



1 Financial Affairs showed payments made and balances owing to two  
2 real property lenders.

3 The Court set the case for initial status conference, then  
4 after the hearing continued it again. At the April 4, 2011  
5 status conference, the Court advised debtor's counsel of some of  
6 the issues of particular concern to the Court. No applications  
7 had been filed and served seeking authorization for insider  
8 compensation, for employment of counsel, or for use of the cash  
9 collateral from each of the subject properties. The status  
10 conference was continued to May 31, and was continued again to  
11 July 6 after a telephonic appearance by a relative of debtor's  
12 counsel.

13 On July 5, 2011, debtor's counsel filed a motion to avoid  
14 lien and a purported plan. The next day at the status conference  
15 the Court concluded that an Order to Show Cause why the Case  
16 Should Not be Converted or Dismissed should issue, for multiple  
17 reasons. The OSC was issued the same day and cited as grounds:

- 18 1) Failure to advance the case;
- 19 2) Failure to file adequate operating reports;
- 20 3) Failure to file cash collateral agreements or otherwise  
21 obtain authorization to use it;
- 22 4) Failure of counsel to seek employment of his own  
23 firm or of an accountant;
- 24 5) Title issues on the real property because they were  
25 held in the name of a revocable trust;
- 26 6) Insufficient information regarding insurance on the

1 real property;

2 7) Possible mismanagement of estate assets;

3 8) Unreasonable delay prejudicial to others.

4 Two days after issuance of the OSC, debtor filed a motion to  
5 employ the law firm. On August 16, counsel filed a version of a  
6 plan and disclosure statement. At the hearing on the OSC on  
7 August 22, the matter was continued for a week while counsel  
8 filed motions for use of cash collateral or stipulations for its  
9 use, and to seek employment of a bookkeeper. Counsel did file an  
10 amended application to employ his firm, nunc pro tunc, on August  
11 24, and on September 1 motions to use cash collateral were filed.

12 The October 6 hearing on the cash collateral motions had to  
13 be continued for further documents. On October 31 they had to be  
14 continued again, and counsel was instructed:

15 By 11/28 debtor is to file revised operating reports,  
16 an order authorizing employment of counsel, and  
17 application to employ a CPA, and a breakdown of paid  
18 and unpaid revenue & expenses per property including  
19 the status of property taxes.

20 On November 28, counsel filed an application to employ an  
21 accountant. Pending matters had to be continued again from  
22 December 15 and debtor was required to file revised and current  
23 operating reports through November 2011 by January 17, 2012.

24 Amended operating reports were filed on January 17. On January  
25 30, the Court continued the cash collateral motions yet again,

26 \\

1 and required a revised plan to be filed by March 19. One was  
2 filed March 19.

3       Following the April 9 hearing, the Court directed debtor to  
4 file an amended plan and disclosure statement by April 30, and  
5 ruled that cash collateral could be used only with the express  
6 consent of the affected lender. No amended plan and disclosure  
7 statement was filed by April 30. The May 21 status conference  
8 was continued yet again, and debtor was directed that a revised  
9 plan and disclosure statement was to be filed by June 22. One  
10 was filed on June 22. On July 23 the matter was continued again,  
11 and another date set for filing of a newer version, this time  
12 August 29. It was filed August 29.

13       Then came the status conference of September 17, 2012, at  
14 which both counsel for the U.S. Trustee and the Court addressed  
15 at length the continuing concerns of both about the proposed plan  
16 and disclosure statement. Most of those concerns had been raised  
17 previously, and were still not rectified in continuing iterations  
18 of the disclosure statement and plan. The substantial concerns  
19 of both the U.S. Trustee's office and the Court were discussed at  
20 length on the record, as the hearing transcript makes clear.

21       At the conclusion of the September 17 hearing, the Court  
22 continued it yet again, requiring application to set a claims bar  
23 date promptly, and requiring the revised documents to be filed  
24 two weeks prior to the continued date of November 19. The Court  
25 elaborated on what it expected debtor's counsel to do in  
26 preparing those documents.

1           Nothing was filed by debtor by November 5, as required. On  
2 November 7 counsel filed operating reports for July, August and  
3 September. Finally, on November 8 counsel filed a purported  
4 Fourth Amended Plan and Disclosure Statement, which did virtually  
5 none of the things the U.S. Trustee's office or the Court asked  
6 for. Again both counsel for the U.S. Trustee and the Court  
7 prepared for the November 19 hearing. On Friday, November 16,  
8 counsel for debtor finally applied for a claims bar date, which  
9 was promptly granted.

10           On November 19, counsel for debtor did not appear, instead  
11 employing appearance counsel who acknowledged he was unaware of  
12 the history of the proceedings, unaware of what was supposed to  
13 be done after the September 17 hearing, unaware of what was  
14 supposed to have been filed by November 5, and was appropriately  
15 apologetic, even embarrassed. In the Court's view, the failure  
16 of debtor's counsel to comply with the Court's instructions after  
17 a series of largely ignored directions over a protracted period  
18 of time, capped by a nonappearance at a critical hearing on  
19 debtor's latest proposed plan and disclosure statement required  
20 explanation. So, for the first time in well over 20 years on the  
21 bench, the Court issued a Second Order to Show Cause Why the Case  
22 Should Not be Dismissed or Converted. The Court listed six  
23 grounds, some of which were bases for the first OSC. The grounds  
24 listed on the Second are:

- 25           1) Failure to advance the case;
- 26           2) Failure to comply with Bankruptcy Local Rules

- 1 regarding redline revisions to draft disclosure  
2 statement and plan;
- 3 3) Failure to make multiple corrections directed by Court at  
4 prior hearing;
- 5 4) Failure to explain why vacant land is being retained  
6 by estate at expense of creditors;
- 7 5) Failure to adequately demonstrate feasibility of  
8 proposed plan after case has been pending approximately  
9 two years; and
- 10 6) Unreasonable delay prejudicial to others.

11 The OSC advised debtor and debtor's counsel that any opposition  
12 to the OSC was to be filed within 14 days of service of the OSC.

13 On December 7, counsel filed an opposition. In it, counsel  
14 asserted:

15 5. Debtor has requested transcripts of the status  
16 conference held on September 17, 2012 wherein the Court  
17 listed several required revisions to the Debtor's plan  
18 and disclosure statement.

19 6. After reviewing of transcripts, Debtor will  
20 complete all requested revisions and refile his amended  
21 plan and disclosure statement with the Court. Debtor  
22 intends to re-file his amended plan and disclosure  
23 statement on or before December 21, 2012.

24 The Hearing on the OSC had been continued for Court reasons from  
25 January 6 to February 11. On February 6, debtor's counsel filed  
26 a supplemental opposition to the Second OSC. In it, he asserted:

1 Although Debtor has made good faith attempts to correct  
2 the errors within his disclosure statement and plan and  
3 comply with the Court's requirements, a fundamental  
4 miscommunication has occurred between the Court and  
5 Debtor.

6 There is no elaboration on what the nature of that  
7 "miscommunication" was or is. The debtor also filed his Fifth  
8 Amended Plan and Amended Disclosure Statement.

9 At the conclusion of the hearing on the Second OSC, debtor  
10 was directed to file a supplemental declaration "and any  
11 supporting documents with respect to compliance with the Court's  
12 Order to Show Cause." The matter would thereafter be taken under  
13 submission.

14 In the Supplemental, counsel stated, in part:

15 4. In an effort to rectify the issues raised by the  
16 Court regarding the proposed disclosure statement and  
17 chapter 11 plan previously filed in the Bankruptcy  
18 case, I through my office staff, contacted and  
19 requested a hearing transcript initially on October 5,  
20 2012. The relevant transcript (transcript from Court's  
21 hearing on September 17, 2012) alluded to numerous  
22 deficiencies in Debtor's proposed disclosure statement  
23 and chapter 11 plan.

24 5. I, for the second time requested the necessary  
25 transcripts on December 6, 2012 via voicemail to  
26 Lynette Alves, Court Reporter. Per Ms. Alves' request,

1 my law clerk requested the transcripts in writing via  
2 email....

3 6. I was told that the expedited processing would take  
4 7 business days for transcripts to be sent. After  
5 remitting payment for the expedited processing,  
6 Counsel's office was notified that due to the  
7 intervening holidays, processing of the transcripts  
8 would not be completed until December 31, 2012....

9 7. On behalf of Debtor, I filed a timely objection to  
10 the Court's second order to show cause on December 7,  
11 2012.... Debtor's objection stated that an amended  
12 disclosure statement and chapter 11 plan was intended  
13 to be filed on or before December 21, 2012 in lieu [?]  
14 of the receipt of the transcripts. At time of filing  
15 his objection Counsel believed that his office would be  
16 in receipt of the transcript by December 18 or 19, 2012  
17 and not December 31, 2012.

18 Attached to counsel's declaration were copies of some of the  
19 communications concerning the ordering of the transcript of the  
20 September 17 hearing, which set November 5 as the deadline for  
21 filing the revised documents.

22 Debtor's counsel referenced a communication of some sort on  
23 or about October 5, requesting a copy of the transcript. That  
24 may have occurred because subsequent emails reference a prior  
25 communication. In any event, on October 17, 2012 counsel's law  
26 clerk emailed the court reporter requesting the transcript and

1 asking what the cost would be, and whether it was available in  
2 audio. The court reporter responded that same date, saying:

3 I gave you all the cost information and where to send  
4 the cashiers check or m/o before transcript could be  
5 started and then sent to you. I am now out of the  
6 office until 10/23. There is no audio available.

7 The law clerk sent a follow-up email, saying simply "Thanks."

8 According to the declaration of debtor's counsel, and the  
9 attachments to it, there was no further communication with the  
10 court reporter until December 11, five weeks after the revised  
11 documents were to be filed. Nor has counsel showed that any of  
12 the conditions of payment had been met prior to then.

13 The December 11 email to the court reporter from counsel's  
14 law clerk requested the September 17 hearing transcript and  
15 noted: " I have inquired about this previously; however, did not  
16 complete request." The next paragraph read:

17 Please re-state the cost for expedited transcript sent  
18 to our office at the address below. Is it possible to  
19 have transcript emailed? Please let me know where to  
20 send the check or money order?

21 The Court reporter responded the next day, according to  
22 debtor's counsel's attachments. She advised of the terms of the  
23 transcript, expedited and otherwise, as well as where to send the  
24 payment. She specified: "I would require payment by cashiers  
25 check or money order first and then receipt of that starts the  
26 clock." She also included a PS: "the intervening holidays do not

1 count in the timeline." The law clerk responded the same day,  
2 saying "Thank you... we will send payment out immediately."

3 On Monday, December 17 the court reporter wrote saying she  
4 had received the check and deposited it that day. She said she  
5 would get them a copy of the transcript by the end of the year.  
6 The law clerk responded the next day. He wrote:

7 Again, thank you for your best efforts in getting the  
8 pdf transcripts to us. If at all possible, please send  
9 pdf by 12/21 because we have a deadline of 12/28/12 to  
10 file our amended disclosures. We would appreciate any  
11 assistance you can offer in this regard.

12 Some days later the court reporter wrote back, saying:  
13 I'm sorry you're up against due dates that you didn't  
14 inform me of until after sending payment. If you read  
15 the email chain, I told you the 7 business days did not  
16 include the intervening holidays and would have it to  
17 you by the end of the year. If you had given me your  
18 due dates prior, we could've possibly arranged  
19 something else at a higher rate. Unfortunately, at  
20 this point, my timeline is still as promised. You  
21 might want to look into an extension?? Sorry.

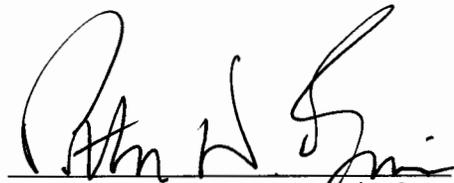
22 The law clerk responded, asked if they would have the transcript  
23 no later than December 31. The court reporter's response came  
24 two days later, on Saturday evening at 7:33 p.m., forwarding an  
25 email copy of the transcript. Receipt was acknowledged by the  
26 law clerk the following Monday.

1           Substantial time has elapsed since the Second OSC was heard,  
2 largely on the Court's end. It is to be expected that much may  
3 have changed in the interim. So, despite the recurring  
4 deficiencies in the handling of this case, the Court will  
5 continue the hearing one more time to see if the debtor can  
6 propose a disclosure statement and plan that can be conditionally  
7 approved to submit to creditors for a vote.

8           The debtor shall have until May 5, 2014 to file a revised  
9 disclosure statement and plan, and serve it on the U.S. Trustee's  
10 office and any creditor who's prior objection has not been  
11 formally resolved. Thereafter, a hearing on the adequacy of the  
12 disclosure statement will be held on June 16, 2014 at 2 p.m. in  
13 this Court. If debtor is unable to timely file and obtain  
14 conditional approval of the disclosure statement as set out  
15 above, the Court will grant the pending Second OSC and order the  
16 case converted to one under Chapter 7, unless the Court is  
17 persuaded otherwise.

18           IT IS SO ORDERED.

19           DATED: MAR 31 2014



PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
325 West F Street, San Diego, California 92101-6991

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In re Bankruptcy Case Name: JASON D. GARNER Case No.: 10-20383-PB11

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON ORDER TO SHOW CAUSE RE: DISMISSAL OR CONVERSION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

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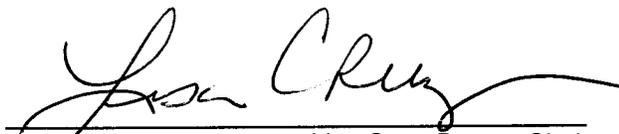
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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on March 31, 2014.

  
\_\_\_\_\_  
Lisa Cruz, Deputy Clerk