

1 WRITTEN DECISION - NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re:	)	CASE NO. 05-13794-H11
	)	
JAMES CECIL HARLAN III and	)	ORDER DENYING MOTION TO VACATE
JOANN LYNN HARLAN,	)	ORDER, FOR NEW HEARING, FOR
	)	ALTERATION OF FINDINGS AND
Debtors.	)	MODIFICATION OR AMENDMENT OF
	)	ORDER, FOR STAY OF ENFORCEMENT,
	)	FOR RELATED RELIEF
	)	

On October 25, 2006, judgment was entered against T. Edward Malpass ("Malpass") requiring him to disgorge the amount of \$80,843.00 to the Chapter 11 trustee, Richard M. Kipperman. The findings of fact and law supporting the judgment are set forth in a written Memorandum Decision dated October 4, 2006 (the "MD").

Malpass filed an Emergency Motion for Stay of Enforcement of Order, For Modification of Order Regarding Terms of Payments, to Set Hearing and Briefing Schedule on Motion to Vacate, and For Related Relief on November 6, 2006 (the "Emergency Motion") and a Motion to Vacate order, For New Hearing, For Alteration of Findings and Modification or Amendment of Order, For Stay of Enforcement, For Related Relief also on November 6, 2006 (the "Motion to Vacate") [see docket #172, 173].

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1 [see Minute Order docket #120]. Thus, the Court gave Malpass  
2 almost two months to proffer evidence as to why he needed an  
3 evidentiary hearing and the Court set the date well beyond the  
4 final date imposed upon the UST and Malpass for filing additional  
5 briefs.

6 In Malpass' September 15, 2006, declaration entitled  
7 "Declaration of T. Edward Malpass Regarding Hearing on Fee  
8 Matters," he stated "To attempt to comply with my understanding of  
9 the Court's instructions regarding the filing of this Declaration,  
10 I do not think that the Court needs to conduct any further  
11 hearings...." [see docket #149 2:15-22]. Malpass then further  
12 declares at paragraph 10, "If the Court is going to proceed  
13 further, I request that I be given an opportunity to present  
14 evidence and be heard. My position is that the Court does not need  
15 to conduct additional proceedings and should exercise its  
16 discretion not to do so. If it does conduct additional  
17 proceedings, I want an opportunity to address particular matters  
18 where I have notice of what I need to respond to and an opportunity  
19 to present evidence and argument." [Id. at 4:23-28]. Malpass  
20 declares in paragraph 13 "If the Court is going to conduct further  
21 proceedings, it should provide specification of what they are and  
22 allow them to proceed in an orderly fashion with notice." [Id.  
23 5:16-17].

24 Malpass' declaration appeared to be directed at requesting the  
25 Court to simply defer ruling on the matter and, therefore, no  
26 additional hearings would be necessary. Evidently, if the Court  
27 did not defer its rulings on the issues which were already fully  
28 briefed, Malpass wanted the Court to conduct additional hearings

1 and specify what the hearings would be about.

2 The Court's directions to Malpass were clear, yet nowhere in  
3 Malpass' declaration does he mention that he wants to testify,<sup>1</sup>  
4 cross examine the UST, Tiffany Carroll, or his client. Nowhere in  
5 Malpass' declaration does he discuss the merits of an evidentiary  
6 hearing. It was not up to the Court to set additional hearings and  
7 "specify" what the hearings would be about. Accordingly, the Court  
8 noted in its MD that Malpass "has not proffered any facts which  
9 demonstrate why an evidentiary hearing would be necessary and the  
10 Court cannot find any." [See MD 19:15-28; 20:3-8].

11 Malpass' various motions and declaration fail to set forth any  
12 grounds for an evidentiary hearing at this late date. Malpass  
13 contends that he wants an opportunity to file additional  
14 declarations, an opportunity to testify on his own behalf, and to  
15 present witnesses, including testimony from his former client and,  
16 if necessary, from Ms. Carroll, creditors, with regard to both  
17 waiver of conflict and the value of his services, and other  
18 evidence as may be necessary to address the issues the Court  
19 addressed, and to present additional evidence on the grounds  
20 discussed in the motion. [see November 15 Motion 2:15-26;  
21 November 13 Motion: 6:21-22]. Malpass also requests the Court to  
22 conduct a hearing and determine, and clarify and amend its Order,  
23 with regard to whether money paid by Malpass to the Chapter 11  
24 Trustee is property of the estate in the Harlan's case.

25 This Court previously gave Malpass numerous opportunities to  
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27 <sup>1</sup> The Court can not understand why Malpass would need to testify when he has  
28 submitted numerous declarations in connection with his employment and disgorgement.  
see In re Adair, 965 F.2d 777 (9th Cir. 1992) (allows declaration in lieu of  
testimony).

1 file additional pleadings and present evidence. Malpass has not  
2 argued that he has any "new" evidence. Moreover, the Court cannot  
3 find that testimony from Mr. Harlan or creditors regarding either  
4 waiver of conflict and the value of his services are relevant to  
5 the issues at hand. Lastly, it is unnecessary at this juncture,  
6 and within the context of Malpass' various motions, for this Court  
7 to determine whether the disgorged funds are property of the estate  
8 since the Harlans and the Chapter 11 Trustee have entered into a  
9 stipulation regarding the funds. [see docket #143]. To the extent  
10 the UST objects to the debtors' disclosure statement because it  
11 conflicts with this Court's MD and subsequent order, those issues  
12 can be addressed at the hearing for the disclosure statement.

13 The Court therefore denies Malpass' request for an evidentiary  
14 hearing.

15 II.

16 MOTION TO VACATE ORDER; FOR ALTERATION OF

17 FINDINGS AND MODIFICATION OR AMENDMENT OF ORDER

18 A. Federal Rule Bankruptcy Procedure 7052(b); Federal Rule  
19 Bankruptcy Procedure 9023

20 Federal Rule Bankruptcy Procedure 7052(b), which incorporates  
21 Federal Rule Civil Procedure ("FRCP") 52, provides in part:

22 On a party's motion filed no later than 10 days<sup>2</sup> after  
23 entry of judgment, the court may amend its findings or  
24 make additional findings--and may amend the judgment  
accordingly. The motion may accompany a motion for a new  
trial under Rule 59.

25 "To warrant alteration or amendment of court's decision, moving  
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27 <sup>2</sup> Malpass filed his Emergency Motion and Motion to Vacate within the 10 day  
28 period. [see docket #172, 173]. The UST and Malpass stipulated that he could  
supplement his Motion to Vacate by November 13, 2006. The stipulation was signed  
by the Court. [see docket #175].

1 party must show: (a) manifest error of law and fact, or (b)  
2 existence of newly discovered evidence which was not available at  
3 time of original hearing." Weiner v. Perry, Settles & Lawson, Inc.  
4 (In re Weiner), 208 B.R. 69, 72 (B.A.P. 9th Cir. 1997) rev'd on  
5 other grounds 161 F.3d 1216 (9th Cir. 1998).

6 Federal Rule 9023, which incorporates FRCP 59 provides in  
7 part:

8 (a) Grounds. A new trial may be granted to all  
9 or any of the parties and on all or part of the  
10 issues ... (2) in an action tried without a  
11 jury, for any of the reasons for which  
12 rehearings have heretofore been granted in  
13 suits in equity in the courts of the United  
14 States ... the court may open the judgment if  
15 one has been entered, take additional  
16 testimony, amend findings of fact and  
17 conclusions of law or make new findings and  
18 conclusions, and direct the entry of a new  
19 judgment.

20 (e) Motion to Alter or Amend Judgment. Any  
21 motion to alter or amend a judgment shall be  
22 filed no later than 10 days after entry of the  
23 judgment.

24 The "reasons" for granting a motion for a new trial under FRCP  
25 59(a) (2) is appropriate if the moving party demonstrates a manifest  
26 error of fact, a manifest error of law, or newly discovered  
27 evidence. Janas v. Marco Crane & Rigging Co. (In re JWJ  
28 Contracting Co.), 287 B.R. 501, 514 (B.A.P. 9th Cir. 2002).

Similarly, under FRCP 59(e), a party may move the court to alter  
or amend its judgment, so long as: (1) the court is presented with  
newly discovered evidence, (2) the court committed clear error or  
the initial decision was manifestly unjust, or (3) there is an  
intervening change in controlling law. Circuit City Stores, Inc.  
v. Mantor, 417 F.3d 1060, 1064 at n.1 (9th Cir. 2005) (citation  
omitted); see also Brown v. Wright, 588 F.2d 708, 710 (9th Cir.

1 1978) (the three grounds generally acknowledged for granting a  
2 motion for reconsideration are: (1) manifest error of law; (2)  
3 manifest error of fact; or (3) newly discovered evidence). Thus,  
4 under either FRBP 7052 or 9023, Malpass must show either a manifest  
5 error of fact or law or the existence of newly discovered evidence.

6 Malpass' arguments appear to be based on perceived errors of  
7 fact or law and not on the existence of newly discovered evidence.  
8 Malpass' arguments focus in three general areas: 1) his employment  
9 under 11 U.S.C. § 327; 2) his employment on a nunc pro tunc basis;  
10 and 3) the value of his services.

11 The Court has reviewed Malpass' motions and declaration and  
12 its MD. The Court is of the opinion that there has been no error  
13 of law or fact. The Court's findings were based on the record,<sup>3</sup>  
14 which was fully developed, and its interpretation of legal  
15 authorities. Malpass reargues points already made or raises new  
16 arguments that should have been made earlier. One Court noted:  
17 "Initial arguments are not to be treated as a dress rehearsal for a  
18 second attempt to prevail on the same matter. Counsel is also  
19 expected to 'get it right' the first time and to present all the  
20 arguments which counsel believes support its position." Wall  
21 Street Plaza LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 103  
22 (B.A.P. 9th Cir. 2006); see also Hale v. United States Trustee (In  
23 re Basham), 208 B.R. 926, 934 (B.A.P. 9th Cir. 1997) (merely  
24 restating the same arguments that were previously raised and  
25 rejected by court not sufficient); Matter of McDaniel, 217 B.R.

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28 <sup>3</sup> The Court considered all the evidence, but had no obligation to mention all  
the evidence it considered in the MD. Tevis v. Wilke, Fleury, et al. (In re Tevis),  
347 B.R. 679, 696 (B.A.P. 9th Cir. 2006).

1 348, 350 (Bankr. N.D. Ga. 1998) (Rule 59(e) "is not designed to  
2 furnish a vehicle by which a disappointed party may reargue matters  
3 already argued and disposed of, nor is it aimed at providing a  
4 mechanism by which new arguments or legal theories, which could and  
5 should have been raised prior to the issuance of judgment, can be  
6 later advanced") (citations omitted).

7 The Court, therefore, denies Malpass' request to vacate its  
8 order and for alteration of findings and modification or amendment  
9 of order under FRBP 9023 and 7052.

10 B. Federal Rule Bankruptcy Procedure 9024

11 Federal Rule Bankruptcy Procedure 9024 incorporates FRBP 60  
12 entitled "Relief from Judgment or Order." There are numerous  
13 grounds for relief from a judgment or order set forth in 60(b),  
14 none of which are mentioned or analyzed by Malpass. This Court  
15 will not attempt to guess at what subsection under 60(b) Malpass  
16 seeks relief.

17 III.

18 STAY OF ENFORCEMENT

19 Federal Rule Bankruptcy Procedure 7062(b), incorporates FRCP  
20 62(b). Rule 62 provides in pertinent part:

21 (b) Stay on Motion for New Trial or for  
22 Judgment: In its discretion and on such  
23 conditions for the security of the adverse  
24 party as are proper, the court may stay the  
25 execution of or any proceedings to enforce a  
26 judgment pending the disposition of a motion  
27 for a new trial or to alter or amend a judgment  
28 made pursuant to Rule 59, or of a motion for  
relief from a judgment or order made pursuant  
to Rule 60, . . . , or of a motion for amendment  
to the findings or for additional findings made  
pursuant to Rule 52(b).

"Rule 62(b) grants authority to the district court to stay a

1 judgment while it considers and disposes of Rule 60 motions." In  
2 re Zapata Gulf Marine Corp., 941 F.2d 293, 295 (5th Cir. 1991). It  
3 appears to the Court that the plain text of Rule 62(b) permits the  
4 Court to issue a stay of proceedings to enforce a judgment in  
5 situations such as this where the party against whom enforcement is  
6 sought is challenging the validity of the underlying judgment  
7 pursuant to Federal Rules of Bankruptcy Procedure 9052, 9023 and  
8 9024.

9 Having denied Malpass' motions under FRBP 7052, 9023 and 9024,  
10 his request for a stay under FRBP 7062 is moot.<sup>4</sup>

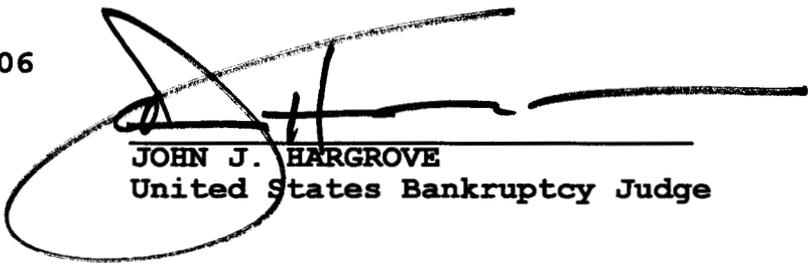
11 IV.

12 CONCLUSION

13 The Court denies the relief requested by Malpass in its  
14 entirety.

15 IT IS SO ORDERED.

16  
17 Dated: November 20, 2006

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20 JOHN J. HARGROVE  
21 United States Bankruptcy Judge

22 s:\Malpass REconsideration.wpd  
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27 <sup>4</sup> In his supplemental declaration, Malpass sets forth arguments regarding his  
28 financial condition and ability to pay. While sympathetic to his situation, the  
Court finds that exercising its equitable powers under § 105 would be inappropriate  
under these circumstances. There is nothing that prohibits Malpass from  
negotiating a payment plan with the Chapter 11 trustee.