OPINION NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: **MINON MILLER,** **Debtor.**	Case No. 2:13-bk-35116-RK Chapter 7 **MEMORANDUM DECISION ON MOTIONS OF CREDITOR EDWARD GILLIAM TO DISMISS BANKRUPTCY CASE FOR BAD FAITH WITH PREJUDICE AND ORDER THEREON**

The contested matters of (1) Motion for Dismissal with Prejudice Due to Bad Faith ("Motion to Dismiss") (ECF 15), (2) Second Amended Motion to Dismiss (ECF 17), and (3) Supplemental Motion to Dismiss (ECF 23) of Creditor Edward Gilliam's ("Creditor" or "Creditor Gilliam") came on for trial before the undersigned United States Bankruptcy Judge on June 12, 2014 and on November 12, 2014. Through these motions, which are contested matters within the meaning of Federal Rule of Bankruptcy Procedure 9014, Creditor contends that this Chapter 7 bankruptcy case filed by Debtor Minon Miller ("Debtor") should be dismissed with prejudice on the grounds that this case was filed in bad faith pursuant to 11 U.S.C. § 707(b)(3)(A), with an award of attorneys' fees and costs

for Creditor. Vic Rodriguez, of the Law Offices of Vic Rodriquez, appeared for and represented Creditor. Debtor Minon Miller appeared for and represented herself.

On December 24, 2014, Creditor lodged proposed findings of fact and conclusions of law. On February 4, 2015, Debtor filed objections to Creditor's proposed findings of fact and conclusions of law and her proposed findings of fact and conclusions of law. On February 11, 2015, Debtor filed amended objections to Creditor's proposed findings of fact and conclusions of law and lodged amended proposed findings of fact and conclusions of law. On February 18, 2015, Creditor filed objections to Debtor's original and amended proposed findings of fact and conclusions of law as well as a motion to strike. Subsequently, the parties filed replies and supplemental objections to each other's proposed findings of fact and conclusions of law and related motions, the last of which was filed on March 11, 2015.

Having considered the evidence received at the evidentiary hearing and the written and oral arguments of the parties on the matters before the court, including the post-trial briefing submitted by the parties on July 11, 2014, on the issue as to what extent a sole member of a limited liability company must disclose the company's income, and the issue as to whether there was bad faith, and the proposed findings of fact and conclusions of law submitted by the parties, and objections, motions and briefing related thereto, this court determines that Creditor's motions should be granted, adopts separate findings of fact along with those discussed herein, and further discusses herein its reasons for so determining that the Debtor's Chapter 7 bankruptcy case was filed in bad faith. The separate findings of fact adopted by the court are based on consideration of the proposed findings of fact submitted by the parties, but have been independently reviewed and substantially revised by the court in its examination and consideration of the evidence admitted at trial, including the documentary evidence and witness testimony.

ANALYSIS

I. CREDITOR'S MOTIONS TO DISMISS FOR BAD FAITH SHOULD BE GRANTED BECAUSE CREDITOR MET HIS BURDEN OF PROVING BAD FAITH UNDER SECTION 707(b)(1) and (3)(A) OF THE BANKRUPTCY CODE, 11 U.S.C., BASED ON THE FACTORS SET FORTH BY THE COURT IN IN RE MITCHELL, 357 B.R. 142 (Bankr. C.D. Cal. 2006).

Section 707 of the Bankruptcy Code authorizes dismissal of a Chapter 7 bankruptcy case under certain conditions. 11 U.S.C. § 707(b). Section 707(b)(1) and (3)(B) of the Bankruptcy Code operate in tandem to allow a bankruptcy court to dismiss a chapter 7 case for abuse of the bankruptcy process based on a bankruptcy petition filed in bad faith or the totality of the circumstances." 11 U.S.C. § 707(b)(1) and (3); *see also, In re Ng,* 477 B.R. 118, 125 (9th Cir. BAP 2012). 11 U.S.C. § 707(b)(1) and (3), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), provide in pertinent part:

> **§ 707. Dismissal of a case or conversion to a case under chapter 11 or 13**
>
> . . .(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee . . ., or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter . . . (3) In considering whether under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted---the court shall consider---(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."

11 U.S.C. § 707(b)(1) and (3), *see also, In re Ng,* 477 B.R. at 125; *In re Maya*, 374 B.R. 750, 752 (Bankr. S.D. Cal. 2007); *In re Mitchell*, 357 B.R. 142, 151 (Bankr. C.D. Cal. 2006) (Robles, J.).

Creditor has moved to dismiss Debtor's Chapter 7 bankruptcy case on grounds of bad faith pursuant to 11 U.S.C. § 707(b)(1) and (3)(A). *See, e.g., Creditor's Supplemental Motion*, ECF 23 at 3:16-27 (page(s):line(s)). In this case, 11 U.S.C. §

707(b)(1) applies here because Debtor acknowledged on her bankruptcy petition that her debts are primarily consumer debts. Petition, ECF 1*; Debtor's Exhibit D-49; see also, In re Mitchell*, 357 B.R. at 151.

Because 11 U.S.C. § 707(b)(3) authorizes the court to dismiss a cases under 11 U.S.C. § 707(b)(1) only when "the presumption in paragraph (2)(A)(i) does not arise or is rebutted," the first step in analyzing § 707(b)(3) is to determine whether the presumption arises. Here, there is no allegation that the presumption arises and Debtor's schedules indicate that the presumption does not arise. *See Debtor's Chapter 7 Statement of Current Monthly Income and Means-Test Calculation*, ECF 10 at 23. Although there are other problems with the calculation of Debtor's current monthly income on Schedules I and J filed by Debtor, which will be detailed later, it does not appear that the 11 U.S.C. § 707(b)(2)(A)(i) presumption arises based on her Schedules I and J. Even if a presumption of abuse does not arise, however, the court may still dismiss a Chapter 7 bankruptcy case for abuse under the alternative tests of § 707(b)(3). *See In re Reed*, 422 B.R. 214, 229-230 (C.D. Cal. 2009) ("even had the Reeds successfully rebutted the presumption of abuse under § 707(b)(2), the UST was entitled to seek dismissal under § 707(b)(3)")(footnote omitted). In other words, a Chapter 7 debtor may "pass" the means test of 11 U.S.C. § 707(b)(2), but may fail the bad faith test of 11 U.S.C. § 707(b)(3)(A) or the "totality of the circumstances" test of 11 U.S.C. § 707(b)(3)(B) to warrant dismissal of the bankruptcy case. *Id.; accord, In re Ng,* 477 B.R. at 126, *citing, In re Reed,* 422 B.R. at 229-230; *see also, In re Paret,* 347 B.R. 12, 14-15 (Bankr. D. Del. 2006) (stating that passing the means test does not put debtors beyond the reach of comprehensive and statutorily mandated inquiry into debtor's fitness for Chapter 7 relief under 11 U.S.C. § 707(b)(3), including the ability to pay creditors); *In re Willingham,* 520 B.R. 818, 823 (Bankr. E.D. Cal. 2014) (stating that debtors' passing the means test does not preclude a discretionary finding of abuse under 11 U.S.C. § 707(b)(3)).

"Pursuant to [11 U.S.C.] § 707(b)(3)(A), an individual consumer debtor's 'bad faith' filing of a Chapter 7 bankruptcy case is itself sufficient 'abuse' to warrant dismissal." 1

March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 5:2217 at 5(II)-61 (2014), *citing, In re Booker,* 399 B.R. 662, 667 (Bankr. W.D. Mo. 2009) ("bad faith" and abuse under "totality of circumstances" test "constitute separate and distinct grounds for relief"); *In re Parada,* 391 B.R. 492, 499 (Bankr. S.D. Fla. 2008) ("Either ability to pay or bad conduct in connection with the bankruptcy will warrant dismissal for abuse under §707(b)(3)"); *see also, In re Reed,* 422 B.R. at 229-230; *In re Mitchell*, 357 B.R. at 151. As the court stated in *Mitchell,* "BAPCPA added two tests to determine whether an 'abuse' of Chapter 7 exists: (1) the filing of a petition in 'bad faith'; and (2) whether 'the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse.'" *In re Mitchell*, 357 B.R. at 151, *citing,* 11 U.S.C. §§ 707(b)(3)(A) and (B). However, as one bankruptcy treatise has observed, "[h]igh standards are set for finding a 'bad faith filing.'" 1 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 5:2217.5 at 5(II)-62, *citing, In re Tamecki,* 229 F.3d 205, 207 (3rd Cir. 2000) (Dismissal of a Chapter 7 case based on the lack of good faith is generally ordered "only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, lavish lifestyles, and intention to avoid a large single debt based upon conduct akin to fraud, misconduct or gross negligence").

The moving party bears the burden of proof to support a 11 U.S.C. § 707(b)(1) motion by a preponderance of the evidence. *In re Cherrett*, 523 B.R. 660, 668 (9th Cir. BAP 2014), *citing inter alia, In re Baker,* 400 B.R. 594, 597 (Bankr. N.D. Ohio 2009). Likewise, the moving party bears the burden of supporting a motion to dismiss under 11 U.S.C. § 707(b)(3) by a preponderance of the evidence. *In re Baker,* 400 B.R. at 597; *In re Lemug,* 403 B.R. 47, 53 (Bankr. N.D. Cal. 2009), *citing, Hebbring v. United States Trustee,* 463 F.3d 902, 909 (9th Cir. 2006).

Because the Bankruptcy Code does not define the term "bad faith," the court in *Mitchell* examined case law determining bad faith in a Chapter 13 bankruptcy case and considered the following nine factors in determining whether a debtor's bankruptcy

petition in a Chapter 7 bankruptcy case was filed in bad faith and thus should be dismissed under § 707(b)(3)(A):

> (1) whether the Chapter 7 debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims;
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> (2) whether debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity;
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> (3) whether debtor obtained cash advances and consumer goods on credit exceeding his or her ability to repay;
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> (4) whether debtor's proposed family budget is excessive or extravagant;
>
> (5) whether debtor's statement of income and expenses misrepresents debtor's financial condition;
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> (6) whether debtor made eve of bankruptcy purchases;
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> (7) whether debtor has a history of bankruptcy petition filings and dismissals;
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> (8) whether debtor has invoked the automatic stay for improper purposes, such as to delay or defeat state court litigation; and
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> (9) whether egregious behavior is present.[1]

In re Mitchell, 357 B.R. at 153-154, *citing inter alia, In re Leavitt,* 171 F.3d 1219, 1224-1225 (9th Cir. 1999) (setting forth factors for bad faith dismissal of Chapter 13 bankruptcy case). As to the "totality of the circumstances" test under 11 U.S.C. § 707(b)(3)(B), the court in *Maya* observed that "[a] central issue under 11 U.S.C. § 707(b)(3)(B) is the role of a debtor's ability to pay" and that "[i]n the pre-BAPCPA days in the jurisdiction of the Ninth Circuit ability to pay was a ground sufficient unto itself to support dismissal for 'substantial abuse'." *In re Maya*, 374 B.R. at 754, *citing inter alia, In re Price, 353 F.3d*

[1] Although the court in *Mitchell* listed nine factors for a court to consider whether a Chapter 7 case should be dismissed on grounds of bad faith under 11 U.S.C. § 707(b)(3)(A), some of the factors do not appear to be relevant in this case, i.e., factors 3, 4, 6 and 9, and the court will not address these factors which would not favor either side. This is in accord with the *Mitchell* bad faith test, which looks at each case holistically. *In re Mitchell*, 357 B.R. at 154 (Bankr. C.D. Cal. 2006) ("Furthermore, no single criterion should be considered dispositive, but rather the entirety of the situation must be evaluated.")

1135, 1140 (9th Cir. 2004). The court in *Mitchell,* however, concluded that no single factor is dispositive and that a finding of fraudulent intent is not required for a finding of bad faith and that all facts in a case must be evaluated. *In re Mitchell,* 357 B.R. at 155. The court determines that the *Mitchell* factors are a useful guide in determining whether this Chapter 7 bankruptcy case should be dismissed as a bad faith filing as contended by Creditor because the factors are consistent with the guidance provided by the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") in *In re Leavitt,* which set out factors for determining whether a Chapter 13 bankruptcy case should be dismissed as a bad faith filing, and *In re Price,* which set forth various factors indicating grounds for dismissal based on abuse. *In re Mitchell,* 357 B.R. at 153-154, *citing inter alia, In re Leavitt,* 171 F.3d at 1224-1225, and *In re Price,* 353 F.3d at 1139-1140.

A. Creditor's Motions to Dismiss Were Timely Filed

As an initial matter, the court notes that Creditor timely filed his motion to dismiss this bankruptcy case pursuant to 11 U.S.C. § 707(b)(3). The deadline for filing a motion to dismiss under 11 U.S.C. § 707(b)(3) is 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a). Fed. R. Bankr. P. 1017(e)(1); *In re dePellegrini,* 365 B.R. 830, 831 (Bankr. S.D. Ohio 2007); *see also,* 1 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 5:2216.7 at 5(II)-61. The first date set for the meeting of creditors in this case was November 18, 2013. *Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines,* ECF 2, filed on October 15, 2013. On November 12, 2013, Creditor filed his original motion to dismiss the Chapter 7 case with prejudice pursuant to 11 U.S.C. § 707(b)(3)(A). *Motion to Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. Sec. 707(b)(3)(A),* ECF 15, filed on November 12, 2013. On November 14, 2013, Creditor filed his amended motion to dismiss the case pursuant to 11 U.S.C. § 707(b)(3)(A). *Second Amended Notice of Motion and Motion to Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. Sec. 707(b)(3)(A),* ECF 17, filed on November 14, 2013. On December 2, 2013, Creditor filed his amended motion to dismiss the case pursuant to 11 U.S.C. § 707(b)(3)(A). *Supplemental Motion to*

Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. Sec. 707(b)(3)(A), etc., ECF 23, filed on December 2, 2013. All three of Creditor's motions to dismiss pursuant to 11 U.S.C. § 707(b)(3)(A) met the filing deadline of Federal Rule of Bankruptcy Procedure 1017(e)(1) because they were filed within 60 days after the first date set for the meeting of creditors on November 18, 2013.

B. Creditor Has Standing to Bring These Motions to Dismiss Despite the Restrictions Imposed by 11 U.S.C. § 707(b)(6).

Although not raised by the parties, the court observes that Creditor's motions to dismiss pursuant to 11 U.S.C. § 707(b)(3) are subject to a statutory standing requirement imposed by 11 U.S.C. § 707(b)(6). That subsection states that only the court and the United States Trustee can bring a motion to dismiss under 11 U.S.C. § 707(b) if the debtor's income is less than or equal to the state's median income for a household of the same size. 11 U.S.C. § 707(b)(6); *see also,* 1 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 5:2216.5 at 5(II)-60; *see also, Schuchardt v. Gandy (In re Gandy),* 2014 WL 1374050 (Bankr. E.D. Tenn. 2014), slip op. at *7-8 (discussing procedural history of case that the court had denied creditor's first motion to dismiss for lack of standing under 11 U.S.C. § 707(b)(6)). Although the statutory standing requirement of 11 U.S.C. § 707(b)(6) was not discussed by the parties in their papers or pleadings, the court addresses this requirement because it is a statutory requirement of the Bankruptcy Code.

Debtor on her means-test form, Form B22A, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, ECF 10 at 23-25, filed on October 29, 2013, listed her current monthly income for purposes of 11 U.S.C. § 707(b)(7) as $5,511.00, her annualized current monthly income as $66,132.00, and reported her household size was 4. $66,132.00 is below the applicable median family income in California of $75,656.00 for a household of 4. *Findings of Fact 2-4, 55-57; see also, Census Bureau Median Family Income by Family Size for Cases Filed Between May 1, 2013 and November 14, 2013, Inclusive,*

http://justice.gov/ust/eo/bapcpa/20130501/bci_data/median_income_table.htm (accessed on July 13, 2015). However, Debtor on her Schedule J – Current Expenditures of Individual Debtor(s) ("Schedule J"), only listed herself and two dependents, a daughter, age 20, and a cousin, age 17, as members of her household, and thus, her household size was only 3, and therefore, the applicable state median family income for her household of three persons was $67,401.00. *Id.; Schedule J,* ECF 10, filed on October 29, 2013. Nevertheless, based on Debtor's self-reported figures, her annualized current monthly income was still below the applicable state median family income, and based on these figures, 11 U.S.C. § 707(b)(6) would thus prohibit Creditor from moving to dismiss the case pursuant to 11 U.S.C. § 707(b)(3)(A). Debtor could have objected under 11 U.S.C. § 707(b)(6) to Creditor's standing to move to dismiss her case under 11 U.S.C. § 707(b)(3)(A), but she did not. For example, Debtor did not raise any objection to Creditor's standing in her original opposition to his original motion to dismiss. *Objection to Motion to Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. § 707(b)(3)(A),* ECF 19, filed on November 13, 2013, at 1-23. Neither did Debtor assert any objection under 11 U.S.C. § 707(b)(6) to Creditor's standing to move to dismiss her case in her proposed findings of fact and conclusions of law submitted after trial of the matter. *[Proposed] Statement of Facts and Conclusions of Law by Debtor Minon Miller,* ECF 103, filed on February 4, 2015, at 1-54; *[Proposed] Amended Statement of Facts and Conclusions of Law by Debtor Minon Miller,* ECF 117, lodged on February 11, 2015, at 1-60.[2] The contested matters of Creditor's motions to dismiss Debtor's Chapter 7 bankruptcy case under 11 U.S.C. § 707(b)(3)(A) proceeded to trial and submission of proposed findings of fact and conclusions of law and supplemental motions and briefing without Debtor raising any objection to Creditor's statutory standing under 11 U.S.C. § 707(b)(6). Unlike constitutional standing, which is jurisdictional, statutory standing, such

[2] Debtor's proposed amended statement of facts and conclusions of law lodged on February 11, 2015 were not reflected on the case docket, so the court ordered them placed on the docket by its order entered on August 11, 2015. ECF 117.

as set forth in 11 U.S.C. § 707(b)(6), may be waived, as the Ninth Circuit has held in *Bilyeu v. Morgan Stanley Long Term Disability Plan,* 683 F.3d 1083, 1090 (9th Cir. 2012) (citations omitted). The court finds that Debtor's failure to raise any objection to Creditor's statutory standing under 11 U.S.C. § 707(b)(6), beginning with her opposition to the original motion to dismiss, and through the conduct of the trial and post-trial briefing, constitutes a waiver of any potential objection.

Having addressed the preliminary matters of timeliness of Creditor's motions to dismiss and Creditor's standing to move to dismiss, the court now addresses the merits of Creditor's motions. In this case, as discussed herein, the court determines that Creditor has proven by a preponderance of the evidence that the case should be dismissed pursuant to 11 U.S.C. § 707(b)(3)(A).

1. Debtor's Case Should Be Dismissed for Bad Faith Because She Has Distorted Her Ability to Pay Debt by Understating Income on Her Statement of Financial Affairs and by Strategically Timing Her Bankruptcy Filing to Mask the Seasonal Nature of Her Income, and Has Abused the Bankruptcy Process for Advantage in Litigation with Creditor Gilliam.

The first factor in *Mitchell* to determine whether a Chapter 7 bankruptcy case should be dismissed for bad faith under 11 U.S.C. § 707(b)(3)(A) is "whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan, which would pay a substantial portion of the unsecured claims." 357 B.R. at 155.

Before the enactment of BAPCPA, the Ninth Circuit held that "the primary factor" defining "substantial abuse" in a Chapter 7 bankruptcy case is the "debtor's ability to pay his debts," and the presence of that factor alone may justify an 11 U.S.C. § 707(b) dismissal. *In re Price*, 353 F.3d 1135, 1140 (9th Cir. 2004), *citing, In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988). Although BAPCPA changed the standard for dismissal under 11 U.S.C. § 707(b) in this context from "substantial abuse" to "abuse," the courts have recognized that pre-BAPCPA law is still applicable when determining whether a Chapter 7 bankruptcy case should be dismissed for abuse. See, e.g., *In re Ng,* 477 B.R. at 126

(collecting cases). Thus, it appears that at least in the Ninth Circuit based on *Price* and *Ng*, the law is still that the presence of the factor of the "debtor's ability to pay his debts" by itself may warrant dismissal under 11 U.S.C. § 707(b). Debtor argues that "[a] debtor's ability to pay a distribution to unsecured creditors is a significant factor, but Courts have held that there must be additional indicia of abuse to dismiss a case under 707(b)(3)." *[Proposed] Amended Statement of Facts and Conclusions of Law by Debtor Minon Miller,* ECF 117, lodged on February 11, 2015, [Proposed] Conclusion of Law No. 7 at 54, *citing, In re Vecera,* 430 B.R. 840, 845 (Bankr. S.D. Ind. 2010). Although Debtor correctly recites the statement of law by the court in *Vecera,* the court does not give much weight to the statement of law in that case because it and the cases cited in the opinion are out of circuit authority, which appear to be inconsistent with the law of the Ninth Circuit as stated in *Price* and *Ng*. Nevertheless, as discussed below, dismissal for bad faith is warranted here, not only considering the factor of Debtor's ability to pay debt, but also because Debtor has seriously misrepresented her ability to repay her debts by omitting a significant amount of income from her statement of financial affairs and by timing her bankruptcy filing to artificially lower her stated "current monthly income," which is derived by extrapolating from a six-month sample size shown on her Schedules I and J.

a. Debtor Misrepresented Her Income on Her Statement of Financial Affairs by Substantially Understating Her Business Income from Her Single-Member Limited Liability Company, Nonim, LLC.

i. *Debtor Substantially Understated Nonim LLC's Income in Debtor's Statement of Financial Affairs*

A question arose at trial as to what extent Debtor, as the sole member of a limited liability company, must disclose the income of the company on her bankruptcy schedules, including her statement of financial affairs. Pursuant to Section 521(a)(1) of the Bankruptcy Code, 11 U.S.C., and Federal Rule of Bankruptcy Procedure 1007(b), a debtor must file a "schedules of assets and liabilities," a schedule of "current income and

expenditures" and a statement of debtor's financial affairs. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007(b)(1). *See also,* 9 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 1007.03[1][a] at 1007-13 – 1004-14 (16th ed. 2015). "[T]he debtor has a duty to prepare schedules carefully, completely, and accurately." *Cusano v. Klein,* 264 F.3d 936, 946 (9th Cir. 2001)(citations omitted); *see also, In re Fauchier,* 71 B.R. 212, 215 (9th Cir. BAP 1987) (bankruptcy debtors bear the burden "to use reasonable diligence in completing their schedules and lists")(citations omitted), *cited in,* 9 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 1007.03[1][a] at 1007-15 and n. 13. The purpose of a bankruptcy debtor's bankruptcy schedules and statements, such as the Statement of Financial Affairs, "is to give interested parties enough information to decide whether they want to engage in further inquiry." 9 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 1007.03[1][a] at 1007-15 and n. 14, *citing inter alia, Cusano v. Klein,* 264 F.3d 936 (9th Cir. 2001). If the bankruptcy schedules and statements are inaccurate regarding a debtor's income, that is likely to be material as it is here.

Debtor's Schedules I and J, and the Statement of Financial Affairs, Official Form B7, are required to be signed under declaration of penalty of perjury. Official Form B7; 28 U.S.C. § 1746(2). A false oath on these documents may be the basis for denial of discharge under 11 U.S.C. § 727(a)(4). However, any false oath for purposes of 11 U.S.C. § 727(a)(4) must be "material." *In re Aubrey,* 111 B.R. 268, 274 (9th Cir. BAP 1990). "A statement is material if it bears on the debtor's business transactions, the debtor's estate, the discovery of assets, or the existence of the debtor's property." 4 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 22:905 at 22-122, *citing, In re Chalik,* 748 F.2d 616, 618 (11th Cir. 1984); *In re Olson,* 916 F.2d 481, 484 (8th Cir. 1990); *In re Wills,* 243 B.R. 58, 62 (9th Cir. BAP 1999); *In re Sullivan,* 455 B.R. 829, 839 (1st Cir. BAP 2011). Based on this definition of materiality, as discussed herein, the court determines that Debtor's misrepresentations regarding her income and financial status were material.

The instructions to the Statement of Financial Affairs (Official Form 7) state that "An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs." The form goes on to state:

> *"In business."* A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within two years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be "in business" for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor's primary employment.

Official Form 7, Definition of "In Business"; see also, Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs at 1.

On her Statement of Financial Affairs, Debtor indicated that the gross income from Nonim LLC was "approx. $98,500" in 2012 and "approx. $45,877" in 2013. *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs,* at 12; *Findings of Fact 8-9*. Debtor testified at trial that she only listed her "approximate" earnings from Nonim LLC in her Statement of Financial Affairs. *Transcript of Trial re: Motion to Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. Section 707(b)(3)(A), June 12, 2014 ("June 12, 2014 Trial Transcript"),* ECF 253:1-5)[3]. In explaining this approximation, Debtor testified that she only reported on her Statement of Financial Affairs what she "earned" from Nonim LLC, which was "net income" and not a "gross income" figure for Nonim. *Testimony of Minon Miller June 12, 2014 Trial Transcript*, ECF 72 299:8 – 302:4; *Findings of Fact 93-94*. Creditor argued at trial that Debtor deliberately understated her

[3] (page:line) References to transcript page and line numbers refer to the transcript page number, and not the ECF file stamp page number.

income on her Statement of Financial Affairs in failing to report the gross income of Nonim. *Closing Argument of Creditor's Counsel, Transcript of Continued Hearing re: Oral Argument on Trial for Motion to Dismiss Chapter 7 Case with Prejudice Pursuant to 11 U.S.C. §707(b)(3)(A), November 12, 2014 ("November 12, 2014 Trial Transcript"),* ECF 100 at 70:11-76:22. In response to this argument, Debtor argued at trial that she correctly disclosed her income with respect to Nonim by only disclosing what she earned from Nonim on a net basis because she as Nonim's member made a tax election with the Internal Revenue Service to treat it as a separate taxable entity and therefore, its income was reportable by it on its own tax returns and not on her personal tax returns. *Closing Argument of Debtor November 12, 2014 Trial Transcript,* ECF 100 at 85:11-13 and 91:9-23. The parties spent considerable time arguing over the election of Nonim as a separate tax entity, including whether the election was actually made and the significance of the election if it was made. *November 12, 2014 Trial Transcript,* ECF 100 at 2:3-76:22. However, as discussed below, the court has analyzed the issue and determines that even if Nonim did properly file the election to be treated as a separate tax entity, such election does not matter for bankruptcy reporting purposes, which are at issue here.

The Treasury Regulations on Income Taxes, Title 26, Code of Federal Regulations ("C.F.R.") § 301.7701-1(a) states that the Internal Revenue Code alone prescribes the classification of various organizations for federal tax purposes. In this regard, 26 C.F.R. § 301.7701-2(a) states, "A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." 26 C.F.R. § 301.7701-2(a). A business entity that is not classified as a corporation under Section 301.7701-2 can elect its classification for federal tax purposes. 26 C.F.R. § 301.7701-2(a). If an entity with a single owner does not file an election to be classified as a corporation, then as a matter of default, the business entity is disregarded as separate from its owner. 26 CFR § 301.7701-3(b)(ii). As such, an eligible entity may elect to be classified other than as the sole proprietorship referenced in subsection (b)(ii) by filing

Form 8832, the Entity Classification Election, with the entity's respective tax return. 26 CFR § 301.7701-3(c)(1)(i). According to 26 CFR Section 301.7701-3(c)(1)(ii), an eligible entity must attach Form 8832 to the Federal income tax or information return for that year. In *Meruelo v. Commissioner*, 691 F.3d 1108, 1111 (9th Cir. 2012), the debtor "was the sole member of Meruelo Capital Management, LLC ("MCM")." MCM was a "single-member limited liability company (LLC) and a disregarded entity by default because it did not file a Form 8832." *Id.* All of MCM's "income and losses were to be reported on the Meruelos' joint tax returns." *Id., citing,* 26 C.F.R. § 301.7701-3(a)).

In this case, Debtor admitted in her trial testimony that she had not filed income tax returns for Nonim for the tax years 2012 and 2013. *Testimony of Minon Miller June 12, 2014 Trial Transcript,* ECF 72 at 252:21-253:2; *Findings of Fact 99-101*. This admission meant that Nonim has not reported its gross business income on any income tax return for these years. In addition, Debtor also admitted during her trial testimony that she did not know how to declare Nonim as a separate entity for tax purposes. *Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 296:3 – 297:8; *Findings of Fact 99*.

On the further session of trial on November 12, 2014, Debtor offered her proposed Exhibit 53, a purported copy of IRS Form 8832, Entity Classification Election. Debtor testified that she filed Form 8832 with the Internal Revenue Service ("IRS") in July 2010. *November 12, 2014 Trial Transcript,* ECF 100 at 17:11-13; *Declaration of Minon Miller attached to Objection to Evidentiary Objections by Creditor Edward Gilliam with Respect to Debtor Minon Miller's Proposed Exhibit 53,* ECF 81 at 22, ¶ 1; *Finding of Fact 111*. Debtor further testified that she never received any notification from the IRS that it accepted or did not accept Nonim LLC's Form 8832 election. *Testimony of Minion Miller November 12, 2014 Trial Transcript,* ECF 100 at 9:22-11:6 and 12:24-13:12; *Declaration of Minon Miller attached to Objection to Evidentiary Objections by Creditor Edward Gilliam with Respect to Debtor Minon Miller's Proposed Exhibit 53,* ECF 81 at 22 ¶ 2; *Finding of Fact 116*. Debtor stated that because she did not receive a letter from the IRS

notifying her that Nonim LLC's election was either accepted or not accepted, she called the IRS to ask for an approval letter in December 2011. *Id.* According to Debtor, the IRS informed her that a Certified Mail Receipt could be used to show acceptance of Nonim LLC's Form 8832 election filing. *Testimony of Minon Miller November 12, 2014 Trial Transcript,* ECF 100 at 44:3-45:16*; Declaration of Minon Miller attached to Objection to Evidentiary Objections by Creditor Edward Gilliam with Respect to Debtor Minon Miller's Proposed Exhibit 53,* ECF 81 at 22*, ¶ 2.*

The instructions for IRS Form 8832 state that if the IRS questions whether Form 8832 was filed, the applying entity can provide acceptable proof of filing in the form of: (1) a certified or registered mail receipt from the U.S. postal service; (2) Form 8832 with an accepted stamp; (3) Form 8832 with a stamped IRS received date; or (4) an IRS letter stating that Form 8832 has been accepted. *Debtor's Exhibit D-53, IRS Form 8832,* at 5. Debtor argues that the receipt attached to Exhibit 53 was a Certified Mail Receipt from the U.S. Postal Service showing that she mailed the form 8832 to the IRS in July 2010. *Exhibit 53* at 3; *Objection to Evidentiary Objections by Creditor Edward Gilliam with Respect to Debtor Minon Miller's Proposed Exhibit 53,* ECF 81 at 1:27-2:2. Having reviewed the receipt attached to Exhibit 53, the court finds that the receipt is a United States Postal Service *sales receipt* showing that Debtor mailed an unspecified item to Ogden, Utah via certified mail. The receipt attached to Exhibit 53 is not a Certified Mail Receipt (PS Form 3800), which would provide the mailer with a mailing receipt and record of delivery at the office of address. *United States Postal Service Publication 109 – Extra Services Technical Guide §2-3 Certified Mail – PS Form 3800.* Although Debtor did not produce a Certified Mail Receipt showing that she mailed IRS Form 8832 to the IRS or any of the other acceptable forms of proof of filing enumerated by the instructions on IRS Form 8832, arguably Debtor has not provided credible evidence that she filed her IRS Form 8832 with the IRS as she says she did, but the court ruled at trial that she did file the Form 8832 with the IRS based on her testimony and the copy of the sales receipt, but noting IRS approval was a different matter. *November 12, 2014 Trial Transcript,* ECF

100 at 53:1-54:8. Arguably, the court's evidentiary ruling receiving Debtor's Exhibit D-53, IRS Form 8832, into evidence was in error, but the court's further analysis as discussed below indicates that the admission or exclusion of Exhibit D-53 does not matter for purposes of deciding this case.

Despite significant argument by the parties over the effect of the classification of Nonim LLC for federal income tax purposes, the reality is that the issue of Nonim's tax status is somewhat of a "red herring". "Red Herring" has been defined as "something unimportant that is used to stop people from noticing or thinking about something important." Merriam-Webster Online: Dictionary and Thesaurus http://www.merriam-webster.com/dictionary/red%20herring (last accessed July 14, 2015). What matters in this case is how the income of a limited liability company should be attributed to its member or members for bankruptcy reporting purposes, which the court believes should be under the laws of the state of its organization. Nonim LLC is a California limited liability company (LLC). *Debtor's Exhibit D-8, Fictitious Business Name Statement for Nonim LLC (signed by Debtor and listing it as a California limited liability company).*

In California, "the profits and losses of a limited liability company shall be allocated among the members, and among classes of members, in the manner provided in the operating agreement." California Corporations Code § 17202 (repealed January 1, 2014) (applicable in years 2012 and 2013). Because Nonim is a single member LLC, "there is little opportunity to make allocations where there is but one party to whom such allocations can be made." 1 Marsh, Finkle and Sonsini*, Marsh's California Corporation Law,* § 3.05(D)(2)(b) at 3-58 (4th ed. 2014). When an LLC is not classified as a corporation, "all of its items of income, gain, loss, expense and deduction (as determined for Federal and California income tax purposes) flow through the LLC to the members, who report such items on their respective annual income tax returns." *Id.* As a matter of California law, all profits and losses of Nonim would be thus allocated to Debtor as its single member under California Corporations Code § 17202 regardless of the entity classification of Nonim for tax purposes.

This concept is further reinforced in the instructions for both Schedule I and the Statement of Financial Affairs. Paragraph 8a of Schedule I requires the debtor to list net income from operating a business, which Debtor ostensibly did. *Creditor's Exhibit C-23, Debtor's Schedule I,* at 2. However, that section also includes instructions to: "Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income." *Id.* Debtor was thus supposed to attach a statement for each of her businesses, including Nonim, which she listed in her Statement of Financial Affairs, but she did not do this. *Id.* At the bottom of the page of her Schedule I for her self-employment as a tax return preparer, Debtor stated: "Dissolving Nonim LLC its insolvent. Tax preparer licence [sic] is current will work as independent contract[or]." Thus, arguably, Debtor is compliant with the instructions for the Schedule I based on Nonim not being operative during the six-month period immediately before the filing of the bankruptcy petition. However, as discussed below, the same cannot be said as to Debtor's Statement of Financial Affairs.

Paragraph 1 of the Statement of Financial Affairs requires the debtor to "State the **gross amount of income** the debtor has received from . . . operation of debtor's business…" (emphasis added). *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 1; *Findings of Fact 14-40*. But as Debtor admitted at trial as noted above, she only listed on her Statement of Financial Affairs what she said was the net income from Nonim rather than the gross income as was required by the form. *Finding of Fact 94.* As discussed above, Debtor argues that she was only required to list the net income of Nonim, and it is this contention that spawned arguments over the classification of Nonim for income tax purposes. As just discussed, Debtor's contention is erroneous because when reporting their financial affairs in bankruptcy, a bankruptcy debtor must make an accounting of, and disclose, all income received from operating a business — the tax treatment of that business is not relevant. *See In re Wiegand*, 386 B.R. 238, 242 (2008) (in a Chapter 13 bankruptcy case, Bankruptcy Appellate Panel stated: "Tax Code

concepts for determining taxable income are inapplicable to a determination of current monthly income [under the Bankruptcy Code].").

At trial, Creditor offered evidence showing that Debtor failed to disclose all of her gross business income from Nonim on her Statement of Financial Affairs she filed in this case. Specifically, Creditor offered into evidence records, obtained by Debtor's state court receiver, Stephen Donell, of an accounting of tax preparation fees paid by Santa Barbara Tax Program Group in 2012 to "MTD Miller Income Tax Service," the dba of Debtor and Nonim, LLC, and that accounting reflected that Debtor earned $422,616.15 in 2012 (an understatement of $341,116.15 in contrast to the statement of only $98,500 by Debtor on her Statement of Financial Affairs). *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 1 and 12; *Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012 by Santa Barbara Tax Program Group* at 27; *Testimony of Stephen Donell, June 12, 2014 Trial Transcript,* ECF 72 at 65-67; *Findings of Fact 14-40*.

Specifically, Creditor offered into evidence records, obtained by Debtor's state court receiver, Stephen Donell, of an accounting of tax preparation fees paid by Santa Barbara Tax Program Group in 2013 to "MTD Miller Income Tax Service," the dba of Debtor and Nonim, LLC, and that accounting reflected that Debtor earned $102,810.67 in 2013 (an understatement of $56,933.67 in contrast to the statement of only $45,877 by Debtor on her Statement of Financial Affairs). *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 12; *Creditor's Exhibit C-16, Accounting of Fees Paid to Debtor in 2013 by Santa Barbara Tax Program Group* at 10; *Findings of Fact 14-40*.

The Receiver obtained financial records of Debtor and Nonim produced in response to document requests propounded by him in his capacity as a state court appointed receiver which requested documents related to the order appointing the receiver that were under the control or in connection to the defendant in that case, which included Debtor. *Testimony of Stephen Donell, June 12, 2014 Trial Transcript,* ECF 72 at 70:6-75:18; Creditor's Exhibit 15; *Findings of Fact 24-30*. The Receiver also relied on Wells Fargo bank account statements under the name of "Nonim LLC" for the periods of

January to April of 2012 and January to August of 2013. *Testimony of Stephen Donell, June 12, 2014 Trial Transcript,* ECF 72 at 68:21-77:20; *Creditor's Exhibits C-17 and C-18; Finding of Fact 30.*

According to Creditor, Debtor substantially understated her gross business income on her Statement of Financial Affairs filed as part of her bankruptcy schedules in this case, and the specific amounts of the income understatements were $341,116.15 for 2012 and $56,933.67 for 2013. *Closing Argument of Creditor's Counsel, November 12, 2014 Trial Transcript,* ECF 100 at 70:11-76:22; *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 1 and 12; *Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012 by Santa Barbara Tax Program Group* at 27; *Testimony of Stephen Donell, June 12, 2014 Trial Transcript,* ECF 72 at 65-67; *Creditor's Exhibit C-16, Accounting of Fees Paid to Debtor in 2013 by Santa Barbara Tax Program Group* at 10. Creditor offered into evidence accounting statements of fee income for MTD Miller Income Tax Service, Debtor's dba ("doing business as"), from the third party electronic tax return processing firm, TPG, Debtor used to electronically file her clients' tax returns, and Nonim's 2012 bank statements as evidence of Debtor's income understatement on her Statement of Financial Affairs for that year.

Specifically, in 2012, Nonim's bank checking account statements from January through April of 2012 reflect respective deposits from TPG totaling $404,036.15. January - $21,465.00, *Creditor's Exhibit C-17, Nonim, LLC's Bank Account Statements with Wells Fargo Bank from January 1, 2012 to April 30, 2012* at 3; February - $160,536.97, *Id.* at 8-11; March - $128,178.13, *Id.,* at 15-18; and April - $93,856.05, *Id.* at 22-25. As shown by these bank statements, Nonim's 2012 bank deposits from TPG of $404,036.15 mostly corroborate Nonim's total 2012 tax preparation fee income of $422,616.15 as shown on TPG's accounting of fees earned by MTDMiller Income Tax Service in 2012. *Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012 by Santa Barbara Tax Program Group* at 1-28; *Findings of Fact 14-40*. Creditor argues that Debtor's disclosure of only $98,500 as her income from Nonim in 2012 on her Statement of Financial Affairs is a

substantially understatement of her gross income in the amount of approximately $324,116.15 based on this evidence, and the court agrees with Creditor's argument and finds that Debtor substantially understated her gross business income for 2012 on her Statement of Financial Affairs in this amount.

Nonim's 2013 bank statements also show Debtor's income understatement on her Statement of Financial Affairs for that year. Specifically, in 2013, Nonim's bank checking account statements from February through May of 2013 reflect respective deposits from TPG totaling $102,810.67. February - $42,930.00, Creditor's Exhibit C-18, Nonim, LLC's Bank Account Statements with Wells Fargo Bank from January 1, 2013 to August 31, 2013 at 7-8.); March - $36,772.67, Id. at 13-15; April - $18,858, Id. at 23-26; and May - $4,250.00 (Id. at 34-36.) As shown by these bank statements, Nonim's 2013 bank deposits from TPG of $102,810.67 corroborate Nonim's total 2013 tax preparation fee income of $102,810.67 as shown on TPG's accounting of fees earned by MTDMiller Income Tax Service (Account No. 3008300001) in 2013. *Creditor's Exhibit C-16, Accounting of Fees Paid to Debtor in 2013 by Santa Barbara Tax Program Group* at 1-11; *Findings of Fact 14-40*. Creditor argues that Debtor's disclosure of only $45,877.00 as her income from Nonim in 2013 on her Statement of Financial Affairs is a substantial understatement of her gross income in the amount of approximately $56,933.67 based on this evidence, and the court agrees with Creditor's argument and finds that Debtor substantially understated her gross business income for 2013 on her Statement of Financial Affairs in this amount. The evidence at trial demonstrates that in total, Debtor understated her gross income from her business, Nonim, on her Statement of Financial Affairs by a total of $381,049.82 for 2012 and 2013.

Creditor has shown by a preponderance of the evidence that Debtor did not fully disclose all of her gross income from her single-member LLC business, Nonim, on her bankruptcy schedules, as she was required to do under bankruptcy law, and her failure to fully disclose her income on her bankruptcy schedules, i.e., her gross income from her businesses on her Statement of Financial Affairs, was substantial and material. 11

U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007(b)(1). Debtor by stating only her net income from Nonim did not give a fair and accurate representation of her income-generating capability based on her historical income and expense data for 2012 and 2013 because the Statement of Financial Affairs instructed that Debtor state her gross income from her businesses, including Nonim, and creditors and interested parties could evaluate for themselves her income-generating capabilities by looking at her gross income and the claimed expenses against such gross income, to determine the reasonableness of the amounts disclosed.

Although some courts have allowed debtors to amend schedules that misrepresented the debtors' financial condition, it would not be appropriate to do so here. See *In re Suttice*, 487 B.R. 245, 256 (Bankr. C.D. Cal. 2013) (allowing the debtors to file Second Amended Schedules I and J because of "non-attentiveness by their former counsel . . . that resulted in some inaccuracies presented" in their first schedules). In this case, there is no evidence that Debtor's schedules were the product of non-attentiveness or mistake, or otherwise innocent. The instructions on the official form Statement of Financial Affairs are clear and explicit that gross income from the Debtor's business was required to be disclosed on the Statement of Financial Affairs and that Debtor disregarded the official instructions and disclosed only net income of her business rather than gross income, which she admits was only approximate and which was not supported by any substantiation whatsoever. *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 1 and 12. Given the large amounts of gross income that Debtor received through her single-member LLC, Nonim, as shown by bank records, the court determines that debtor's failure to disclose Nonim's gross income on her Statement of Financial Affairs was deliberate and was intended to minimize the amount of the previous years' income she had to disclose on her schedules and thereby obscure her true ability to pay debt.

The court therefore determines that Debtor has seriously misrepresented her income and expenses by failing to include Nonim's gross income and expenses in her

bankruptcy schedules and stating only net income from Nonim, which substantially understated her gross income, and in turn, her income-generating capability, and that such misrepresentation was intentional, and not innocent or inadvertent.

ii. Debtor Used Funds from Nonim LLC's Bank Accounts for Her Personal Expenses

As reviewed herein, Nonim LLC's bank statements have shown that Debtor was using the funds in Nonim LLC's bank account for her own personal expenses. While Debtor's testimony was that this money was spent to attract low-income clients and for employee incentives, the court does not find Debtor's testimony credible for lack of corroborative evidence. *See Testimony of Minon Miller, June 12, 2014 Trial Transcript*, ECF 72 at 271:22-293:15. No other witness testimony or exhibits corroborate Debtor's testimony. Debtor herself in her testimony failed to present any specific details on the identity and purpose of the claimed business expenses of a personal nature as "travel and entertainment" business expenses. See Section 274 of the Internal Revenue Code, 26 U.S.C.; 26 C.F.R. 1.274-5T. As a tax return preparer, Debtor should be familiar with the generally known substantiation requirements for travel and entertainment business expenses, which include contemporaneous accounting of business purpose and identification of clients for each expense, and Debtor's conclusory testimony that these expenses of a personal nature were business expenses completely fails to substantiate any business purpose for these expenses.

Numerous expenses in the Nonim LLC bank statements are of a personal nature and are unrelated to tax preparation, including: Pauline's Human Hair (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts*, at 17, line entry for 3/26); Nora Eyebrow Threading (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 17, line entry for 3/23); ShopNastyGal.com (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 27, line entry for 4/30); Philthy Ragz (*Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 35, line entry for 5/13); Burke Williams Spa (*Creditor's Exhibit C-17, Wells Fargo Combined Statement*

of Accounts, at 2, line entry for 1/3; *Id.* at 9, line entry for 2/3; *Id*. at 17, two line entries for 3/19; *Id.* at 22, line entry for 4/3; *Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 13, line entry for 3/4; *Id.* at 15, line entry for 3/25; *Id.* at 26, line entry for 4/29); Victoria's Secret (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 26, two line entries for 4/30; *Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 13, line entry for 3/11); Nordstrom (Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts, at 10, line entry for 2/24; *Id.* at 10, line entry for 2/27; *Id.* at 15, line entry for 3/5; *Id.* at 16, line entry for 3/12; *Id.* at 23, three line entries for 4/9; *Id.* at 25, line entry for 4/23; *Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 14, line entry for 3/11; *Id.* at 25, line entry for 4/18; *Id.* at 25, two line entries for 4/19; *Id.* at 35, line entry for 5/28); Louis Vuitton (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 23, line entry for 4/9); Bloomingdales (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 25, line entry for 4/24); Boston Proper (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 22, line entry for 4/2; *Id.* at 23, line entry for 4/10); Ugg Store (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 22, line entry for 4/2); Michael Kors Retail (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 22, line entry for 4/2); Steve Madden (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 22, line entry for 4/3); True Religion (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 22, line entry for 4/3); Bebe Store (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 25, three line entries for 4/24; *Id.* at 27, two line entries for 4/30; *Creditor's Exhibit 18, Wells Fargo Combined Statement of Accounts*, at 14, two line entries for 3/11); BCBG (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 25, line entry for 4/24; *Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 23, line entry for 4/5); Fashion Trend (*Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 14, line entry for 3/22); Save-On-Crafts.com (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 9, line entry for 2/6; *Id.* at 9, line

entry for 2/9); Fashion Beauty (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts*, at 9, line entry for 2/13; *Id.* at 15, line entry for 3/5; *Id.* at 17, line entry for 3/26; *Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 8, line entry for 2/19); Eyeexam (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 27, line entry for 4/30); Lenscrafters (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 17, line entry for 4/30); Tammy's Beauty Salon (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts*, at 9, line entry for 2/13); Johnny's Beauty (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 24, line entry for 4/12); Beauty Lounge (*Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 8, line entry for 2/19; *Id.* at 14, line entry for 3/15); JW Marriott in New Orleans, Louisiana (*Creditor's Exhibit C-17, Wells Fargo Combined Statement of Accounts,* at 18, two line entries for 3/30); and 24-Hour Fitness in Lakewood, CA (*Creditor's Exhibit C-18, Wells Fargo Combined Statement of Accounts*, at 34, line entry for 5/2; *Id.* at 35, line entry for 5/28; *Id.* at 43, line entry or 6/26); *Findings of Fact 41-54*. These personal expenses included the purchase of a prom dress for Debtor's daughter in alleged payment for office work for Nonim, leisure travel for Debtor, her sister and cousins to New Orleans as a "reward" for their alleged tax return preparation assistance for Debtor at Nonim, and gift cards as "rewards" for others for their alleged referrals of potential clients as admitted in Debtor's trial testimony describing the alleged business purposes of these expenditures, which is not corroborated by any other witness or documentary evidence. *See Testimony of Minon Miller, June 12, 2014 Trial Transcript* ECF 72 at 271:12 - 293:15. For example, the court does not find credible Debtor's testimony that Nonim LLC bought $1,109 worth of "Ugg" gift cards or $2,034 worth of Michael Kors gift cards as an incentive for contractors. *See Testimony of Minon Miller, June 12, 2014 Trial Transcript* ECF 72 at 279:16 - 280:8. This testimony of Debtor was not corroborated by any other witness, nor by any other credible documentary evidence that any of these expenses had a legitimate business purpose related to Debtor's tax return preparation business.

The personal nature of these expenses, many of which are for clothing and related accessories, beauty and personal grooming, and vacation travel, indicate that Debtor used funds to pay her expenses of a personal nature from Nonim's accounts, which would not ordinarily be considered business expenses related to tax return preparation. Due to the unsubstantiated business purpose of these mostly personal expenses, the court attributes these expenses to Debtor as additional income which was not reported by her on her Statement of Financial Affairs. While the court has determined that Debtor has underreported her income from Nonim on her Statement of Financial Affairs based on gross receipts of Nonim, it would be double-counting this income to add these personal expenses for the purposes of determining her income understatements from Nonim on her Statement of Financial Affairs. (However, given Debtor's position that she need only report her "net" income from Nonim, her failure to include these personal expenses would also be considered an understatement of income by her on her Statement of Financial Affairs.)

While using a business bank account to pay personal expenses does not, by itself, constitute bad faith, the large amount of funds used for personal expenses in light of Debtor's position that she only needed to report her "net" income on her Schedule I or Statement of Financial Affairs does further indicate that Debtor's lack of full and accurate disclosures of income on her bankruptcy schedules and that Debtor was motivated to misrepresent her income on her bankruptcy schedules due to personal nature of expenditures from her business.

b. Debtor's Bankruptcy Petition Filing in this Bankruptcy Case Was Strategically Timed to Understate Her Income for the Means-Test and Her Ability to Repay Debt on Her Bankruptcy Schedules.

The original Schedule I listed Debtor's employment as a casual longshore employee at the Pacific Maritime Association with a net monthly income of $2,208.64 and her employment as a self-employed tax preparer at Minion Miller with a net monthly income of $3,000. *Creditor's Exhibit C-23, Debtor's Schedule I; Findings of Facts 5-6.*

On her Statement of Financial Affairs, Official Form B7, Debtor indicated that she was a "Member" of "Nonim LLC dba MTD Miller Income Tax Service (Tax Prep)" from "2010 to present." *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 13; *Finding of Fact 7*. On her Statement of Financial Affairs Debtor also indicated that her income from Nonim LLC was "approx. $98,500" in 2012 and "approx. $45,877" in 2013. *Creditor's Exhibit C-26, Debtor's Statement of Financial Affairs* at 12; *Findings of Fact 8-9*.

The *Mitchell* bad faith factors do not look only at the "current monthly income" of the debtor, which is specifically defined for purposes of Schedule I and the means-test form. The facts of this case show why it is important not to focus on the artificially defined "current monthly income" under the means test analysis of 11 U.S.C. § 707(b)(2). Here, Debtor filed her Chapter 7 bankruptcy petition on October 15, 2013, which probably was not a coincidence. Due to the seasonal nature of Debtor's work as a tax return preparer, the October 15 bankruptcy filing date served to omit the maximum amount of income which Debtor would have been required to include in her income and expense schedules, Schedules I and J, which have a six-month lookback. "Tax season," that is, tax return preparation season, is commonly described as beginning on January 1 and ending on April 15, but can sometimes begin even later than January 1. "Tax Season Definition" http://www.investopedia.com/terms/t/tax-season.asp (last checked July 22, 2015; "IRS Plans Jan. 30 Tax Season Opening For 1040 Filers" http://www.irs.gov/uac/Newsroom/IRS-Plans-Jan.-30-Tax-Season-Opening-For-1040-Filers (last checked July 22, 2015); *Finding of Fact 21; see also,* 26 U.S.C. § 6072 (federal individual income tax returns are generally due on the 15th day of the fourth month after the end of preceding calendar year on December 31, which is normally April 15). October 15 is exactly six months after that general tax return due date April 15, or the end of tax season. Debtor's income as a tax return preparer is largely concentrated in the few months leading up to April 15. Therefore, filing six months after April 15 will mean that Debtor's "current monthly income" will vastly understate her actual financial status because it is limited to a six-month lookback. The bankruptcy court in *In re Ng*

similarly went outside the face of the debtors' Schedule I, and took into account additional evidence of income in computing the debtor's true net monthly income. *See In re Ng*, 477 B.R. at 131-132. As noted in *In re Ng,* the court in *In re Reed,* 422 B.R. at 233, held that the debtor's ability to pay constituted abuse under the totality of the circumstances test of 11 U.S.C. § 707(b)(3)(B), even where the debtor passes the means test of 11 U.S.C. § 707(b)(2). *In re Ng,* 477 B.R. at 126; *see also, In re Paret,* 347 B.R. at 14-17 (holding that consideration of a debtor's ability to pay may indicate abuse under 11 U.S.C. § 707(b)(3), stating that "[n]o presumption of abuse does not mean there is no abuse"); *In re Willingham,* 520 B.R. at 823 (stating that debtors' passing the means test without creating a presumption of abuse is "inconsequential" if the case is otherwise "abusive" under 11 U.S.C. § 707(b)(3)).

In the court's view, a truer picture of Debtor's regular annual income comes from analysis of her actual income, based on her financial records considered on a yearly basis, rather than on a truncated basis from the "current monthly income" of the means test, which relies on only a six-month lookback from April to September of 2013. *Findings of Fact 61-68.* This picture reveals a much greater ability of Debtor to repay creditors than as reflected in her bankruptcy schedules. *Id.* In reaching this conclusion, the court has reviewed Debtor's gross receipts from Nonim for the twelve months between October 1, 2012 through September 30, 2013. *Id.*

The evidence includes the TPG's records of disbursement of tax return preparation fee income paid to Debtor dba MTDMiller Income Tax Service (Account Number 3008300001) for the time period between September through December 2012, which records were obtained by the Receiver. *Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012* at 27; *Findings of Fact 61-68*. TPG's records show that it paid Debtor dba MTDMiller Income Tax Service as tax return preparation fees a total of $310.00 disbursed on October 19, 2012. *Id.* The evidence includes the TPG's records of disbursement of tax return preparation fee income paid to Debtor dba MTDMiller Income Tax Service (30083000001) for the time period between February through May

2013, which records were obtained by the Receiver. *Creditor's Exhibit C-16, Accounting of Fees Paid to Debtor in 2012* at 1-11. TPG's records show that it paid Debtor dba MTDMiller Income Tax Service as tax return preparation fees during the time period of February through May 2013 in the total amount of $102,810.67. *Id.* This amount is corroborated by Nonim's bank checking account statements for the time period between February through May 2013 showing bank deposits from TPG during this time period totaling $102,810.67. *Id.*

Therefore, Debtor's total gross income for the fiscal year of October 1, 2012 through September 30, 2013, based on fee income paid by TPG to MTDMiller Income Tax Service, as shown by TPG's accounting records and Nonim's bank checking account statements, was $103,120.67, which yields a monthly income average of $8,593.38. *Findings of Fact 61-68.* Based upon Creditor's evidence of Debtor's tax return preparation income from TPG in the fiscal year between October 1, 2012 and September 30, 2013, the average monthly gross receipts of $8,593.38 for this twelve-month time period exceeds the $5,956.00 in average monthly gross receipts reported on Debtor's Means-Test, a difference of $2,637.38, which added to Debtor's declared total current monthly income of $5,511.00 would have yielded an adjusted total current monthly income of $8,148.38, which multiplied by 12 months, would yield in turn an adjusted annualized current monthly income of $97,780.56, *Id.* This would have exceeded Debtor's declared applicable median family income of $75,656.00 for a family of four in California, or the applicable median family income of $67,401 for a family of three in California, which the court determines that Debtor should have declared. *Id.* Debtor would have then had to have listed her living expense deductions in order to determine whether or not a presumption of abuse should have arisen under 11 U.S.C. § 707(b)(2), which she did not have to do because she declared an annualized current monthly income of less than the applicable median family income in the state, thus evading further scrutiny for abuse under 11 U.S.C. § 707(b)(2). *Id.*

This shows the distorted nature of the means-test results when analyzing Debtor's

ability to pay creditors based on the six month lookback period starting with October 15 because it misses Debtor's true income from her tax return preparation business, which was bunched up in the early months of the calendar year during tax season. The court finds that this evidence shows that Debtor deliberately chose October 15 as her filing date in an attempt to manipulate the means test calculation period on Schedule I in order to hide her true income earning ability. The court determines that this is an indicator of bad faith.

c. Debtor Has the Ability To Continue Working as a Tax Return Preparer.

In this case, Creditor argued that Debtor wanted to falsely portray that "she will no longer work as a tax preparer," while in fact her "earning capacity is more than sufficient to pay her creditors outside bankruptcy." *Movant's [Creditor's] Opening Brief re: Tax Issue and Mitchell Factors filed on July 11, 2014,* ECF 73 at 8. Creditor also argued that Debtor's 2013 income "exceeded her annualized expenses," and that there was "nothing precluding the Debtor from simply starting operations again this January as a sole proprietorship or as a new corporate entity through which she provides her personal services again as a tax preparer." *Movant's [Creditor's] Reply Brief re: Tax Issue and Mitchell Factors, filed on August 15, 2014,* ECF 75 at 5-8.

The evidence indicates that Debtor has the ability to earn sufficient income as a tax return preparer to repay her debts, though she denied this at trial, claiming that she no longer received an income from Nonim LLC because the state court receiver took over the premises of Nonim, denied Debtor access to the premises, and rendered the business insolvent. *Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 352:3 - 358:9. Debtor's occupation as a tax return preparer, however, allows her to make an income without relying on a separate entity for employment, as evidenced by the facts that she was and is self-employed as a tax return preparer and operated her tax return preparation business either as a sole proprietor or as the sole member of her limited liability company, Nonim. *Findings of Fact 14-40.* Furthermore , Debtor's offered excuse that she can no longer work with her previous clients because she feels it would be

"embarrassing" is not credible. *Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 359:18-24. The court in *In re Mitchell*, 357 B.R. at 156, observed that the debtor made "scant efforts" to find employment by only attending two informal job interviews. Similarly, in this case, Debtor has also made only "scant efforts" to find employment. She gave no testimony to demonstrate that she performed any due diligence in seeking work as a tax return preparer by taking such reasonable steps as contacting old clients, reaching out to new ones, or applying for other tax preparation jobs in order to pay her debts.

Based on the above discussion, the court finds that the preponderance of the evidence indicates that Debtor had sufficient funds to pay her debts before filing for bankruptcy, which establishes the presence of the first *Mitchell* factor. Under cases such as *In re Price,* this factor alone would be sufficient to warrant a 11 U.S.C. § 707(b) dismissal for abuse assuming Debtor had made full and accurate disclosures on her bankruptcy schedules, but here, the evidence indicates that Debtor misrepresented her income on her Statement of Financial Affairs by stating her net rather than gross business income to disguise her actual earning ability, which is an aggravating circumstance that indicates bad faith in addition to financial ability to pay debt. *Findings of Fact 14-40.* As stated previously, creditors and interested parties could not meaningfully evaluate Debtor's true income-generating capabilities for reasonableness without full and accurate disclosures of her gross business income as well as the claimed offsetting business expenses.

Debtor apparently argues that the Receiver's takeover of the Nonim's business premises adversely affected her ability to generate income, but the evidence does not bear this out. *See Amended Statement of Facts and Conclusions of Law by Debtor Minon Miller,* lodged on February 11, 2015, ECF 117 at 7-8, 24. The Receiver took over Nonim's business premises from July to September 2013, which appears to have had minimal impact on her tax return preparation business because as stated before, her income from preparing tax returns for clients is primarily generated during tax season

from January to April. *Findings of Fact 14-40.* Debtor argues that she "lost clients of Nonim LLC and the ability to file before the [Income Tax Return] Extension Deadline [of] October 2013. *Amended Statement of Facts and Conclusions of Law by Debtor Minon Miller,* lodged on February 11, 2015, ECF 117 at 24:25-26. The evidence cited by Debtor in support of this argument does not support it, as it consists only of the Receiver's monthly reports, correspondence between Debtor and the Receiver, and her uncorroborated trial testimony. *Id., citing, Debtor's Exhibits D-22 through D-29; Trial Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 330-331, 352. The accounting report of Debtor's income tax preparation fee income paid by TPG during 2012 refute Debtor's argument because the report shows very few of Debtor's clients filed tax returns after June for the October 15 extension deadline rather than the original April deadline, only 11 out of 1,321 fee distribution entries for Debtor's taxpayer clients were for tax returns processed and paid after June 15 for the year 2012. *Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012 by Santa Barbara Tax Program Group* at 1-27; *Findings of Fact 14-40*. That most of the fee income deposited by TPG into Nonim's bank account for Debtor's tax return preparation services occurred during tax season is also corroborated by Nonim's 2012 bank statements. *Id.; Creditor's Exhibit C-15, Accounting of Fees Paid to Debtor in 2012 by Santa Barbara Tax Program Group* at 1-28; *Findings of Fact 14-40* (as shown by these bank statements, Nonim's 2012 bank deposits from TPG of $404,036.15 during January to April 2012 mostly corroborate Nonim's total 2012 tax preparation fee income of $422,616.15 as shown on TPG's accounting of fees earned by MTDMiller Income Tax Service in 2012). The Receiver's occupancy of Nonim's premises for a short three-month period of time during July to September 2013 had a minimal impact on Debtor's income in 2013 since it appears that the most of her income tax preparation clients have their tax returns prepared and filed by and through Debtor during the regular income tax return filing season of January to April. Moreover, the Receiver's occupancy of Nonim's premises for this three month period in 2013 has a minimal impact on Debtor's ability to generate income by preparing income

tax returns for clients since she is an independent and self-employed income tax return preparer and there is no current impediment to her continuing in this business from the Receiver or anyone else.

d. Debtor's History of Bankruptcy Filings Is an Abuse of the Bankruptcy System for Improper Advantage in Litigation.

Two additional factors in determining dismissal for bad faith are: (1) whether the debtor has a history of filings and case dismissals; and (2) whether the debtor intended to invoke the automatic stay for improper purposes, such as for the sole objective of defeating state court litigation. *In re Mitchell*, 357 B.R. at 155; *see also*, *In re Leavitt*, 171 F.3d at 1224 (discussing the "totality of the circumstances" test governing bad faith dismissal of Chapter 13 cases). The court will discuss these two factors together because Debtor appears to be improperly invoking the automatic stay for strategic state court litigation purposes by repeatedly filing for bankruptcy. Based on Debtor's past filings and case dismissals, the preponderance of the evidence demonstrates that Debtor's history of bankruptcy case filings and dismissals supports the dismissal of this case pursuant to 11 U.S.C. § 707(b)(3)(A).

Debtor's bankruptcy and dismissal history includes the following. Debtor's first Chapter 13 case, 2:11-bk-23561-SK, filed on March 30, 2011 was dismissed by the court for failure to file information. *Creditor's Exhibit C-4, Order and Notice of Dismissal for Failure to File Information in In re Minon Trenell Miller, Case No. 2:11-bk-23561-SK.* Moreover, Debtor's second Chapter 13 case, *In re Minon Trenell Miller,* 2:11-bk-32470-ER, filed on May 24, 2011, was dismissed by the court for bad faith. *Creditor's Exhibit C-8, Order Granting Motion to Dismiss Chapter 13 Plan for Bad Faith; Findings of Fact 69-136.* In the Tentative Ruling regarding Creditor Edward Gilliam's Motion to Dismiss in this second Chapter 13 case, the court by Judge Robles stated that "Debtor understated her income," and that the "mere fact that Debtor is abusing the Court system to avoid paying her judgments and to avoid following the Court's order in providing documents for a debtors' exam" is sufficient evidence for a dismissal for bad faith. *Creditor's Exhibit C-*

9, Judge Robles's Tentative Ruling in Support of Order Granting Motion to Dismiss at 1. Judge Robles also stated in his tentative ruling that in that case, the "timing of Debtor's two bankruptcy cases appears to have been to avoid the production of documents and a fee award," which evidenced an "unfair manipulation" of the bankruptcy system, a "history of filings and dismissals," and "Debtor's intent to defeat state court litigation." *Id*. at 3. Judge Robles concluded by stating that Debtor did not provide a "justification for the timing" of her bankruptcy filings. *Id*. After hearing argument from the parties at the hearing on the motion to dismiss on October 13, 2011, Judge Robles orally announced that the court was dismissing the case, which was consistent with his tentative ruling, and signed the order for dismissal of the case. *Transcript of Hearing [18] Motion to Dismiss Chapter 13 Plan or in the Alternative Motion to Reject Chapter 13 Plan Due to Fraudulent Filing of Income Statement, Incorrect and False Information re: Income and Schedules; filed by Interested Party Edward Gilliam, In re Minon Trenell Miller, LA 11-32470-ER Chapter 13, ECF 50 ("Chapter 13 Case Dismissal Hearing Transcript"), Debtor's Exhibit D-36;* [4] *Creditor's Exhibit C-8, Order Granting Motion to Dismiss Chapter 13 Plan for Bad Faith.* During the colloquy between Debtor and Judge Robles, the court indicated that the court's reason for granting the motion to dismiss is that it found that the situation was really a two-party dispute between Creditor Gilliam and Debtor:

> THE COURT: . . . everything that I've heard so far indicates that it's a State Court dispute that has found its way into Bankruptcy Court by way of the bankruptcy petition filing that you've made. And everything that you've said would indicate that - - and you highlighted that by saying you really don't have any debts except for Mr. Gilliam.
>
> MS. MILLER: That's all I have.

[4] The court also takes judicial notice of the hearing transcript in Debtor's second Chapter 13 bankruptcy case in this court pursuant to Rule 201 of the Federal Rules of Evidence.

THE COURT: You have to deal with Mr. Gilliam and you have to deal with Mr. Gilliam's suit, it's not here, and that's the problem.

Chapter 13 Case Dismissal Hearing Transcript, ECF 50 at 5-6; *Debtor's Exhibit D-36.* As indicated by this evidence, Debtor's second Chapter 13 case filing and dismissal highlight the admitted fact that the prior bankruptcy case filings were motivated by Debtor's effort to defeat Creditor Gilliam's state court litigation efforts. It is "bad faith to file bankruptcy to impede, delay. . . or obtain a tactical advantage regarding litigation ongoing in a nonbankruptcy forum—whether that nonbankruptcy forum is a state court or a federal district court." *In re Silberkraus*, 253 B.R. 890, 904-906 (Bankr. C.D. Cal. 2000), *affirmed*, 336 F.3d 864 (9th Cir. 2003).

Debtor's efforts to defeat Creditor Gilliam's state court litigation efforts continued prior to her filing this Chapter 7 bankruptcy case on October 15, 2013. *Findings of Fact 69-133.* On December 17, 2012, the Superior Court of California for the County of Orange entered judgments in the state court litigation in the amount of $53,555.42 against Debtor and Nonim LLC and in favor of Creditor Gilliam for "fraudulent conveyance, malicious prosecution, and injunctive relief." *Creditor's Exhibit C-13*, *Malicious Prosecution Judgment in Favor of Movant in State Court Case No. 30-2012-00565634* at 2. This December 17, 2012 judgment specifically amended prior judgments to include Nonim LLC and granted injunctive relief ordering "defendant" (i.e., Debtor and Nonim) not to transfer any assets without court permission. *Id.* Nonim's bank account statements show numerous and substantial cash withdrawals and purchase card withdrawals by Debtor from Nonim's bank accounts after the state court injunction of December 12, 2012, which included $101,040 in cash withdrawals, and $9,944.26 in check card purchases, which were made by Debtor without the state court's authorization in violation of that court's injunction (i.e., Debtor offered no evidence to show that she made any of these withdrawals with the knowledge and authorization of the state court which issued the injunction). *Findings of Fact 41-54, 69-133.*

On August 6, 2013, Stephen J. Donnell ("Receiver") was appointed by the state court as a receiver on behalf of Creditor to enforce Creditor's judgments against Debtor and Nonim LLC. *Creditor's Exhibit C-14, Amended Order Appointing Receiver in Aid of Execution*. The Receiver was authorized "to immediately assume possession and control of all assets of defendants Miller and Nonim" except those assets that were exempt. *Id* at 2.

When the Receiver made a demand for turnover of certain books and records as mandated under the Appointing Order, Debtor did not respond to his requests, and never complied with her duties to turn over the information. *Creditor's Exhibit C-19, Demand Letter from Stephen J. Donell to Debtor Dated August 8, 2013; Testimony of Stephen J. Donell, June 12, 2014 Trial Transcript,* ECF 72 at 85:6-86:4*; Debtor's Exhibit 28, Receiver's Ex Parte Application for an Order to Abandon Leased Premises from the Receivership Estate* at 3. The Receiver also testified at trial that when he asked Debtor for her computers, she failed to turn over the computers to him. *Testimony of Stephen J. Donell*, *June 12, 2014 Trial Transcript*, ECF 72 at 86:8-12.

After Debtor failed to give the Receiver the documents he requested, in August 2013, Receiver's counsel then sent another demand letter to Debtor for the same items. *Creditor's Exhibit C-20, Demand Letter from Byron Z. Moldo to Debtor dated August 16, 2013; Testimony of Stephen J. Donell, June 12, 2014 Trial Transcript,* ECF 72 at 84:19-85:18. Debtor failed to comply with the demands again, forcing the Receiver to approach the landlord to gain access to Nonim LLC's premises. *Testimony of Stephen J. Donell, June 12, 2014 Trial Transcript*, ECF 72 at 84:8-86:12; *Debtor's Exhibit 28, Receiver's Ex Parte Application for an Order to Abandon Leased Premises from the Receivership Estate* at 4. After the Receiver searched the premises, he explained that he could not "carry on the business affairs" of Nonim LLC because "there were no assets of substantial value located at the Premises which could have been liquidated to satisfy the judgment." *Id.* Thus, by its order filed on September 25, 2013, the state court authorized the Receiver to "immediately abandon the Receivership Estate." *Debtor's Exhibit D-29,*

Order Authorizing State Court Receiver to Abandon Leased Premises at 2. By email notice of September 25, 2013 by the Receiver's office, Debtor was notified of the state court's authorization of the abandonment of the Receivership Estate and of the Receiver's turnover of possession and control of Debtor's office to her (i.e., telling her to schedule an appointment to pick up her keys). *Id.* That the Receiver was not able to liquidate any tangible assets of Debtor's business office in August and September 2013 is perhaps understandable in hindsight because as discussed herein, the evidence shows that the nature of Debtor's tax return preparation business is personal service and seasonal. That is, Debtor was preparing income tax returns for clients for a fee annually during tax season from roughly February to April, and it was not tax season during the limited time which the Receiver took over custody and possession of Debtor's office. As shown by the evidence in the record, the income and assets of Nonim (and thus, Debtor) came from Debtor's voluntary efforts as an income tax return preparer, and if Debtor did not prepare tax returns, there were no income and no assets.

The Receiver's September 25, 2013 turnover of possession and custody of Debtor's assets, including Nonim, such as her office and its contents, has independent significance for purposes of this case because this meant that Debtor then had complete custody and control of her and Nonim's financial records, which she could have and should have reviewed in preparing her bankruptcy petition and schedules. As discussed herein, Debtor chose the date on which she filed her bankruptcy petition and schedules, October 15, 2013, which was the first date she could file a new bankruptcy case and be eligible for another Chapter 7 bankruptcy discharge of her debts. *Findings of Fact 85-86, 102-103.* There can be no dispute that the Statement of Financial Affairs in her bankruptcy petition called for Debtor to disclose the amounts of her gross income from her businesses, such as Nonim, during the year in which the bankruptcy petition was being filed and the two immediately preceding calendar years. *Findings of Fact 7-40.* Debtor's declarations of income from Nonim on her Statement of Financial Affairs for 2012 and 2013 were as she admitted at trial "guesstimatations." There is no excuse for

Debtor declaring only "guesstimations" of the amounts of gross income from her business, Nonim LLC, on her Statement of Financial Affairs. *Id.* As shown above, the official bankruptcy forms plainly and unambiguously requested Debtor to disclose gross income from business on the Statement of Financial Affairs. Debtor did not have to "guessestimate" her gross income for Nonim for 2012 and 2013 because she had full access to her business records once the Receiver turned over possession and control of her office to her on September 25, 2015 and could have consulted such records to make sure her financial disclosures on her Statement of Financial Affairs were completely accurate and truthful. Moreover, there does not seem to be any reason why Debtor could not have retrieved her bank account records for Nonim directly from the bank while her office was under the control and possession of the Receiver to make sure that her disclosures of her gross income from her Nonim business was accurate and complete, and not just "guesstimations." Therefore, the court determines that Debtor had no justification for not accurately and truthfully disclosing the amounts of gross income from her business, Nonim, on her Statement of Financial Affairs, which untrue disclosures were material because they would have revealed more information about her income generating history and ability, which would have been relevant to creditors and other interested parties, such as the United States Trustee. 11 U.S.C. § 707(b)(2) and (3).

For these reasons, the court finds that based on the evidence of Debtor's history of bankruptcy filings and dismissals, which show that these filings were strategically timed to aid Debtor's state court litigation position with respect to Creditor as indicated by the timing and sequence of Debtor's actions to defeat Creditor's collection efforts and bankruptcy filings after unfavorable results in Creditor's collection litigation against her, including transfer of her tax return preparation business to a controlled entity, Nonim, held by the state court to be a fraudulent transfer, and transfers of funds and assets belonging to her and her controlled entity, Nonim, in violation of the state court's injunction order, this factor showing Debtor's continued abuse of the bankruptcy system weighs in favor of dismissal for bad faith.

f. Debtor's Bankruptcy Was Not a Consequence of Illness, Disability, Unemployment, or Some Other Calamity.

One mitigating factor in determining bad faith under 11 U.S.C. § 707(b)(3)(A) is "whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity." *In re Mitchell*, 357 B.R. at 155. In this case, Creditor argued that Debtor's medical claims in her Schedule F – Creditors Holding Unsecured Nonpriority Claims "were all incurred in 2012," and had "nothing to do with her bankruptcy filing in October 2013." *Movant's Opening Brief re: Tax Issue and Mitchell Factors filed on July 11, 2014,* ECF 73 at 9. Creditor further contends that even if her medical claims were true, she "had more than sufficient monies in 2012 and 2013 to pay her medical bills," but "simply chose not to pay them." *Id*. at 9-10. Debtor in response to Creditor's argument argued that she "was forced to file bankruptcy after illness, failed business, and unsteady work as a casual worker whose job depends on the work load." *Debtor Minon Miller's Opening Brief re: Income of LLC and Mitchell Factors and Opposition to Gilliam Opening Brief,* ECF 74, filed on July 31, 2014 at 14:22-24. She testified at trial that she was suffering from an illness and had various medical expenses before and after her bankruptcy filing. *Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 346:8-350:10. Debtor in her amended proposed statement of facts and conclusions of law, she proposed Statement of Fact No 92: "As part of Debtor's bankruptcy, debtor had blood transfusion, hospital stay, and surgeries. (Transcript June 12, 2014 page 346, 348-349, D-49 (schedule F*)." [Proposed] Amended Statement of Facts and Conclusions of Law by Debtor Minon Miller,* lodged on February 11, 2015, at 38. However, Debtor offered no specific details about her medical condition and how it affected her ability to work and earn income, and there was little, if any, evidence to corroborate Debtor's conclusory testimony on her medical condition or treatment as she did not call any expert witnesses to testify on her medical condition or treatment and provided no written documentation to corroborate her health claims. *Findings of Fact 133-136.*

In *Mitchell*, the debtor did not claim that there were "mitigating circumstances" like illness or disability that led to an "unexpected inability to find work in her profession." 357 B.R. at 156. The *Mitchell* court was not persuaded that she was "currently experiencing any medical condition that would prevent her from working." *Id*. In contrast, the debtors in *Suttice* had demonstrated mitigating circumstances based on health concerns and the court found that the debtors' "two leaking heart valves…frequent medical observation and treatment. . .degenerative eye condition, [and] prosthesis" caused the debtors to incur "medical bills and cost of living expenses due to significant health problems," and created a "need to file bankruptcy." *In re Suttice*, 487 B.R. 245, 256 (Bankr. C.D. Cal 2013).

The evidence in this case does not indicate that Debtor is suffering severe medical conditions like the debtors in *Suttice*. Further, Debtor in her testimony at trial did not state, let alone show, how her illness and medical procedures prevented her from working as a self-employed tax return preparer, which she indicated that she had been doing for 14 years on her Schedule I, or as a casual longshore worker, which she indicated that she had been doing for 8 years on her Schedule I, or produce any documents that would evidence that her illness actually prevented her from physically working these occupations. *See Testimony of Minon Miller, June 12, 2014 Trial Transcript,* ECF 72 at 346:8-350:10; *Creditor's Exhibit 20, Debtor's Schedule I; Findings of Fact 133-136.* Nowhere does Debtor explain what her illness was, whether it was ongoing, whether it affected her ability to work, and there was no substantiation of the alleged illness other than her listing of medical claims on her bankruptcy schedules. *Id.* The evidence in this case shows that although the alleged medical condition occurred in 2012, as indicated by the scheduled claims on her Schedule F, afterwards in 2013, Debtor had earned $102,810.67 in gross income from tax return preparation fees paid to Nonim, and this evidence would show otherwise that her medical condition did not impair

her ability to earn substantial income from her self-employment as an income tax return preparer and repay her debts.[5] *Findings of Fact 14-40, 133-136.*

Therefore, the court finds that the preponderance of the evidence shows that Debtor's bankruptcy petition in this case was not filed as a consequence of "illness, disability, unemployment, or some other calamity," which thus does not indicate such would be a mitigating factor in this case.

II. DEBTOR'S BANKRUPTCY CASE SHOULD BE DISMISSED WITH PREJUDICE PURSUANT TO 11 U.S.C. § 349(a) FOR BAD FAITH.

"Under appropriate circumstances, a bankruptcy court may dismiss a bankruptcy case with prejudice." *In re Ellsworth,* 455 B.R. 904, 921 (9th Cir. BAP 2011), *citing inter alia,* 11 U.S.C. § 349(a) and *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219, 1223 (9th Cir. 1999). 11 U.S.C. § 349(a) states: "Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." As the Bankruptcy Appellate Panel of the Ninth Circuit stated in *In re Ellsworth,* "[a] dismissal with prejudice is a complete adjudication of the issues presented by the pleadings and a bar to further action between the parties" and "[f]unctionally, then, a dismissal with prejudice is equivalent to a judgment under [11 U.S.C.] § 523(a) that each debt that would have been discharged under the debtor's plan is thereafter nondischargeable." 455 B.R. at 921-922, *citing inter alia, In re Leavitt,* 171 F. 3d at 1223 and *Colonial Auto Center v. Tomlin (In re Tomlin),* 105 F.3d 933, 936-937 (4th Cir. 1997). Dismissal with prejudice is a drastic remedy reserved for "extreme situations." *In re Ellsworth,* 455 B.R. at 922, *citing, In re*

[5] Conceivably, Debtor could have argued that comparing the gross income figures for business, Nonim, LLC, of $422,616.15 and $102,810.67 for 2012 and 2013 indicates a decline of income attributable to her medical condition from 2012 to 2013, but the evidence is insufficient to substantiate any such possible argument since she did not put on sufficient evidence to show that she had a debilitating medical condition that adversely impacted her ability to earn income.

Tomlin, 105 F.3d at 937. As the United States Court of Appeals for the Fourth Circuit in *In re Tomlin* explained,

> "[A] bankruptcy court rarely uses its authority to bar the discharge of debts in a later case. In any court, a dismissal order that bars subsequent litigation is a severe sanction warranted only by egregious misconduct. Given that the Bankruptcy Code's central purpose is remedial, i.e., to afford insolvent debtors an opportunity to enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt, such an order is particularly devastating in a bankruptcy case. For this reason, a permanent bar to discharge is at times referred to as the capital punishment of bankruptcy, for it removes much of the benefit of the bankruptcy system.

105 F.3d at 937 (citations and internal quotations marks omitted), *quoted in, In re Ellsworth,* 455 B.R. at 922.

Creditor has shown based on this evidentiary record that the drastic remedy of dismissal of Debtor's bankruptcy case with prejudice is warranted here as he has shown that he has demonstrated that this is an extreme situation warranting such relief based on the evidence of her bad faith filing this bankruptcy case. As shown by the evidence presented by Creditor in this case, Debtor misrepresented her income on her Statement of Financial Affairs by substantially understating her business income for 2012 and 2013, the instructions for the Statement of Financial Affairs clearly stated that Debtor was to disclose her gross income from her businesses during the current year and the two years immediately preceding the filing of her bankruptcy petition, she did not do that and stated amounts that grossly understated her income, she had access to the bank account records of her business, Nonim (either she had them or could have gotten them from the bank), which demonstrated over $506,846.82 in demonstrated bank deposits shown in the bank statements produced by Creditor representing Debtor's gross business income from tax return preparation fees through her business, Nonim, yet she only disclosed a total of $144,377 from this business for these years, which was not even one-third of

what she was required to report on her Statement of Financial Affairs filed in this bankruptcy case. (A third year, 2011, is not at issue as Creditor did not argue that she understated her gross business income for that year.) Debtor's explanation for her income understatement was that she only put down what her single-member LLC, Nonim, paid her personally, completely lacks credibility because the instructions on the Statement of Financial Affairs clearly stated that she was to disclose amounts of gross income from her businesses, which included Nonim. Even if Debtor was correct that she only had to disclose what Nonim paid her, which is somewhat incredible because she effectively was Nonim, what she put down lacks any certainty because she had admitted at trial that her stated income figures from Nonim were "guesstimations" and because the evidence indicated that she used Nonim's business bank accounts to pay her personal expenses, including to make purchases of purported business items from clothing and luxury item retailers and personal grooming establishments, such as Nordstrom, Louis Vuitton, Bloomingdales, Victoria's Secret, the Ugg Store, Michael Kors Retail, Steve Madden, True Religion, Bebe Store, Fashion Trend, Save-On-Crafts.com, Fashion Beauty, Pauline's Human Hair, Nora Eyebrow Threading, ShopNastyGal.com, Philthy Ragz, and Burke Williams Spa, just to name a few of these "business" vendors, and such "business" purchases also included her daughter's prom dress, which was purportedly compensation in-kind for her "data entry" services for Nonim. Debtor who had disclosed that she had been a self-employed income tax return preparer for 14 years offered none of their records to substantiate the alleged business purposes of these expenditures and rebut Creditor's allegations that she misstated her income on her bankruptcy schedules, including her Statement of Financial Affairs, and that her cash withdrawals and purchase card withdrawals from Nonim's bank accounts were for her personal purposes.

The evidence offered by Creditor further demonstrates that Debtor's multiple bankruptcy filings, including this case, were intended to hinder, delay and defraud him in his efforts to collect debts owed by Debtor to him, which had been reduced to judgment in state court and in this court. The state court had found that Debtor fraudulently conveyed

her sole proprietorship tax return preparation business to her self-created limited liability company, Nonim LLC, which she controlled as the single member, and the evidence showed that Debtor ignored and disobeyed the state court's order that she individually and through Nonim not transfer any of their assets as shown by Nonim's bank account records showing substantial cash withdrawals and purchase card withdrawals by Debtor after the state court issued its judgment and injunction against Debtor and Nonim in December 2012. This evidentiary record strongly resembles the situation in *In re Leavitt,* wherein the Ninth Circuit upheld the dismissal of the debtor's bankruptcy case for bad faith with prejudice based on the single-minded efforts of the debtor in that case to thwart and impede the judgment creditor's collection efforts in state court litigation and bankruptcy case filings. 171 F.3d at 1221-1226.

Accordingly, the court determines that Creditor has met his burden of proving by a preponderance of the evidence that the factual circumstances in this case warrant dismissal for bad faith with prejudice.

Conclusion

In sum, after analyzing Debtor's bankruptcy filing using the *Mitchell* factors, and focusing primarily on Debtor's deliberate misstatements and obfuscations regarding her ability to repay her debts, and based on her abuse of the bankruptcy system for strategic advantage in litigation, the court finds that Creditor demonstrated by a preponderance of the evidence that Debtor filed this Chapter 7 bankruptcy case in bad faith sufficient to warrant the granting of his Motions to Dismiss and that the case should be dismissed with prejudice on grounds of bad faith pursuant to 11 U.S.C. §§ 707(b)(3)(A) and 349(a).

Creditor has also requested that the court impose sanctions against Debtor for a bad faith filing pursuant to 11 U.S.C. § 105(a) and the court's inherent authority to impose sanctions. *See also,* Fed. R. Bankr. P. 9011. A dismissal for "bad faith" may, but does not automatically, lead to sanctions, whether under 11 U.S.C. § 105(a), the court's inherent authority, or Federal Rule of Bankruptcy Procedure 9011. *See* 1 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 5:2300 at 5(II)-79 (2014), *citing, In*

re Southern California Sound Systems, Inc., 69 B.R. 893, 901 (Bankr. S.D. Cal. 1987). If Creditor believes that sanctions should be imposed against Debtor under these circumstances, Creditor should bring the appropriate motion in accordance with the requirements of procedural due process and the applicable rules governing such motions. Under these circumstances, the court declines to exercise its discretion to impose sanctions against Debtor and award such to Creditor *sua sponte,* or on its own without adequate opportunity for Debtor to respond and be heard.

This memorandum decision and the separately adopted findings of fact constitute the court's findings of fact and conclusions of law on Creditor's Motions to Dismiss. A final order for dismissal of the bankruptcy case on Creditor's motions consistent with the findings of fact and conclusions of law set forth in this memorandum decision is being entered concurrently herewith. The continued post-trial hearing set for September 29, 2015 at 2:00 p.m. is vacated and taken off calendar.

IT IS SO ORDERED.

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Date: September 9, 2015

Robert Kwan
United States Bankruptcy Judge