

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman  
Bankruptcy Judge  
Modesto, California

September 28, 2004 at 9:30 a.m.

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1. 04-92604-A-7 ERNEST & JUDY HATCHER HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF DEBTORS AND/OR DEBTORS' ATTORNEY TO ATTEND THE SECTION 341 MEETING ON AUGUST 12, 2004  
8/30/04 [6]

**Disposition Without Oral Argument:** The order to show cause is discharged. The debtors attended the continued meeting of creditors on September 13, 2004, and the meeting concluded. No monetary sanctions are imposed.

The court will issue a minute order.

2. 04-92709-A-11 L.L.-G.L. ENTERPRISES, INC. HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, CONVERSION OR IMPOSITION OF SANCTIONS FOR FAILURE OF DEBTOR AND/OR DEBTOR'S ATTORNEY TO FILE LIST OF EQUITY SECURITY HOLDERS  
8/31/04 [114]

**Disposition Without Oral Argument:** The order to show cause is discharged. The debtor-in-possession filed the missing document on September 9, 2004. No monetary sanctions are imposed.

The court will issue a minute order.

3. 04-92124-A-7 LESLIE ANNE JENSEN

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION  
OF SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 19, 2004  
8/27/04 [11]

DISMISSAL EOD 8/31/04

**Disposition Without Oral Argument:** The Order to Show Cause is discharged as moot. The case was dismissed on August 31, 2004.

The court will issue a minute order.

4. 04-92325-A-7 CYNTHIA ANN WEBB

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL, OR  
IMPOSITION OF SANCTIONS FOR  
FAILURE OF DEBTOR OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 19, 2004  
8/27/04 [19]

**Tentative Ruling:** None.

5. 04-93133-A-7 ELEANOR SANTIAGO

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO FILE SUMMARY OF  
SCHEDULES, SCHEDULES A-J,  
DECLARATION OF SCHEDULES,  
STATEMENT OF FINANCIAL  
AFFAIRS 9/2/04 [7]

**Tentative Ruling:** None.

6. 04-92738-A-7 KELLY ANN BEAM

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL, OR  
IMPOSITION OF SANCTIONS FOR  
FAILURE OF DEBTOR OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 12, 2004  
8/27/04 [6]

**Tentative Ruling:** None.

7. 04-92739-A-7 JEFFREY DEAN ROGERS

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 27, 2004  
9/1/04 [28]

**Tentative Ruling:** None.

8. 04-92657-A-7 GLORIA MORALES

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL, OR  
IMPOSITION OF SANCTIONS FOR  
FAILURE OF DEBTOR AND/OR  
DEBTOR'S ATTORNEY TO ATTEND  
THE SECTION 341 MEETING ON  
AUGUST 19, 2004  
8/27/04 [6]

**Tentative Ruling:** None.

9. 04-92559-A-7 ESTHER A. EMANA

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 12, 2004  
8/27/04 [6]

**Tentative Ruling:** None.

10. 04-92461-A-7 GWENDA L. JOHNSON

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL, OR  
IMPOSITION OF SANCTIONS FOR  
FAILURE OF DEBTOR TO PAY  
FILING FEE INSTALLMENT  
(\$53.00 DUE AUGUST 30, 2004)  
9/3/04 [17]

**Tentative Ruling:** None.

11. 04-92674-A-7 STEPHANIE CANDEVAN

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL, OR  
IMPOSITION OF SANCTIONS FOR  
FAILURE OF DEBTOR OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 19, 2004  
8/27/04 [25]

**Tentative Ruling:** None.

12. 04-93284-A-7 BARBARA KAYE FERRY

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL  
AND/OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO FILE  
VERIFICATION OF MASTER  
ADDRESS LIST  
9/2/04 [8]

**Disposition Without Oral Argument:** The order to show cause is discharged. The debtor filed the missing document on September 3, 2004. No monetary sanctions are imposed.

The court will issue a minute order.

13. 04-92692-A-7 LATANYA R. WRIGHT

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 19, 2004  
9/2/04 [7]

**Tentative Ruling:** None.

14. 04-92794-A-7 RICHARD C. TRELOAR

HEARING ON ORDER TO  
SHOW CAUSE RE DISMISSAL,  
CONVERSION OR IMPOSITION OF  
SANCTIONS FOR FAILURE OF  
DEBTOR AND/OR DEBTOR'S  
ATTORNEY TO ATTEND THE  
SECTION 341 MEETING ON  
AUGUST 27, 2004  
9/1/04 [8]

**Disposition Without Oral Argument:** The Order to Show Cause is discharged as moot. The case was dismissed on September 17, 2004.

The court will issue a minute order.

15. 03-91700-A-7 ROMANO & CHRISTINE  
SSA #2 ROCCUCCI

CONT. HEARING ON TRUSTEE'S  
OBJECTION TO DEBTORS'  
CLAIM OF EXEMPTIONS  
6/21/04 [28]

**Tentative Ruling:** None. This matter was continued, at the requests of the parties, from July 27, 2004.

16. 04-92202-A-7 GREG & BRENDA DECKER  
UST #1

HEARING ON THE  
UNITED STATES TRUSTEE'S  
MOTION TO DISMISS CHAPTER 7  
CASE, PURSUANT TO 11 U.S.C.  
SECTION 707(B)  
8/25/04 [10]

**Disposition Without Oral Argument:** This matter was withdrawn by the moving party on September 20, 2004 and is removed from the calendar.

17. 04-91105-A-7 STANLEY CAMPBELL  
SF #4

HEARING ON MOTION  
TO COMPROMISE CONTROVERSY  
RE: AVOIDANCE AND TURNOVER  
LAWSUIT FILED BY  
TRUSTEE, LARRY GRAY  
8/31/04 [26]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted. The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id.

The compromise in question arises from litigation in Adversary No. 04-9055 between the trustee and Claudia Campbell, the debtor's wife (the debtor and Ms. Campbell are separated and do not live together), regarding the debtor's pre-petition transfer of real property to her in February 2002, for no consideration. The trustee alleges this is a fraudulent transfer and seeks a turnover of the property in his complaint. The trustee contends that the property is valued at approximately \$200,000, with a mortgage of approximately \$120,000. While Ms. Campbell admits that she did not pay consideration for the property, she claims it had very little equity at the time of the transfer and that it was her maintenance and mortgage payments which resulted in the

increased value. The trustee believes that these contentions are "not frivolous, and may, if proven, establish a complete or partial defense to the lawsuit." (Mo., at 6). To avoid the risk of litigation, they have agreed to settle the matter by having Ms. Campbell pay the estate \$25,000, in exchange for the trustee dismissing the adversary. Ms. Campbell will not have a claim against the estate for paying the mortgage and maintaining the property.

On the whole, the court finds that the A&C factors favor the approval of the compromise.

Accordingly, the court finds that the trustee has carried his burden of persuading the court that the proposed compromise is fair and equitable, and the motion is granted.

Counsel for the trustee shall submit an order that conforms to the court's ruling. Counsel shall submit a separate order in the adversary proceeding disposing of it pursuant to the terms of the settlement.

18. 04-92708-A-7 ANN MIDDLETON HEARING ON TRUSTEE'S  
MDM #1 OBJECTION TO DEBTOR'S  
EXEMPTIONS  
8/20/04 [7]

**Disposition Without Oral Argument:** This matter was withdrawn by the objecting party on September 16, 2004 and is removed from the calendar.

19. 04-92709-A-11 L.L.-G.L. ENTERPRISES, INC. HEARING ON MOTION TO  
FWP #3 EXTEND THE TIME TO ASSUME  
OR REJECT NONRESIDENTIAL  
REAL PROPERTY LEASES  
8/27/04 [88]

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance, the court issues a tentative ruling.

At the hearing, the debtor-in-possession shall establish that the two subject lessors were timely served with the full set of moving papers. LBR 9014-1(d)(4). The Proof of Service at ECF-94 is not clear that the lessors were served with all the moving papers.

If the debtor-in-possession makes the required showing, then the motion will be granted to extend through December 13, 2004, the time to assume or reject the following non-residential real property leases: (1) a lease with Leonard Lovalvo for 3737 McHenry Avenue in Modesto, California; and (2) a lease with Oasis, for 5001 McHenry Avenue in Modesto, California. Otherwise, the motion is denied for failure to serve all parties directly affected by the requested relief.

Counsel for the debtor-in-possession shall submit an order that conforms to the court's ruling.

20. 04-92709-A-11 L.L.-G.L. ENTERPRISES, INC. HEARING ON MOTION FOR  
FWP #4 ORDER AUTHORIZING LIMITED  
NOTICE OF CERTAIN MOTIONS  
8/27/04 [89]

**Tentative Ruling:** None.

21. 04-92413-A-7 DANILO ESCALANTE HEARING ON TRUSTEE'S  
MGO #2 MOTION OBJECTING TO  
DEBTOR'S EXEMPTIONS  
8/24/04 [9]

**Disposition Without Oral Argument:** This matter continued, pursuant to a court-approved stipulation, to October 26, 2004, at 9:30 a.m., and is removed from calendar.

22. 04-91715-A-7 BETTY A. SCOTT HEARING ON APPLICATION  
SF #2 OF CHAPTER 7 TRUSTEE FOR  
APPOINTMENT OF REAL  
ESTATE BROKER  
8/24/04 [15]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). The court notes the debtor filed a statement of non-opposition to the motion. Therefore, this matter is resolved without oral argument.

The application is approved pursuant to 11 U.S.C. § 327(a) and the trustee is authorized to employ Marian Norris, of Century 21 M&M and Associates, as a real estate broker to provide valuation, marketing and/or sale services to the trustee. As set forth in the motion, compensation will be either by hourly fees approved through an application for compensation under 11 U.S.C. § 330, or as part of a court-approved sale.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

23. 04-92418-A-7 SIDRA REBULDELA HEARING ON TRUSTEE'S  
MGO #2 MOTION OBJECTING TO  
DEBTOR'S EXEMPTIONS  
8/24/04 [9]

**Disposition Without Oral Argument:** This matter continued to October 26, 2004 at 9:30 a.m. pursuant to order. It is removed from this calendar.

24. 04-92127-A-7 DREW & DOLORES PETERSON  
LG #1

HEARING ON MOTION  
FOR AUTHORITY TO SELL  
NON-EXEMPT EQUITY IN REAL  
PROPERTY TO DEBTORS FILED  
BY TRUSTEE LARRY GRAY  
8/25/04 [9]

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance, since the debtors are *pro se*, the court issues a tentative ruling.

The estate owns an interest in real property located at 2142 Brennan Lane in Manteca, California ("the Property"). The chapter 7 trustee seek to sell the estate's interest in the Property to the debtors for \$4,000. Pursuant to 11 U.S.C. § 363(b)(1), the motion is granted and the trustee is authorized to sell the estate's interest in the Property to the debtors for \$4,000, on the terms set forth in the motion.

The 10-day stay of Fed. R. Bankr. P. 6004(g) is waived.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

25. 04-91836-A-7 DAVID & LINDA KEMP  
SF #3

HEARING ON MOTION  
TO SELL NON-EXEMPT EQUITY  
IN REAL PROPERTY TO DEBTORS  
8/31/04 [20]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The estate owns an interest in real property located at 2087 Nevada Street in Stockton, California ("the Property"). The chapter 7 trustee seek to sell the estate's interest in the Property to the debtors for \$13,000. Pursuant to 11 U.S.C. § 363(b)(1), the motion is granted and the trustee is authorized to sell the estate's interest in the Property to the debtors for \$13,000, on the terms set forth in the motion.

The 10-day stay of Fed. R. Bankr. P. 6004(g) is waived.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

26. 03-90946-A-7 BONNIE FRANK  
SSA #6

HEARING ON APPLICATION  
OF TRUSTEE FOR PAYMENT OF  
FINAL COMPENSATION AND  
REIMBURSEMENT OF EXPENSES  
TO SPECIAL COUNSEL  
8/23/04 [55]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The application is approved for a total of \$19,061.65 in fees and costs. On March 7, 2003, the debtor filed a chapter 7 petition. This court authorized the employment of special counsel for the trustee in an amended order on June 28, 2004 on a contingent fee basis. The trustee's special counsel now seeks compensation, equaling \$18,969.18 as fees, and \$92.47 as costs. The fees are calculated pursuant to the December 2, 2002 Contingent Fee Agreement which provides for applicant to receive one-third of any net recovery plus expenses.

As set forth in the attorney's application, these fees and costs are reasonable compensation for actual, necessary and beneficial services.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

27. 02-93058-A-11 SUPERIOR EMPLOYMENT, INC.  
UST #1

HEARING ON THE UNITED  
STATES TRUSTEE'S MOTION TO  
CONVERT OR DISMISS  
CHAPTER 11 CASE PURSUANT  
TO 11 U.S.C. SECTION 1112(B)  
8/31/04 [206]

**Tentative Ruling:** Creditor Diana Perry has consented in her "joinder" to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). Movant did not file within the time for reply a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, movant has also consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(iii). The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1).

The motion is granted in part and the case is converted to one under chapter 7. There is cause in this case to convert or dismiss. The case is over two years old and the debtor-in-possession has not filed a plan or disclosure statement. The DIP filed its last monthly operating reports on May 17, 2004 (for April 2004). The foregoing constitutes an unreasonable delay that is prejudicial to creditors.

In this case, the court finds that conversion is in the best interests of creditors. One creditor, Diana Perry, has stated her preference for that

outcome. The court agrees that an independent trustee should examine this case.

Counsel for the U.S. Trustee shall submit an order that conforms to the court's ruling.

28. 04-91959-A-7 ANTHONY & ANDREA AGUIRRE HEARING ON APPLICATION  
SF #2 OF CHAPTER 7 TRUSTEE FOR  
APPOINTMENT OF REAL  
ESTATE BROKER  
8/24/04 [13]

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Nevertheless, in this instance, the court issues a tentative ruling.

The application is granted in part pursuant to 11 U.S.C. § 327(a). The trustee is authorized to employ Marian Norris of Century 21 M&M and Associates as a real estate broker to provide valuation, marketing and/or sale services to the trustee. Compensation will be either by fee application under 11 U.S.C. § 330, or as part of a court-approved sale. No specific hourly rate or other term of the application is approved.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

29. 04-91959-A-7 ANTHONY & ANDREA AGUIRRE HEARING ON MOTION TO  
SF #3 EXTEND DEADLINE TO OBJECT  
TO DISCHARGE  
8/24/04 [18]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted and the time for the trustee to file objections to discharge under 11 U.S.C. § 727 is extended to and including October 8, 2004. The trustee's need to further investigate the debtors' valuation of their residence constitutes cause for enlargement of time under Bankruptcy Rule 4004(b). The court makes no finding at this time as to compliance or lack of compliance with 11 U.S.C. § 521.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

30. 04-92470-A-7 PARAMOUNT BUILDERS, INC. HEARING ON TRUSTEE'S  
APPLICATION FOR ORDER  
AUTHORIZING AND APPROVING  
AGREEMENT OF COMPROMISE  
WITH VILLAGIO APARTMENTS, LLC  
8/30/04 [39]

**Disposition Without Oral Argument:** Given the filing defects under the local bankruptcy rules, oral argument would not benefit the court in rendering a decision on this matter.

The motion is denied without prejudice, pursuant to LBR 9014-1(1). No monetary sanctions are imposed.

This motion fails to comply with LBR 9014-1(c)(requiring a docket control number be placed on all motions and other pleadings filed in support or opposition to the motion) and 9014-1(f)(1)(requiring at least twenty-eight days notice of motions requiring written opposition). None of movant's pleadings has a docket control number. Furthermore, movant's second amended notice of hearing, the only one which complied with LBR 9014-1(d)(3), was filed September 14, 2004; the date opposition was due under that notice. The time limits under the local bankruptcy rules do not begin to run until a compliant motion is filed and served.

Even had the motion been procedurally compliant, it would still be denied. The motion completely fails to address the legal standard for approval of a compromise. Any new compromise motion shall address the four factors set forth in In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986).

The court will issue a minute order.

31. 04-91876-A-7 JESUSA F. MABALCON HEARING ON MOTION TO  
MDM #1 ABANDON REAL PROPERTY  
9/8/04 [26]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

32. 04-90877-A-7 JUANITO G. DOMINGO HEARING ON MOTION TO  
GRF #1 COMPROMISE CONTROVERSY RE  
AVOIDANCE CLAIM  
8/23/04 [16]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The court has great latitude in approving compromise agreements. *In re*

Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. *Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *In re A & C Properties*, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. *Id.*

The compromise in question arises from an allegedly avoidable transfer of property by the debtor to his non-filing spouse. The debtor scheduled no real property. However at his 341 meeting of creditors, he admitted to recently owning real property which was sold to a third party. The proceeds of that sale were used to purchase another home in which the debtor currently resides. The new property was placed solely in the name of his wife. The trustee asserts that this transfer is avoidable such that the estate could recover the debtor's interest. The parties propose to compromise the matter with debtor paying \$5,000 to the estate; an amount sufficient to pay administrative claims and all scheduled general unsecured claims.

On the whole, the A&C factors favor the approval of the compromise.

Accordingly, the court finds that the trustee has carried his burden of persuading the court that the proposed compromise is fair and equitable, and the motion is granted.

The trustee has not submitted a settlement agreement. Approval of the compromise does not constitute court approval of any particular term of any settlement agreement the parties may execute.

Trustee shall submit an order that conforms to the court's ruling.

33. 04-91279-A-7 ARNEL & ROSEMARIE HEARING ON MOTION TO  
FW #2 TOLENTINO ABANDON REAL PROPERTY  
8/23/04 [31]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

Pursuant to 11 U.S.C. § 554(b), the debtor's motion is granted, and the trustee is ordered to abandon the estate's interest, if any, in the real property located at 415 Amber Court, Tracy California. The asset is of inconsequential benefit to the estate due to the debtors' exemption of

the equity therein. The court notes that the trustee filed a no-asset report on August 27, 2004.

Counsel for debtors shall submit an order that conforms to the court's ruling.

34. 04-92381-A-7 TRALECA G. CHADWICK HEARING ON MOTION FOR  
SF #1 AUTHORIZATION TO SELL  
EQUITY IN REALTY TO  
DEBTOR  
8/24/04 [7]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The estate owns real property located at 655 Diane Drive, Manteca California ("the Property"). The chapter 7 trustee seeks to sell the estate's interest in the Property to the debtor for \$15,000 cash. Pursuant to 11 U.S.C. §363(b)(1), the motion is granted and the trustee is authorized to sell the estate's interest in the Property to debtor for the agreed price.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

35. 04-92182-A-7 MARK ALLEN SEARCY HEARING ON MOTION TO  
SF #4 SELL REAL PROPERTY FREE AND  
CLEAR OF LIENS AND FOR  
AUTHORITY TO COMPENSATE  
REAL ESTATE BROKER  
8/23/04 [23]

**Tentative Ruling:** The failure of any party in interest to file written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Nevertheless, because other parties may be interested in purchasing the property, the court will issue a tentative ruling.

The motion is granted to the extent set forth herein. The estate owns real property located at 882 Foxfire Drive, Manteca California ("the Property"). The chapter 7 trustee seeks to sell the Property to Ronnie and Stella Neaterous for \$369,950.00 free and clear of liens and interests. The court can only authorize a sale free and clear of a lien or interest if the trustee establishes one or more of the bases set forth in 11 U.S.C. § 363(f) with respect to the lien or interest. Furthermore, the court cannot either statutorily or constitutionally authorize a sale free and clear of a lien or interest the holder of which did not receive sufficient notice of the sale to enable it to object. 11 U.S.C. § 363(b); In re Center Wholesale, Inc., 759 F.2d 1440, 1448-49 (9<sup>th</sup> Cir. 1985); In re Moberg Trucking, Inc., 112 B.R. 362 (9<sup>th</sup> Cir. BAP 1990).

The trustee seeks to sell free and clear of several identified claims or possible liens on the property. These include:

1) A deed of trust in favor of Countrywide in the approximate amount of \$238,334.94. The trustee intends to satisfy this lien through escrow on the property. The court finds that the trustee can sell free and clear of this lien under 11 U.S.C. § 363(f)(3).

2) deed of trust in favor of Willshire Credit in the approximate amount of \$29,570.13. The trustee intends to satisfy this lien through escrow on the property. The court finds that the trustee can sell free and clear of this lien under 11 U.S.C. § 363(f)(3).

3) prorated property taxes in the approximate amount of \$1,800.00. The trustee intends to satisfy this lien through escrow on the property. The court finds that the trustee can sell free and clear of this lien under 11 U.S.C. § 363(f)(3).

Pursuant to 11 U.S.C. § 363, the chapter 7 trustee is authorized to sell the property to Ronnie and Stella Neaterous or an overbidder approved at the hearing free and clear of the liens and interests specified above, said liens and interests to attach to the proceeds of the sale. The proceeds of sale shall be administered as set forth in the motion. The trustee is further authorized to pay a 6% broker's commission to be split equally between the trustee's broker, Sheri Midgley, and the broker for the buyer, if any.

The overbid and qualification procedures set forth in the motion are approved. Any initial overbid shall be in the amount of \$372,500.00. Subsequent overbids shall be in minimum \$1,000 increments.

No request for a finding of good faith is made and the court makes no such finding.

The trustee shall prepare an order consistent with the foregoing ruling.

36. 04-91386-A-7 PAUL CHACON  
FW #1

HEARING ON MOTION TO  
ABANDON REAL PROPERTY  
8/6/04 [45]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

Pursuant to 11 U.S.C. § 554(b), the debtor's motion is granted, and the trustee is ordered to abandon the estate's interest, if any, in the real property located at 1318 Carver Road, Modesto California. The asset is of inconsequential benefit to the estate due to the debtor's exemption of the equity therein. The court notes that the trustee filed a no-asset report on August 27, 2004.

Counsel for debtor shall submit an order that conforms to the court's ruling.

37. 01-92889-A-7 GRAPECO, INC.  
04-9102 GDV #1  
MICHAEL D. MCGRANAHAN, TRUSTEE VS.  
  
HIGH AND MIGHTY FARMS, INC.

HEARING ON MOTION TO  
DISMISS UNDER RULE 12(B)(6)  
AND IN THE ALTERNATIVE FOR  
SUMMARY JUDGMENT  
8/13/04 [8]

**Tentative Ruling:** As an initial matter, the court notes that this motion fails to comply with the Local Bankruptcy Rules. Movant has filed a combination Notice of Motion and Motion. This violates LBR 9014-1(d)(2). The original notice of motion did not comply with LBR 9014-1(f)(1) and (d)(3) because it did not state when or where written opposition had to be filed and served. The amended notice of motion and motion incorrectly states that opposition must be filed and served "on the Trustee at the address set forth above" (which is movant's counsel's address) fourteen court days prior to hearing. Opposition is due fourteen calendar days prior to hearing. Finally, the exhibits attached to movant's Request for Judicial Notice must be filed as a separate document pursuant to LBR 9014-1(d)(1) and the Guidelines for Preparation of Documents (effective January 20, 2004). In this instance, the court will reach the merits.

The motion to dismiss for failure to state a claim pursuant to Fed. R. Bankr. P. 7012 incorporating Fed. R. Civ. P. 12(b)(6) is granted with leave to amend. The motion for summary judgment is denied. Movant's request for sanctions is denied for failure to comply with Fed. R. Bankr. P. 9011(c)(1).

At issue here is whether or not the plaintiff's complaint is barred by the applicable statute of limitations. Defendant seeks alternate relief of dismissal under Fed. R. Civ. P. 12(b)(6) or summary judgment. Statute of limitations defenses "may be raised by a motion for dismissal or by summary judgment motion. If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss. If the defense does not appear on the face of the complaint and the trial court is willing to accept matters outside of the pleadings, the defense can still be raised by a motion to dismiss accompanied by affidavits. Rule 12(b)(6) permits the court to consider a motion to dismiss accompanied by affidavits as a motion for summary judgment. If the motion is treated as one for summary judgment, all parties shall be permitted to present all material pertinent to the motion." Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9<sup>th</sup> Cir. 1980) (citations omitted).

The statute of limitations applicable here is 11 U.S.C. § 546(a) which provides: "An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of (1) the later of (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election fo the first trustee ... if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or (2) the time the case is closed or dismissed." (West 2004). Subpart (a)(2) does not apply.

Defendant asks the court to take judicial notice of the dates when certain events occurred in both the main case as well as the filing date of this complaint. Defendant correctly cites MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9<sup>th</sup> Cir. 1986), for the proposition that the court may take judicial notice of "matters of public record outside the pleadings in a motion to dismiss." The court takes judicial notice of

the following dates: July 20, 2001 (the date the Grapeco, Inc., bankruptcy was filed); July 11, 2003 (the date the case converted to chapter 7 and when Mr. McGranahan was appointed trustee); and July 19, 2004 (the date this complaint was filed). The court also takes judicial notice that the docket reflects that Mr. McGranahan is the only trustee appointed in this case. It is clear that the complaint was filed over one year after Mr. McGranahan was appointed trustee and outside the time limitation imposed by Section 546(a)(1)(B).

Plaintiff argues that the statute of limitations in this case is equitably tolled. Plaintiff argues that dismissal of the complaint is inappropriate unless "it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." (Plaintiff's opposition, p.5). Plaintiff misstates the rule by omitting a step. "When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Jablon, 614 F.2d at 682. Plaintiff has skipped over the determination of whether the complaint is sufficiently pled to raise the issue of equitable tolling. In this instance, it is not. There is nothing on the face of the complaint regarding the statute of limitations or the tolling thereof. There is nothing to put defendant on notice that such a theory is raised. Because of this, the complaint in its present form fails to state a claim on which relief can be granted.

However, the court will grant leave to amend. This case is still in the pleading stage. Plaintiff's equitable tolling theory is not frivolous. The court will therefore allow plaintiff to amend his complaint to plead the theory. Nothing herein is a determination that equitable tolling applies to this case. That determination awaits another day.

Because the motion under Fed. R. Civ. P. 12(b)(6) is granted, the motion for summary judgment is denied. The request for sanctions in movant's reply is denied for failure to comply with Fed. R. Bankr. P. 9011(c)(1).

Plaintiff shall file his amended complaint and serve it on the defendant on or before October 13, 2004. Defendant shall have fifteen days thereafter to file an answer to the amended complaint or a permitted motion. If plaintiff fails to file an amended complaint by October 13, 2004, this adversary proceeding will be dismissed without further notice or hearing for failure to state a claim upon which relief can be granted.

Counsel for Defendant shall submit an order that conforms to the court's ruling.

38. 01-92889-A-7 GRAPECO, INC. HEARING ON MOTION  
04-9106 JLW #1 FOR SUMMARY JUDGMENT  
MICHAEL D. MCGRANAHAN VS. 8/16/04 [10]

TERRA LINDA FARMS

**Tentative Ruling:** As an initial matter, the court notes that the movant's notice of hearing fails to comply with the Local Bankruptcy Rules. The notice of hearing incorrectly states that opposition must be filed and

served "on the Trustee at the address set forth above" (which is movant's counsel's address) fourteen court days prior to hearing. Opposition is due fourteen calendar days prior to hearing. In this instance because the plaintiff filed timely opposition, the court will reach the merits of the motion. But see LBR 9014-1(1).

Federal Rule of Civil Procedure 56, made applicable to this proceeding by Bankruptcy Rule 7056, provides that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions on file, and declarations, if any, show that there is "no genuine issue of fact and that the moving party is entitled to judgment as a matter of law."

The defendant, Terra Linda Farms, filed this motion for summary judgment against plaintiff asserting that the instant complaint is barred by the statute of limitations of 11 U.S.C. § 546(a)(1). The only issues raised by defendant are that the complaint was filed long after the initial two year statute of limitation of Section 546(a)(1)(A) had expired and that the one year extension in Section 546(a)(1)(B) does not apply because no trustee was appointed or elected under Section 702 prior to expiration of the two year limit. The defendants' interpretation of the statute is incorrect. As stated below, the relevant date under Section 546(a)(1)(B) is the date the interim trustee was appointed. Therefore, the trustee is entitled to the one year extension of the statute of limitations in Section 546(a)(1). As such, the defendant is not entitled to summary judgment on the issue raised, and the motion is denied.

While the facts underlying this motion are not in dispute, defendant is not entitled to judgment as a matter of law on the one issue raised in the motion. Defendant cites no authority for the proposition that the date of the meeting of creditors is the relevant date for determining whether the trustee is appointed or elected such that the additional one year time limit would apply. See LBR 9014-1(d)(5).

In fact, the Ninth Circuit Court of Appeals has, in dictum, stated that the date of appointment of the interim trustee is the relevant date. Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.), 199 F.3d 1029, 1034 (9<sup>th</sup> Cir. 1999) discusses this very issue. The case involved the pre-1994 version of Section 546(a), but the Ninth Circuit looked to the current version in addressing the statute's ambiguity. "The added 'first trustee' language suggests that the statute of limitations should be applied to the interim trustee because the interim trustee is the 'first trustee.'" Id. While the language is dictum, it is persuasive dictum and this court will follow it. The court finds that the one year extension of the statute of limitations found in Section 546(a)(1)(B) applies because the interim trustee was appointed July 11, 2003; less than two years after this case was filed.

The court declines to reach the issues of whether the complaint is timely under the extended statute of limitations or if the statute of limitations is equitably tolled because those issues were not raised in the motion. Movant's attempt to do so in the reply is improper. However, the court directs the parties' attention to Matters 37 and 51 for guidance on the issue.

Counsel for plaintiff shall submit an order that conforms to the court's ruling.

39. 01-92889-A-7 GRAPECO, INC. HEARING ON DEFENDANT  
04-9111 RBK #1 BANK OF THE WEST'S MOTION  
MICHAEL D. MCGRANAHAN, TRUSTEE VS. FOR SUMMARY JUDGMENT  
8/30/04 [10]  
BANK OF THE WEST

**Disposition Without Oral Argument:** This matter is continued by the court to October 26, 2004 at 9:30 a.m.

The court will issue a minute order.

40. 04-93089-A-7 JOHN & ADRIENNE WANG HEARING ON APPLICATION  
SF #3 OF CHAPTER 7 TRUSTEE FOR  
APPOINTMENT OF REAL  
ESTATE BROKER  
8/23/04 [12]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The application is approved pursuant to 11 U.S.C. § 327(a) and the trustee is authorized to employ Sheri Midgley as a real estate broker to provide valuation, marketing and/or sale services to the trustee. As set forth in the motion, compensation will be either by hourly fees approved through an application for compensation under 11 U.S.C. § 330, or as part of a court-approved sale.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

41. 04-92499-A-7 JOSEPH E. MCKINLEY HEARING ON OBJECTION  
TO THE TRUSTEE'S REPORT  
OF NO DISTRIBUTION FILED  
BY JAMES PERKINS  
8/5/04 [6]  
9/2/04 [8]

**Tentative Ruling:** Creditor's objection to the trustee's report of no distribution is overruled.

As an initial matter, the court notes that this matter has not been properly served. The trustee's report of no distribution requires that any objection thereto, supporting documents, and notice thereof should be served on the chapter 7 trustee and the United States trustee. Neither were served with this objection. Only the debtor, and not his counsel, was served with the objection and notice. The court could overrule the objection on this basis alone.

Even had the objection been properly served, it would still be overruled. The assets to which objecting creditor refers in his objection are not

property of the bankruptcy estate and are therefore not available to the chapter 7 trustee for administration. 11 U.S.C. § 541 defines what is property of the chapter 7 estate. Section 541(a)(6) excludes post-petition income ("earnings from services performed by an individual debtor after the commencement of the case.") from the estate. Therefore, debtor's post-petition income is unavailable for distribution to creditors in chapter 7. For this reason, the objection is overruled.

The court will issue a minute order.

42. 04-91709-A-11 RICK PERRY HEBM #1 HEARING ON EMERGENCY MOTION TO COMPEL SURRENDER OF NON-RESIDENTIAL LEASEHOLD PREMISES AND RELATED RELIEF FILED BY ALAMEDA-CONTRA COSTA TRANSIT 9/9/04 [55]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

43. 04-92709-A-11 L.L.-G.L. ENTERPRISES, INC. FWP #5 HEARING ON DEBTOR'S SECOND MOTION (1) FOR AUTHORITY TO USE CASH COLLATERAL, (2) FOR AUTHORITY TO PAY DOWN FLOORING LINE FROM COLLATERAL, PROCEEDS AND (3) FOR MISCELLANEOUS RELIEF INCLUDING POTENTIAL APPROVAL OF A MANAGEMENT AGREEMENT 9/13/04 [132]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

44. 04-91715-A-7 BETTY A. SCOTT DPC #1 HEARING ON MOTION TO COMPEL TRUSTEE LARRY GRAY TO ABANDON PROPERTY OF THE BANKRUPTCY ESTATE 9/13/04 [28]

**Disposition Without Oral Argument:** This matter is continued by the court to October 26, 2004 at 9:30 a.m. The debtor seeks abandonment of her residence asserting an exemption of \$150,000. Debtor filed her amended claim of exemption on September 13, 2004. Pursuant to Fed. R. Bankr. P. 4003(b), parties in interest have thirty days from filing to object to

that amended claim of exemption. The continuance is necessary for the amended exemptions to become final.

Counsel for debtor shall provide notice of the continued hearing to all parties in interest.

45. 03-94533-A-7 PAUL L. GOZA & CONT. HEARING ON TRUSTEE'S  
MGO #2 KAREN A. MARK MOTION FOR AUTHORITY TO  
SETTLE A CONTROVERSY WITH  
THREETS  
8/12/04 [34]

**Disposition Without Oral Argument:** This matter continued from September 14, 2004, for the trustee to supplement his motion. The trustee did so timely. The supplement adequately addresses the court's prior concerns and contains the level of analysis required by the court in compromise motions. The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The court has great latitude in approving compromise agreements. *In re Woodson*, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. *Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. *In re A & C Properties*, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. *Id.*

The compromise in question arises from a dispute between the estate and Willie Threet, Jr. and Stephanie Threet. The trustee alleges that the Threets received a \$20,920 preferential transfer from debtors approximately four months pre-petition. The trustee further alleges that Willie Threet, Jr. is debtor Paul Goza's brother. The Threets deny the payment was a preferential transfer and raise a variety of affirmative defenses. The parties propose to compromise the matter through the Threets paying the estate \$10,000 in exchange for a release for any future claims related to this dispute.

The trustee asserts that the compromise satisfies the A & C Properties factors. Based on the supplement filed by the trustee, the court finds that, on the whole, the A&C factors favor the approval of the compromise.

Accordingly, the court finds that the trustee has carried his burden of

persuading the court that the proposed compromise is fair and equitable, and the motion is granted.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

46. 04-91333-A-7 LOUIS & CHERYL RUBIO CONT. HEARING ON ORDER TO SHOW CAUSE RE DISMISSAL, OR IMPOSITION OF SANCTIONS FOR FAILURE OF DEBTORS TO PAY FILING FEE INSTALLMENT (\$53.00 DUE AUGUST 6, 2004) 8/12/04 [18]

**Tentative Ruling:** None.

47. 04-91851-A-11 PAUL & JACKLYN DUMAS DCJ #3 HEARING ON MOTION TO EXTEND BAR DATE FOR FILING PLAN AND DISCLOSURE STATEMENT 9/10/04 [47]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

48. 04-91851-A-11 PAUL & JACKLYN DUMAS DCJ #4 HEARING ON MOTION FOR APPROVAL OF ASSUMPTION OF LEASE/OPTION 9/13/04 [52]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

49. 04-93360-A-11 PATRICK M. MCGRATH DCJ #1 HEARING ON MOTION FOR EXTENSION OF TIME TO FILE SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS 9/14/04 [9]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

**Tentative Ruling:** This matter continued from September 14, 2004 for JJ&J, Inc. ("Buyer") to brief the issue of barring Steven Dultmeier from bidding at this auction. Buyer timely filed its brief on the issue. The principal case cited by Buyer, C & J Clark America, Inc. v. Carol Ruth, Inc. (In re Wingspread Corp. et al.), 92 B.R. 87 (Bankr. S.D. N.Y. 1988), is not a proper fit for this case and therefore does not bar Mr. Dultmeier from bidding. Many of the facts are similar but it is the differences that are most important. In that case, Norman Hinerfeld, a principal and fiduciary of the corporate debtor, committed fraud in connection with the sale in addition to his other misconduct in the case. That has not occurred here. Mr. Dultmeier appeared in open court himself to bid on the assets. Furthermore, "[t]he integrity of the sale is the issue to be addressed--not any general past conduct of a bidder in relation to other matters." Gross v. Russo (In re Russo), 762 F.2d 239, 243 (2d Cir.1985). For this reason, Buyer's objection to Mr. Dultmeier's participation in the auction is overruled.

The motion to compromise the estate's interest in litigation through the sale of real and personal property, subject to overbidding, is granted, as set forth below.

The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id.

The compromise in question arises from litigation in Kansas ("Kansas Litigation") regarding, *inter alia*, the debtor's allegations that JJ&J Incorporated, formerly known as R.B.R. Golf Management, Inc. ("JJ&J") trespassed onto the debtor's land ("Kansas Realty") and removed about 75 trees, causing \$40,000 in damages. There is another party to the Kansas Litigation, which is not relevant to the issues before this court. JJ&J answered the complaint and denied liability. JJ&J filed a motion to dismiss to which the debtor and the other party responded. The court in the Kansas Litigation has not ruled yet. The trustee wants to settle the estate's interest in the Kansas Litigation, given the expense of litigation and the uncertainty of success.

To compromise this controversy, the trustee and JJ&J have agreed that JJ&J will pay: (1) \$2,500 to the estate for the estate's interest in the Kansas Realty, on an "as is" basis; and (2) \$2,500 to the estate for the trustee to "compromise, settle, and assign all McGranahan's rights in the Kansas Litigation with and to JJ&J." The separate sale of each asset is subject to overbids in increments of \$500.00 in open court. Overbids must be paid in cash within a time set by trustee at the hearing.

On the whole, the A&C factors favor the approval of the compromise.

Accordingly, the court finds that the trustee has carried his burden of persuading the court that the proposed compromise is fair and equitable, and the motion to approve the compromise is granted, with the clarification that the compromise calls for the sale of the estate's rights in the Kansas litigation to JJ&J, or a court approved overbidder, rather than a dismissal of the estate's claims in the Kansas Litigation. At the hearing, the court will hold separate bidding for potential overbidders for the estate's interest in the Kansas Realty and the Kansas Litigation. As set forth in the motion, all overbids must be in \$500 increments. Bids and overbids must be paid in cash, or by cashier's check issued by a bank acceptable to the trustee, within a time set by trustee at the hearing.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

51. 01-92889-A-7 GRAPECO, INC. CONT. HEARING ON DEFENDANT'S  
04-9113 AEW #1 MOTION TO DISMISS UNDER  
MICHAEL MCGRANAHAN, TRUSTEE VS. FED.R.CIV.P.12(B)(6) FOR  
TXU ENERGY RETAIL COMPANY, LP FAILURE TO STATE A CLAIM  
FOR WHICH RELIEF CAN BE  
GRANTED  
8/11/04 [8]

**Tentative Ruling:** As an initial matter, the court notes that this motion fails to comply with the Local Bankruptcy Rules. The formatting does not comply with LBR 9014-1(d)(1) and the Guidelines for Preparation of Documents (effective January 20, 2004). In addition, movant's reply was untimely. The misfiling of a document is not the proper subject of an errata. In this instance, the court will reach the merits.

The motion to dismiss for failure to state a claim pursuant to Fed. R. Bankr. P. 7012 incorporating Fed. R. Civ. P. 12(b)(6) is granted with leave to amend.

At issue here is whether or not the plaintiff's complaint is barred by the applicable statute of limitations. Defendant seeks alternate relief of dismissal under Fed. R. Civ. P. 12(b)(6) or summary judgment. Statute of limitations defenses "may be raised by a motion for dismissal or by summary judgment motion. If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss. If the defense does not appear on the face of the complaint and the trial court is willing to accept matters outside of the pleadings, the defense can still be raised by a motion to dismiss accompanied by affidavits. Rule 12(b)(6) permits the court to consider a motion to dismiss

accompanied by affidavits as a motion for summary judgment. If the motion is treated as one for summary judgment, all parties shall be permitted to present all material pertinent to the motion." Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9<sup>th</sup> Cir. 1980) (citations omitted).

The statute of limitations applicable here is 11 U.S.C. § 546(a) which provides: "An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of (1) the later of (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election fo the first trustee ... if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or (2) the time the case is closed or dismissed." (West 2004). Subpart (a)(2) does not apply.

The court may take judicial notice of the dates when certain events occurred in both the main case as well as the filing date of this complaint. MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9<sup>th</sup> Cir. 1986) (the court may take judicial notice of "matters of public record outside the pleadings in a motion to dismiss.") The court takes judicial notice of the following dates: July 20, 2001 (the date the Grapeco, Inc., bankruptcy was filed); July 11, 2003 (the date the case converted to chapter 7 and when Mr. McGranahan was appointed trustee); and July 19, 2004 (the date this complaint was filed). The court also takes judicial notice that the docket reflects that Mr. McGranahan is the only trustee appointed in this case. It is clear that the complaint was filed over one year after Mr. McGranahan was appointed trustee and outside the time limitation imposed by Section 546(a)(1)(B).

Plaintiff argues that the statute of limitations in this case is equitably tolled. Plaintiff argues that dismissal of the complaint is inappropriate unless "it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." (Plaintiff's opposition, p.5). Plaintiff misstates the rule by omitting a step. "When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Jablon, 614 F.2d at 682. Plaintiff has skipped over the determination of whether the complaint is sufficiently pled to raise the issue of equitable tolling. In this instance, it is not. There is nothing on the face of the complaint regarding the statute of limitations or the tolling thereof. There is nothing to put defendant on notice that such a theory is raised. Because of this, the complaint in its present form fails to state a claim on which relief can be granted.

However, the court will grant leave to amend. This case is still in the pleading stage. Plaintiff's equitable tolling theory is not frivolous. The court will therefore allow plaintiff to amend his complaint to plead the theory. Nothing herein is a determination that equitable tolling applies to this case. That determination awaits another day.

Plaintiff shall file his amended complaint and serve it on the defendant on or before October 13, 2004. Defendant shall have fifteen days thereafter to file an answer to the amended complaint or a permitted motion. If plaintiff fails to file an amended complaint by October 13, 2004, this adversary proceeding will be dismissed without further notice or hearing for failure to state a claim upon which relief can be granted.

Counsel for Defendant shall submit an order that conforms to the court's ruling.

52. 04-92752-A-11 ARNOLD & GEORGETTE TOSO  
CWC #5

HEARING ON MOTION FOR  
APPROVAL OF STIPULATION FOR  
POST-PETITION FINANCING  
(OST)  
9/16/04 [50]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(3)(motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.