ENTERED MAY - 4 2010
FILED
MAY - 4 2010
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re EUGENE DUGGER and MARIEANNE FRANCIS DUGGER, **Debtors.**	**Case No. 05-00024-A7** **Adv. Proc. No. 08-90002-A7**
GREGORY A. AKERS, Chapter 7 Trustee, **Plaintiff,** **v.** **EUGENE DUGGER, SR. an individual; GHK ENTERPRISES, LP, an entity; and MARY ANN MATTEI, an individual.** **Defendants**	**MEMORANDUM DECISION**

I.

PARTIES

Gregory A. Akers ("Plaintiff" or "Trustee") moves this Court pursuant to Federal Rule of Bankruptcy Procedure 7037, which incorporates Federal Rule of Civil Procedure 37(b)(2)(B) and (C), and Federal Rule of Bankruptcy Procedure 7016, which incorporates Federal Rule of Civil Procedure 16(f), for an order striking the answer of Eugene Dugger, Sr. ("Defendant" or "Dugger Senior") and entering a default judgment against him as a

terminating sanction for his continued discovery abuses. Because of the severity of the requested sanction, the Court took the matter under submission for further review. Having had the opportunity to review the case law, and having duly considered the parties' written and oral arguments and the underlying evidence, the Court concludes that a terminating sanction is warranted in this case. However, for the reasons more fully set forth below, the terminating sanction is limited to an order striking the answer and entry of a default. The Trustee must still prove up his entitlement to a default judgment given the prior rulings in this case.

II.

BACKGROUND

On January 4, 2005, Eugene Dugger ("Debtor" or "Dugger Junior") and Marieanne Frances Dugger ("Mrs. Dugger") (collectively "Debtors") filed a voluntary chapter 13 bankruptcy petition. The Debtors confirmed a chapter 13 plan of reorganization, but were not able to complete the payments provided under their plan. On August 22, 2007, the Debtors voluntarily converted their case to a chapter 7 case and Plaintiff was appointed the chapter 7 trustee in the converted case. Plaintiff hired Nannette Farina, Esq. ("Ms. Farina") as his counsel in this case.

At a § 341(a) hearing in September 2007, the Plaintiff learned from a creditor that the Debtor had bragged about owning two real properties in Texas which were not disclosed in his bankruptcy schedules. The Trustee investigated this allegation and learned the Debtors had owned two real properties in Texas which Dugger Junior had conveyed to his father, Dugger Senior, prior to the petition date.

A. <u>The Avoidance Action.</u>

On January 2, 2008, the Trustee filed this adversary proceeding against Dugger Senior, GHK Enterprises, LP ("GHK") and Mary Ann Mattei ("Ms. Mattei"), to avoid and recover the transfers and for an order authorizing a sale of the properties. The Trustee amended his complaint before a responsive pleading was filed.

///

1. The Guadalupe County Property

The Trustee's amended complaint alleges in the First through Fourth Claims for Relief that --

- On or before October 9, 2001, the Debtors owned an equitable estate through a "contract for deed" in 21.27 acres of real property located in Guadalupe County in Texas.
- The bare legal title holder was GHK (the successor to the original vendor), who allegedly held bare legal title for the benefit of the Debtors.
- On or about October 9, 2001 (prepetition), Dugger Junior executed an unrecorded assignment conveying the Debtors' equitable interest in the Guadalupe property to Dugger Senior.
- On October 15, 2007 (postpetition), GHK executed an unrecorded warranty deed purporting to transfer title to the Guadalupe property to Dugger Senior.
- The Debtors' prepetition assignment of the contract for deed and/or equitable estate is avoidable as a constructive or actually fraudulent transfer pursuant to § 544(b).
- The postpetition transfer of title by GHK to Dugger Senior is an avoidable postpetition transfer pursuant to § 549.
- The § 544(b) action is timely because the applicable two-year statute of limitations in § 546(a)[1] was equitably tolled as a result of the diligence of the Trustee and chapter 13 trustee, and the active fraud or misrepresentations and concealment of the transfers by the Debtors and the Defendants. [¶ 10]
- The Trustee is entitled to recover the avoided prepetition and postpetition transfers of the Guadalupe property pursuant to § 550 and to sell the property pursuant to § 363.
- On information and belief, the current value of the Guadalupe property is worth $100,000.

---

[1] Section 546(a) provides that an action under § 544 of this title may not be commenced after the earlier of –

(1) the later of –

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under ... § 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is close or dismissed.

The Trustee's amended complaint added an equitable tolling allegation because the § 546(a) statute of limitations had expired.

2. The Cibolo Property in Bexar County

The Trustee's amended complaint alleges in the Fifth and Sixth Claims for Relief that –

- There is a quit claim deed recorded on July 17, 2002 in Bexar County (Texas) transferring to Duggar Senior the Debtor's 100% ownership interest in real property located at 11249 Bethany Way, Cibolo, Texas (the "Cibolo" property).

- The transfer of the Cibolo property from Debtor to Dugger Senior is avoidable as a constructive or actually fraudulent transfer pursuant to § 544(b).

- There is a quit claim deed recorded on July 24, 2003 in Bexar County (Texas) further transferring the Cibolo property from Dugger Senior to Ms. Mattei.

- This further transfer of the Cibolo property is avoidable as a constructive or actually fraudulent transfer pursuant to § 544(b). Alternatively, Ms. Mattei is an immediate or mediate transferee who is jointly and severally liable with the initial transferee pursuant to § 550.

- The § 544(b) action is timely because the applicable two-year statute of limitations in § 546(a)[2] was equitably tolled as a result of the diligence of the Trustee and chapter 13 trustee, and the active fraud or misrepresentations and concealment of the transfers by the Debtors and the Defendants. [¶ 10]

- The Trustee is entitled to recover the Cibolo property pursuant to § 550 and to sell this property pursuant to § 363.

- On information and belief, the Cibolo property is currently worth at least $66,000.

The Trustee has stipulated to dismiss GHK from the action. The Court has granted Ms. Mattei's motion for summary adjudication of the claims against her. Accordingly, Dugger Senior is the only defendant remaining in this action. He is representing himself in *pro per* from Texas. The Court has permitted him to appear at the various hearings by telephone due to his assertion of poor health and lack of finances.

B. <u>Ms. Mattei's Successful Adjudication of the Statute of Limitations Defense.</u>

Ms. Mattei and Dugger Senior initially hired Scott Smiley, Esq., an attorney in San Diego, to jointly represent them, but soon substituted themselves in *pro per* due to

---

[2] *See* footnote 1, *supra*.

inability to pay legal fees.[3] Ms. Mattei thought Dugger Senior could handle the litigation for her so she did not appear by telephone at the initial status conference. Consequently, the Trustee moved to strike Ms. Mattei's answer and enter a default against her. Upon appropriate prove up, a default judgment was entered. [D.E. # 43]

Ms. Mattei learned of the default, and asked Mr. Smiley for help. He gratuitously represented her in vacating the default judgment. [D.E. # 42; D.E. # 70; # 71] Thereafter, Mr. Smiley filed a motion for summary adjudication of the claims against Ms. Mattei. The Court granted the motion, and an order was entered on the Fifth and Sixth Claims for Relief in favor of Ms. Mattei. [D.E. # 109] The Court found the complaint was time barred pursuant to § 546(a), and there were no factual grounds for equitable tolling merely because Debtor was in a chapter 13 case. Further, the Court found no evidence of wrongful conduct or fraud by Debtor, or any other extraordinary circumstances during the relevant time period that would justify equitable tolling since Debtor had not actively concealed the transfer or made any untrue misrepresentations. [D.E. # 108][4]

Dugger Senior has continued to represent himself *pro se*, and he has not moved for summary adjudication of the claims against him. Upon further review of the amended complaint, it appears he should have the same defenses as Ms. Mattei.

C. <u>The Discovery Disputes.</u>

Trustee directed a records subpoena to both of the Debtors, and he conducted a Rule 2004 examination of Dugger Senior. Further, he has deposed Dugger Senior and Ms. Mattei. The Trustee also attempted to depose Mrs. Dugger, but the Court issued a protective order upon proof from Mrs. Dugger's treating physician that she is in the final stages of advanced lung cancer.

///

---

[3] Ms. Mattei is the Debtor's sister. She is a single mother who works at the YMCA and McDonalds. Dugger Senior is retired. His main income is social security.

[4] The Court also ruled the Trustee lacked standing since he had failed to established the existence of an actual unsecured creditor of the Debtor on the date of transfer. [*Id.*]

From this discovery, the Trustee learned the Debtor had owned a third parcel of real property in Texas located at 12041 Shaeffer Road, Cibolo, Texas (the "Shaeffer Road"property). Debtor transferred the Shaeffer Road property to Dugger Senior sometime prior to 1996. In his deposition, Dugger Senior testified that:

> • He remembered the transfer of this property [Shaeffer Road], but he could not recall the circumstances because it was so long ago.
>
> • He sold the Shaeffer Road property for $21,000 in or about 1996, and he spent the proceeds (he speculated that he may have gambled the proceeds or gone on vacation, but he didn't really remember).
>
> • He did not give the Debtor any of the sales proceeds because the property belonged to him so he did not owe his son anything.

[D.E. #135 at Ex. "C-7"-"C-9"]

Further, the Trustee claims Dugger Senior testified he kept "a book" at his home to account for the sums owed to him by the Debtor. Dugger Senior actually testified he kept a record of the sums owed *in a book*. [*Id.* at "B-1"] When the Trustee started calling it "the book," Dugger Senior clarified: "It's not a book .... It's a blank piece of paper that I jot stuff down on. I don't keep books." [*Id.* at "B-2 - "B-3"]

On May 15, 2009, the Trustee served Dugger Senior with a records subpeona seeking, *inter alia*, tax returns and "the book" Dugger Senior had purportedly mentioned in his deposition. Dugger Senior produced some responsive documents, but he did not produce tax returns or "a book." [D.E. #134 at Ex. "G"]

On June 2, 2009, the Trustee served Dugger Senior with Requests for Admissions ("RFA") and Interrogatories ("ROG"). [*Id.* at Exs. "A"-"B"] The RFA and ROG questions sought information concerning the transfers in the complaint and the Shaeffer Road transfer. The Trustee intends to use this information to show a "continuing pattern" of sham transfers between the Debtor and Dugger Senior to infer the Debtor's fraudulent intent in the avoidance action.

On June 26, 2009, Dugger Senior served timely responses to the RFA and ROG questions. [*Id.* at Exs. "C" - "D"] Dugger Senior refused to answer the RFA questions

directed to Shaeffer Road, objecting on the grounds of: "Does not pertain to this case."[5] Additionally, he denied many other RFA questions, stating: "Unable to admit or deny the allegations of this paragraph and based thereon, deny the allegations."[6] Dugger Senior did not answer any ROG questions, stating in blank: "[T]he defendant ... hereby object[s] to interrogatories #1 thru #16 due to sub parts and burdensome."[7]

On July 27, 2009, the Trustee sent a letter to Dugger Senior setting forth the deficiencies in his discovery responses and proposing a compromise. [*Id.* at Ex. "E"] Dugger Senior did not directly respond to the Trustee's letter. However, on September 23, 2009, Dugger Senior served the Trustee with a supplemental response titled "Responses to Interrogatories" which included a single-page document titled "Eugene Jr. Owes Me. [*Id.* at Ex. "F"] Dugger Senior still did not produce tax returns; he still did not answer any of the ROG questions; and he still did not candidly admit or deny any of the RFA questions, or state any facts showing a "reasonable inquiry." [*Id.*]

On October 1, 2009, the Trustee filed a Motion to Deem Requests for Admission Admitted or, Alternatively, to Compel Responses; and to Compel Interrogatory Responses and Production of Documents; and for Reimbursement of Costs and Sanctions ("Motion to Compel"). [D.E. # 132] The Motion to Compel argued, *inter alia*, that Dugger Senior's objections were improper and his responses were nonresponsive and/or inadequate; that Dugger Senior had not candidly admitted or denied the RFA questions, or attempted to obtain the RFA information from his family by "reasonable inquiry" as required by Fed. R. Civ. P. 36(a)(4);[8] and that Dugger Senior had not produced "the

---

[5] *Id.* at Ex. "C" (Responses to RFA # 23-28).

[6] *Id.* at Ex. "C" (Responses to RFA # 13-14, #16, # 18-19, #21, #29-32, # 34, # 36-45, etc.).

[7] *Id.* at Ex. "D."

[8] *See also* Fed. R. Bankr. P. 7026, incorporating Fed. R. Civ. P. 26(g)(1), requiring that every discovery response must be signed. By signing, that person certifies they have responded to the discovery to the best of that person's knowledge, information, and belief *formed after reasonable inquiry.*

book" described in his deposition. Dugger Senior opposed the motion, but he lacked legal sophistication to properly defend his responses.

At the hearing held October 29, 2009 on the Motion to Compel, the Court granted the motion in part, and denied it in part. The Court directed Dugger Senior to supplement his answers to certain RFA and ROG questions. Further, it directed the Trustee to restate RFA question # 32 and # 48, together with ROG question # 15, into more specific questions. [D.E. # 147] The Court explained to Dugger Senior that he must make a "reasonable inquiry" to answer to the discovery:

> The Court: Well ... Mr. Dugger ... the problem you're saddled with here is that interrogatories [and requests for admissions] require you to make a reasonable attempt to find out, a reasonable inquiry.
>
> Mr. Dugger,. Sr.: Okay.
>
> The Court: Now, if you ask your son, and he's an adult and refuses to tell you, I guess that's the end of it. You need to just tell me: I asked him and he refuses to tell me.
>
> Mr. Dugger, Sr.: I haven't asked him.
>
> The Court: All right. Then you need to ask him. That's what the reasonable inquiry part is.
>
> Mr. Dugger, Sr.: Okay.
>
> The Court: That's what it means. You've got to ask him and find out if he's going to answer .... If he answers, and you have an answer that you can tell us, that's fine. If he won't answer, then you have to say: I've asked him; this is the date I asked, and he refused to answer .... You have to make the attempt .... If you have anything in writing, you have to produce it. If you don't have anything in writing, you have to state that you don't have anything in writing. It is not enough to say: I don't know what you're talking about .... If there aren't any writings, you need to say under oath: I don't have any writings related to this ....
>
> Mr. Dugger, Sr.: Okay. Uh-huh.
>
> The Court: – Where it says that your answers are either nonresponsive or that you have failed to make a reasonable inquiry, you need to make the attempt to find out .... Do you understand what you need to do?
>
> Mr. Dugger, Sr.: That's fine. I can do that.

[D.E. # 170 at Ex. "E" (Motion to Compel Hr'g Tr. 5-6)] Specifically, the Court warned the failure to respond based upon a "reasonable inquiry," and to clarify his answers, would result in additional sanctions, *including a possible terminating sanction*. [D.E. # 147]. On October 30, 2009, the Trustee served Dugger Senior with a Notice of Lodgment attaching the proposed order which incorporated the detailed language in the Minute Order and included a warning that noncompliance could result in a possible terminating sanction ("Discovery Order"). [D.E. # 148][9]

On November 12, 2009, Dugger Senior served his second set of supplemental responses as directed by the Discovery Order. [D.E. # 152] Most of Dugger Senior's November 12, 2009 responses are still nonresponsive to the ROG and RFA questions in violation of the detailed terms of the Discovery Order.[10] He still did not identify any writings in response to ROG question # 14, or state under oath that there are "none," in violation of ¶ 7 of the Discovery Order.[11] Most glaringly, he still did not candidly admit or deny most of the RFA questions; nor did his continuous response of "I do not know"

---

[9] The Discovery Order was entered November 18, 2009. [D.E. # 157]

[10] *See e.g.*, ROG # 12, RFA # 14, RFA # 16, RFA # 29. For example, RFA # 16 asks Dugger Senior to admit or deny the following --

> Question: "Junior represented to the San Antonio realtor, through the San Diego realtor, that Junior (not his father) was the true owner [of the Guadalupe County property]."
>
> Response: "I do not know that he had talked to a San Diego realtor, I asked junior to find me a realtor in Seguin and to contact me about selling the 21 acres [the Guadalupe County property]. I did not know that [sic] asked a realtor on [sic] California."

[D.E. # 152 at ¶ 4 (response to RFA 16)] Dugger Senior's answer is nonresponsive, and it violates ¶ 3 of the Discover Order which directed him to show a reasonable inquiry in responding to RFA 16.

[11] Paragraph ¶ 7 of the Discovery Order directed Dugger Senior to state whether there are any "writings" responsive to his answer to ROG # 14. And, if there are none, he must state there are "none" under oath. Dugger Senior's answer to ROG # 14 is: "I have never given junior any money as a gift, I have loaned him money at different times." [D.E. # 152 at ¶ 12] His answer is nonresponsive to the question in ROG #14, and still fails to identify or deny "writings."

satisfy Fed. R. Civ. P. 36(a)(4) requiring him to show a "reasonable inquiry."[12] Finally, his responses to RFA # 25 - RFA # 28 and ROG # 13 [D.E. # 152 at ¶¶ 32-36], completely contradicted Dugger Senior's sworn deposition testimony.[13]

On December 10, 2009, the Court conducted a continued hearing on the Motion to Compel. The Court granted the Trustee's request for monetary sanctions and directed the Trustee to file a declaration to prove up his fee request.[14] At this hearing, the Trustee raised the issue of the continuing insufficiency of Dugger Senior's November 12, 2009 responses. The Court directed the Trustee to raise the issue in a follow up motion for sanctions.

---

[12] *See eg.* Responses to RFA # 34, # 36- # 45 (D.E. # 152 at ¶ 13, ¶¶ 15-24). For instance, RFA # 34 asks Dugger Senior to admit or deny:

> Question: "By October 2001, Junior was unemployed without construction jobs, and he and his wife were having financial difficulties meeting their bills and financial problems."
>
> Response: "I do not know if he is unemployed or construction work was slow at that time. I do not have any knowledge of his financial troubles, until he told me he was about to lose the 21 acres [Guadalupe property] and wanted to know if I wanted to take over payments." (Still no reasonable inquiry shown in violation of ¶ 8 of the Discovery Order.)

Likewise, RFA # 36 asks Dugger Senior to admit or deny:

> Question: "In 2001, Junior 'wasn't able to pay his debts as they came due.'"
>
> Response: "I do not know." (Still no reasonable inquiry shown in violation of ¶ 10 of the Discovery Order.)

[13] In his deposition, Dugger Senior testified he alone owned Shaeffer Road and he did not give Debtor any of the sales proceeds. However, his November 12, 2009 responses state that Dugger Senior held the title to Shaeffer Road "just for collateral" until he could get the $7,500 Debtor owed him. When he sold the property, he repaid himself from the sales proceeds gave the balance to the Debtor. At the Motion to Compel hearing, Dugger Senior had let this fact slip at which point the Trustee pointed out that Dugger Senior had just "perjured himself." [D.E. # 170 at Ex. "E" (Motion to Compel Hr'g Tr. at 14)]

[14] Trustee has not yet filed a prove up declaration for these fees.

On January 21, 2010, the Trustee filed his follow up Motion for Terminating Sanctions. [D.E. # 173 - # 174] Dugger Senior opposed the Motion for Terminating Sanctions by filing a declaration belatedly claiming: "I asked my son Eugene Dugger Jr. and he told me it was none of my business. That is why I answer I DO NOT KNOW." [D.E. # 175 at ¶ 2 (emphasis in original)]. Dugger Senior still did not state *what* it is he asked the Debtor; *when* he made the inquiry; or *which* of the RFA or ROG questions he was referring to. Further, Dugger Senior's belated claim that he asked the Debtor contradicts his November 12, 2009 response to RFA # 48 B Restated which answered: "I do not know what his [Junior's] assets or liabilities were, *we never talked about it*, it was none of my business." [D.E. # 152 at ¶ 43 (emphasis added)] It is difficult to reconcile Dugger Senior's belated declaration with his earlier response that *we never talked about it.*

Finally, the Court observes that Dugger Senior's declaration contradicts itself. Dugger Senior denied ever holding title for his children. [D.E. #175 at ¶ 8 and ¶ 9] Yet, he admits the Debtor transferred title to the Shaeffer Road property to Dugger Senior "for collateral" because the Debtor "owed me money." [*Id.* at ¶ 8; *see also* D.E. #152 at ¶¶ 33-35 (RFA # # 26-28)] The Court surmises that Dugger Senior may not understand that holding title "for collateral" equates to holding title for the Debtor.

On February 18, 2010, the Court conducted a hearing on the Motion for Terminating Sanctions. At that hearing, Ms. Farina set forth her view that the Discovery Order was violated; she was unlikely to collect monetary sanctions; and she would never obtain truthful answers to her discovery. Dugger Senior expressed his view that Ms. Farina is dishonest and unreasonable; he provided her everything and answered the discovery to the best of his ability; and she is "dragging [his] family through the mud." Further, Dugger Senior confirmed he has no ability to pay a monetary sanction, and if the Trustee is awarded all of these sanctions, he will be forced into bankruptcy. [Feb. 18, 2010 Hr'g Tr. at 18]

///

Because of the severity of the requested terminating sanction and because the Court is mindful that Dugger Senior is representing himself *pro se*, the Court took the matter under submission to review the case law and the evidence.

III.

ANALYSIS

A. <u>Sanctions for Failure to Comply With Discovery Order.</u>

Fed. R. Bankr. P. 7037, which incorporates Fed. R. Civ. P. 37, sets forth the available sanctions for failure to comply with a discovery order. Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii) provides:

> (A) For Not Obeying a Discovery Order. If a party ... fails to obey an order to provide or permit discovery ... the court ... may issue further just orders. They may include the following:
>
> (i) directing that matters embraced in the order or other designated facts be taken as established for purposes of the action ...
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters into evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party;
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(C) provides:

> (C) Payment of Expenses: Instead of or in addition to the orders above, the court must order the disobedient party ... to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Additionally, Fed. R. Bankr. P. 7016, which incorporates Fed. R. Civ. P. 16, authorizes the same sanctions for failure to obey a pre-trial order. Fed. R. Civ. P. 16(f) provides:

> (1) In General. On motion ... the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party ...:
> ...
>
> (C) fails to obey a ... pretrial order.

> (2) Imposing Fees and Costs: Instead of or in addition to any other sanction, the court must order the party ... to pay the reasonable expenses – including attorney's fees – incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

In this case, Trustee seeks an order striking Dugger Senior's answer and entering a default judgment against him as a terminating sanction for his violation of the Discovery Order. Trustee argues that termination of the action through entry of a default judgment is the appropriate sanction because he is unlikely to collect monetary sanctions, and he does not believe the Trustee (or the Court) will ever have access to the truth. Trustee has cited to a five-part test to support his argument for a terminating sanction. He has not, however, given any consideration to Dugger Senior's unfortunate circumstance of trying to defend himself *pro se*.

B. <u>Factors to Consider.</u>

The Ninth Circuit has constructed a five-part test to determine whether a terminating sanction under Rule 37(b)(2) is just: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007); *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). Where a court's discovery order is violated, factors 1 and 2 support the sanction and 4 cuts against a terminating sanction, so factors 3 and 5 (prejudice and availability of less drastic sanctions) are decisive. *Valley Engineers*, 158 F.3d at 1057; *Payne v. Exxon Corp.*, 121 F.3d at 507. Factor 5 involves consideration of three subparts: whether the court explicitly discussed alternative sanctions; whether it tried them; and whether it warned the recalcitrant party about the possibility of a terminating sanction. *Valley Engineers*, at 1057.

The five-part test is not a mechanical test. The list of factors is a guide for a judge to think about what to do. *Id.* The test is not a series of conditions precedent before the judge can do anything; nor is it a script for making what the judge does appeal-proof. *Id.* Even in the absence of all factors, if the court gave the litigant prior opportunities to comply with the discovery order and there "is no reason to believe that further orders would be obeyed," a court may properly find that the litigant's willful refusal to obey the order justifies a sanction terminating the litigation. *Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996).

In this case, the Trustee correctly argues the five-part test supports imposing a case-dispositive terminating sanction. First, the public's interest in expeditious resolution of the case weighs in favor of a terminating sanction due to the many years this bankruptcy case has been pending and the lack of progress made in this adversary proceeding. The Trustee has spent over six months, and he indicated he has spent over $28,000, chasing Dugger Senior for proper discovery responses. It does not appear he will ever get them.

Second, the Court needs to manage its docket. The continuing discovery dispute has already diverted too much of the Court's attention and limited resources. The Court senses the dispute is no longer about the real property. Both sides are stubborn and highly emotional in their dislike of the other side. The Court simply does not have the resources to litigate this dispute to infinity.

Third, the Trustee has urged there is a high risk that he will be unable to keep the attention of his witnesses in Texas who support his case. He indicates he first interviewed these witnesses in early 2008. With each passing day, the risk grows that he will be unable to obtain their cooperation to appear at a trial in San Diego. More importantly, the Court agrees that Dugger Senior's continuing nonresponsiveness, his reversal of sworn testimony, and his refusal to ask his family about basic facts, make it impossible for the Court to conduct a trial with any reasonable assurance the truth would be available.

Finally, the Court has already imposed a less drastic monetary sanction which did not coerce compliance with the Discovery Order. It is pointless to impose yet another monetary sanction since Dugger Senior has no ability to pay them and he intends to file bankruptcy.

C. <u>Special Considerations for a *Pro Se* Litigant.</u>

Notwithstanding, a court must impose a harsh terminating sanction cautiously. For termination to be proper, the sanctioned conduct must be due to a finding of "willfulness, fault, or bad faith" attributable to the litigant, rather than inability to comply. *Payne v. Exxon Corp.*, 121 F.3d at 507; *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995). Further, a court has duty to recognize the *pro se* status of a litigant and to treat the *pro se* litigant more leniently than an attorney-represented litigant. *Downs v. Westphal*, 78 F.3d at 1257; *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). "When a party appears *pro se*, 'the court should carefully assess whether it might ... impose some sanction other than dismissal [termination], so that the party does not unknowingly lose its right of access to the courts because of a technical violation.'" *Ehrenhaus*, 965 F.2d at 920, n.3 (citation omitted).

But, being a *pro se* litigant does give a party unbridled license to disregard clearly communicated court orders. *Downs v. Westphal*, 78 F.3d at 1257. It does not give the *pro se* litigant discretion to choose which of the court's rules and orders it will follow, and which it will wilfully disregard. *Id.* at 1257. Thus, in assessing whether to enter a terminating sanction against a *pro se* litigant, a court should assess whether it clearly communicated its order and whether the failure to obey was due to innocent misunderstanding or lack of familiarity with the law. *Id.* If the court clearly communicated its order, and the *pro se* litigant communicated he understood, the choice to defy the order is not innocent. If the court has no reason to believe a further order would be obeyed, a terminating sanction is warranted. *Id.*

///

///

In this case, Dugger Senior had several opportunities to properly respond to the discovery questions. He disobeyed the Court"s clearly communicated Discovery Order after he expressed his understanding and ability to comply. The Court gave Dugger Senior a template to follow in responding to each question to show he had made a reasonable inquiry. The template was simple; the Discovery Order was clear; yet he chose not to comply.[15] It is pointless to impose yet another layer of monetary sanctions since Dugger Senior cannot pay them. Moreover, given the overall circumstances of this case, it is best to terminate the litigation.

Accordingly, the Court grants the Trustee's motion to terminate the action by striking Dugger Senior's answer and entering a default. However, it will not enter a default judgment against Dugger Senior merely because he refused to cooperate in responding to discovery. The Court granted Ms. Mattei's motion for summary adjudication that the § 546(a) statute of limitations had expired. Upon further review of the amended complaint, it appears Dugger Senior should have the same statute of limitations defense as Ms. Mattei. Accordingly, the Trustee is directed to schedule a hearing on regular notice to prove up his entitlement to a default judgment against Dugger Senior. Specifically, Trustee must identify an actual creditor of Debtor with a debt owed at the time of the transfers to Dugger Senior, and he must explain why he is continuing to prosecute this action against Dugger Senior given the Court's summary adjudication that the § 546(a) statute of limitations has expired. Dugger Senior shall be permitted to present arguments on the statute of limitations issue, but nothing further shall be considered.

///

///

---

[15] Even if the Court considered Dugger Senior's belated declaration a proper response, his belated compliance with the Discover Order would not preclude imposition of sanctions. Last-minute tender of discovery does not cure the prejudice to the opponent nor does it restore to the other litigants on a crowded docket the opportunity to use the courts. *Payne v. Exxon Corp.*, 121 F.3d at 508 (citing *North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986)).

IV.

CONCLUSION

The Court finds that Dugger Senior did not comply with the Discovery Order despite his understanding of its terms and ability to comply. This is not a situation of innocent misunderstanding, inability to comply, or lack of familiarity with the discovery rules and procedures. Dugger Senior acted intentionally and in bad faith despite the prior warning of a possible terminating sanction. The Court has given special consideration to Dugger Senior's *pro se* status, but concludes a terminating sanction is warranted in this case. The Court does not believe a lesser sanction would prompt Dugger Senior to provide accurate, complete responses. Accordingly, the Court shall strike his answer and enter a default against him. Trustee must schedule a hearing to prove up his entitlement to a default judgment in light of the Court's rulings in this case.

Dated: 4 May 2010

LOUISE DE CARL ADLER, Judge