 (9th Cir. 2011).

The grounds argued in the Stay Motion are a rehash of the motion for reconsideration that this Court has already denied after careful reassessment of its decision to appoint a Trustee. See Docket #189. These arguments are no stronger the third time the Court has considered them. The Court found multiple independent grounds to appoint a trustee at the time it first considered this matter in July and when it reconsidered this matter in September. There is nothing new before the Court now to dissuade it from that view; no new legal authority or evidence that contradicted those findings is presented. The Court incorporates its findings in regard to the appointment of a Trustee and in regard to the denial of the motion for reconsideration in finding a weak case on the merits.

While London has presented new evidence in support of the Stay Motion that Trustee is not doing an adequate job since her appointment, this Court has no jurisdiction to reconsider an order that is already on appeal based on this new evidence. The timely filing of a notice of appeal to either a district court or bankruptcy appellate panel will typically divest a bankruptcy court of jurisdiction "over those aspects of the case involved in the appeal." See *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1190 (9th Cir. Cal. 2000). Moreover, the Court is satisfied that Trustee, unlike the case with London, is at a minimum free of conflict in performing her duties and is working to pay the creditors by selling the business. The sale of the business that she is advocating may well be an astounding success; but it is not scheduled for auction until May 13, 2015.

In addition to countering the substantive stay arguments presented by London, the UST opposes the stay on the grounds that the appeal was untimely and ineffective. These matters are appropriate to be determined by the District Court in the appeal, so the Court will not address them here.

However, the UST's argument about the effectiveness of the appeal highlights another procedural defect in regard to the Stay Motion: that London lacks standing to seek a stay on the Debtor's behalf at this time. London's standing is an issue that has arisen before in this case and was addressed in regard to the motion for reconsideration. Under 11 U.S.C. § 323, the Trustee is the exclusive representative of the estate, including the capacity to sue and be sued on the debtor's behalf. See *Movitz v. Fiesta Inv. LLC (In re Ehmann)*, 319 B.R. 200, 206 (Bankr. D. Ariz. 2005) ("[The] Trustee has all of the rights and powers . . . that the Debtor held as of the commencement of the case."); see also *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 345 (1985) (chapter 11 trustee has the power to waive privilege previously held by corporate officers). The Trustee's replacement of London as the only party capable of making decisions for the Debtor even includes the ability to maintain this appeal. In *C.W. Mining Co. v. Aquila, Inc. (In re C.W. Mining Co.)*, 636 F.3d 1257, 1263 (10th Cir. 2011), the Tenth Circuit held that corporate management did not have authority to file an appeal of the conversion of a Chapter 7 case on behalf of the corporation because only the trustee has the right to bring the appeal on the corporation's behalf. In *S. Edge LLC v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 49621, at *15 (D. Nev. Apr. 28, 2011), the district court applied this reasoning in a Chapter 11 case and held that "[a] chapter 11 trustee displaces former management just as a chapter 7 trustee does, and no basis exists to permit ousted management to appeal over the chapter 11 trustee's objection any more than in a chapter 7 case." Whatever London's standing to seek a stay pending appeal in his own capacity, he failed to either appeal in that capacity.

For both substantive and procedural reasons, the Court finds London does not have a strong likelihood of success on the merits.

Irreparable Injury Absent the Stay

London asserts that the Trustee is seeking "an immediate fire sale and 'death' of Debtor and the entire PureFitness brand" which he asserts will destroy Debtor's "reputation and goodwill as a business" as his showing of irreparable harm. London claims the actions taken by the Trustee have damaged the reputation and goodwill of the Debtor and ultimately the business will be impaired, causing irreparable injury to all parties. London claims he would have paid creditors 100%, an assertion not supported by the record in this case. No plan was ever filed, nor was any credible financial information predicting Debtor's success. On his personal behalf, although he was not the party filing the appeal, London cites personal injury from the impairment of his creditor relationships and reduction in credit score.

The UST in turn states that Debtor is now in better operational shape due to completion of deferred maintenance, stronger financial operations, and that the decline in membership has been insignificant and within the normal trends of a health club business. As noted above, the issues of whether the sale or Trustee's management will prove successful are at minimum in dispute, and possibly unknowable until the sale in the future. This argument thus does not carry London's burden of proof.

More than a mere "possibility of irreparable injury" is required to be shown by the moving party. *Nken*, 552 U.S. at 434 (citing *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). A movant must establish that the irreparable injury is likely without a stay. *Alliance for the Rockies*, 622 F.3d at 1049 (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 19 (2008)). The mere prospect of economic injury alone is not sufficient to support a finding of irreparable harm because the injuries can be remedied by damages. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Even if significant injury could result, this factor must be considered on a sliding scale compared to the likelihood of the success of London's appeal. See *Alliance for the Rockies*, 622 F.3d at 1131 ("[F]or example, a stronger showing of irreparable harm to the plaintiff might offset a lesser showing of [the] likelihood of success on the merits."). Since it is unknown whether the Trustee will render the business of the Debtor more or less successful than if it had continued to be run by London, he has not shown a likelihood of irreparable injury by his claims of malfeasance by the Trustee.

The Court recognizes that if the Trustee completes a sale of the business, the appeal could be rendered moot in absence of a stay. That possibility however is insufficient to constitute irreparable harm alone. See *In re Adelpia Communications Corp.*, 361 B.R. 337, 347 & n. 39 (S.D.N.Y. 2007) ("majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm"). Even if it were, the proper remedy is for London to bring a motion pursuant to 11 U.S.C. § 324 to remove the trustee, not to try to stay the administration of this case. *Estate of Spirtos v. One San Bernardino County Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006); see also *S. Edge LLC v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 49621, 17-18 (D. Nev. Apr. 28, 2011) ("To the extent South Edge has any evidence that the Trustee has breached her fiduciary duties by failing to pursue an appeal in this case, the proper remedy is to seek removal of the Trustee, not to pursue an appeal on South Edge's behalf.>").

Irreparable injury has not been shown and this factor does not support granting a stay.

Impact of Stay on other Parties in this Proceeding

The movant must establish that with the other factors, the balance of

equities tips in the favor of the movant in approving a stay. *Winter v. Natural Resources Defense Council, Inc.*, 55 U.S. 365 (2008). A court must consider the effect on each party of granting or withholding the requested relief on each party. *Independent Living Center of Southern California, Inc. v. Maxwell-Joy*, 572 F.3d 644, 651 (9th Cir. 2009).

The balancing of the equities also does not favor London. While the responsible principal of the Debtor in possession he was responsible for numerous breaches of fiduciary duties, disclosure errors, contradictory statements under oath to the Court, mismanagement of Debtor's business to benefit himself as well as conflicts of interest. See *In re Beyond.com Corp.*, 289 B.R. 138, 146 (Bankr. N.D. Cal. 2003) (bankruptcy relief through approval of disclosure statement denied where the "lack of disclosure brings into question not only the ability of the debtor to fulfill its fiduciary responsibilities, but the true allegiance of debtor's counsel and, to the extent the creditor's committee negotiated the proposed plan, the committee's competency, and perhaps, its counsel's self-interest.").

London's inequitable conduct must be compared to the dutiful actions of the Trustee in managing a struggling business and trying to pay creditors through what may be a successful sale. London has other procedural options, such as opposing the sale or seeking to remove the trustee. Returning London to management would surely halt the sale and return the estate to mismanagement and conflicts of interest. It was also not equitable for London to fail to seek a stay until the Trustee had managed the business and attracted 11 possible buyers for an auction of the business.

The balance of the equities favors denying the stay.

Public Interest

The factor focused on the public interest is primarily a determination of the harm to non-parties as opposed to parties. *Sammartano v. First Judicial District Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). The creditors in this case are the nonparties whose interests are not served by granting a stay. Notably, none of them have joined in the appeal, although creditor California Bank & Trust had joined in the motion to appoint a trustee in the first case. In any event, London's disregard of his fiduciary duties while managing the Debtor in possession clearly damaged the public's interest in a fair and honest bankruptcy process. See *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (policy of the bankruptcy court is to allow the restructuring of affairs only for deserving debtors.).

Conclusion

The Court finds that the likelihood of success on the merits of the case to be low and finds that London will not suffer irreparable injury as a result of the appointment of the Chapter 11 trustee. Neither the balancing of the equities nor the public interest supports granting the stay. The Stay Motion is accordingly denied.

- 2) MOTION FOR ORDER: (1) AUTHORIZING SALE OF ASSETS, SUBJECT TO OVERBID, FREE AND CLEAR OF CERTAIN LIENS AND INTERESTS; AND (2) APPROVING BIDDING PROCEDURES FILED BY TRUSTEE

- 3) MOTION TO COMPEL GOOD FAITH ESTIMATE OF COST FILED BY MICHAEL LONDON

ATTORNEY: CHRISTIN A. BATT (LESLIE GLADSTONE, TRUSTEE)
ATTORNEY: GAVRIEL GLEIBERMAN (PUREFITNESS CARLSBAD, INC.)