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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

In Re: )  
YBA NINETEEN, LLC, )  
Debtor. )  
\_\_\_\_\_)  
YBA NINETEEN, LLC, )  
Appellant, )  
v. )  
INDYMAC VENTURE, LLC, )  
Appellee. )  
\_\_\_\_\_)

Civil No. 13cv2426-WQH-RBB  
Bankruptcy No. 13-00968-LA11  
[Bankruptcy Appeal #3]

**ORDER**

HAYES, Judge:

The matter before the Court is the appeal of the “Order Converting Case to One Under Chapter 7” (“Order Converting Case”), issued by the Bankruptcy Court on October 4, 2013. (ECF No. 1).

**I. Background**

This is the third appeal to this Court in this bankruptcy proceeding. *See In re YBA Nineteen*, S.D. Cal. Case No. 13cv1326-WQH-RBB; *In re YBA Nineteen*, S.D. Cal. Case No.

1 13cv2239-WQH-RBB.<sup>1</sup> The Court presumes familiarity with its Orders issued in the other  
2 appeals.

3 **A. Proceedings Prior to the October 3, 2013 Status Conference**

4 Debtor, YBA Nineteen, LLC, filed a voluntary Chapter 11 petition on January 31,  
5 2013. On March 6, 2013, the Bankruptcy Court entered an Order entitled, “Order Re:  
6 Chapter 11 Petition 1) Setting Status Conference; 2) Setting Compliance Deadlines; 3)  
7 Setting Disclosure Statement and Plan Filing Deadlines; and 4) Setting Sanctions, If  
8 Appropriate, Including Dismissal, Conversion or Appointment of a Chapter 11 Trustee or  
9 Examiner Because of Noncompliance with Above-Reference[d] Requirements” (the  
10 “Scheduling Order”). (Notice of Lodgment Supp. Mot. for Stay, Ex. C at 1, ECF No. 4-2  
11 at 14). The Scheduling Order states:

12 The above-referenced Debtor filed a petition for reorganization under Chapter  
13 11. To insure compliance with the numerous federal and local rules governing  
14 bankruptcy procedure as well as the United States Trustee’s Operating and  
Reporting Requirements for Chapter 11 cases (‘ORR’) and for other good cause  
appearing, the Court hereby

- 15 1. ORDERS that pursuant to 11 U.S.C. § 105(d), the Court will hold a  
16 status conference on this Chapter 11 case on 4/11/13 ... at which the  
Debtor and the United States Trustee shall appear.
- 17 2. ORDERS that prior to the above-referenced status conference, the  
18 Debtor shall have complied with all applicable ORR, federal and local  
19 bankruptcy rules governing Chapter 11 cases, including, but not limited  
20 to ... d. Submission of all operating reports due under ORR C.3.....
- 21 3. ORDERS that no later than one week in advance of this status  
22 conference and before every continued hearing of this Chapter 11 status  
23 conference, the Debtor is directed to file and serve on the U.S. Trustee  
24 a report addressing the status of each of the above-referenced  
requirements and any other requirements imposed by the Court at a  
previous status conference in this case. Failure to file this status report  
or comply with the requirements ordered by the Court may be cause to  
dismiss or convert this case, appoint a Chapter 11 trustee or examiner or  
impose other appropriate sanctions as permitted by 11 U.S.C. §§ 105(a)  
and 1112(b).

25 *Id.* at 2. The United States Trustee’s Operating and Reporting Requirements for Chapter 11

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27 <sup>1</sup> In the second appeal, the Court issued a stay preventing Appellee IndyMac Venture,  
28 LLC from taking any further action as to the real property at issue. (S.D. Cal. Case No.  
13cv2239, ECF No. 6).

1 cases (“ORR”), which are incorporated in the Scheduling Order, state that a debtor must file  
2 Monthly Operating Reports no later than twenty calendar days after the close of each month.  
3 (Appellee’s Notice of Lodgment, Ex. 3 at 65 ¶ C.3., ECF No. 22).

4 On April 11, 2013, the Bankruptcy Court conducted a status conference. (Notice of  
5 Lodgment Supp. Mot. For Stay, Ex. G, ECF No. 4-2 at 26). The Bankruptcy Court docket  
6 reflects that Debtor did not file a status report prior to the April 11, 2013 status conference,  
7 and Debtor filed the operating report for February (which was due on March 20, 2013) on  
8 the day of the conference, April 11, 2013. *Id.* The Bankruptcy Court’s Minute Order from  
9 the April 11, 2013 status conference states: “Hearing continued to 7/18/13 at 10:30 to hear  
10 the [Disclosure Statement] & Plan. Debtor to set the claims bar date. Amend Sch[edules]  
11 B & D.” (Notice of Lodgment Supp. Mot. For Stay, Ex. D, ECF No. 4-2 at 17).

12 On April 22, 2013, Debtor filed the operating report for March. (Notice of Lodgment  
13 Supp. Mot. For Stay, Ex. G, ECF No. 4-2 at 27). On May 8, 2013, Debtor filed the operating  
14 report for April. *Id.* at 28. On May 31, 2013, Debtor filed an amendment to Schedules A  
15 and B (although Debtor did not amend Schedule D). *Id.* at 30. On July 16, 2013, Debtor  
16 filed the operating reports for May (which was due on June 20, 2013) and June. *Id.* at 33.  
17 On July 18, 2013, the Bankruptcy Court conducted a status conference. *Id.* at 34. The  
18 Bankruptcy Court docket reflects that Debtor did not file a disclosure statement, a plan or  
19 a status report prior to the July 18, 2013 status conference. *Id.* The Bankruptcy Court’s  
20 Minute Order from the July 18, 2013 status conference states: “Hearing continued to 9/5/13  
21 at 11:00, [Disclosure Statement] to be filed by 7/22/13.” (Notice of Lodgment Supp. Mot.  
22 For Stay, Ex. F, ECF No. 4-2 at 21).

23 On July 22, 2013, Debtor filed a Disclosure Statement pursuant to 11 U.S.C. § 1125.  
24 (Notice of Lodgment Supp. Mot. For Stay, Ex. G, ECF No. 4-2 at 35). On August 12, 2013,  
25 the Bankruptcy Court issued an order scheduling a status conference and hearing on the  
26 Debtor’s Disclosure Statement for October 3, 2013. *Id.* at 38.

27 On September 11, 2013, Debtor filed the operating report for July (which was due on  
28 August 20, 2013). *Id.* at 42.

1 On September 19, 2013, Appellee and secured creditor IndyMac Venture, LLC filed  
2 an “Opposition to Approval of Disclosure Statement and Suggestion That Case Be  
3 Converted to a Case under Chapter 7 of the Bankruptcy Code at Case Status Hearing.”  
4 (Appellee Notice of Lodgment, Ex. 4, ECF No. 22 at 73). This document states:

5 The Court is ... considering the Debtor’s chapter 11 status hearing. Due to the  
6 lack of case progress, the enormous administrative expenses accrued in the  
7 estate and the continuing loss and diminution in the estate, IndyMac suggests  
8 that the Court convert Debtor’s case to chapter 7. As the Court knows, the  
9 Debtor has refused to engage in repairs and remediation to the property while  
10 the property remains under the threat of foreclosure. The Debtor’s appeal now  
11 threatens to extend the duration of the case while IndyMac is stayed from  
12 foreclosing. The duration of the case is now extending into the Southern  
13 California rainy season in which IndyMac’s collateral will be exposed to  
14 further moisture intrusion and rot.

15 All the foregoing suggests a need for a change in case management to break the  
16 impasses that have developed. The case should be converted to chapter 7 to  
17 facilitate a resolution of the case.

18 Wherefore, IndyMac Venture, LLC respectfully requests that the Court deny  
19 approval of Debtor’s disclosure statement and convert the ... case to a case  
20 under chapter 7 of the Bankruptcy Code.

21 *Id.* at 75.

22 On September 27, 2013, the Bankruptcy Court issued a Tentative Ruling denying  
23 approval of the Debtor’s Disclosure Statement. (Notice of Lodgment Supp. Mot. For Stay,  
24 Ex. I, ECF No. 4-2 at 54). The Bankruptcy Court stated that “a plan based on retention of  
25 the property is problematic at best”; the treatment of the claims of Mr. Banayan and his  
26 company Avaria are “inconsistent”; “the promises made to creditors under this plan” are  
27 “illusory”; and there is no remedy provided if monthly adequate protection payments to  
28 IndyMac are not made or the property is not repaired. *Id.*

On October 3, 2013, the day of the status conference, Debtor filed a status report  
(which was due on September 26, 2013). (Notice of Lodgment Supp. Mot. For Stay, Ex. J,  
ECF No. 4-2 at 56-57). The status report states that Debtor is “willing to submit on the  
tentative ruling of the Bankruptcy Court.” *Id.* at 56. The remainder of the two-page status  
report argues that “IndyMac’s improperly proposed motion to convert the case to chapter 7  
should be denied.” *Id.* at 57.

1 The Bankruptcy Court docket reflects that Debtor did not file an operating report for  
2 August (which was due on September 20, 2013) or September as of the October 3, 2013  
3 status conference or any time thereafter. (Notice of Lodgment Supp. Mot. For Stay, Ex. G,  
4 ECF No. 4-2 at 47).

5 **B. October 3, 2013 Status Conference**

6 At the October 3, 2013 status conference, counsel for Appellee IndyMac stated:

7 Your Honor, we came down here today and are appearing in our capacity as the  
8 estate's largest and perhaps only non-insider creditor in this case to urge the  
9 Court, in connection with the case status conference, to convert the debtor's  
10 case to Chapter 7 based on the record that's before the Court today.

11 The basis for conversion under these circumstances -- there's no motion  
12 pending -- is fundamentally lack of compliance with the Court's March 6, 2013  
13 status conference order which gives notice of the potential for conversion or  
14 dismissal and related cause under five subsections of section 1112(b)(4).

15 (Suppl. Notice of Lodgment Supp. Mot. Stay, Ex. 7 at 5-6, ECF No. 20-8 at 6-7). Counsel  
16 for IndyMac argued that "there's ... lack of compliance with [the Bankruptcy Court's March  
17 6, 2013] status conference order"; the requirement that a status report be filed seven days  
18 before any continued status hearing was violated; the "monthly operating reports are  
19 missing" or "chronically late throughout the entire case"; the most recent monthly operating  
20 report on file was the July report, which is "demonstrably false and contains a false financial  
21 statement"; "there was an initial date set for disclosure statement in this case [and] the debtor  
22 just blew through the deadline to file the disclosure statement, didn't file it, wound up at the  
23 last hearing on case status, and you gave the debtor a reprieve and you gave the debtor a new  
24 deadline"; "[a]fter nine months the debtor has not paid a dime of adequate protection to my  
25 client"; "[i]f this case fails, which it's been on the edge of failing consistently, and there is  
26 no money in this estate, we will have a house that is more exposed to the winter rain than as  
27 it presently stands"; "the accrual of administrative expenses is a serious issue in this case and  
28 reflects a continuing loss and diminution that, coupled with a lack of prospect of  
rehabilitation in the case, which was just confirmed this morning by denial of the disclosure  
statement, is cause for conversion under 1112(b)(4)(A)"; "[IndyMac] would prefer to deal  
with a disinterested fiduciary who can look at the assets in this estate ... and with whom we

1 can deal to resolve this estate and it's not just an estate which can keep tripping down the  
2 calendar without resolution. And so we support conversion....” *Id.* at 6-11.

3 The Bankruptcy Court then asked counsel for Debtor to “please address that.” *Id.* at  
4 11. Counsel for Debtor stated that “there is no noticed motion by IndyMac, I think the  
5 appropriate way to proceed....” *Id.* The Bankruptcy Court stated: “[Y]ou do know that the  
6 Court has a continuing OSC on Chapter 11 cases and that there does not have to be a motion  
7 by IndyMac. The Court has made its own motion.” *Id.* at 12. Counsel for Debtor stated:

8 I understand, your Honor. And if I can get to those points ..., I think ... there  
9 was a concern ... that there's an ongoing risk to the property, and that's the  
10 water intrusion.... The evidence provided to the Court, your Honor, says that  
11 the repairs are to be finished within ten days and make sure that that water  
intrusion problem doesn't -- if it exists, doesn't keep existing after that time  
period. If IndyMac claims that there's not evidence on that issue, your Honor,  
then perhaps an evidentiary hearing on that should be set a few days out.

12 *Id.* at 12.

13 Counsel for Debtor stated: “if the Court wants further explanation of what is being  
14 done and what the process is to protect the property, we'd submit something on rather short  
15 notice and would be happy to do so, your Honor.... The operating report for August could  
16 be submitted today if the debtor is given time. And we would make sure that in the  
17 future....” *Id.* at 13-14. The Bankruptcy Court stated: “[Y]our client has not submitted  
18 timely operating reports almost as a matter of course.” *Id.* at 14. The Bankruptcy Court  
19 noted that the last operating report in the case was submitted for July; it was submitted late;  
20 and it was “inaccurate, as [IndyMac's counsel] pointed out.” *Id.* The Bankruptcy Court  
21 asked counsel for Debtor if there was “anything further?” *Id.* Counsel for Debtor stated:

22 [A]t this point putting in a trustee and converting the matter would probably  
23 create more administrative problems, more issues with the matter so close to  
24 being determined on the appeal, on the litigation and on the status of the  
25 property. If the Court is inclined to consider this, then I would request that the  
26 matter be continued at least to the November hearing that is currently set for  
disclosure statement.... There was evidence to be provided by Mr. Banayan that  
he does have the ability to fund a plan, and that could be brought to light in  
short order, your Honor.

27 *Id.* at 14-16.

28 Counsel for IndyMac stated: “The ending balance, your Honor, on the July monthly

1 operating report for this estate is \$65.13, less than the amount that's necessary to pay for  
2 telephone bills that are showing up on the July monthly operating report.... There's no  
3 money in this estate, unless Mr. Banayan, out of his good graciousness and strategic desire,  
4 drops it into the estate.... And I think that dropping that status report into the record within  
5 a couple of hours of a status conference in a case like this is not enough and it's time for a  
6 conversion." *Id.* at 16.

7 The Bankruptcy Court asked counsel for Debtor if there was "anything further?" *Id.*  
8 at 17. Counsel for Debtor stated: "No, your Honor. I don't think there's really anything to  
9 add. As I think has been established, the debtor ... has put a lot into this case, has been  
10 obviously very busy with the relief from stay matters, has done everything to protect the  
11 property within its power. It is doing everything within its power at this time to protect that  
12 property.... The debtor believes there is a way to get equity out of this property and pay off  
13 creditors, and that's the direction that it has been going at all times and that's the direction  
14 it hopes to continue to push forward on." *Id.* at 17-18.

15 The Bankruptcy Court then stated that it was going to "convert this case to one under  
16 Chapter 7." *Id.* at 19. The Bankruptcy Court stated:

17 I'm looking at the untimely [July] operating report.... And when I look at that  
18 as to what happened with this case up to that point in time, we have no income,  
19 and the only thing they we have are advances, if you will, not authorized by the  
20 Court, by Aviara and Mr. Banayan himself, totaling some \$17,000. Now,  
21 [counsel for IndyMac] points out on page 6 of that untimely operating report  
22 that what was left in the account was \$65.13. And you have argued eloquently  
23 about how this house is a valuable asset for repayment of creditors and the like,  
24 but the problem that we've been having ... is that I think your client [i.e.,  
25 Debtor] is too close to the problem....

26 When you couple that with the fact that your client has failed to file a timely  
27 status report for this hearing, has failed to file a timely operating report for  
28 August, that ... no operating reports had been filed by [the first status  
conference on April 11, 2013].... [E]xcuse me. The first operating report had  
been filed by that date; however, the case [was] filed January 31, 2013. So it's  
been here a full nine months, and you've had no progress being made on  
getting a plan filed other than one that is patently unable to proceed.... And  
then we have IndyMac's concern about the protection of the property, which  
is legitimate because protection of the property depends on Mr. Banayan....  
[The Bankruptcy Court] definitely has the impression that the advancement of  
money is really pretty much up to Mr. Banayan; and if he chooses not to  
advance the money and this process of fixing the house starts ... not quickly, not  
when the case was filed, but nine months after, he's finally getting around to

1 repairing that which he could have repaired earlier. But if he stops advancing  
2 the funds, there is no money in this case to do that.

3 So I think we need a trustee. I think a trustee can make the kinds of decisions  
4 the trustee needs to make to get the property protected, to get the property sold,  
5 to pursue the litigation if it is meritorious or to drop it if it is not, and to  
6 determine what the trustee needs to do in order to even make this case  
7 successful or to let it just liquidate, as a case sometimes has to do. So I think  
8 at this point an objective person such as a Chapter 7 trustee would be the best  
9 to look at the management and the disposition of the assets of this estate. I  
10 think that the points that [IndyMac's counsel has] made concerning the  
11 inaccuracy of the [July] operating report ... gives me serious concerns. There  
12 is a lot of inaccuracy in it based on what we do know; for example, the amount  
13 of accrued administrative expenses, which have not been provided for.... [The  
14 administrative expenses are] just accruing -- ... there is a serious loss and that  
15 this is cause for conversion.

16 *Id.* at 19-21.

### 17 **C. Order Converting Case**

18 On October 4, 2013, the Bankruptcy Court issued the Order Converting Case. (Notice  
19 of Lodgment Supp. Mot. For Stay, Ex. K, ECF No. 4-2 at 65-69). The Order Converting  
20 Case states:

21 On March 6, 2013, this Court entered an order pursuant to 11 U.S.C. § 105(d)  
22 on notice to the Debtor, its counsel and all creditors setting a Chapter 11 status  
23 conference and *inter alia* providing for sanctions, if appropriate, including  
24 dismissal or conversion of the case for noncompliance with various orders  
25 applicable to Chapter 11 debtors ('Scheduling Order').

26 The first hearing on the Scheduling Order was held April 11, 2013. At that  
27 hearing, the Court scheduled a continued hearing for July 18, 2013, and  
28 directed the Debtor to file a plan and disclosure statement in time to have it  
considered in conjunction with this continued hearing. Additionally, the Court  
directed the Debtor to amend Schedules B and D. The Debtor did not timely  
file a plan and disclosure statement, as it had been directed to do. The Debtor  
amended Schedule B, but it did not amend Schedule D, as it had been directed  
to do....

At the October 3, 2013 hearing, the Court found that the Debtor had violated  
¶ 3 of the Scheduling Order. This paragraph directs the Debtor to file a status  
report on its Chapter 11 case no later than one week prior to each continued  
hearing. The Debtor filed its status report on October 3, 2013 – the same date  
as the continued hearing.

Additionally, the Court determined the Debtor had violated ¶ 2.d. of the  
Scheduling Order requiring it to be current on filing all of its Monthly  
Operating Reports ('MOR'). The MOR for the period of May 1, 2013 through  
May 31, 2013 was due no later than the twentieth day after the close of the  
period, i.e., June 20, 2013. It was filed on July 16, 2013, when the Debtor filed  
its MOR for the period of June 1, 2013 through June 30, 2013. More  
importantly, no MORs have been filed for the period of July 1, 2013 through



1 July 31, 2013, or for the period of August 1, 2013 through August 31, 2013.  
2 At the October 3, 2013 hearing, the Court also disapproved the Debtor's  
3 disclosure statement for the reasons cited in the tentative ruling. Although the  
4 Court's tentative ruling had indicated its willingness to permit the Debtor to file  
5 another disclosure statement and plan, IndyMac opposed this proposal.  
6 IndyMac argued that the Debtor's most recent MOR (June) showed a  
7 continuing post-petition loss totaling \$83,267.01 as of June 30, 2013, with no  
8 business income received since the inception of the case. Rather, Debtor's sale  
9 revenues have consisted of funds advanced by the Debtor's insider, Kamran  
10 Banayan, and his wholly owned company, Aviara Development, to pay some  
11 of the Debtor's postpetition operating expenses.

12 The MOR reflects and IndyMac confirmed, that the Debtor has not made any  
13 of postpetition payments that have come due on IndyMac's secured claim; nor  
14 has the Debtor used any of the funds advanced to repair the water leakage  
15 defects to the real property despite the approaching rainy season. For these  
16 reasons and others stated on the record, IndyMac urged conversion of this case  
17 to one under Chapter 7.

18 Based on the foregoing, the Court finds, and for good cause ORDERS, that:

19 Pursuant to 11 U.S.C. § 1112(b)(4), this case be converted to one under Chapter  
20 7 for 'cause' including: (1) Debtor's continuing failure to comply with the  
21 Scheduling Order; (2) Debtor's failure to timely file MORs; and (3) the  
22 substantial and continuing loss to or diminution of the estate and the absence  
23 of reasonable likelihood of rehabilitation. *See* 11 U.S.C. §§ 1112(b)(4)(A), (E)  
24 and (F).

25 *Id.* (citations omitted).

#### 26 **D. Appeal**

27 On October 8, 2013, Debtor filed a Notice of Appeal of the Order Converting Case.  
28 (ECF No. 1). On October 8, 2013, Debtor filed an election to have the appeal heard by this  
Court. *Id.*

On November 7, 2013, Debtor filed its opening brief. (ECF No. 20). Debtor  
contends:

The Bankruptcy Court, having its relief from stay proceedings on appeal once  
again, now seeks to prevent the District Court from having the ability to  
overturn the Bankruptcy Court's decisions. To do this, the Bankruptcy Court  
has taken the extraordinary step of converting the Debtor's chapter 11  
bankruptcy into a chapter 7 bankruptcy without giving the Debtor reasonable  
notice and virtually no opportunity to present an opposition allowing the  
Bankruptcy Court to make its ruling on an incomplete record that the  
Bankruptcy Court has itself manipulated....

Interestingly, the Bankruptcy Court's Order on Conversion made no mention  
of the Bankruptcy Court's findings on the plan and disclosure statement,  
instead finding that conversion was warranted based on the Debtor's failure to  
file timely operating reports, the Debtor's failure to provide a timely status

1 report and on the Debtor's alleged continuing loss based solely on the record  
2 in front of the Bankruptcy Court at a status conference hearing. A review of the  
3 alleged grounds upon which the conversion was entered and the way in which  
it was procedurally achieved shows that the Bankruptcy Court has a strong bias  
against the Debtor and its actions are a clear abuse of discretion.

4 *Id.* at 4-5. Debtor requests this Court to reverse the Order Converting Case and "withdraw  
5 the Bankruptcy Court's reference with relation to this bankruptcy." *Id.* at 33.

6 On December 20, 2013, IndyMac filed its opposition brief. (ECF No. 21). IndyMac  
7 contends:

8 YBA blames everyone but itself for the failure of its chapter 11 case. YBA  
9 contends it was denied due process because, 'Debtor had no reason to believe  
10 that the issue of conversion would be entertained by the Bankruptcy Court' at  
11 the October 3, 2013 hearing. This statement belies YBA's credibility. Not  
12 only was YBA admittedly aware of the risk of case conversion at the October  
13 3, 2013 at 10:30 a.m. hearing, but at 8:00 a.m. that same morning YBA filed an  
14 11th hour, woefully untimely, status report arguing against conversion because  
15 Banayan had finally started caulking windows after it began raining. YBA was  
16 keenly aware of the potential for case conversion and its argument that it was  
17 denied due process is frivolous.

18 Next YBA argues that the Bankruptcy Court abused its discretion in converting  
19 the case to chapter 7 because no cause existed for doing so. YBA fails in its  
20 attempt to prove an abuse of discretion because YBA was admittedly out of  
21 compliance, the estate had amassed substantial unpaid administrative expenses  
22 and relief from stay had been granted thereby precluding a feasible plan. YBA  
23 simply ignores the reality of its chapter 11 case status and compliance and  
24 engages in a 30 page rant against the Bankruptcy Court and IndyMac. When  
25 viewed in context and under applicable legal authorities, there is no legitimate  
26 question that the Bankruptcy Court was well within its statutory power to  
27 convert the Debtor's case to chapter 7.

19 *Id.* at 5.

20 On December 20, 2013, the Chapter 7 Trustee filed a brief.<sup>2</sup> (ECF No. 23). The  
21 Chapter 7 Trustee contends that the Debtor was accorded due process; the Debtor's argument  
22 based on due process has been waived; and the Bankruptcy Court did not abuse its discretion  
23 in deciding to convert the case.

24 On January 10, 2014, Debtor filed a reply brief. (ECF No. 26). Debtor contends that  
25 IndyMac and the Chapter 7 Trustee "point to additional alleged failures of the Debtor" which  
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27 <sup>2</sup> On November 13, 2013, the United States Trustee filed in the underlying bankruptcy  
28 case a report of the election of Nancy Wolf as the Chapter 7 Trustee. (Req. Judicial Notice  
Supp. Br. Appellee Trustee, ECF No. 23-1 at 3-6).

1 “are not issues that were considered [by] the Bankruptcy Court and should be ignored.” *Id.*  
2 at 8. “The Debtor requests that the District Court stick to the actual findings of the  
3 Bankruptcy Court and see them for what they are, just another effort to ignore the facts of  
4 the case and establish a clear bias against the Debtor.” *Id.* Debtor objects to the Chapter 7  
5 Trustee’s brief on the basis that the Trustee does not have standing to oppose Debtor’s appeal  
6 because “the Trustee was not in existence at the time of the conversion order, it was only  
7 created after the order was entered.” *Id.* at 22.

8 On January 31, 2014, the Court heard oral argument. (ECF No. 31).

## 9 **II. Discussion**

10 This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1). *See In*  
11 *re Rosson*, 545 F.3d 764, 770 (9th Cir. 2008) (“[A] bankruptcy court order converting a case  
12 from one under another chapter of the Bankruptcy Code to one under Chapter 7 is a final and  
13 appealable order.”).

14 Debtor’s brief identifies two issues in this appeal: (A) “the Bankruptcy Court denied  
15 the Debtor due process on the Conversion Order”; and (B) “the Bankruptcy Court abused its  
16 discretion by entering the Conversion Order.” (ECF No. 20 at 23, 26). All parties agree that  
17 the standard of review for the first issue is *de novo*, and the standard of review for the second  
18 issue is abuse of discretion. (ECF No. 20 at 22-3; ECF No. 21 at 6; ECF No. 23 at 7).

### 19 **A. Due Process**

20 The Supreme Court set forth the due process requirements for notice as follows:

21 An elementary and fundamental requirement of due process in any proceeding  
22 which is to be accorded finality is notice reasonably calculated, under all the  
23 circumstances, to apprise interested parties of the pendency of the action and  
24 to afford them an opportunity to present their objections. The notice must be  
of such nature as reasonably to convey the required information ... and it must  
afford a reasonable time for those interested to make their appearance.

25 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).  
26 “The adequacy of notice and hearing respecting proceedings that may affect a party’s rights  
27 turns, to a considerable extent, on the knowledge which the circumstances show such party  
28 may be taken to have of the consequences of his own conduct.” *Link v. Wabash R.R. Co.*,

1 370 U.S. 626, 632 (1962). For example, the Bankruptcy Appellate Panel for the Ninth  
2 Circuit has held: “A dismissal without notice and an opportunity to be heard would not be  
3 appropriate where substantive issues are to be determined, but if a case involves only very  
4 narrow procedural aspects, a court can dismiss a Chapter 13 case without further notice and  
5 a hearing if the debtor was provided with notice of the requirements to be met. Thus, a  
6 procedure is perfectly appropriate that notifies the debtor of the deficiencies of his petition  
7 and dismisses the case sua sponte without further notice and a hearing when the debtor fails  
8 to file the required forms within a deadline.” *In re Tennant*, 318 B.R. 860, 870-71 (B.A.P.  
9 9th Cir. 2004) (quotations omitted).

10 The March 6, 2013 Scheduling Order requires the Debtor to submit “all operating  
11 reports due under ORR C.3.” and submit a status report “no later than one week in advance  
12 of this status conference and before every continued hearing of this Chapter 11 status  
13 conference.”<sup>3</sup> (Notice of Lodgment Supp. Mot. For Stay, Ex. C at 2, ECF No. 4-2 at 15).  
14 The Scheduling Order states that “[f]ailure to file this status report or comply with the  
15 requirements ordered by the Court may be cause to ... convert this case ... as permitted by 11  
16 U.S.C. § 105(a) and 1112(b).” *Id.* The Scheduling Order informs Debtor of what it is  
17 supposed to do, when it is supposed to do it, and the possible consequences of failure to do  
18 it. The Bankruptcy Court provided counsel for Debtor with the opportunity at the October  
19 3, 2013 status conference to address IndyMac’s argument that conversion was appropriate  
20 “based on the record that’s before the Court today” due to “lack of compliance with [the  
21 Bankruptcy Court’s] status conference order,” including the untimely filing of the status  
22 report and the “monthly operating reports [which] are missing” or “chronically late  
23 throughout the entire case.” (Suppl. Notice of Lodgment Supp. Mot. Stay, Ex. 7 at 5-6, 8,  
24 ECF No. 20-8). The Scheduling Order and the October 3, 2013 hearing provided Debtor  
25 with sufficient notice and opportunity to be heard to meet due process requirements. *See In*  
26

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27 <sup>3</sup> ORR C.3. states that the debtor must file Monthly Operating Reports no later than  
28 twenty calendar days after the close of each month. (Appellee’s Notice of Lodgment, Ex.  
3 at 65 ¶ C.3., ECF No. 22).

1 *re Bijelonic*, No. CV 11-08077-JVS, 2012 WL 2263289, at \*5 (C.D. Cal. June 15, 2012)  
2 (holding that a bankruptcy court’s initial scheduling order “provided sufficient notice and  
3 opportunity to present evidence to meet due process requirements” when the bankruptcy  
4 court sua sponte converted a Chapter 11 case to Chapter 7 because a debtor failed to comply  
5 with an initial scheduling order by not submitting a status report prior to the second status  
6 conference and failing to appear at the second status conference.

7 Debtor contends that, prior to the October 3, 2013 status conference, Debtor had not  
8 been warned about its failure to comply with the Scheduling Order. No party submitted the  
9 transcripts from the April 11, 2013 and July 18, 2013 status conference. The only record  
10 from these status conferences in the appellate record are the brief minute orders issued after  
11 each conference, and the Bankruptcy Court’s Order Converting Case, which states that, at  
12 the April 11, 2013 status conference, Debtor was “directed to file a plan and disclosure  
13 statement in time to have it considered in conjunction with” the July 18, 2013 status  
14 conference and amend Schedules B and D. (Notice of Lodgment Supp. Mot. For Stay, Ex.  
15 K, ECF No. 4-2 at 67). The minute order from the April 11, 2013 status conference confirms  
16 this, *see* Notice of Lodgment Supp. Mot. For Stay, Ex. D, ECF No. 4-2 at 17, as do the  
17 uncontradicted comments of IndyMac’s counsel at the outset of the October 3, 2013 status  
18 conference, *see* Suppl. Notice of Lodgment Supp. Mot. Stay, Ex. 7 at 9, ECF No. 20-8  
19 (“there was an initial date set for disclosure statement in this case [and] the debtor just blew  
20 through the deadline to file the disclosure statement, didn’t file it, wound up at the last  
21 hearing on case status, and you gave the debtor a reprieve and you gave the debtor a new  
22 deadline”). As stated in the Order Converting Case, Debtor failed to comply with this order  
23 to file a disclosure statement and plan prior to July 18, 2013, and at the July 18, 2013  
24 hearing, the Bankruptcy Court “[o]nce again ... ordered the Debtor to file its plan and  
25 disclosure statement.” (Notice of Lodgment Supp. Mot. For Stay, Ex. K, ECF No. 4-2 at 67).  
26 Accordingly, at least with respect to Debtor’s failure to comply with the Bankruptcy Court’s  
27 initial order to file a disclosure statement and plan, Debtor received a warning and an  
28 extension of time.

1 To the extent the Bankruptcy Court converted the case for failure to comply with the  
2 requirements in the Scheduling Order (including the requirement to timely comply with the  
3 Bankruptcy Court’s other orders, such as the April 11, 2013 order to timely file a disclosure  
4 statement and plan and amend Schedule D), the Court finds that the Scheduling Order and  
5 the October 3, 2013 status conference provided sufficient notice and opportunity to be heard  
6 to satisfy due process requirements.

7 Even if the Bankruptcy Court failed to provide Debtor with sufficient notice and  
8 opportunity to be heard, Debtor has failed to show that it was prejudiced by any defective  
9 process afforded it. *See In re Rosson*, 545 F.3d 764, 777 (9th Cir. 2008) (“Because there is  
10 no reason to think that, given appropriate notice and a hearing, Rosson would have said  
11 anything that could have made a difference, Rosson was not prejudiced by any procedural  
12 deficiency. We hold that the bankruptcy court did not abuse its discretion in denying the  
13 motion to dismiss and converting the case to Chapter 7.”); *In re City Equities Anaheim, Ltd.*,  
14 22 F.3d 954, 959 (9th Cir. 1994) (rejecting due process claim for lack of prejudice where  
15 debtor could not show that any different or additional arguments would have been presented  
16 if bankruptcy court had timely approved petition for new counsel). In the appellate briefing,  
17 Debtor has proffered its reasons for failing to comply with the Scheduling Order: “Debtor  
18 was heavily burdened with emergency filings in order to protect the Subject Property”; “the  
19 Subject Property is vacant and is not generating income”; and “the Bankruptcy Court and  
20 Debtor have been in constant contact on the case through the continuing relief from stay,  
21 appeal, and hearings on the motion for relief from stay.” Appellant’s Opening Br. at 25, ECF  
22 No. 20 at 28; *see also* Appellant’s Reply Br. at 16, ECF No. 26 at 19 (“Debtor had been  
23 understandably preoccupied with the appeal of the second relief from stay order and with  
24 repairs to the Subject Property.”). These reasons were brought to the Bankruptcy Court’s  
25 attention by Debtor’s counsel, *see* Suppl. Notice of Lodgment Supp. Mot. Stay, Ex. 7 at 17-  
26 18, ECF No. 20-8 at 18-19 (“As I think has been established, the debtor has been ...  
27 obviously very busy with the relief from stay matters, has done everything to protect the  
28 property within its power.”), or the Bankruptcy Court was aware of them at the October 3,

1 2013 hearing, *see id.* at 19 (the Bankruptcy Court stated at the outset of its oral ruling that  
2 the Scheduling Order is “basically a way to keep the cases moving forward, especially one  
3 such as this one, where there is one asset and no income”). Debtor has failed to demonstrate  
4 that, given more notice, Debtor “would have argued any differently.” *In re City Equities*  
5 *Anaheim, Ltd.*, 22 F.3d at 959 (“CEA ... contends that the bankruptcy court violated due  
6 process by failing to approve CEA’s petition for new counsel before the hearing on Lincoln’s  
7 motion.... At no point does CEA explain how its counsel would have argued any differently  
8 had formal approval been granted. Indeed, CEA's arguments on appeal are essentially the  
9 same as those raised by its owners in the bankruptcy court.”).

10 Applying *de novo* standard of review, the Court will not reverse the Order Converting  
11 Case based upon any denial of due process.

## 12 **B. Order Converting Case**

13 The second issue is whether the Bankruptcy Court abused its discretion by entering  
14 the Order Converting Case. “The bankruptcy court is given wide discretion to convert a  
15 chapter 11 case to chapter 7 for cause, and an order for conversion is reviewed for an abuse  
16 of discretion.” *In re Greenfield Drive Storage Park*, 207 B.R. 913, 916 (B.A.P. 9th Cir.  
17 1997). “[T]he first step of our abuse of discretion test is to determine *de novo* whether the  
18 trial court identified the correct legal rule to apply to the relief requested. If the trial court  
19 failed to do so, we must conclude it abused its discretion.” *United States v. Hinkson*, 585  
20 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). If the trial court identified the correct legal  
21 rule to apply to the relief requested, the reviewing court must then determine whether the  
22 trial court’s “resolution of the motion resulted from a factual finding that was illogical,  
23 implausible, or without support in inferences that may be drawn from the facts in the record.”  
24 *Id.* at 1263; *see also In re Hernandez*, 483 B.R. 713, 719 (B.A.P. 9th 2012) (same).

### 25 **1. Whether the Bankruptcy Court Applied the Correct Legal Standard**

26 The bankruptcy code provides:

27 (b)(1) ... [O]n request of a party in interest, and after notice and a hearing, the  
28 court shall convert a case under this chapter to a case under chapter 7 or dismiss  
a case under this chapter, whichever is in the best interests of creditors and the

1 estate, for cause....

2 (2) The court may not convert a case under this chapter to a case under chapter  
3 7 or dismiss a case under this chapter if the court finds and specifically  
4 identifies unusual circumstances establishing that converting or dismissing the  
case is not in the best interests of creditors and the estate, and the debtor or any  
other party in interest establishes that--

5 (A) there is a reasonable likelihood that a plan will be confirmed ...  
6 within a reasonable period of time; and

7 (B) the grounds for converting or dismissing the case include an act or  
omission of the debtor other than under paragraph (4)(A)--

8 (i) for which there exists a reasonable justification for the  
9 act or omission; and

10 (ii) that will be cured within a reasonable period of time  
fixed by the court.

11 11 U.S.C. § 1112(b). “[T]he term ‘cause’ includes--

12 (A) substantial or continuing loss to or diminution of the estate and the absence  
13 of a reasonable likelihood of rehabilitation; ...

14 (E) failure to comply with an order of the court;

15 (F) unexcused failure to satisfy timely any filing or reporting requirement  
established by this title or by any rule applicable to a case under this chapter....

16 11 U.S.C. § 1112(b)(4). “Cause is a flexible standard, subject to the Court’s discretion, and  
17 does not necessarily involve one or all of the those factors set forth in Section 1112(b)(4).”

18 *In re Prods. Int’l Co.*, 395 B.R. 101, 107 (Bankr. D. Ariz. 2008).

19 A bankruptcy court is empowered to convert or dismiss a Chapter 11 case *sua sponte*.  
20 *See* 11 U.S.C. § 105(a) (“No provision of this title providing for the raising of an issue by  
21 a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action  
22 or making any determination necessary or appropriate to enforce or implement court orders  
23 or rules, or to prevent an abuse of process.”); *see also In re Rosson*, 545 F.3d 764, 771 n.8  
24 (9th Cir. 2008) (“Although the statute provides for conversion ‘on request of a party ... or  
25 the ... trustee, ...’ there is no doubt that the bankruptcy court may also convert on its own  
26 motion.”) (citing 11 U.S.C. § 105(a)); *In re Labankoff*, No. 09-1300-PAJUK, 2010 WL  
27 6259969, at \*5 (B.A.P. 9th Cir. June 14, 2010) (collecting cases).

28 In its oral ruling at the October 3, 2013 status conference and in the Order Converting



1 Case, the Bankruptcy Court relied upon the “cause” factors listed in 11 U.S.C. §  
2 1112(b)(4)(A), (E) and (F). The Court finds that the Bankruptcy Court applied the correct  
3 legal standard to determine whether the case should be converted.

4 **2. Whether the Bankruptcy Court’s Finding Was Illogical,**  
5 **Implausible, Or Without Support**

6 The Court must next determine whether the Bankruptcy Court’s “resolution of the  
7 motion resulted from a factual finding that was illogical, implausible, or without support in  
8 inferences that may be drawn from the facts in the record.” *Hinkson*, 585 F.3d at 1263.

9 The Scheduling Order and the incorporated ORR required Debtor to timely file  
10 monthly operating reports, file a status report no later than one week prior to any status  
11 conference, and otherwise comply with the orders of the Bankruptcy Court. As set out  
12 above, Debtor filed the February, May and July operating reports late, and failed to file the  
13 August operating report. Debtor failed to comply with the Bankruptcy Court’s April 11,  
14 2013 order to file the Disclosure Statement and Plan prior to the July 18, 2013 status  
15 conference. Debtor failed to comply with the Bankruptcy Court’s April 11, 2013 order to  
16 amend Schedule D. Debtor filed the status report for the October 3, 2013 status conference  
17 on the day of the conference, rather than a week before, as it had been ordered to do in the  
18 Scheduling Order.<sup>4</sup>

19 “The statute does not indicate that compliance with orders should be measured by  
20 viewing all orders together and weighing how many the debtor is in compliance with and  
21 how many it is not. The statute is written in the singular; thus failure to comply with a single  
22 order is sufficient for cause.” *In re Bijelonic*, No. CV11-8077-JVS, 2012 WL 2263289, at  
23 \*4 (C.D. Cal. June 15, 2012) (citing 11 U.S.C. § 1112(b)(4)(E)). Based upon the facts listed  
24 above, the Bankruptcy Court’s finding that Debtor failed to comply with the Scheduling  
25 Order and ORR is not illogical, implausible, or without support in inferences that may be

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26  
27 <sup>4</sup> Debtor failed to file status reports prior to the April 11, 2013 and July 18, 2013  
28 status conferences, but the Bankruptcy Court did not rely upon these facts in reaching its  
decision, and this Court does not rely upon them in determining whether the Bankruptcy  
Court abused its discretion in converting the case.

1 drawn from the facts in the record.

2 Debtor contends that the Bankruptcy Court should have found that converting the case  
3 was not appropriate pursuant to 11 U.S.C. § 1112(b)(2). That provision requires the  
4 Bankruptcy Court to not convert a case “if the court finds and specifically identifies unusual  
5 circumstances establishing that converting or dismissing the case is not in the best interests  
6 of creditors and the estate” and if the court makes additional findings, including that “the  
7 grounds for converting or dismissing the case include an act or omission of the debtor ... for  
8 which there exists a reasonable justification for the act or omission.” *Id.* The Bankruptcy  
9 Court did not make the predicate finding of identifying unusual circumstances establishing  
10 that converting the case was not in the best interests of creditors and the estate. Even if such  
11 unusual circumstances existed, after considering the justifications proffered by Debtor at the  
12 October 3, 2013 hearing and in the subsequent appellate briefing, the Court finds that the  
13 Bankruptcy Court did not abuse its discretion in finding that no reasonable justification  
14 exists for the Debtor’s failures to comply with the Scheduling Order. *Cf. In re Hoyle*, No.  
15 10-01484-TLM, 2013 WL 210254, at \*9 (Bankr. D. Idaho Jan. 17, 2013) (“Section §  
16 1112(b)(4)(E) provides that ‘failure to comply with an order of the court’ constitutes cause  
17 to convert or dismiss a chapter 11 case.... [F]ailure to comply with a court order need not  
18 be willful, in bad faith, or fraudulent, because a debtor takes on the responsibilities required  
19 by the Code in availing himself of its protections.”); *In re Whetten*, 473 B.R. 380, 383-84  
20 (Bankr. D. Colo. 2012) (“To allow a debtor to sidestep [its] duties simply because he is  
21 ‘busy’ would render the Code’s reporting requirements a nullity.... The late filing of  
22 catch-up monthly reports does not satisfactorily explain or excuse failure to satisfy a debtor’s  
23 duties as a chapter 11 debtor.... Monthly reports and the financial disclosures contained  
24 within them are the life-blood of the Chapter 11 process and are more than mere busy  
25 work.... The reporting requirements provide the primary means for monitoring the debtor’s  
26 compliance with the Code’s requirements and they serve as a litmus test for a debtor’s ability  
27 to reorganize.... If a debtor does not fulfill this basic obligation during the Chapter 11 case,  
28 when it knows it will have to come before the court on any number of occasions, how can

1 the creditors have any confidence that the debtor will timely and accurately report its income  
2 and make the required distributions under its plan, when the court and the [United States  
3 Trustee] are no longer monitoring the case? Consequently, the importance of filing monthly  
4 reports cannot be over-emphasized. A debtor ignores this basic duty at its own peril.”); *In*  
5 *re Babayoff*, 445 B.R. 64, 80 (Bankr. E.D.N.Y. 2011) (“[I]n the bankruptcy context, if a  
6 debtor wants the protection the Bankruptcy Code offers, that debtor must be willing to abide  
7 by the orders a court enters.... [T]o reap the benefit of chapter 11, the debtor must pay the  
8 price of disclosure; he or she needs to provide financial and other relevant information to the  
9 creditors to inform them and the Court about the progress and status of the case.”)  
10 (quotations omitted).

11 The Court finds that the Bankruptcy Court’s decision to convert the case did not result  
12 from a factual finding that was illogical, implausible, or without support in inferences that  
13 may be drawn from the facts in the record.

14 Having determined that the Bankruptcy Court provided adequate due process and did  
15 not abuse its discretion in converting the case based upon Debtor’s failure to comply with  
16 the Scheduling Order (“cause” grounds (1) and (2) in the Order Converting Case), any  
17 argument regarding the substantial and continuing loss to or diminution of the estate (“cause”  
18 ground (3) in the Order Converting Case) would not affect the outcome of the appeal.<sup>5</sup> Even  
19 considering Debtor’s arguments as to “cause” ground (3) and record on appeal, the Court  
20 finds that Debtor received notice as to IndyMac’s argument that the Bankruptcy Court should  
21 convert the case for substantial and continuing loss to or diminution of the estate, *see*  
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23 <sup>5</sup> The Order Converting Case lists the grounds for “cause” as follows:

24 Based on the foregoing, the Court finds, and for good cause ORDERS, that:  
25 Pursuant to 11 U.S.C. § 1112(b)(4), this case be converted to one under Chapter  
26 7 for ‘cause’ including: (1) Debtor’s continuing failure to comply with the  
27 Scheduling Order; (2) Debtor’s failure to timely file MORs; and (3) the  
28 substantial and continuing loss to or diminution of the estate and the absence  
of reasonable likelihood of rehabilitation. *See* 11 U.S.C. §§ 1112(b)(4)(A), (E)  
and (F).

(Notice of Lodgment Supp. Mot. For Stay, Ex. K, ECF No. 4-2 at 69).

1 Appellee Notice of Lodgment, Ex. 4, ECF No. 22 at 73-75 (“Opposition to Approval of  
2 Disclosure Statement and Suggestion That Case Be Converted to a Case under Chapter 7 of  
3 the Bankruptcy Code at Case Status Hearing,” filed September 19, 2013), and Debtor had  
4 an opportunity to be heard in the October 3, 2013 status report and at the October 3, 2013  
5 status conference. The Bankruptcy Court’s decision as to “cause” ground (3) did not result  
6 from a factual finding that was illogical, implausible, or without support in inferences that  
7 may be drawn from the facts in the record, and was not an abuse of discretion.

8 **C. Trustee’s Standing**

9 Debtor objects to the Trustee’s brief on the basis that the Trustee does not have  
10 standing to oppose Debtor’s appeal. The Court overrules Debtor’s objection as moot,  
11 finding that, even if the Trustee does not have standing, the Court considers the Trustee’s  
12 brief as an amicus curiae. *See In re Heath*, 331 B.R. 424, 429-30 (B.A.P. 9th Cir. 2005)  
13 (considering trustee’s brief as an amicus brief “even if Trustee cannot appear as a party” due  
14 to lack of appellate standing); *cf.* Fed. R. App. P. 29 (an amicus curiae brief may be filed  
15 with leave of court). The Court makes no finding as to the Trustee’s standing on appeal.

16 **III. Conclusion**

17 IT IS HEREBY ORDERED that the Order Converting Case is AFFIRMED. The  
18 Clerk of the Court shall close this case.

19 DATED: February 4, 2014

20   
21 **WILLIAM Q. HAYES**  
22 United States District Judge  
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