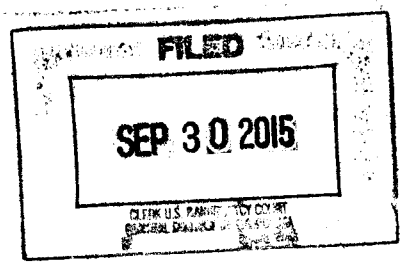

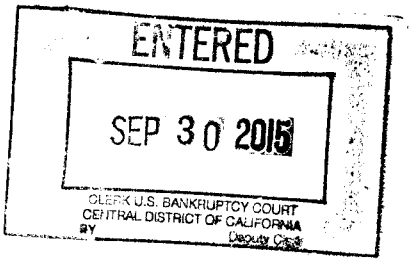

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: Ruben Gonzalez Cuevas, Debtor.	Case No.: 2:14-bk-32359-NB Chapter 13 **MEMORANDUM DECISION ON (1) DISMISSAL WITH A BAR; AND (2) SANCTIONS AGAINST PHILIP E. KOEBEL**

This memorandum decision explains why, at a hearing on January 15, 2015, this court dismissed this case with a bar against the debtor once again being a debtor in bankruptcy (a) for a period of two years and alternatively, in the event that a bar for that period exceeds this court's authority or is ineffective for any other reason, (b) for a period of 180 days, under 11 U.S.C. § 109(g)(1).[1] In addition, this memorandum decision addresses sanctions against counsel for the debtor, Philip E. Koebel, Esq.

[1] For brevity, filed documents are referred to by docket number ("dkt.") rather than their full title. Unless the context suggests otherwise, references to a "chapter" or "section" ("§") refer to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code"), a "Rule" means one of the Federal Rules of Bankruptcy Procedure ("FRBP"), Federal Rules of Civil Procedure ("FRCP"), or other federal or local rule, and other terms have the meanings provided in the Code, the Rules, and the parties' briefs. The following discussion constitutes this court's findings of fact and conclusions of law pursuant to Rule 52 (incorporated by Rules 7052 and 9014(c)).

I. INTRODUCTION

This case arises from very unfortunate circumstances. The debtor is over 70 years old and an armed services veteran. Dkt. 20 p. 7:10-11. He attempts to get by on a meager pension and Social Security benefits. *Id.* For years he has been attempting to stave off foreclosure and eviction from his home at 36 E. Mariposa Street, Altadena, California 91001, title to which is held by the Juliana Cuevas Living Trust (the "Probate Trust"). He attributes his troubles in part to the allegation that "[s]omething went wrong with his sister [who was] serving as the original trustee" of the Probate Trust (dkt. 20 p. 7:14-15) and who was eventually replaced by Mr. Stevan Chandler (the "Probate Trustee").

Nearly eight years ago, on October 2, 2007, the debtor filed a chapter 7 case which remains pending before Chief Judge Bluebond of this court (2:07-bk-18732-BB, the "Chapter 7 Case"). The sole remaining significant asset in that case appears to be the Debtor's interest in the Probate Trust and, through it, the house.

Despite the pending Chapter 7 Case, this chapter 13 case was filed on December 1, 2014 (the "Petition Date"). That was shortly before an unlawful detainer trial, scheduled for January 16, 2015, to evict the debtor from the house. Mr. Koebel has represented the debtor both in this chapter 13 case and, with various periods of withdrawal, in the Chapter 7 Case (dkt. 52).

On December 23, 2014 this court issued an Order To Show Cause Re Dismissal (dkt. 16, the "Dismissal OSC"), directing the debtor to show cause why this chapter 13 case should not be dismissed because of the pending Chapter 7 Case. In addition, because of Mr. Koebel's role in both cases, this court issued an order to appear and show cause why he should not be sanctioned (dkt. 32, the "Sanctions OSC") and the Probate Trustee later filed a motion for sanctions (dkt. 75, the "Sanctions Motion").

After a hearing on January 15, 2015 regarding the Dismissal OSC, this court issued an order dismissing this case with a bar against refiling (dkt. 34, the "Dismissal Order"). Mr. Koebel filed a notice of appeal (dkt. 42) that purported to appeal from both

the Dismissal Order and the Sanctions OSC.

The Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") issued an order (dkt. 74) dismissing the appeal from the Sanctions OSC as interlocutory, without prejudice to a timely appeal from any final sanctions order. The BAP also issued an order (dkt. 86) granting a limited remand of the appeal from the Dismissal Order to seek relief from that order in this court.

On June 15, 2015 Mr. Koebel filed a "Motion to Correct Dismissal Order on Appeal" (dkt. 87, the "Dismissal Reconsideration Motion"). Meanwhile, after several hearings on the Sanctions OSC and the Sanctions Motion, those matters were submitted on March 18, 2015. This memorandum decision addresses all of these matters.

II. JURISDICTION, AUTHORITY, AND VENUE

No party has questioned this court's jurisdiction and authority to determine the issues presented, but this court has an independent duty to examine these issues. *See In re Rosson,* 545 F.3d 764, 769 n. 5 (9th Cir. 2008) (subject matter jurisdiction); *In re Pringle*, 495 B.R. 447, 455 (9th Cir. BAP 2013) (authority under *Stern v. Marshall*, 564 U.S. 2; 131 S.Ct. 2594 (2011)). This court has no trouble concluding that it has jurisdiction (28 U.S.C. § 1334(b)), that the matters at issue are statutorily "core" (28 U.S.C. § 157(a)), and that this court has the authority under the U.S. Constitution to issue final orders and judgments regarding those matters: whether to dismiss this chapter 13 case, whether to dismiss it with a bar against being a debtor in future bankruptcy cases, and whether to sanction Mr. Koebel for his role in this chapter 13 case. *See generally Stern*, 564 U.S. 2; *In re Lehtinen*, 564 F.3d 1052, 1057 (9th Cir. 2009); *In re Brooks-Hamilton,* 400 B.R. 238, 244-45 (9th Cir. BAP 2009) (sanctions hearing was core proceeding); *Lasar v. Ford Motor Co.*, 399 F.3d 1101 (9th Cir. 2005) (when court contemplates sanctions, jury trial is only required if sanctions amount to "serious criminal penalties"). In addition, venue is proper under 28 U.S.C. §§ 1408(1) and 1409(a).

III. DISCUSSION

A. There Was More Than Adequate Cause To Dismiss This Case With a Bar

1. Legal standards, and procedural background

Section 1307(c) provides that on motion of a party in interest (or, pursuant to Section 105(a), on the court's own motion), and after notice and a hearing, "the court may convert a case under this chapter to a case under chapter 7 of [the Bankruptcy Code], or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause ...." 11 U.S.C. § 1307(c) (emphasis added). "Cause" has been interpreted to include bad faith. *See, e.g., In re Ellsworth*, 455 B.R. 904, 915 (9th Cir. BAP 2011).

Section 109(g) provides that no individual may be a debtor under the Bankruptcy Code who has been a debtor in a bankruptcy case pending at any time in the preceding 180 days if "the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear in proper prosecution of the case ...." 11 U.S.C. § 109(g)(1) (emphasis added). In addition, a bar of longer than 180 days appears to be within the power of the Bankruptcy Court under 11 U.S.C. §§ 105(a), 349(a), 1307(c) and, alternatively, this court's inherent powers to manage its own docket. *See In re Glover*, 537 Fed.Appx. 741 (9th Cir. 2013) (affirming dismissal with a five-year bar to refiling under 11 U.S.C. § 105(a)); *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999) (affirming dismissal with prejudice based upon a finding of bad faith).

The Dismissal OSC (dkt. 16) directed the debtor to show cause why this chapter 13 case should not be dismissed "because the debtor is already a debtor in a different, pending bankruptcy case [the Chapter 7 Case]." That order went on to state:

> This court is aware of authority that, in extremely rare instances, there may be exceptions to the general rule that it is not permissible for two bankruptcy cases to be pending at the same time. *See Grimes v. United States (In re Grimes)*, 117 B.R. 531 (9th Cir. B.A.P. 1990). But the debtor has not established that the current cases qualify for that extremely limited exception. [Dismissal OSC, dkt. 16, at 1:24-28]

The debtor (through Mr. Koebel) filed a timely response that mostly argued what is

technically a different issue – whether successive bankruptcy cases are permissible. Nevertheless, as *Grimes* points out, decisions on that issue are analogous, and their consideration of what constitutes good and bad faith is relevant.

One of the leading decisions, cited in the debtor's response (dkt. 20 pp. 2:1, 4:3-15), is *In re Metz*, 820 F.2d 1495 (9th Cir. 1987). *Metz* held that successive bankruptcy filings are not bad faith "*per se*," but must be examined together, and the debtor's good faith must be judged by reviewing the totality of the circumstances. *Id.* at 1498-99. Other facts that may establish a lack of good faith, and warrant dismissal of a bankruptcy case, include whether a debtor has "unfairly manipulated the Bankruptcy Code," "misrepresented facts in his [petition or] plan," or "otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner." *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994) (citations and internal quotation marks omitted; bracketed text in original). In addition, there is no doubt that "[b]ad faith exists where the debtor only intended to defeat state court litigation." *Id.* (citation omitted). *See also In re St. Paul Self Storage Ltd. P'ship*, 185 B.R. 580 (9th Cir. BAP 1995) (bad faith inferred where debtor filed chapter 11 on eve of state court discovery proceeding, debtor had few creditors and little need for reorganization); *In re Ebell Media, Inc.*, 462 Fed. Appx. 674 (9th Cir. 2011) (bad faith inferred where chapter 7 petition filed on eve of arbitration decision given its timing and a lack of an estate to be administered).

Good faith, in contrast, can be shown by a bona fide need and ability to restructure financial obligations that were not discharged in the earlier chapter 7 case. In *Metz*, for example, the Ninth Circuit observed that the debtor, who had discharged his *in personam* liability in a prior chapter 7 case, "proposed to pay the arrears [on his mortgage in his subsequent chapter 13 case] over thirty-six months at a market rate of 12%" and "had shown good faith by keeping the payments on his house current," while his "increased salary made it possible for the first time in the bankruptcy proceedings to propose such a cure." *Metz*, 820 F. 2d at 1498. The Ninth Circuit concluded that "[s]uch a bona fide change in circumstances is precisely what the bankruptcy judge

should examine to determine whether successive filings are proper." *Id.* (citation omitted). *See also, e.g., Ellsworth*, 455 B.R. at 917-21 (bad faith generally); *In re Powers*, 135 B.R. 980 (Bankr. C.D. Cal. 1991) (same).

There is some question as to the burden of proof on the issue of good or bad faith. *See Ellsworth*, 455 B.R. at 918-19 & n. 12 (noting that in situation *not* involving multiple bankruptcy cases an initial showing of bad faith may be required before the burden shifts to the debtor to show the contrary). This court presumes without deciding that there must be initial indicia of bad faith before the burden shifts to the debtor. Regardless of the initial burden of proof, this court finds bad faith for the reasons set forth below.

2. The debtor's alleged need to discharge his debts was a sham

The debtor (through Mr. Koebel) alleged that he needed to file this chapter 13 case to discharge approximately $21,334.40 in "consumer and non-consumer debts" incurred after the filing of his Chapter 7 Case (dkt. 20 pp. 2:11, 4:26-5:2, and dkt. 7 pp. 14-17). He also asserted, "an argument can be made" that "the administrative claims of the [Probate Trustee] and the Chapter 7 Trustee" are subject to treatment in this chapter 13 case (dkt. 20 p. 4:9-10) – *i.e.,* that these debts were another reason to file this chapter 13 case.

This was a sham. The debtor did not allege any efforts by creditors holding the debts of $21,334.40 to collect on those debts. As for the anticipated administrative claims of the Probate Trustee and the Chapter 7 Trustee, those claims are not even liquidated yet (in fact, the debtor separately complains about the fact that they have not been liquidated). So there is no apparent need for bankruptcy relief at this time.

The only apparent motivation for filing this chapter 13 case was to block the debtor's forthcoming eviction by using the automatic stay of Section 362(a). That alone was a sufficient basis to dismiss this case as a bad faith filing.

3. The debtor's alleged monthly net income was a sham

The debtor's bankruptcy Schedules I and J (dkt. 7 pp. 20-25) show aggregate Social

Security and pension income of only $1,074.01 per month, no rent or mortgage expense (because the debtor had been living in the house without paying any rent or mortgage), and barely any other expenses (*e.g.,* only an estimated $60 per month for medical and dental expenses). Those schedules state that there is no anticipated increase or decrease in either income or expenses. Based on these completely unrealistic assumptions as to future expenses, the debtor projected that he could devote $99.01 per month to funding this chapter 13 case.

The debtor's initial response (dkt. 20) to the Dismissal OSC did not address how the debtor could assume that he will continue living (a) rent-free and (b) virtually expense-free. The debtor has never addressed the latter assumption, but his purported grounds for assuming that he could live rent-free can be gleaned from other documents and subsequent oral argument.

a. The debtor's expectation of living rent-free based on Judge Bluebond's order is a sham

In 2007 Judge Bluebond granted a motion for relief from the automatic stay to continue the litigation with the debtor regarding who was entitled to ownership and possession of the house (the "Chapter 7 Stay Relief Order"). The debtor relies on the fact that, although that order permitted the ownership and possession issues to be litigated, it also provided that the then-serving probate trustee "shall not be permitted to evict or eject debtor from the premises absent a further order from this Court granting relief from stay to do so." Chapter 7 Stay Relief Order (Case No. 2:07-bk-18732-BB, dkt. 21) (emphasis added).

Although *that order* stopped short of lifting the stay as to actual eviction, the order did not purport to supersede the provisions of the Bankruptcy Code that *automatically* terminated the stay as to the debtor's mere possessory interest – which is not a property interest – when he received a discharge. *See* 11 U.S.C. § 362(c)(2) (stay only continues as to *in personam* acts "until the earliest of – ... (C) ... the time a discharge is granted or denied"). By the time this chapter 13 case was filed, the debtor had received

his discharge in the Chapter 7 Case and therefore, as to his bare possessory interest in the Property, the stay had automatically terminated.

Despite these facts, the debtor asserted in his bankruptcy Schedule G in this chapter 13 case that somehow his possession of the house was permanently protected by Judge Bluebond 's Chapter 7 Stay *Relief* Order:

> Notwithstanding the discharge entered on 05/30/2014, the Debtor is informed and believes that his possession of [the house] is protected by [the Chapter 7 Stay Relief Order] [dkt. 7 p. 18 (emphasis added).]

Not only is it completely unrealistic to read the Chapter 7 Stay Relief Order as continuing the automatic stay after it has been automatically terminated by the Bankruptcy Code, but even if that order had purported to be a permanent bar on eviction, it was explicitly subject to "a further order from this Court" granting relief from the automatic stay to evict. By the time this chapter 13 case was filed the debtor had lost every attempt to establish any property interest or valid possessory interest in the house, so there was no good faith basis to assume that the debtor's rent-free possession would continue at all, let alone for the multi-year duration of his chapter 13 plan.

Despite these facts, the debtor threatened to seek sanctions against the Probate Trustee for pursuing the debtor's eviction, Mr. Koebel prepared a draft order to show cause (the "Draft OSC") for Judge Bluebond's signature, and Mr. Koebel later misrepresented (in connection with the Sanctions OSC) that Judge Bluebond had seen sufficient merit in that Draft OSC to "set a hearing on such OSC re Contempt" for April 1, 2015. Dkt. 57 p. 5:6 (emphasis omitted). Based on this faulty premise, Mr. Koebel argued, "Given Judge Bluebond's power simpy [sic] to refuse to issue the Order to Show Cause, the fact that Judge Bluebond instead set the hearing on the OSC re Contempt would indicate that there at least was enough ambiguity of the effect of such Lift-Stay Orders that [he and the debtor were] justified ... to time the filing of the Chapter 13 case when he did [*i.e.,* shortly before the unlawful detainer trial, allegedly to obtain a

stay long enough to seek clarification from Judge Bluebond]." *Id.* p. 5:6-11. In reality, as Mr. Koebel later admitted, he had self-calendared a hearing before Judge Bluebond (dkt. 61-1, ex. 2), so this assertion was completely without any factual basis. These subsequent facts illustrate that the real purpose of this chapter 13 case was to delay the eviction, not to reorganize the debtor's finances.

In sum, the debtor (through Mr. Koebel) attempted to use a meritless reading of Judge Bluebond's Chapter 7 Stay Relief Order as a permanent injunction against eviction even after the stay terminated by operation of law, and then attempted to use that reading to assume that the debtor could continue living rent-free throughout this chapter 13 case. That was a sham.

b. The debtor's other (belated) assertion, that he could live rent-free with a relative or friend, is also a sham

At a later time (in one of the several hearings on the Sanctions OSC), Mr. Koebel orally speculated that the debtor could have arranged to live rent-free by living with a relative or friend. But the Probate Trustee argued that this flatly contradicted the debtor's sworn statements in State court that he had no other place to live, and thereafter the debtor and Mr. Koebel chose not to introduce any evidence that the debtor could live rent-free or virtually expense-free.

c. Conclusion as to purported net monthly income

For all of these reasons, the debtor's assumptions about his expenses had absolutely no basis in fact, and his purported monthly net income of $99.01 was a sham. Under 11 U.S.C. § 109(e), only an individual "with regular income" is eligible to be a chapter 13 debtor, and the debtor had no basis to presume that he would have any disposable income to fund a chapter 13 plan. This is an independent, sufficient ground to dismiss this chapter 13 case as a bad faith filing.

4. The debtor's alleged ability to fund the chapter 13 case from proceeds of the Chapter 7 Case was a sham

The debtor argued in the alternative (dkt. 20 pp. 5:4-6:20) that he could fund this

chapter 13 case out of assets to be distributed from the Chapter 7 Case at some future, unspecified date. This argument is also a sham.

a. Speculative lump sum payments are not a proper basis to fund a chapter 13 case

The debtor's bankruptcy Schedule A lists an "equitable interest" in the house and further states:

> FMV = $585,000 estimated. Property held by the [Probate Trust] to be distributed . . . One hundred percent (100%) shall be divided equally between [the three beneficiaries including the debtor], share and share alike, or the survivor's [sic] of them.' Chapter 7 Trustee in Debtor's case 2:07-bk-18732-BB has yet to administer the asset. Estimated value of Debtor's distribution is $195,000.00. [dkt. 7 p. 3, emphasis added.]

The debtor's premise is flawed because reliance on a speculative lump sum payment at some unspecified future date is not a proper basis for a chapter 13 case. *See, e.g., In re Gavia*, 24 B.R. 573 (9th Cir. BAP 1982).

b. In any event, the debtor and Mr. Koebel have not shown that any distribution to the debtor from the Chapter 7 Case is remotely possible

The notion that the debtor can reasonably expect any distribution from his Chapter 7 Case to fund this chapter 13 case is a complete fiction. In 2012 the debtor's alleged homestead exemption was denied in the Chapter 7 Case, after the Chapter 7 Trustee objected that the debtor did not actually have an interest in the house itself, only an interest in the probate estate, and therefore was ineligible to claim a homestead exemption (Case No. 2:07-bk-18732-BB, dkt. 118 at 4:21-5:28). The debtor never filed any notice of appeal or otherwise sought relief from the order disallowing his homestead exemption (Case No. 2:07-bk-18732-BB, dkt. 129, the "Order Sustaining Objection to Exemption"), as confirmed by the docket in the Chapter 7 Case. (At a later point Mr. Koebel filed his declaration asserting the he was "informed and believe[s]" that the Order Sustaining Objection to Exemption "is not yet a final order" (dkt. 52 p. 4:22-25), but he failed to explain how that could possibly be so.)

Therefore the debtor's only hope of a distribution from the Chapter 7 Case would be if it were a surplus estate – *i.e.,* if sufficient assets were available to pay him after costs of administering the probate matters and the Chapter 7 Case and after payments to creditors in those proceedings. There is no evidence of that, and to the contrary the debtor (through Mr. Koebel) acknowledges that the attorneys for the Probate Trustee and the Chapter 7 Trustee have "confidently asserted" that the costs of administering those proceedings "will completely absorb any beneficial share left to the Debtor" (dkt. 20 p. 7:24-28) and the debtor's subsequent papers argue that the Chapter 7 Trustee "seeks an unknown amount estimated at nearly $380,000 or more" (dkt. 47 p. 9:21-22).

Nevertheless, the response to the Dismissal OSC argued, "it is not unreasonable for the Debtor" to base his chapter 13 case on the $195,000 that he estimates to be his alleged one-third share of the value of the house, without deduction for any claims or administrative expenses. *Id.* p. 6:18. The only stated basis for this speculation is (*id.* p. 6:16-20) that those trustees allegedly have not been "willing to disclose their administrative claims or any other claims affecting the Chapter 7 estate."

This argument ignores the burden of proof. Supposing for the sake of discussion that the expectation of a future lump sum payment could be a good faith foundation for a chapter 13 case in *some* circumstances (*cf. Gavia*, 24 B.R. 573), the debtor would have the burden to show such circumstances. The debtor cannot shift the burden to the Probate Trustee to demonstrate the contrary, just because he thinks that administrative expenses ought to be low.

c. Alternatively, even if the burden were on the Probate Trustee to show that the debtor will not receive a distribution from the Chapter 7 Case, that is established on the present record

A brief history of the litigation in the Chapter 7 Case will illustrate how the debtor and Mr. Koebel have no basis to speculate about any surplus from his Chapter 7 Case. That litigation has been enormously time consuming and involved.

The debtor resided at the house with his mother until her death in 2005. Thereafter

his sister, Ms. Graciela Dibble, was appointed trustee of the Probate Trust and pursued a series of actions in the Probate Division of the San Mateo Superior Court (the "Probate Court") and the Los Angeles Superior Court (the "Superior Court") to establish that the Probate Trust was the legal owner of the house and evict the debtor. The Superior Court ultimately issued a writ of possession with an eviction date of October 4, 2007.

The debtor filed the Chapter 7 Case on October 2, 2007 to stave off the eviction while he sought to vacate the orders entered by the Probate Court and the Superior Court. The debtor apparently was successful in vacating at least some of those orders on the grounds that he had not been given sufficient notice by Ms. Dibble of these actions (dkt. 46 p. 20:11-17).

As noted above, Ms. Dibble filed a motion in 2007 for relief from the automatic stay to continue the litigation with the debtor regarding who was entitled to ownership and possession of the house, and that motion was granted by the Chapter 7 Stay Relief Order. Then, for more than two years, the debtor's Chapter 7 Trustee[2] deferred to Ms. Dibble as probate trustee to liquidate the house for the benefit of the Probate Trust and the ultimate good of the chapter 7 bankruptcy estate.

In December of 2009, however, the Chapter 7 Trustee grew suspicious of Ms. Dibble's motivations and commenced proceedings in the Probate Court to have her removed as probate trustee and to surcharge her beneficial interest in the Probate Trust for the loss of value due to her alleged mismanagement. In November of 2012 the Chapter 7 Trustee was ultimately successful in having Ms. Dibble removed and having the Probate Trustee appointed as her replacement.

Unfortunately, it was discovered at or around the time of Ms. Dibble's removal that she had transferred title in the house from the Probate Trust to her own personal trust. Thus began efforts by the Probate Trustee to have title to the house transferred back to

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[2] At that time the chapter 7 trustee was David L. Hahn, but his tenure as chapter 7 trustee terminated in October 2014, prior to the Debtor's filing of this chapter 13 case. The successor chapter 7 trustee was Heide Kurtz. Both Mr. Hahn and Ms. Kurtz are referred to herein as the "Chapter 7 Trustee."

the Probate Trust.

Meanwhile, a great deal of litigation, almost all of it initiated by the debtor, took place in the Chapter 7 Case. The debtor filed no less than three (3) motions to dismiss the Chapter 7 Case (Case No. 2:07-bk-18732-BB, dkt. 54, 64, 76) between June 2010 and January 2011. Each one of these motions to dismiss was opposed by the Chapter 7 Trustee and each was denied by Judge Bluebond (Case No. 2:07-bk-18732-BB, dkt. 65, 73, 86). The debtor brought a claim objection against the Franchise Tax Board that was overruled by Judge Bluebond (Case No. 2:07-bk-18732-BB, dkt. 149, 152). The debtor also filed a motion to convert the chapter 7 case to one under chapter 13, which was similarly opposed by the Chapter 7 Trustee and denied by Judge Bluebond (Case No. 2:07-bk-18732-BB, dkt. 133, 139).

In addition to these motions/objections, the debtor commenced an adversary proceeding against the Chapter 7 Trustee alleging breach of fiduciary duty and seeking an order that the debtor's beneficial interest in the Probate Estate was not property of the estate. The Chapter 7 Trustee filed a motion for summary judgment which was granted. The judgment issued by Judge Bluebond (the "Judgment Rejecting Claims Against Chapter 7 Trustee") made it clear that the debtor's one-third beneficial interest in the Probate Trust was property of the chapter 7 estate. *See* Judgment (Adv. No. 2:11-ap-02946-BB, dkt. 14 at 1:25-27). Thereafter the debtor claimed a homestead exemption and that claim was disallowed, as noted above.

Returning to proceedings outside the bankruptcy court, by April 2014 the Probate Trustee had succeeded in recovering title to the house back from Ms. Dibble and into the Probate Trust. The Probate Trustee proceeded with efforts to market and sell the house. An unlawful detainer trial seeking to evict the debtor from the house was scheduled for January 16, 2015 and, as noted above, shortly before then the debtor filed his chapter 13 petition commencing this case.

Further litigation has taken place in this case. In fact, frivolous arguments by Mr. Koebel in this case have undoubtedly forced the Probate Trustee to expend tens of

thousands of dollars of additional litigation expenses.

In sum, there is no doubt that nearly eight years' worth of administrative expenses owed to the Chapter 7 Trustee as well as substantial expenses incurred by the Probate Trustee are enormous, due to the seemingly endless litigation by the debtor (and his sister). Not only is there no evidence presented by the debtor and Mr. Koebel to show any likelihood of a distribution to the debtor out of the Chapter 7 Case, but the evidence in the record strongly suggests exactly the opposite. On this record, the Probate Trustee has established a *prima facie* showing that there is no realistic chance of any distribution to the debtor. The debtor has not rebutted that showing.

d. Summary as to alleged $195,000 lump sum to fund this chapter 13 case

The reliance by the debtor and Mr. Koebel on a lump sum distribution from the Chapter 7 Case to fund this chapter 13 case is legally insufficient: Chapter 13 is for debtors with regular income, not speculative lump sum distributions at unspecified future dates. Alternatively, even if such a lump sum hypothetically could be sufficient in some circumstances, the debtor and Mr. Koebel have not borne their burden to show that any such distribution is remotely likely. Alternatively, even if the initial burden were on the Probate Trustee (which it is not) to show that no such distribution were likely, he has made a *prima facie* showing based on the evidence in the record that there is no realistic hope of any such distribution, and the debtor has not rebutted that showing.

The debtor's purported hope of being able to pay creditors out of some future, speculative distribution from the Chapter 7 Case is a sham. This is an independent, sufficient ground to dismiss this chapter 13 case as a bad faith filing.

5. The debtor's chapter 13 plan, prepared by Mr. Koebel, is a sham

The debtor's proposed chapter 13 plan (dkt. 8) provided for monthly plan payments by the debtor of $99.00 for a plan term of 60 months that supposedly would pay a total of 8.00% to nonpriority unsecured creditors (dkt. 8 p. 2). The proposed plan contains a notation that the "[p]lan *assumes $195,000 from distribution of [the Probate Trust] /*

[Chapter 7 case] less $175,000 Homestead" (dkt. 8 p. 2) (emphasis added). The plan provides further that the plan would pay "94% to unsecureds if distribution is $195,000" (dkt. 8 p. 2). The "Plan Analysis" section repeats the above provision that the proposed plan ["[a]ssumes distribution from [Probate Trust] / [Chapter 7 Case] is $195,000 less $175,000 for homestead exemption" (dkt. 8 p. 7). Yet again, under "Miscellaneous provisions," the "[p]lan assumes Debtor gets $195,000 from distribution of [Probate Trust] / [Chapter 7 case]" (dkt. 8 p. 7).

There is no good faith basis for these assumptions, either as to monthly net income, or any distribution from the Chapter 7 Case, including the assumed homestead exemption. Nor is it good faith to propose a chapter 13 plan that relies on such fictions. This is an independent, sufficient ground to dismiss this chapter 13 case as a bad faith filing.

6. The debtor's motion to continue the automatic stay, prepared by Mr. Koebel, relied on the foregoing and additional shams

On December 20, 2014, the debtor, by and through Mr. Koebel, filed a motion in this chapter 13 case to continue the automatic stay under 11 U.S.C. § 362(c)(3) as to the house and all creditors (dkt. 9, the "Motion to Continue the Stay") with an application for shortened notice (dkt. 10). As this court subsequently ruled (dkt. 14), no such motion was necessary and it was a waste of time and resources (because Section 362(c)(3) would only apply if a prior case had been *dismissed* within one-year before this case was filed, and the Chapter 7 Case had not been dismissed) but that is not the main point.

The main point is that the Motion to Continue the Stay asserted that the debtor is entitled to a homestead exemption in the house (dkt. 9 p. 4, para. 3.a.7.). That is blatantly contrary to Judge Bluebond's unappealed Order Sustaining Objection to Exemption.

Based on subsequent proceedings and oral argument, the theory advanced by the debtor (through Mr. Koebel) seems to be that he anticipates receiving a distribution out

of the Chapter 7 Case, and that he will then have a new opportunity in this chapter 13 case to assert a homestead exemption in that distribution. That is nonsense (assuming without deciding that the debtor and Mr. Koebel could belatedly offer this argument as a reason for asserting a homestead exemption in this chapter 13 case).

First, as already explained, on the record presented there is no realistic basis to assume any distribution from the Chapter 7 Case. Second, even if there were any cash distribution, the debtor offers no argument how cash from a non-homestead property could be subject to a homestead exemption.

At a later point the debtor (through Mr. Koebel) apparently conceded that the homestead exemption "would only arise in the unlikely event that the Chapter 7 [T]rustee administers the Chapter 7 bankruptcy estate by awarding the Debtor his home." Dkt. 57 p. 6:23-26 (emphasis added). "Awarding" the property to the debtor is not just unlikely, it is impossible on this record. In other words, the debtor (through Mr. Koebel) filed an (unnecessary) motion to extend the automatic stay, to protect a homestead exemption in property that the debtor does not and will not own.

The debtor's frivolous motion and argument that he is entitled to a homestead exemption, contrary to Judge Bluebond's un-appealed ruling, is yet another example of wasteful litigation and is another independent, sufficient ground to dismiss this chapter 13 case as a bad faith filing. This is yet another sham.

7. Dismissal proceedings, and the Dismissal Reconsideration Motion

After briefing by the parties, this court held a hearing on January 15, 2015 on the Dismissal OSC. A tentative ruling to dismiss the case was posted prior to the hearing (dkt. 34, Ex. A). The tentative ruling included a two year bar against the debtor being a debtor in another bankruptcy:

> The debtor's response to the OSC is correct (a) that the filing of a second bankruptcy case while the first is pending is not per se bad faith and (b) that filing a chapter 13 case when a debtor is not entitled to a discharge can, theoretically, be a permissible method to attempt to pay debts over time (thereby possibly benefitting creditors by paying them more than they otherwise would receive, while giving the debtor enough relief from dunning

> creditors to maximize income, stabilize expenses, and obtain a fresh start). Nevertheless, this court's review of the docket in his pending chapter 7 case [*i.e.,* the matters described above in this memorandum decision], as well as all of the matters set forth in the [Probate] trustee's papers in response to the OSC [as also described above], persuade this court that the debtor has engaged in a pattern of repeated abuse of the bankruptcy system and that his filing of this chapter 13 bankruptcy case, after repeated attempts to convert or dismiss the chapter 7 case before Judge Bluebond, amply demonstrate bad faith and grounds for a bar against filing another bankruptcy case. In addition, given the length of time caused by the various delaying tactics of the debtor and his sister, this court concludes that a 180-day bar is inadequate, and that a two year bar is appropriate under 11 U.S.C. [§§] 105(a), 349(a), 1307(c) and, alternatively, this court's inherent powers to manage its own docket. *See In re Glover*, 537 Fed.Appx. 741 (9th Cir. 2013) (affirming dismissal with a five-year bar to refiling under 11 U.S.C. [§] 105(a)); *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999) (affirming dismissal with prejudice based upon a finding of bad faith). [Dkt. 34, Ex. A, PDF pp. 3-4]

In addition, because published authority is sparse for imposing a bar in excess of 180 days, and because there are specific statutory grounds for imposing a 180 day bar that are well established in this case, the tentative ruling also included the following alternative bar of 180 days that would run concurrent with the two year bar:

> In addition, the court imposes a concurrent 180-day bar under 11 U.S.C. [§] 109(g)(1) for the debtor's willful attempt to evade Judge Bluebond's orders denying his motions to convert or dismiss his chapter 7 case [Case No. 2:07-bk-18732-BB, dkt. 65, 73, 86 (dismissal denied "with prejudice") & 139 (conversion denied "with prejudice")], and his willful failure to appear in proper prosecution of this chapter 13 case, including filing a chapter 13 plan (dkt. 8) that completely ignores the realities of binding orders in that case [Case No. 2:07-bk-18732-BB, dkt. 129 (the Order Sustaining Objection to Exemption); Adv. No. 2:11-ap-02946-BB, dkt. 14 (judgment rejecting claims regarding entitlement to house)] and the probate proceedings [*i.e.,* the impending eviction trial and sale of the house, and the limited distribution that the chapter 7 estate can expect from the probate proceedings]. [Dkt. 34, Ex. A, p. 4]

a. Reconsideration generally

The Dismissal Reconsideration Motion cites Rule 60(a) (incorporated by Rule 9024), which only applies to clerical mistakes, oversights, or omissions. Rule 60(a) provides in relevant part:

> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is

> found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. ...

"Rule 60(a) may be invoked to make a judgment or order reflect the actual intentions of the court plus necessary implications." *In re Bestway Products, Inc.,* 151 B.R. 530, 534 (Bankr. ED Cal. 1993) (citations omitted).

b. Omission of concurrent 180 day bar

Due to an internal court error, the actual dismissal order (dkt. 34) misstated the tentative ruling and did not include the alternative, concurrent 180 day bar described above. The debtor's Dismissal Reconsideration Motion points this out (dkt. 87 pp. 3:15-4:3). A separate order will grant that motion in part and deny it in part, as set forth in this memorandum decision. In addition, an amended Dismissal Order will be issued concurrent with this decision.

c. Denial of oral motions for 14 day stay and for stay pending appeal

The Dismissal Reconsideration Motion argues (dkt. 87 p. 4:4-14) that the Dismissal Order should incorporate oral rulings denying Mr. Koebel's oral motions that the order not take effect for 14 days and for a stay pending appeal. To that extent the Dismissal Reconsideration Motion will be denied.

Those oral rulings are already in the record, as the debtor admits (through Mr. Koebel) (dkt. 53 pp. 24:19-25:7; dkt. 87 p. 4:5-8). There is no need to add them to the Dismissal Order.

In addition, to the extent that the debtor seeks to revisit the merits, there is no reason to reconsider the oral denial of those motions. As to the 14 day stay, various bankruptcy Rules apply such a stay in different situations (*e.g.,* Rule 4001(a)(3) imposes a 14 day stay of orders granting relief from the automatic stay), but the debtor has not pointed to any such rule applicable in this situation. Mr. Koebel orally argued before this court (as well as, apparently, the court that conducted the unlawful detainer trial) that this court's issuance of an order dismissing this chapter 13 case did not have final legal effect "until 14 days have passed after its entry" (dkt. 52 at 8:10-12) despite the fact that the order itself states that it is effective immediately. In subsequent papers

Mr. Koebel cites Rule 62(a), but that rule only applies to execution on a judgment, and in addition it is inapplicable in this contested matter (*see* Rule 9014(c), which does not incorporate Rule 62 or 7062).

In addition, the request for a 14 day stay is moot because the 14 days expired months ago. Mr. Koebel's request to add it to the Dismissal Order at this late date is yet another example of his propensity to raise irrelevant issues and needlessly complicate and prolong this litigation.

In addition, as to the denial of a stay pending appeal, Mr. Koebel may be attempting to "get a second bite at the apple." He did not file a notice of appeal from that oral ruling, and if the written Dismissal Order were amended to add a denial of stay then no doubt Mr. Koebel would argue that the debtor should have another opportunity to appeal from the denial of that stay. This court will not facilitate such apparent gamesmanship.

d. Erroneous references to Chapter 7 Trustee instead of Probate Trustee

The Dismissal Reconsideration Motion argues (dkt. 87 pp. 4:16-5:6) that this court's tentative ruling, incorporated into the Dismissal Order, erroneously refers to the Chapter 7 Trustee when it should refer to the Probate Trustee. The amended Dismissal Order will not include those erroneous references.

e. Evidentiary rulings on the Probate Trustee's declaration

The Dismissal Reconsideration Motion argues (dkt. 87 pp. 5:26-6:23) that this court's rulings on the debtor's evidentiary objections are unclear. As explained below, this whole issue is irrelevant on multiple grounds. Nevertheless, for the sake of completeness the merits of this issue are addressed before explaining why the issue is irrelevant.

The Probate Trustee filed a declaration that asserted:

> The Debtor's tactics have involved various litigation delays in the San Mateo Probate Court. The tactics were engaged in by both the Debtor in his own right as well as in conspiracy with his sister

> Graciela Dibble, who was the former trustee of the [Probate] Trust. Amongst the tactics engaged in by the Debtor and his sister was the fraudulent transfer by Ms. Dibble of the [house] from the Trust. [Dkt. 21 p. 37, para. 2, emphasis added.]

There are undisputed recitations of fact in the record to support the allegation of a dilatory conspiracy between the debtor and his sister. For example, as recited in the Chapter 7 Trustee's status report (dkt. 21, Ex. 1, at para. 36-46), the Probate Court ruled that the debtor was not entitled to occupy the house, but the debtor refused to leave, and for over two years the debtor's sister did nothing further to evict the debtor, which certainly seems like a conspiracy between the debtor and his sister to delay any sale of the house.

Nevertheless, the debtor asserted that the Probate Trustee had no personal knowledge of any such conspiracy, and in fact committed "perjury" by stating otherwise:

> Debtor objects to the Declaration of Stevan Chandler [the Probate Trustee] attached to Docket Entry #21 as perjury. Not only is it impossible for Mr. Chandler to have personal knowledge that the Debtor was "in conspiracy with his sister Graciela Dibble ... [in] the fraudulent transfer by Ms. Dibble of the [house] from the Trust[,]" the public record establishes the falsity of his declaration. [Dkt. 25, emphasis added.]

Prior to the hearing on the Dismissal OSC, this court issued its written tentative ruling on this evidentiary objection (attached as an exhibit to dkt. 32 p. 3), which was later orally adopted as this court's final ruling at the hearing. *See* dkt. 53, Tr. 1/15/15, p. 20:19. That written tentative ruling states in relevant part:

> (1) Evidentiary objections. This court is not persuaded by the debtor's objections to the allegations and evidence presented by the [Probate] trustee because (a) this court can take judicial notice of the findings of fact recited by the probate court, the appellate court, and the bankruptcy court, in the documents authenticated in the [Probate] trustee's responses;
> (b) alternatively, supposing for the sake of discussion that any of the [Probate] trustee's allegations were not sufficiently supported by such evidence, this court can treat them as argument;
> (c) alternatively, this court would reach the same conclusions even if this court were to ignore the statements to which the debtor has objected.
>
> * * *
>
> If you wish to dispute the above tentative ruling, please see Judge Bason's Procedures (posted at www.cacb.uscourts.gov, "Judges," "Bason, N.," "Instructions/Procedures," "Procedures;"

> see the section labeled "Tentative rulings"). [Dkt. 32 p. 3, emphasis in original.]

First, the debtor failed to dispute this tentative ruling at the hearing on January 15, 2015, so he has forfeited any challenge to it. *See* dkt. 53 *passim*.

Second, and alternatively, there is such a strong correlation between the debtor's and his sister's history of dilatory acts and omissions (as set forth in the exhibits that are part of the same document, dkt. 21) that the Probate Trustee had a sufficient basis to conclude that there was a conspiracy. Admittedly, it is questionable whether the Probate Trustee's opinion of a conspiracy might be excluded under the Federal Rules of Evidence, such as Rule 702, but there was no objection on that basis (the only bases were lack of personal knowledge and "perjury").

Third, and most importantly, this entire issue is irrelevant. This court did not rely on any alleged conspiracy between the debtor and his sister – in fact, this court assumes without deciding that the debtor and his sister may be at odds on many issues, perhaps including the sister's transfer of the house to herself; but that does not take away from the fact that the debtor has been entirely willing to take advantage of the delays caused by his sister.

Both the evidentiary ruling and the irrelevance of this dispute are illustrated by this court's statements at the hearing on the Dismissal OSC. This court pointed to one of the debtor's frivolous arguments (that there is "no such thing as taxes, because there's no such thing as income," dkt. 53, Tr. 1/15/15, p. 10:20-21) as an example of how the Probate Trustee could conclude that the debtor was in a dilatory conspiracy with his sister, so the trustee's declaration alleging such a conspiracy would not be stricken; but then this court explained that it was not making any finding of such a conspiracy. This court explained:

> I think somebody [*i.e.*, the Probate Trustee] faced with an argument [by the debtor] that there's no such thing as income and no such thing as taxes could reasonably interpret that as frivolous arguments that are designed to be in cahoots with the sister in just causing delay.
>
> * * *

> Now, I'm not saying that that's what I'm finding. I'm explaining that that's why I denied your motion to strike that. There is evidence to support that assertion. It's a litigation. They're entitled to make that assertion. [Dkt. 53, Tr. 1/15/15, p. 13:10-20, emphasis added.]

(Mr. Koebel later misrepresented this court's findings, stating in connection with the Sanctions OSC that this court "erroneously finds the unsubstantiated insinuation of a conspiracy between the Debtor and [Ms. Dibble] to be credible" (dkt. 47 p. 7:8-11). That is false: as the above quote shows, this court specifically declined to make any such finding.)

It is true that in dismissing this case this court concluded that a 180 day bar under Section 109(g) would be inadequate, and a two year bar was necessary, "given the length of time caused by the various delaying tactics of the debtor and his sister." Dkt. 34, Ex. A, pp. 3-4 (emphasis added). But, again, the point is that regardless whether the debtor and his sister are "in cahoots," the debtor has taken advantage of her failure to do anything for years to evict him, and the debtor has added to that his own dilatory tactics. These types of tactics can delay eviction for far more than 180 days even if there is no "conspiracy" with his sister, so a two year bar is warranted.

Finally, the debtor's evidentiary objection to the Probate Trustee's declaration is irrelevant pursuant to each of the two alternative rulings set forth in the written tentative ruling, which were also adopted at the hearing (dkt. 53, Tr. 1/15/15, p. 20:19):

> (b) alternatively, supposing for the sake of discussion that any of the [Probate] trustee's allegations were not sufficiently supported by such evidence, this court can treat them as argument;
> (c) alternatively, this court would reach the same conclusions even if this court were to ignore the statements to which the debtor has objected. [Dkt. 32 p. 3]

For all of these reasons, the Dismissal Reconsideration Motion is denied to the extent that it seeks any different rulings on the debtor's objection to the Probate Trustee's declaration.

f. Evidentiary rulings on the chapter 7 trustee attorney's declaration

The Dismissal Reconsideration Motion questions this court's evidentiary rulings regarding a declaration of Kathleen J. McCarthy, Esq., an attorney for the Chapter 7

Trustee. That declaration accuses the debtor of having engaged in "every imaginable delay and litigation tactic" (dkt. 21 p. 7:11) and describes the waterfall of distributions once the home is sold: first the probate administrative expenses will be paid and distributions will be made to the probate beneficiaries (only one of which is the debtor's chapter 7 bankruptcy estate), and then "the Debtor's Chapter 7 case creditors and administrative claimants can be paid." *Id.* p. 7:25-26.

The debtor's entire objection (dkt. 26) was that this declaration is "intentionally incomplete in violation of [Ms. McCarthy's] duty to inform this court of the complete truth" because "[s]he refuses to tell the court that the sum total of the single claim filed in 2:07-bk-18732-BB is $4,219.15 and that the Chapter 7 Trustee has never disclosed their legal costs and refuses to do so now." (Emphasis added.) This objection is unpersuasive for multiple alternative reasons.

First, there was no need to "disclose" (calculate) the exact dollar amount of legal costs because that issue is irrelevant. As described above, (a) the debtor's alleged expectation of a speculative future lump sum distribution – reduced by legal costs – is legally inadequate to fund a chapter 13 case; (b) alternatively, it is the debtor's burden (not the Probate Trustee's burden) to show that he had a reasonable basis to expect a distribution (after deducting those legal costs) that could fund his chapter 13 plan; and (c) even if that were not so, this court can take judicial notice of the seemingly endless litigation by the debtor (and his sister) in the Chapter 7 Case, this chapter 13 case, and the probate proceedings, the costs of which undoubtedly make any net distribution to the debtor a remote possibility at best, all of which would shift the burden back to the debtor to establish a reasonable expectation of a lump sum distribution.

Second, and alternatively, the evidentiary objection is irrelevant pursuant to the same two alternative rulings quoted above:

> (b) alternatively, supposing for the sake of discussion that any of the [Probate] trustee's allegations were not sufficiently supported by such evidence, this court can treat them as argument;
> (c) alternatively, this court would reach the same conclusions even if this court were to ignore the statements to which the

debtor has objected. [Dkt. 32 p. 3; dkt. 53, Tr. 1/15/15, p. 20:19.]

For all of these reasons, the Dismissal Reconsideration Motion is denied to the extent that it seeks any different rulings on the debtor's objection to Ms. McCarthy's declaration.

g. Other asserted grounds for reconsideration

To the extent, if any, that the Dismissal Reconsideration Motion seeks additional changes to the Dismissal Order, that motion is denied. The debtor has not established sufficient grounds for any such changes under Rule 60(a) (incorporated by Rule 9024).

8. Conclusion as to dismissal

The debtor filed this case while his Chapter 7 Case was still pending, and the only apparent purpose for doing so was to delay an unlawful detainer trial that was scheduled for January 16, 2015. The debtor's alleged alternative reasons for filing this case are nonsense: his alleged need to address debts incurred after his Chapter 7 Case was filed was a sham; his alleged monthly net income was based on living rent free and virtually expense free, which was a sham; his alleged ability to fund the chapter 13 case from speculative future proceeds from his Chapter 7 Case was a sham; and his assertion that he could resuscitate a homestead exemption in a non-homestead property was a sham. In addition, the debtor has repeatedly advanced frivolous arguments and needlessly imposed delay and expense on other parties. There was ample cause to dismiss this case, and to impose a two year bar against once again being a debtor in bankruptcy, or alternatively a 180 day bar.

Except as provided above, the debtor's Dismissal Reconsideration Motion will be denied by separate order. An amended Dismissal Order will be issued to correct the issues noted above and other minor errors.

B. There Is More Than Adequate Cause For Sanctions Against Mr. Koebel

Various sections of the Code, the Rules, and other authorities form a patchwork under which a bankruptcy court may sanction attorney misconduct. Those most relevant to the present case will be discussed in turn, after reviewing the procedural

background.

1. Procedural background

Proceedings on the Sanctions OSC and the Sanctions Motion have been continued several times, partly so that the Probate Trustee would have an adequate opportunity to supplement and fully articulate grounds for his Sanctions Motion, and partly so that Mr. Koebel could respond to new issues raised in the Sanctions Motion and obtain the advice of counsel (Giovanni Orantes, Esq., who has sometimes assisted Mr. Koebel in these proceedings). At each stage this court has also attempted to minimize the expense to Mr. Koebel and the Probate Trustee. Hearings were held on February 10, March 18, and May 8, 2015.

Written responses to the Sanctions OSC were filed by Mr. Koebel (dkt. 47) and the Probate Trustee (dkt. 46), and Mr. Koebel then filed a response to the Probate Trustee's papers (dkt. 52) as well as evidentiary objections to the declarations (included in those papers) of the Chapter 7 Trustee (dkt. 49), the Probate Trustee (dkt. 50), and the Probate Trustee's counsel (dkt. 51). This court sustained most of those evidentiary objections, primarily on the grounds that they contained improper argumentation and legal conclusions. This court also provided an extensive oral tentative ruling. Additional briefs and evidentiary objections were filed by Mr. Koebel (dkt. 57, 66, 67, 68, 69, 81) and the Probate Trustee (dkt. 61, 75, 83, 84). Those papers addressed not only Mr. Koebel's conduct in this case but also his conduct in other cases, including removal of unlawful detainer proceedings from State court to the Bankruptcy Court.

At the hearing on May 8, 2015 Mr. Koebel chose not to present testimony or other evidence beyond what is in the filed papers. This court took the matter under submission.

This court is not convinced by Mr. Koebel's argument (dkt. 81 p. 2:1-5) that, by setting a deadline for the Probate Trustee to file his Motion for Sanctions (to be heard in conjunction with the Sanctions OSC), this court transformed that motion into a proceeding for sanctions on the court's initiative for purposes of 9011(c)(1)(B). That is

an example of Mr. Koebel attempting to take advantage of this court's accommodations that were made largely for his own benefit. There was nothing preventing the Probate Trustee from re-filing all of the previous papers in the form of a document specifically captioned as a motion for sanctions, and having that motion heard separately from the Sanctions OSC; but all of that would have caused greater expense for all parties in having to address two separate proceedings (the Sanctions OSC and the Sanctions Motion). So instead this court permitted the Probate Trustee to file his motion and incorporate previously filed documents by reference. In addition, on several occasions this court continued the hearings on the Sanctions OSC and the Sanctions Motion to provide Mr. Koebel with additional time to respond to any new issues or arguments.

Mr. Orantes was asked at the May 8, 2015 hearing to explain how his client had been prejudiced or otherwise denied an opportunity to adequately respond given that the Motion for Sanctions simply incorporated the documents previously filed by the Probate Trustee. Mr. Orantes declined to further address the issue, instead simply submitting on the papers.

This court is satisfied that Mr. Koebel has been afforded due process and all of the procedural protections to which he is entitled.

2. Sanctions are warranted under this court's inherent powers

A bankruptcy court's inherent powers allows it to sanction an attorney based upon explicit findings of "bad faith" or "willful misconduct," even in the absence of express statutory authority to do so. *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009). The Ninth Circuit has thus far declined to decide "whether the bankruptcy court must find bad faith by clear and convincing evidence or under a preponderance of the evidence standard []." *In re Dyer*, 211 F.3d 1178, 1197 no. 20 (9th Cir. 2003) (citing *Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1143 no. 11 (9th Cir. 2001)). This court assumes without deciding that the "clear and convincing" standard applies.

"When using the inherent sanction power, due process is accorded as long as

the sanctionee is 'provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith.'" *Id.* at 1060. The extensive proceedings have provided Mr. Koebel with more than adequate advance notice of exactly the conduct at issue and that he has been accused of acting in bad faith or with willful misconduct.

There is clear and convincing evidence that Mr. Koebel did in fact operate in bad faith, and additionally and alternatively engaged in willful misconduct, by filing this chapter 13 case for the purpose of delaying and obstructing the Probate Trustee and the Chapter 7 Trustee, including staying the unlawful detainer trial and needlessly increasing the costs of litigation. The debtor had no genuine need, let alone any ability, to reorganize his finances in chapter 13. Moreover, after filing the petition Mr. Koebel continued to engage in further bad faith and willful misconduct as described above, including false and misleading representations to this court, and frivolous and wasteful litigation.

3. Sanctions are warranted under Rule 9011

Rule 9011(b) imposes on attorneys the obligation to insure that all submissions to the bankruptcy court are truthful and for proper litigation purposes. *In re DeVille*, 361 F.3d 539 at 543 (9th Cir. 2004). Specifically, 9011(b) provides:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Unlike the "bad faith and/or willful misconduct" requirement under the court's inherent sanctioning powers, "[t]he imposition of Rule 11 sanctions ... requires only a showing of objectively unreasonable conduct." *In re Deville*, 361 F.3d 539, 548 (9th Cir. 2004) (quoting *Fellheimer, Eichen & Braverman v. Charter Technologies*, 57 F.3d 1215, 1225 (3rd Cir. 1995)).

Procedurally, there are two methods by which Rule 9011 sanctions may be imposed.

a. Sanctions on motion by a party-in-interest

Rule 9011(c)(1)(A) states in pertinent part:

> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) *How Initiated*
>
> (A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific *conduct* alleged to violate subdivision (b)[.]

Rule 9011 typically provides for a 21-day "safe harbor" provision during which a party may withdraw or correct the offending representation. But that "safe harbor" provision does not apply if the conduct at issue is the filing of a bankruptcy petition in violation of Rule 9011(b). *See* Rule 9011(c)(1)(A).

This court is persuaded that in his acts and omissions described above Mr. Koebel did not engage in an inquiry reasonable under the circumstances before making his legal arguments and factual allegations; presented his papers for improper purposes including unnecessary delay and needless increase in the cost of litigation; made legal arguments that were not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and made factual contentions that did not have evidentiary support. Sanctions are

warranted under Rule 9011(c)(1)(A).

b. Sanctions on the court's own motion

Rule 9011(c)(1)(B) provides:

> (B) *On Court's Initiative*. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

While "fee shifting" sanctions cannot be imposed under Rule 9011(c)(1)(B) (on the court's initiative), attorney fees may be awarded under Rule 9011(c)(1)(A) (motions by a party). *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998).

For the same reasons set forth above with respect to Rule 9011(c)(1)(A), sanctions are warranted under Rule 9011(c)(1)(B).

4. Specific sanctions

a. Monetary sanctions

It is appropriate to award reasonable attorney fees and costs to the Probate Trustee. This court has reviewed the Probate Trustee's evidence in support of his and the Chapter 7 Trustee's fees and costs and is satisfied that those fees and costs are reasonable and appropriately charged to Mr. Koebel. This court will direct the Probate Trustee to lodge separate orders awarding $15,346.30 in fees and expenses to the Probate Trustee and the second awarding $2,110.60 in fees and expenses to the Chapter 7 Trustee, without prejudice to seeking additional fees and costs for further proceedings as appropriate.

b. Referral to disciplinary panel with recommendation for ½ year suspension and further 4½ year probation

The BAP has held that "[b]ankruptcy courts . . . have express authority under the Code and Rules to sanction attorneys, including disbarment or suspension from practice." *In re Nguyen,* 447 B.R. 268, 281 (9th Cir. BAP 2011) (citing F.R.B.P. 9011 and 11 U.S.C. § 105(a)).

The Ninth Circuit has also held that bankruptcy courts have the power to

suspend attorneys under their inherent powers for "bad faith and willful misconduct," provided the attorney is accorded due process. *In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009). Attorney suspension is "neither civil nor criminal, but an investigation in to the conduct of the lawyer-respondent. Disbarment proceedings are not for the purpose of punishment but to maintain the integrity of the courts and the profession." *Lehtinen*, 564 F.3d at 1059. Therefore, an attorney facing a possible suspension need not be afforded the protections accompany criminal contempt proceedings.

The BAP has further stated that, "[a]lthough the Panel's prior decisions do not require that the bankruptcy court refer the matter to the [disciplinary panel], we *strongly* urge the bankruptcy court to do so, . . . [so that] the bankruptcy court will avoid the awkward responsibility for serving as 'prosecutor and arbiter in the investigation, prosecution and discipline' of [the attorney]." *In re Brooks-Hamilton*, 400 B.R. 238, 253 (9th Cir. BAP 2009) (quoting *Crayton*, 192 B.R. 970, 978 (9th Cir. BAP 1996) (emphasis in original). *Cf. Lehtinen*, 564 F.3d at 1062.

Mr. Koebel's filing of this chapter 13 case and his subsequent arguments and actions relating to the Dismissal OSC, the Sanctions OSC, and the Sanctions Motion have been frivolous, wasteful and tremendously costly. They have created unnecessary expense for the Chapter 7 Trustee and the Probate Trustee. They have consumed a tremendous amount of time and attention of all involved – including this court. At the end of the process, this court is left with a lasting impression that the imposition of these costs – at least upon his opponents – was one of Mr. Koebel's primary goals in filing the chapter 13 case. In addition, there are unrebutted assertions in the record that Mr. Koebel has not paid prior sanctions imposed by another Bankruptcy Judge of this court, and to the contrary Mr. Orantes conceded that Mr. Koebel, who is in his own chapter 13 case, has not paid those sanctions. Dkt. 82, Tr. 3/18/15, pp. 19:25-20:8 and 21:21-22:3. Moreover, while Mr. Koebel's conduct may have delayed the day of reckoning for the debtor, they have also squandered whatever equity the debtor might have had in the house and presumably could have used to find

alternate housing. In addition to these tangible costs to his litigation opponents and the debtor in this particular case, Mr. Koebel's conduct creates an "in terrorem" effect in other cases – anyone contemplating litigation against him may be deterred by his penchant for running up litigation costs, causing unwarranted delays, and other misconduct. Finally, it is offensive to the proper administration of justice to permit Mr. Koebel to continue with his conduct, and he shows no signs of tempering his conduct. For all of these reasons, in this court's opinion, it is appropriate to recommend that Mr. Koebel be suspended from practice before this court, and also to refer this matter to the California bar.

All of the foregoing is based solely on Mr. Koebel's conduct in this case and the related Chapter 7 Case and probate proceedings. The Probate Trustee has also provided persuasive evidence that Mr. Koebel's conduct is part of a broader pattern that extends to other cases. That evidence includes:

> (1) The issuance of sanctions and a referral for prosecution for perjury by District Court Judge Andrew Gilford in connection with a case in which Mr. Koebel was a party (dkt. 61 at 2:15-18);
>
> (2) The conduct described in a motion for sanctions against Mr. Koebel filed in another case before the undersigned Bankruptcy Judge, *In re Mannings* (Case No. 2:13-ap-01968-NB), which is supported by a declaration of Carol G Unruh, Esq. detailing Mr. Koebel's improper removal of an unlawful detainer proceeding from state court to the bankruptcy court in *Mannings* as well as eight other cases (dkt. 61 p. 64-65, the "Unruh Declaration");
>
> (3) The issuance of sanctions against Mr. Koebel by Bankruptcy Judge Zurzolo in *In re Brooks* (2:13-ap-02078-VZ) for "egregious, vexatious, and bad faith conduct" (dkt. 61 p. 2:24-27 and dkt. 61 p. 14-30).

Although Mr. Koebel argues that removal of unlawful detainer proceedings is not necessarily improper in <u>every</u> situation, he has not pointed to any facts in the cases at issue that would have made his removal of such proceedings proper in <u>those</u> situations. *See generally Lebbos v. Judges of Superior Court, Santa Clara County*, 883 F.2d 810, 815 (9th Cir. 1989) (unlawful detainer actions are summary proceedings – cross-complaints, countercomplaints, and affirmative defenses are inadmissible). *In re Bisno*, 433 B.R. 753, 756-58 (Bankr. C.D. Cal. 2010).

A review of the cases cited in the Unruh Declaration, some of which were before this Court, reveal that Mr. Koebel, engaged in the following conduct:

(1) *Rose Avenue, LLC v. Kerr et. al.* (2:12-ap-01489-SK): The debtor, represented by Mr. Koebel, filed a chapter 13 petition after an unlawful detainer judgment had been entered in state court. The creditor moved for and obtained relief from stay in the chapter 13 case. Later that day, Mr. Koebel removed the unlawful detainer proceeding to the bankruptcy court. The action was remanded by Judge Klein.

(2) *Freddie Mac Federal Home Loan Mortgage Corp. v. Peng* (2:12-ap-02672-MT): A pre-petition unlawful detainer complaint was filed against the debtors and continued when the debtors filed their bankruptcy petition. The creditor sought and obtained relief from the automatic stay in the bankruptcy case. Two days later, Mr. Koebel removed the unlawful detainer proceeding to district court. The district court remanded, holding that federal courts lacked subject matter jurisdiction over the proceeding. The following month, a second bankruptcy case affecting the subject property was filed. The creditor again sought and obtained relief from stay. The day prior to the scheduled date for the continued unlawful detainer trial, Mr. Koebel removed the unlawful detainer proceeding to the bankruptcy court. The unlawful detainer action was again remanded to state court.

(3) *Deutsche Bank National Trust Co. v. Atkins*, (2:12-ap-02099-TD): A pre-petition unlawful detainer judgment was entered against the debtors. The debtors filed a chapter 7 petition. The creditor moved for and obtained relief from stay. Approximately two weeks later, Mr. Koebel would remove the fully adjudicated unlawful detainer proceeding to the bankruptcy court. The proceeding was remanded by Bankruptcy Judge Donovan.

The Unruh Declaration references six other cases in which Mr. Koebel engaged in similar gamesmanship. All of the unlawful detainer proceedings cited in the Unruh Declaration were met with an immediate motion to remand. The end result in each of these adversary proceedings was either that the motion to remand was granted or the

adversary complaint was closed when the underlying bankruptcy case was dismissed. This track record demonstrates a pattern by Mr. Koebel of engaging in tactics designed purely to unnecessarily delay his litigation opponents.

Mr. Koebel has argued that the removals cited in the Unruh Declaration are not evidence of misconduct because removal of an unlawful detainer proceeding to bankruptcy court may sometimes be proper. At the final hearing Mr. Orantes cited *Vella v. Hudgins*, 20 Cal. 3d 251 (1977), as standing for the proposition that title "has to be litigated" in an unlawful detainer action and that once title is at issue the judicial officer presiding over the unlawful detainer trial typically transfers the matter to the unlimited jurisdiction section of the state court. Under these circumstances, it is argued, removal of the unlawful detainer action to bankruptcy court may be proper.

Vella deals primarily with the *res judicata* effects of an unlawful detainer trial. As part of its discussion, the *Vella* Court identifies a "qualified exception" provided for by Cal. Code. Civ. Proc 1161a to the "rule that title cannot be tried in unlawful detainer." *Id.* at 255. Under that section, "one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must show that he acquired the property at a regularly conducted sale and thereafter 'duly perfected' his title."[3] *Vella* recognized that once a question of title was properly raised, the official presiding over the unlawful detainer proceeding lacked jurisdiction to adjudicate issues of title relating to property worth more than the jurisdictional limit. *Id.* at 257.

The *Vella* decision does not persuade this court that Mr. Koebel's conduct in the cases cited in the Unruh Declaration is any less egregious. First, despite having several opportunities to respond to the Unruh Declaration, Mr. Koebel has not addressed how title to the subject properties was legitimately at issue in the narrow sense provided for by Cal. Code Civ. Proc. 1161a in any of those cases. The notices of removal filed by

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[3] Cal. Code Civ. Proc. 1161a(3) extends the summary eviction remedy available in an unlawful detainer trial beyond the landlord-tenant relationship to purchasers at a foreclosure sale by providing that "[w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust, executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected."

Mr. Koebel in the cases cited in the Unruh Declarations do not hint that title was "at issue" for purposes of 1161a in any of the cases cited in the Unruh Declaration. *See, e.g., Lin v. Shimkus* (2:12-ap-01037-ER, dkt. 3); *305 Rose Avenue, LLC v. Kerr* (2:12-ap-01489-SK, dkt. 1).

Moreover, the *Vella* Court only recognized a limited exception to the rule that "title cannot be tried in unlawful detainer" proceedings for plaintiffs who purchased property at a foreclosure sale. *Id. at 255.* But some of the cases cited in the Unruh declaration do not even involve foreclosure sales. For example, *La Pintoresca Apartments v. Mannings* (2:13-ap-01968-NB) involved a debtor/tenant "holding over" following the expiration of a lease with the plaintiff/landlord. Likewise, *Lin v. Shimkus* (2:12-ap-01037-ER) involved a plaintiff who purchased the property directly from Mr. Koebel's client, the debtor therein. While that debtor subsequently asserted that "she only sold the real property to [plaintiff] because she was a victim of a home equity fraud scheme," that allegation does not bring the unlawful detainer proceeding within the narrow exception of Cal. Code. Civ. Proc. 1161a.

This court does not find persuasive Mr. Orantes's argument that Mr. Koebel has already been *de facto* suspended during pendency of the proceedings on the Sanctions OSC and the Sanctions Motion. These proceedings have been lengthy and drawn out primarily because of Mr. Koebel's conduct.

In keeping with the BAP's recommendation in *Brooks-Hamilton*, this court will not impose a suspension or pre-filing order on its own authority but rather will refer the matter to the Central District Disciplinary Panel to make a determination whether to suspend Mr. Koebel, refer the matter to the State Bar for further proceedings, or take some other action.

This court's recommendation is that Mr. Koebel be suspended from practice for a period of not less than one half a year, with a probationary period of an additional four and a half years.

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V. CONCLUSION

The underlying facts of this chapter 13 case and the Chapter 7 Case are unfortunate. It is tragic that an elderly veteran was in the position of being evicted from his home. But these unhappy circumstances did not justify the debtor's and Mr. Koebel's conduct in filing and prosecuting this meritless chapter 13 case.

For all of the reasons stated above, separate orders will be issued concurrent with this memorandum decision (1) granting in part and denying in part the motion for reconsideration, as set forth herein; and (2) amending the dismissal order to set forth more clearly both the 2 year bar and the concurrent 180 day bar, and other minor clarifications.

In addition, the Probate Trustee is hereby directed to lodge two separate orders no later than 14 days after entry of this memorandum decision on this court's docket: the first awarding $15,346.30 in fees and expenses to the Probate Trustee and the second awarding $2,110.60 in fees and expenses to the Chapter 7 Trustee. This court intends to issue those orders at the same time as this court recommends to the Central District Disciplinary Panel that Mr. Koebel be suspended as set forth above, and anticipates that this memorandum decision will serve as this court's "Statement of Cause" for purposes of initiating disciplinary proceedings under (Fourth Amended) General Order 96-05.

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Date: September 30, 2015

Neil W. Bason
United States Bankruptcy Judge