UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

January 3, 2018 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	17-26909-D-7 KMR-1 WELLS FARGO BANK, N.A. VS.	GREGORY/KIMBERLY HARVEY	MOTION FOR RELIEF FROM AUTOMATIC STAY 11-30-17 [11]

Final ruling:

This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

2.	14-25820-D-11 16-2082 MBL-5 MCFARLAND V. BATTLE CREEK STATE BANK	INTERNATIONAL MANUFACTURING GROUP, INC.	MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION 11-20-17 [123]

Tentative ruling:

This is the motion of defendant Battle Creek State Bank (the "Bank") for summary judgment against the plaintiff, International Manufacturing Group, Inc., a liquidating debtor ("IMG"), by and through its plan administrator, The Beverly Group, Inc. (the "plan administrator"), pursuant to Fed. R. Civ. P. 56, made applicable in this proceeding by Fed. R. Bankr. P. 7056, or in the alternative, for summary adjudication of certain facts. The plan administrator has filed opposition and the Bank has filed a reply. For the following reasons, the court intends to continue the hearing to permit additional briefing of a single discrete issue, after which the court will issue findings of fact and conclusions of law, together with a recommendation, to the district court.[1]

Summary judgment is appropriate when there exists "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court discussed the standards for summary judgment in a trilogy of cases: Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. Anderson, 477 U.S. at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories, and any affidavits. Celotex at 323. To demonstrate the presence or absence of a genuine dispute, a party must cite to specific materials in the record, or submit an affidavit or declaration by a competent witness based on personal knowledge. See Fed. R. Civ. P. 56(c)(1), (4). Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Anderson, 477 U.S. at 252. Once the moving party has met its initial burden, the non-moving party must show specific facts demonstrating the existence of genuine issues of fact for trial. Id. at 256.

By its complaint, the plan administrator seeks to avoid and recover, pursuant to California law, as permitted by § 544(b) of the Bankruptcy Code, certain pre-petition payments made by IMG to the Bank as actual and/or constructive fraudulent transfers. The Bank's motion is based on "good faith" and "for value" defenses. That is, as to the actual fraudulent transfer claims, the Bank contends it took the payments in good faith and for a reasonably equivalent value given to IMG, and therefore, that the payments are not avoidable. See Cal. Civ. Code § 3439.08(a). As to the constructive fraudulent transfer claims, the Bank contends its evidence demonstrates the plan administrator will be unable to make a prima facie case that the payments were made without IMG receiving a reasonably equivalent value for them, and therefore, that they are not avoidable. See Cal. Civ. Code § 3439.04(a)(2).

In September of 2008, five and a half years before IMG's bankruptcy case was filed, the Bank made a $1,200,000 loan to an individual named Larry Carter and an LLC of which he was the manager, N9FX, LLC ("N9FX"). The loan was secured by a security interest in an airplane owned by Carter or N9FX. Carter testifies in support of the motion that he and IMG's principal, Deepal Wannakuwatte, agreed that

Carter would loan IMG the $1,200,000 Carter was borrowing from the Bank and IMG would make the monthly payments on the airplane loan directly to the Bank. Wannakuwatte executed, as president and CEO of IMG, a promissory note for $1,200,000 in favor of Carter, which stated, "Monthly payments in the amount of $9,486.59 will be made to the airplane loan." Declaration of Larry Carter, DN 127, Ex. 3. That was the exact amount of the monthly payment Carter was to make on the Bank loan. The Bank's Loan Transaction History Summary Inquiry shows IMG made the payments regularly and on time and the plan administrator does not dispute that.[2]

As to both the actual and constructive fraudulent transfer claims, the Bank contends IMG received reasonably equivalent value for its monthly payments to the Bank because those payments reduced the amount due from IMG to Carter under the IMG/Carter promissory note. In other words, they were payments on an antecedent debt, which generally fall within the definition of "value" under California fraudulent transfer law. "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." Cal. Civ. Code § 3439.03. Although the antecedent debt owing by IMG was to someone – Larry Carter – other than the recipient of the monthly payments – the Bank, the payments resulted in an indirect benefit to IMG in the form of the partial satisfaction of its debt to Carter – in amounts corresponding to the amounts of the monthly payments IMG made to the Bank.

"It is well settled that 'reasonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule.'" Frontier Bank v. Brown (In re Northern Merch., Inc.), 371 F.3d 1056, 1058 (9th Cir. 2004) (citation omitted). Thus, for example, the shareholders of a company that already owed money to a bank signed a promissory note to the bank for a second loan, the proceeds of which were paid directly to the company which, in turn, granted the bank a security interest in its assets to secure the second loan. Later, when the company's bankruptcy trustee sought to avoid the security interest as a fraudulent transfer, the Ninth Circuit held:

> Although Debtor was not a party to the October loan, it clearly received a benefit from that loan. In fact, [the bank] deposited the $ 150,000 proceeds of the October Loan directly into Debtor's checking account. Because Debtor benefitted from the October Loan in the amount of $ 150,000, its grant of a security interest to [the bank] to secure Shareholder[s'] indebtedness on that loan, which totaled $ 150,000, resulted in no net loss to Debtor's estate nor the funds available to the unsecured creditors. To hold otherwise would result in an unintended $ 150,000 wind-fall to Debtor's estate. Accordingly, Debtor received reasonably equivalent value in exchange for the security interest it granted to [the bank].

Id. at 1059.

The plan administrator contends, however, that because IMG was actually the front for a sizeable Ponzi scheme, and because the plan administrator claims to have established or to be able to establish that Carter was in deeply involved in that scheme, the IMG/Carter promissory note was void and unenforceable. Thus, in the plan administrator's view, when IMG made the monthly payments to the Bank pursuant to the IMG/Carter promissory note, IMG received no value in exchange. The bulk of the plan administrator's opposition is an attempt to prove IMG was a Ponzi scheme. In fact, the plan administrator contends this court so ruled when it granted the former chapter 11 trustee's motion for substantive consolidation of IMG and other

entities. For the purpose of this motion the court will assume IMG was a Ponzi scheme, however, the court is not persuaded the IMG/Carter promissory note, which looked regular and ordinary on its face and which was paid regularly and on time by IMG, was necessarily void and unenforceable, and therefore, that IMG received nothing of value – that is, it did not satisfy a valid antecedent debt – when it made the monthly payments to the Bank.

First, the determination of reasonably equivalent value "must be made as of the time of the transfer" (Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 341 (Bankr. N.D. Cal. 2009), citing BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994)), whereas the plan administrator has not focused its analysis on the time period in which IMG made the monthly payments. In fact, most of the documents filed by the plan administrator as exhibits in support of its Ponzi scheme argument are dated after April of 2011, when the Bank loan was paid off in full. Further, the plan administrator has cited no authority for the proposition that, even if IMG was a Ponzi scheme when it made the monthly payments to the Bank and even if Carter was a participant in it, the Carter/IMG promissory note should be held to be void and unenforceable as against the entity that received the payments; namely, the Bank.

The Bank has demonstrated that the monthly payments on the airplane loan were made by IMG to the Bank regularly and on time pursuant to the IMG/Carter promissory note, which appeared regular and ordinary on its face. The plan administrator has not demonstrated that, as a legal matter, the existence of a Ponzi scheme, with or without Carter's participation, necessarily rendered that particular discrete obligation void and unenforceable, such that the court should determine IMG received nothing of value in exchange for its monthly payments to the Bank. As the Bank states in its reply, there has been no judgment determining the particular contract that was the Carter/IMG promissory note to be void or unenforceable, and the plan administrator says nothing about that particular contract except that the airplane loan proceeds were deposited into IMG's wholesale division's bank account (which the plan administrator says is the account the Ponzi scheme was run out of) and the monthly payments to the Bank were made out of that account. But in fact there are exceptions to the illegality of contracts doctrine (see, e.g., McIntosh v. Mills, 121 Cal. App. 4th 333 (2004)), which neither party has addressed. The court intends to continue the hearing to permit the parties to brief this discrete issue, each party to be limited to five pages with the font and other formatting as required by LBR 9004-2.

As for the good faith issue, the court finds the Bank has satisfied its initial burden of persuasion in demonstrating that no genuine issues of material fact exist. The person who has been the Bank's president since 1993 testifies the Bank knew nothing about IMG or Wannakuwatte at the time it made the loan; that the Bank does not unilaterally decide where to send account statements; that in this case, at Carter's request, the statements were addressed to N9FX and Carter and sent in care of JTS Communities, Inc; that between October of 2008 and April of 2011, the Bank received the monthly payments and was paid off in April of 2011; that at no time between those dates did the Bank know of IMG's and Wannakuwatte's fraud, or have knowledge of any facts that would suggest the payments the Bank was receiving from IMG were made with the intent to defraud its creditors, or have knowledge of any facts that would have suggested IMG was insolvent at the time it made the payments, or receive any information suggesting there was any suspicious activity on the part of IMG. The Bank's president concludes: "There was nothing unusual about the way Battle Creek received the payments on the fully secured Loan with Carter. In my experience, there are numerous situations where a payment from a third party is

entirely acceptable. Having received no calls from anyone, no documentary evidence indicating that there was an issue, we did not suspect that any issues existed as to the payments received from IMG." Declaration of Roger Brestel, DN 128, ¶ 15.

The plan administrator's only argument in opposition is that the single fact that the loan payments were made by someone (IMG) other than the Bank's obligor (Carter/N9FX) was enough of a red flag to put the Bank on inquiry notice that something suspicious, and possibly fraudulent, was going on. Thus, the plan administrator states, "Battle Creek's files are devoid of any information regarding why it was receiving payments on its note from a third party not obligated on the debt" and

> the mere receipt by a financial institution of payments on a loan from a third party not obligated on the debt is a red flag warranting inquiry by the bank, since on its face, without any information or investigation into the basis for the third party to be making the payments, the payments appear to be gifts by the payor that would be subject to avoidance as fraudulent transfers unless (a) based on an investigation into the underlying relationship of the parties and transactions between them, the party making the payments is somehow receiving reasonable value in exchange for the transfers, or (b) an investigation into the financial status of the payor shows that entity, IMG, was fully solvent and could legitimately donate its assets for the benefit of Carter.

Plaintiff's Opp., DN 132, at 18:21-19:6.

The plan administrator has cited a single case for this proposition. In that case, Development Specialists, Inc. v. Hamilton Bank, N.A. (In re Model Imperial, Inc.), 250 B.R. 776 (Bankr. S.D. Fla. 2000), the bank made a loan to a company it knew had no assets and it knew the company the money was actually going to was maxed out on its line of credit with and subject to borrowing restrictions by a group of other banks. The bank's senior vice president knew the real borrower's inability to incur additional debt was the only reason the "paper company" was used as the bank's nominal borrower. In other words, there was a lot more in the nature of red flags than a bank receiving payments from someone other than its named borrower.

In short, the court is not persuaded that the mere receipt of regular and timely monthly payments from someone other than a bank's borrower is, in and of itself, sufficient to put the bank on inquiry notice of something irregular going on with the payor. Further, the plan administrator has not suggested there are additional facts it might present showing there were any other red flags that should have put the Bank on inquiry notice.[3] Thus, in response to the Bank's prima facie case as to its good faith defense, the plan administrator has failed to show specific facts demonstrating that there are genuine issues of fact for trial.

For the reasons stated, if the court, after supplemental briefing, finds in favor of the Bank on its "for value" defense, the court will recommend to the district court that the motion be granted. On the other hand, if the court finds the plan administrator has shown facts sufficient to demonstrate genuine issues of material fact for trial on the for value defense, the court will recommend granting the motion in part and summarily adjudicating that the Bank took the payments from IMG in good faith. The court will hear the matter.

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1 In June of 2016, the Bank moved to withdraw the reference of this adversary

proceeding; the district court denied the motion without prejudice. The adversary proceeding is now much farther along, the parties do not dispute that the Bank is entitled to a jury trial, and resolution of this motion may well be dispositive of the adversary proceeding. For these reasons, and as the Bank has not consented to entry of final orders or judgment by this court, the court finds it appropriate to make a recommendation to the district court despite that court's suggestion that pre-trial motions might be resolved by this court.

2 The Bank loan, by its terms, would have been all due and payable on September 2, 2013. In 2011, an individual named Jerry Nelson purchased Carter's sole member interest in N9FX (and therefore in the airplane), and the balance due on the Bank loan, $1,147,325, was paid off with the sale proceeds. See Declaration of Gerald C. "Jerry" Nelson, filed April 12, 2017, in connection with the motion designated DC No. BJ-1. By this adversary proceeding, the plan administrator seeks to avoid and recover the monthly payments IMG paid the Bank, a total of $246,650. As it was not made by IMG, the balloon payment is not in issue.

3 The discovery bar date and the deadline to disclose experts have passed.

3. 17-25421-D-7 MICHAEL HAIGH — OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
PA-2 — 11-30-17 [26]

Tentative ruling:

This is the objection of creditor Jamshid Saleh, M.D. ("Dr. Saleh") to the debtor's claims of exemption of pension plans described as (1) "CalPers"; and (2) "Community Interest in Non-Filing Spouse CalPers." The debtor has filed opposition and Dr. Saleh has filed a reply. For the following reasons, the court intends to continue the hearing.

First, the court declines Dr. Saleh's request to strike the debtor's opposition as late. The opposition was filed just one day late and the delay does not appear to have caused any prejudice to Dr. Saleh. Second, the court is aware, as Dr. Saleh points out, that the debtor was not initially accurate in reporting the values of the pension plans. He valued them at $0 in his initial Schedules B and C, then at $54,636 and $53,056, respectively, in amended Schedules B and C, and finally, at $54,636 and $80,280, respectively, in second amended Schedules B and C. Of course, debtors have a duty to be careful, if not meticulous, in valuing their assets in bankruptcy schedules; however, the court does not find the changes to be such as to support a finding of concealment or to warrant disallowance.[1]

Finally, it appears from the account statements filed as exhibits to and authenticated by the debtor's declaration that the pension plans are indeed CalPERS plans, and as such, that they are not property of the bankruptcy estate. In re Mueller, 256 B.R. 445 (Bankr. D. Md. 2000), involved the Maryland equivalent of a CalPERS account. The court began with the general proposition that the plan was not an ERISA-qualified plan because it was a "governmental pension plan." Id. at 455. The court then conducted an analysis similar to the one in Patterson v. Shumate, 504 U.S. 753 (1992),[2] under § 541(c)(2) of the Bankruptcy Code, and concluded that the Maryland plan was not property of the estate. Mueller, 256 B.R. at 462.

In In re Braulick, 360 B.R. 327 (Bankr. D. Mont. 2006), the court also conducted a Patterson analysis and concluded that a debtor's plan under the Montana Public Employees Retirement System was not property of the estate. 360 B.R. at 331. The court reached that conclusion despite the fact that neither the debtors nor the trustee had raised the issue. "In reviewing Debtors' schedules, Ex. A, the facts, the briefs and the applicable law, the Court concludes both parties missed the essential issue in this contested matter. Before a property may be claimed exempt under the exemption provisions of either the federal exemptions . . . or the State exemptions . . ., the property claimed exempt must be property of the estate." Id. at 329.

The court recognizes that the Ninth Circuit has held that "[t]he exclusion [under § 541(c)(2)] is permissive rather than mandatory: 'a debtor's interest in an ERISA-qualified pension plan may be excluded from the property of the bankruptcy estate pursuant to § 541(c)(2).'" Rains v. Flinn (In re Rains), 428 F.3d 893, 905-06 (9th Cir. 2005), quoting Patterson, 504 U.S. at 765 (emphasis added by Ninth Circuit). However, it did so in the context of a debtor who had agreed in a settlement approved by the bankruptcy court that if he did not make a particular payment to the trustee by a particular date, his exemption claim in his retirement plan would be denied up to the amount of the required payment. The debtor later relied on § 541(c)(2) to try to get out of the settlement. He was unsuccessful, the Ninth Circuit holding that "by ceding his claim of exemption in the settlement agreement, Rains necessarily agreed to include the retirement plan funds in the bankruptcy estate . . . ." Id. at 906.

This is not such a situation. It is, instead, as in Braulick, a case where the debtor does not appear to be aware of his right to claim the PERS plans as excluded from the estate. Thus, the court finds the following language in Rains to be applicable and the "permissive versus mandatory" language has no bearing here.

> Section 541(c)(2) of the Bankruptcy Code provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). "The natural reading of [this] provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law."

Rains, 428 F.3d at 905, quoting Patterson, 504 U.S. at 758 (emphasis added). Further, "[a] bankruptcy court lacks subject matter jurisdiction over excluded ERISA-qualified pension plan funds." Id. at 906.

The Braulick court also noted that even if it had concluded the debtor's Montana PERS plan was property of the estate, the plan would likely be subject to exemption under § 522(b)(3)(C) and (b)(4), added to the Code by BAPCPA in 2005. Braulick, 360 B.R. at 331-32. Citing Collier, the court noted those subsections were added "[t]o expand the protection of certain tax-exempt retirement plans." Id. at 332, quoting 4 COLLIER ON BANKRUPTCY, P 522.10[8] (15th ed. rev.).

In light of these considerations and the court's lack of jurisdiction over property that is not property of the estate, the court finds it appropriate, as did the Braulick court, to point out the issue to the parties and to permit the debtor, as did the Braulick court (see 360 B.R. at 333), to amend his Schedule B to list the plans but to assert they are excluded from property of the estate and to amend his Schedule C to delete the plans. The court intends to continue the hearing on this

objection to January 17, 2018 at 10:00 a.m. If the debtor has filed those amendments by that time, the court will overrule the objection to exemptions as moot. If the debtor has not filed the amendments, the court will take up the issues raised by Dr. Saleh's objection to the existing claims of exemption.

The court will hear the matter.

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1 In fact, the initial valuation at $0, although inaccurate and inappropriate, suggests a belief that the plans, as CalPERS plans, were not significant to the estate, as discussed below.

2 In Patterson, the Court held that ERISA-qualified plans are excluded from property of the estate under § 541(c)(2) of the Bankruptcy Code. 504 U.S. at 760.

4.	17-27721-D-7 CPA-3 DHANY DARAPHET VS.	EZEKIEL BURWELL	MOTION FOR RELIEF FROM AUTOMATIC STAY 12-7-17 [20]

5.	17-26928-D-7 EJS-1	JARED REEK	MOTION TO COMPEL ABANDONMENT 12-5-17 [13]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtor's motion to compel the trustee to abandon property and the debtor has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned. Moving party is to submit an appropriate order. No appearance is necessary.

6.	17-20731-D-11 DB-9	CS360 TOWERS, LLC	MOTION TO USE CASH COLLATERAL 12-6-17 [268]

7. 17-20731-D-11 TBG-2 — CS360 TOWERS, LLC — CONTINUED MOTION TO USE CASH COLLATERAL
2-15-17 [12]

8. 13-21837-D-7 HLG-2 — MARTIN/KELLY CLARK — MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
11-28-17 [34]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order, which order shall specifically identify the real property subject to the lien and specifically identify the lien to be avoided. No appearance is necessary.

9. 16-24739-D-7 DNL-5 — ANN POFFENBERGER — MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM FOR J. RUSSELL CUNNINGHAM, TRUSTEE'S ATTORNEY(S)
12-5-17 [62]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

10. 17-27352-D-7 RPZ-1 — ALBERTINA JOHNSON-SMITH — MOTION FOR RELIEF FROM AUTOMATIC STAY
CITIMORTGAGE, INC. VS.
11-28-17 [15]

Final ruling:

This matter is resolved without oral argument. This is Citimortgage, Inc.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

11. 17-22056-D-11 JAMES MCCLERNON — MOTION TO SET ASIDE
17-2113 RLC-3 — 11-28-17 [26]
MCCLERNON GENERAL ENGINEERING, INC. V. MCCLERNON

Tentative ruling:

This is the defendant's motion to set aside the default entered against him on August 8, 2017. The plaintiff has filed opposition. For the following reasons, the motion will be granted.

By its complaint, the plaintiff seeks a determination that a state court judgment against the defendant in the amount of $77,723 is not dischargeable; a determination that two additional debts, in amounts to be determined at trial, are not dischargeable; and a denial of the debtor's discharge. Summons was issued on June 30, 2017; pursuant to Fed. R. Bankr. P. 7012(a), an answer or other response was due by July 31, 2017 (as July 30 was a Sunday). The plaintiff's counsel testifies that in an email on August 1, she acknowledged the defendant's counsel was on vacation and voluntarily extended the deadline to August 4, which was a Friday. When she had not received an answer or other response by that date, she filed a request for entry of default the following Monday, August 7, and on August 8, the clerk of the court entered the defendant's default. The next day, August 9, the defendant filed an answer. Thus, considering the original deadline, July 31, the answer was filed nine days late; considering the extended deadline, it was five days late.

The standard for setting aside a default is "good cause." Fed. R. Civ. P. 55(c), incorporated herein by Fed. R. Bankr. P. 7055. The factors the court is to consider are: "(1) whether [the defendant] engaged in culpable conduct that led to the default; (2) whether [the defendant] had a meritorious defense; or (3) whether reopening the default judgment would prejudice [the plaintiff]."

Franchise Holding II, LLC v. Huntington Rests. Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004). These factors are in the disjunctive; a motion to set aside a default may be denied if any one of them is present. Id. at 926. The burden of proof is on the moving party. Id. However, "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." United States v. Signed Personal Check No. 730, 615 F.3d 1085, 1091 (9th Cir. 2010) (citations omitted).

In support of the motion, the defendant's counsel testifies he was dealing with matters in the defendant's parent case and this and two other adversary proceedings against the defendant at the time the answer was due. He states he was communicating with counsel for the plaintiff and related parties about all these matters and "believed that [he] had a few days beyond [the] August 7, 2017 dead line to file an Answer." S. Reynolds Decl., DN 28, at 2:4. He adds he "believed at the time that a global resolution of the various claims and counter-claims of the parties was possible and that full[-]on litigation mode would not serve the interests of either debtor or creditors." Id. at 2:5-7.

The plaintiff's counsel testifies that on August 17, she agreed to seek her client's authority to set aside the default if the debtor's counsel would stipulate to relief from stay for her client Matthew McClernon to pursue a personal injury action against the debtor in state court. On September 22, the plaintiff's counsel

advised the defendant's counsel she did not think he needed to file a motion to set aside the default at that time and she was trying to schedule a meeting with all her clients. On November 7, the defendant's counsel asked the plaintiff's counsel whether she had authority to allow the default to be set aside and she responded she did not. On November 28, the defendant filed this motion.

In these circumstances, and especially given the very short delay (five days) in filing the answer, the court finds the defendant did not engage in culpable conduct that led to the default. "A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer. . . . [T]o treat a failure to answer as culpable, the movant must have acted with bad faith, such as an intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process." Signed Personal Check No. 730, 615 F.3d at 1092 (citations omitted, internal quotation marks omitted). Further, "simple carelessness is not sufficient to treat a negligent failure to reply as inexcusable, at least without a demonstration that other equitable factors, such as prejudice, weigh heavily in favor of denial of the motion to set aside a default." Id.

In terms of prejudice, the plaintiff's argument in opposition to this motion is primarily directed to the defendant's conduct as the debtor in the parent case, and in that regard, the court sympathizes with the plaintiff's frustration. However, the plaintiff suffered no prejudice from the five-day delay in the filing of the answer of the type that would justify refusing to set aside the default. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case. Rather, the standard is whether [plaintiff's] ability to pursue his claim will be hindered," such as by "loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 701 (9th Cir. 2001) (citations omitted). Nor is the plaintiff's incurring of costs in litigating the default the type of prejudice the court is to consider. Id.

Finally,

> [a] defendant seeking to vacate a default judgment must present specific facts that would constitute a defense. But the burden . . is not extraordinarily heavy. All that is necessary to satisfy the "meritorious defense" requirement is to allege sufficient facts that, if true, would constitute a defense: the question whether the factual allegation is true is not to be determined by the court when it decides the motion to set aside the default. Rather, that question would be the subject of the later litigation.

TCI Group Life Ins. Plan, 244 F.3d at 700 (citation omitted). On this factor, the defendant has made the weakest showing, failing even to address it in his moving papers. However, although, as the plaintiff points out, the defendant has admitted many of the plaintiff's allegations, his answer includes denials of key allegations, as well as several affirmative defenses.

Although the three factors the court is to consider are in the disjunctive, this means only that the court has the discretion to deny a motion to vacate if the defendant fails to demonstrate any one of them (see Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987)). The court has found no authority for the proposition that the defendant must demonstrate all three. In TCI Group Life, the court strongly suggested the three factors are to be weighed in the balance.

[I]f a defendant's conduct was not "culpable," then . . . in the interests of substantial justice the better course may well be to vacate the default judgment and decide the case on the merits. If, however, the defendant presents no meritorious defense, then nothing but pointless delay can result from reopening the judgment. Similarly, if reopening the judgment would actually prejudice the plaintiff who has diligently pursued her claim, then the interest in finality should prevail.

TCI Group Life, 244 F.3d at 696-97. The court was discussing the standards for setting aside a default judgment, not a clerk's entry of default. The factors the court is to consider are the same for both (Signed Personal Check No. 730, 615 F.3d at 1091, n.1); however, "the test is more liberally applied" on a motion to set aside a default, "because in [that] context there is no interest in the finality of the judgment with which to contend." Id.

On balance, the court is satisfied that, although the defendant's conduct in the parent case has been regrettable, as to his delay in filing an answer in this adversary proceeding, the factors the court is to consider weigh in his favor and the motion will be granted. The court will hear the matter.

12. 17-22056-D-11 JAMES MCCLERNON
CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
3-29-17 [1]

13. 17-26568-D-7 KARISSA KNUROWSKI
CONTINUED AMENDED MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
10-26-17 [15]

14. 15-29890-D-7 GRAIL SEMICONDUCTOR
16-2088 DNL-13
CARELLO V. STERN ET AL
CONTINUED MOTION TO ENFORCE JUDGMENT
10-11-17 [408]

15. 17-26391-D-7 TARA ROOKS
HLG-1

MOTION TO COMPEL ABANDONMENT
12-2-17 [12]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtor's motion to compel the trustee to abandon property and the debtor has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned. Moving party is to submit an appropriate order. No appearance is necessary.

16. 17-27801-D-7 DAVID/VERONICA HANSEN
BPC-1
THE GOLDEN 1 CREDIT UNION
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
12-18-17 [12]

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtors' statement of intentions indicates the debtors intend to surrender the vehicle that is the subject of this motion and the trustee has filed a statement of non-opposition. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

17. 10-46942-D-7 DAVID TAFT
JLK-1

CONTINUED MOTION TO AVOID LIEN
OF DISCOVER BANK
12-6-17 [31]

18. 17-27362-D-7 JESSICA SANTANA
RTD-1
YOLO FEDERAL CREDIT UNION
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
12-9-17 [9]

19.	16-27672-D-11 DNL-9	DAVID LIND	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SONDRA SALAICES KAHRS, LAURA KAHRS EMIGH, ALMA KAHRS FLETCHER, AND BRIAN SALAICES 12-13-17 [275]
20.	17-25279-D-7 ADJ-2	JONATHAN VELASQUEZ	CONTINUED MOTION TO SELL 11-28-17 [30]
21.	17-25279-D-7 ADJ-3	JONATHAN VELASQUEZ	CONTINUED MOTION TO SELL 11-28-17 [35]