UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

MODESTO DIVISION CALENDAR
January 9, 2020 at 10:30 a.m.

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1. **18-90600-E-7** **CORAZON HERNANDEZ** **MOTION FOR ENTRY OF DEFAULT**
19-9016 **MM-1** **JUDGMENT**
MCGRANAHAN V. GARIBA **12-5-19 [15]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on December 5, 2019. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is denied without prejudice.

Michael D. McGranahan, Chapter 7 Trustee ("Plaintiff-Trustee") filed the instant Motion for Default Judgment on December 5, 2019. Dckt. 15. Plaintiff-Trustee seeks an entry of default judgment against Socorro Gariba ("Defendant") in the instant Adversary Proceeding No. 19-09016.

The instant Adversary Proceeding was commenced on September 30, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on October 1, 2019. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 7.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on November 5, 2019. Dckt. 12.

REVIEW OF THE MOTION

Plaintiff-Trustee argues that he is entitled to default judgment against the Defendant on the basis that:

A. In Paragraph 1 of the Motion the Plaintiff-Trustee provides a recitation of "Background," which consists of:

1. The Trustee filed the Complaint on September 20, 2019.

2. The Summons was issued on October 1, 2019.

3. The Summons and Complaint were served on October 2, 2019.

4. Defendant was required to answer on or before October 31, 2019.

5. Defendant has not filed an answer and no extension of time to so do has been filed.

6. On November 1, 2019, Plaintiff-Trustee requested the entry of Defendant's default.

7. On November 5, 2019, Defendant's default was entered.

B. The Second Paragraph, titled "Jurisdiction and Venue," states:

1. This is a core proceeding seeking relief pursuant to 11 U.S.C. § 363(h).

2. The court has jurisdiction pursuant to 28 U.S.C. § 157 and § 1334.

C. The Third Paragraph, titled "Grounds for Relief" states with particularity the following grounds:

1. Pursuant to Federal Rule of Civil Procedure 55(b)(2) the Plaintiff-Trustee is "entitled" to a default judgment against Defendant because:

a. Defendant's default has been entered;

b. Defendant failed to appear in this Adversary Proceeding;

c. Defendant failed to file a responsive pleading or answer in this Adversary Proceeding (presumably "a" above would not have been entered if Defendant had filed an answer or other responsive pleading).

Dckt. 15.

The above is the universe of grounds stated with particularity that the requested relief may properly be granted.

As discussed in detail below, Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that the Motion itself state with particularity the grounds upon which the requested relief is based. Looking at the above particular grounds, there is no relief that the court is justified in ordering pursuant to this Motion.

Interestingly, in the Points and Authorities filed by Plaintiff-Trustee (discussed below), the Plaintiff-Trustee affirms that the above states the grounds and alleges the facts necessary for granting the Motion:

> **FACTS**
>
> The facts proving grounds for relief are set forth in the Motion and the complaint that commenced the above-captioned adversary proceeding, and are only repeated or elaborated upon to the extent necessary for context.

Points and Authorities, p. 1:23-26; Dckt. 17,

RELIEF SOUGHT IN MOTION FOR DEFAULT JUDGMENT

Plaintiff-Trustee requests the following relief in the Motion's prayer:

A. Entering default judgment in favor of the Trustee and against the Defendant;

B. Authorizing and directing the Trustee to cause 2721 E. Orangeburg Ave, Modesto, California 95355 to be listed for sale and to be sold free and clear of interests of the non-debtor Defendant; and

C. For such other relief as the Court deems just and proper.

The Motion does not state grounds for an order of such sale of a co-owner's stated interests.

EVIDENCE PRESENTED WITH MOTION

No evidence has been presented by Plaintiff-Trustee in support of relief by the present Motion. In the eight page Points and Authorities filed by Plaintiff-Trustee (Dckt. 17), counsel argues some facts, but does not provide any evidence thereof.

REVIEW OF COMPLAINT

Though the Motion is not sufficient to grant the requested relief, the court has reviewed the Complaint filed by Plaintiff-Trustee. Plaintiff-Trustee filed a complaint for injunctive relief against Defendant. The Complaint contains the following general allegations as summarized by the court:

A. On August 16, 2018 (the "Petition Date"), the Debtor filed a petition under Chapter 7 of the Bankruptcy Code.

B. The Trustee is informed and believes that defendant Socorro Gariba ("Defendant") is an individual residing in the State of California and is the Debtor's mother.

C. Pursuant to a Grant Deed dated February 14, 2014, and recorded on February 21, 2014, the Debtor purchased that certain real property commonly known as 2721 E. Orangeburg Ave, Modesto, California 95355 (the "Property").

D. The Trustee is informed and believes that the Property secures a mortgage of Wells Fargo Bank, N.A. in the approximate amount of $175,788.53 based on the Debtor's schedules and reaffirmation agreement filed on November 28, 2018.

E. The Trustee is informed and believes that the value of the Property ranges from $290,000.00 to $296,000.00. Thus, substantial equity in the Property exists.

F. In the Debtor's Schedule A/B, the Debtor purports that she only has bare legal title for the Property, and purports that the Defendant: resides on the property, provided the down payment, has made all of the monthly installment payments, pays the taxes and the insurance, maintains, and repairs the property. Debtor has not contributed any money to the property and has no equitable interest in the property.

G. The Trustee is informed and believes that the estate owns more than bare legal title in the Property. The Trustee is informed and believes that the estate holds some or all of the beneficial interest in the Property, inter alia, by virtue of the fact that the Debtor borrowed the money used to purchase the Property and remains solely liable for the unpaid balance of the loan.

H. Notwithstanding any partial equitable interest asserted by the Defendant (the Debtor's mother) arising from her allegedly making mortgage payments, the estate holds the majority beneficial interest in the Property as a result of the Debtor's investment in the Property of the proceeds of the loan she obtained.

I. The Trustee sought documentary evidence of the mortgage payments purportedly made by the Defendant by way of examination pursuant to Rule

2004 of the Federal Rules of Bankruptcy Procedure and, despite several voluntary continuances based upon the Debtor's representation that responsive documents exist and that she would provide them, such documents have not been produced.

J. Accordingly, the precise ratio of the estate's beneficial interest in the property to any alleged equitable interest held by the Defendant has not been determined. In addition to authority to sell the Property, this Complaint seeks a determination of the extent of the estate's interest in the Property.

K. The Property is property of the Debtor's bankruptcy estate under 11 U.S.C. § 541(a)(1).

L. Under 11 U.S.C. § 363(h), the Trustee may sell the Property free and clear of a co-owner's interests, subject to approval of the Court.

Claim for Relief—Sale of Co-Owner's Interest Under 11 U.S.C. §363(h)

Plaintiff-Trustee alleges the following for the Cause of Action:

A. The Debtor contends she holds only a bare legal title in the Property.

B. The Trustee is informed and believes that the Debtor's interest in the Property exceeds that of bare legal title. At most, the Defendant holds only a partial equitable interest in the Property.

C. Under 11 U.S.C. § 363(h), the Trustee seeks to sell the estate's interest in the Property together with any interest of the Defendant in the Property, with Defendant's interest in the Property, if any, attaching to the sale proceeds.

D. Partition in kind of the Property, among the estate of the Debtor and Defendant, is impracticable because the Defendant's purported equitable interest is an undivided interest.

E. Sale of only the estate's interest in the Property would yield significantly less for the estate than the sale of the Property free and clear of the interests of Defendant.

F. The benefit to the estate of a sale of the Property free of the interest of Defendant outweighs the detriment, if any, to Defendant.

G. The Property is not used in the production, transmission, or distribution for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Prayer for Relief

Plaintiff-Trustee requests the following relief in the Complaint's prayer:

A. Determining the extent of the estate's interest in the Property;

B. Authorizing the Trustee to sell both the estate's interest and Defendant's interest, if any, in the Property pursuant to 11 U.S.C. § 363(h), pursuant to a motion for approval of the sale pursuant to 11 U.S.C. § 363(b);

C. As pre-judgment relief if the extent of the estate's interest in the property has not yet been determined, authorizing the sale to be consummated provided that net sale proceeds are reserved by the Trustee with the interests of the estate and the Defendant attaching to such proceeds to the same extent, validity and priority as such interests attach to the Property immediately prior to sale; and

D. For such other relief as the court deems just and proper.

REVIEW OF THE MOTION'S POINTS AND AUTHORITIES

Plaintiff-Trustee filed a Memorandum of Points and Authorities in support of their Motion for Entry of Default Judgment arguing that *Eitel* factors used by a court in order to grant default judgment weigh in favor of granting default judgment in this case. Entwined in the various legal points, legal authorities, and arguments (factual and legal) may well be what Plaintiff-Trustee would assert are the grounds that would be stated in the Motion - if the Plaintiff-Trustee had stated grounds in the Motion.

A. Prejudice to Plaintiff: Plaintiff-Trustee as Trustee has the duty to manage the property of the estate and close it as expeditiously as possible. In order to fulfill that duty, the Plaintiff-Trustee needs to sell the interest in the Property which he believes to have a value of at least $290,000.00 which means there is substantial equity.

B. Merits of Plaintiff's Substantive Claim: Plaintiff-Trustee believes that the complaint supports his substantive claims against the Defendant. In that Plaintiff-Trustee sought documentary evidence of the mortgage payments purportedly made by the Defendant by way of an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and, despite several voluntary continuances based upon the Debtor's representation that responsive documents exist and that she would provide them, such documents have not been produced. From there, one can infer that the Trustee's position has merit, while the Defendant and Debtor's position does not.

C. Sufficiency of the Complaint: The Trustee seeks a sale of the Property under § 363(h) of the Bankruptcy Code. 11 U.S.C. § 363(h). The complaint for this adversary proceeding offers a prima facie case for relief § 363(h) of the Bankruptcy Code.

i. As to the first element of § 363(h), partition in kind of the Property among the estate and the Defendant is impracticable. 11 U.S.C. § 363(h)(1). The Property is a residence.

ii. As to the second element of § 363(h), sale of the estate's interest in such property would realize significantly less for the estate than sale of such property free of the interests of the Defendant. 11 U.S.C. § 363(h)(2).

iii. As to the third element of § 363(h), the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to the Defendant. 11 U.S.C. § 363(h)(3). Here, the benefit to the estate is the liquidation of the Property. The Debtor, in her schedules, values this property in the amount of $285,000.00, encumbered by a mortgage in the amount of $175,406.00 in favor of Wells Fargo Bank, N.A. based on her schedules. Therefore, the sale of the Property will aid the bankruptcy estate in collecting and reducing to money the property of the estate for distribution to creditors.

iv. The property is a residence.

D. Sum of Money at Stake in the Action: The Defendant's interest in the Property, if any, is protected by the Bankruptcy Code through § 363(i), and (j) of the Bankruptcy Code. 11 U.S.C. §363(i) (permitting the co-owner of property to "purchase such property at the price at which such sale is to be consummated."); § 363(j) (providing that proceeds are to be distributed in accordance with the interests of the co-owner, less the costs of sale). Therefore, Defendant's financial interest is protected by the Bankruptcy Code.

E. Possibility of a Dispute Concerning Material Facts: The possibility of a dispute concerning material facts is remote, because the Defendant has failed to submit anything to contradict well-pled allegations in the complaint, and the allegations in the complaint are to be taken as true except for those relating to damages.

F. Whether the Default was Due to Excusable Neglect: Defendant received proper service but has failed to appear in the adversary proceeding and failed to file an answer or responsive pleading. The Debtor is the daughter of the Defendant, and should be presumed to have taken measures to alert the Defendant about this matter too. Debtor has filed a reaffirmation agreement concerning this Property, and was the subject of a Rule 2004 examination concerning this Property. Plaintiff-Trustee filed this Motion around or at thirty days within the date of the Clerk of the Court's entry of default, thereby providing the Defendant ample time to appear. There is no evidence that Defendant's failure to participate in this litigation is due to excusable neglect.

G. Strong Policy Underlying the Federal Rules of Civil Procedure Favoring Decisions on the Merits: The Trustee's position has merit. And, if merit is an issue, the Defendant's failure to appear makes a decision on the merits impracticable.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Trustee's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Trustee did not offer evidence in support of the allegations. *See id.* at 775.

11 U.S.C. § 363(h)

A trustee may sell the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

> (1)partition in kind of such property among the estate and such co-owners is impracticable;

> (2)sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
>
> (3)the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
>
> (4)such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h).

DISCUSSION

Review of Minimum Pleading Requirements for a Motion in an Adversary Proceeding

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

The Plaintiff-Trustee has failed to provide the minimum necessary pleadings for the relief requested. No evidence has been provided in support of the Motion. Rather, the Motion appears to be premised upon the very simple principle of "The Trustee Is Entitled To A Judgment Because the Trustee Asks For A Judgment."

The Motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Michael D. McGranahan, Chapter 7 Trustee ("Plaintiff-Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is denied without prejudice.

2. **18-90600-E-7 BSH-3** **CORAZON HERNANDEZ** **SCHEDULING CONFERENCE RE: MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13**
1-2-20 [76]

The Scheduling Conference is xxxxx.

The Debtor in this case filed a motion to convert this case from a Chapter 7 to one under Chapter 13 and a Motion to Shorten Time seemingly to remove the Chapter 7 Trustee who is prosecuting an adversary proceeding against the Debtor's Mother - or so it appears from the pleadings filed.

Rather than shortening time, the court issued a Scheduling Order, the hearing which will be conducted in conjunction with the Motion for Entry of Default Judgment in the Adversary Proceeding.

3. **18-90428-E-11 UST-1** | **RANDHAWA TRUCKING, LLC** **Brian Haddix** | **CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7, MOTION TO DISMISS CASE 10-30-19 [129]**

Tentative Ruling: The Motion to Convert or Dismiss this Chapter 11 Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, and parties requesting special notice on October 30, 2019. By the court's calculation, 50 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen-days' notice for written opposition).

The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

The Motion to Convert or Dismiss the Chapter 11 Bankruptcy Case is granted and the case is converted to one under Chapter 7.

Continuance of December 19, 2020 Hearing

At the hearing, though no opposition was filed, Brian Haddix, counsel for the Debtor in Possession, appeared and reported that a Chapter 11 plan has been worked out with creditors. While the Debtor in Possession cannot propose the plan due to the passage of time in this small business case, Mr. Haddix advised the court and parties in interest that PG 14, LLC would be proposing a creditor's plan. Further, that James Mootz, counsel for PG 14, LLC would be diligently prosecuting the filing of a plan, disclosure statement, and preliminary approval of the disclosure statement. Unfortunately, Mr. Mootz was not in attendance at the hearing.

Over the objection of the movant U.S. Trustee, the court continues the hearing for this last minute, possible plan in this case that would avoid liquidation.

The appearances of Mr. Haddix and Mr. Mootz, in persons, is required for the continued hearing.

DISCUSSION OF MOTION

This Motion to Convert or Dismiss the Chapter 11 bankruptcy case of Randhawa Trucking, LLC ("Debtor in Possession") has been filed by Tracy Hope Davis ("Movant"), the U.S. Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. Debtor has failed to timely file numerous monthly operating reports. *See* 11 U.S.C. § 1112(b)(4)(F).

B. Debtor has failed to file a plan by the 300-day deadline applicable to small business debtors. *See* 11 U.S.C. § 1112(b)(4)(J).

APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

DISCUSSION

Trustee argues there is a cause to act because Debtor has failed to timely file numerous monthly operating reports. Notably, the report for January 2019 was approximately 106 days late; the report for February 2019 was approximately 46 days late; the report for June 2019 was approximately 106 days late; the report for July 2019 was approximately 75 days late; and the report for August 2019 was approximately 44 days late.

Additionally, Debtor failed to file a plan by the 300-day deadline imposed by Section 1121(e)(2). On the Petition, the Debtor designated itself as a "small business debtor." The plan in a small business case "shall be filed not later than 300 days after the date of the order for relief." *See* 11 U.S.C. § 1121(e)(2). The 300-day deadline to file a plan in this case has now passed. The Debtor has not filed a plan or a disclosure statement. The 300-day deadline was on or about April 3, 2019. Declaration, Dckt. 131.

Trustee also contends that Debtor is unable to establish unusual circumstances that would grant justification against converting the case. Trustee argues that the record does not disclose any unusual circumstances that would establish justification against granting the relief requested in the Motion. For instance, the Debtor has not filed a plan and is now precluded from doing so.

Further, Trustee asserts that converting to a Chapter 7 on the basis that although there may not be significant equity in the Real Property, the Debtor, may own inventory, supplies, and equipment worth more than $100,000. Moreover, on the September MOR, the Debtor reported that it has $137,572 of funds on hand.

Filing of Plan

On December 23, 2020, a PG14, LLC filed a Chapter 11 Plan which is identified as "Dated November 3, 2019. Dckt. 153. No disclosure statement has been filed. The Plan of Reorganization Dated November 3, 2019, has on it the following information as part of the caption:

Date: January 9, 2020
Time: 10:30 a.m.
Place: Sacramento
Courtroom #33 Dept. E

Dckt. 153 at 1. This is the common practice for showing the date, time, and location when a matter is to be heard. No hearing is scheduled for the Plan of Reorganization.

When filing this case, Debtor designated itself as a small business debtor as defined in 11 U.S.C. § 101 (51D). Petition, Dckt. 1. Having so designated itself as a small business debtor, the limitations of 11 U.S.C. § 1123(e) come into play concerning any Chapter 11 plan the Debtor/Debtor in Possession my file. The plan and disclosure statement shall be filed not later than 300 days after the entry of the order for relief.

This bankruptcy case was filed on June 5, 2018. The 300 day period for the Debtor/Debtor in Possession to file a plan and disclosure statement expired in March 2019. Debtor/Debtor in Possession's ability to propose and prosecute a plan in this case has expired.

It is interesting that under the Miscellaneous Provisions of the Plan purported to be filed and to be prosecuted by the creditor PG14, LLC shall be served on Brian S. Haddix, counsel for the Debtor in Possession. Plan, p. 12:18-21; Dckt. 153. No provision is made for the attorney for PG14, LLC or anyone representing PG14, LLC to be served.

Th e PG14, LLC Plan goes further, having the Debtor make all plan payments and distributions. Plan, p. 8:22-23; *Id.*

The Plan does provide that only PG14, LLC may modify the Plan. *Id.*, p. 8:25.

On the whole, this appears not to be a plan by PG14, LLC, a creditor driven to the cost and expense of prosecuting a Chapter 11 Plan when the Debtor in Possession has failed. Rather, it appears to merely be the Debtor in Possession using the name PG14, LLC to circumvent the provisions of 11 U.S.C. § 1123(e). If this Debtor in Possession had a bona fide plan, it would have been proposed and prosecuted within the 300 days as required by Congress.

While filing a document titled "Plan," no proposed disclosure statement has been filed by PG14, LLC. PG14, LLC is not seeking to move this "Plan" forward, but merely have it filed.

After nineteen months in Chapter 11, if the Debtor in Possession had a plan to prosecute, it would have. If any creditors had a Chapter 11 plan to prosecute they would have.

Conversion of Case

Here, cause exists to convert this case. While the estate has cash flowing through it, nobody can prosecute a Chapter 11 plan. When faced with the United States Trustee's Motion to Convert or Dismiss, nobody filed an opposition, but counsel for the Debtor in Possession appears and told the court that PG14, LLC was prosecuting a creditor plan and please do not convert the case (even though nobody filed an opposition to the U.S. Trustee's Motion).

Throwing a document titled "Plan" on the docket does not prosecution of a Chapter 11 plan make. Nobody - not the Debtor in Possession, not PG14, LLC, nor anyone else has filed an opposition to the Motion to Convert or Dismiss.

Cause exists to convert this case to one under Chapter 7 and have the appointment of a Chapter 7 trustee to be the fiduciary of the estate and administer the assets in this case. Such is in the best interests of creditors and the estate, rather than just dismissing it and allowing the Debtor and its principals to take over all of these assets.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Convert or Dismiss filed by U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the case is converted to one under Chapter 7.

4. **18-90428-E-11** **RANDHAWA TRUCKING, LLC** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION**
6-7-18 [1]

Debtor's Atty: Brian S. Haddix

Notes:
Continued from 12/19/19 to be heard in conjunction with other matters on the calendar.

The case having been converted to one under Chapter 7, the Status Conference is removed from the Calendar.

5. **18-90428-E-11** **BSH-3** **RANDHAWA TRUCKING, LLC** **Brian Haddix** **CONTINUED PRE-EVIDENTIARY HEARING RE: MOTION FOR ORDER TO SHOW CAUSE WHY THE SHARMA FAMILY TRUST, PARAMJIT RAI, SHAKUNTALA RAI, AND DALBIR SINGH SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATION OF THE AUTOMATIC STAY**
4-29-19 [77]

Debtor's Atty: Brian Haddix

Notes:
Continued from 11/21/19 by oral motion of the Parties and pursuant to order of the court [Dckt 142]

The Motion for Order to Show Cause Why the Sharma Family Trust, Paramjit Rai, Shakuntala Rai, and Dalbir Singh Should Not Be Held in Contempt for Violation of the Automatic Stay is continued to xxxxx, 2020, to allow for the Chapter 7 Trustee to substitute in as the real party interest.

REVIEW OF MOTION

The Chapter 11 debtor in possession, Randhawa Trucking, LLC ("ΔIP") filed this Motion for Sanctions [FN.1.] seeking (1) a determination that the Sharma Family Trust, Paramjit Rai, Shakuntala Rai, and Dalbir Singh ("Respondent") wilfully violated the automatic stay, and (2) an order awarding sanctions.

FN.1. The Motion was actually entitled "MOTION FOR ORDER TO SHOW CAUSE WHY THE SHARMA FAMILY TRUST, PARAMJIT RAI, SHAKUNTALA RAI, AND DALBIR SINGH SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATION OF AUTOMATIC STAY." Dckt. 77.

However, the Motion does not actually request the court issue an order to show cause–what is requested if for the court to find there was a stay violation and to issue sanctions. The court has recast the Motion to reflect the relief requested.

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

1. Debtor filed this case on June 6, 2018.

2. Respondent received notices from this bankruptcy case via the BNC beginning June 13, 2018.

3. Respondent appeared at November 29, 2018 status conference.

4. On December 10, 2018 Respondent filed and served a Notice of Default.

5. On April 17, 2019 Respondent filed and served a Notice of Trustee's Sale.

6. No motions for relief have been filed in this case.

7. It is indisputable Respondent had actual notice of the bankruptcy. Therefore the violation was wilful.

8. The violation of stay was not inconsequential.

Motion, Dckt. 77.

The Declaration of Avinash Singh filed in support of the Motion presents testimony that Mr. Singh spoke "with Mr. Sharma several times regarding the bankruptcy and the debt both in telephone and a face-to-face meeting on November 29, 2018 at the US Bankruptcy Court's meeting room outside the court room." Declaration, Dckt. 79.

OPPOSITION

Respondent filed several documents relating to the Motion on May 23, 2019. Dckts. 84-86.

The Declaration of Rajinder Sharma presents the following testimony:

1. On or about August 24, 2015, Rajinder Sharma, Paramjit Rai, Shakuntala Rai, and Dalbir Singh collectively made a $600,000.00 loan to Avinash Singh ("Singh").

2. The loan was made to Singh as an individual, secured by two properties owned by Singh as of the date the loan was made and Deed of Trust was recorded: 1200 6th Street, Modesto, Stanislaus County, California ("Modesto Property") and 253 Tissot Drive, Patterson, Stanislaus County, California.

3. Rajinder Sharma recently discovered that the day after the loan was made, Singh transferred the Modesto Property to ΔIP. The lenders did not know about this transfer.

4. Respondent did receive a notice of ΔIP's filing, but did not know the Modesto Property had been deeded by Singh to ΔIP. Further, Respondent are not attorneys and did not understand the import or significance of ΔIP filing a bankruptcy.

5. Respondent hired Equity Foreclosure Company ("EFC") in 2018 to pursue foreclosure on the Modesto Property. A record search by EFC indicated the Modesto Property was owned by "Randhawan Trucking, LLC" and not "Randhawa Trucking, LLC."

6. After learning ΔIP held title to the Modesto Property through notice of this Motion, Respondent instructed ECF to postpone further proceedings.

7. Respondent was not advised by ΔIP or counsel for ΔIP regarding possible stay violations.

Declaration, Dckt. 84.

The Declaration of Stephanie Roberts, and EFC employee, presents testimony that the title owner of the Modesto Property is "Randhawan Trucking, LLC" and not "Randhawa Trucking, LLC," and therefore that there was nothing to give Respondent notice that the Modesto Property was included in the bankruptcy of ΔIP.

REVIEW OF GRANT DEED

ΔIP filed as Exhibit "A" the Corporation Grant Deed alleged to transfer title of the Modesto Property to ΔIP. Dckt. 80.

The Grant Deed states Avinash Singh grants to "Randhawa**n** Trucking, LLC" the Modesto Property. *Id (*emphasis added). The Grant Deed was recorded on September 15, 2015 in Stanislaus County.

JUNE 6, 2019 HEARING

At the June 6, 2019 hearing the court continued the hearing in part to allow further pleadings to be filed (and in part to allow the presiding judge to hear the Contested Matter). Civil Minutes, Dckt. 96. In continuing the Matter for further pleadings, the court provided the following discussion:

> On April 29, 2019 the Debtor in Possession filed and serve this Motion. On May 23, 2019, the attorneys for Rajinder Sharma, one of the persons named in the Motion for Sanctions, filed the Declaration of Rajinder Sharma, the Declaration of Stephanie Roberts, and thirty pages of Exhibits as evidence in connection with the Motion. Dckts. 84, 85, 86. The Declaration of Rajinder Sharma has the title,
>
> DECLARATION OF RAJINDER SHARMA IN OPPOSITION TO DEBTOR'S MOTION FOR ORDER TO SHOW CAUSE REGARDING CONTEMPT FOR VIOLATION OF AUTOMATIC STAY
>
> Dckt. 84. Then, the Declaration of Stephanie Roberts is titled:
>
> DECLARATION OF STEPHANIE ROBERTS IN OPPOSITION TO DEBTOR'S MOTION FOR ORDER TO SHOW CAUSE REGARDING CONTEMPT FOR VIOLATION OF AUTOMATIC STAY
>
> Dckt. 85.
>
> The Exhibits document has the title:
>
> EXHIBITS IN OPPOSITION TO DEBTOR'S MOTION FOR ORDER TO SHOW CAUSE REGARDING CONTEMPT FOR VIOLATION OF AUTOMATIC STAY
>
> Dckt. 86.
>
> However, no "Opposition" to the Motion has been filed, only evidence that someone wants to present - if there was an opposition filed.
>
> It may well be that an opposition could be distilled from the testimony given by Stephanie Roberts and Rajinder Sharma, but none has been stated by any of the named persons against whom relief is requested. If it were to be distilled by the court, then it would effectively be the court that would be creating the opposition - which would be highly improper for the court to advocate for one party against another.
>
> Further, relief is sought against the Sharma Family Trust, Paramjit Rai, Shakuntala Rai, and Dalbir Singh. Paramjit Rai, Shakuntala Rai, and Dalbir Singh are nowhere to be seen in this contested matter - not only failing to file any opposition but for the documents filed the counsel filing those documents is only the attorney for Rajinder Sharma personally. The attorney filing the pleading clearly identifies that he is representing only Rajinder Sharma personally, and does not

indicate any representation of Mr. Sharma in any representative or fiduciary capacities, such as a trustee of a trust.

It appears that the Sharma Family Trust, Paramjit Rai, Shakuntala Rai, and Dalbir Singh have elected to default in response to the Motion, acknowledging or admitting their violations of the automatic stay.

Counsel of record for Rajinder Sharma, who is not named in the Motion, is a very experienced, well respected attorney in the bankruptcy community. That there would just be some declarations thrown at the court, no opposition filed, and the named parties defaulting is very surprising. It appears that such may reflect a larger problem for the court and parties in this case.

Reading the Rajinder Sharma (who is not named in the present Motion) declaration, it appears that there is an under current of ill will or bad blood with the Debtor and Debtor in Possession. Mr. Sharma goes beyond merely providing personal knowledge, factual testimony of a lay person witness (Fed. R. Evid. 601, 602), but proceeds to provide his legal analysis and conclusion concerning due on sale or transfer clauses.

Beyond his legal opinion, Mr. Sharma then provides the court with his "personal knowledge testimony" (with personal knowledge required, Fed. R. Evid. 602) that based only on "information and belief" does he so testify as to certain "facts."

With respect to the testimony provided by Stephanie Roberts, she does so as an employee of the foreclosure company. Presumably, she presents herself as having specialized knowledge of the foreclosure process in California. Her declaration provides detailed testimony of checking public records for bankruptcies filed and there being a trustee's sale guarantee issued which identified the Debtor as the owner of the property. Ms. Roberts testifies as there being actual notice that the Debtor owned the property as of November 2018.

> 7. As noted in the [trustee sale guarantee], the record owner of the subject property as of November 2018 was "Randhawan Trucking, LLC." As part of EFC's due diligence, we check the public records to see if there is any pending bankruptcy cases and in this instance, there was not a record of any pending or prior bankruptcy filed by Randhawan Trucking, LLC.

Dec. ¶ 7, Dckt. 85.

Ms. Robert's testimony is accurate with respect to the trustee sale guaranty stating the property is owned by "Randhawan Trucking, LLC." Rajinder Sharma Exhibit D, Dckt. 86 at 13. But the Debtor in this case, and the owner of the property is named -

Randhawa Trucking, LLC

there being no "n" on the end of "Randhawa." Petition, p. 1; Dckt. 1.

> A copy of the Corporation Grant Deed provided by the Debtor in Possession to document the 2015 transfer from Avinash Singh to the Debtor which has been filed as Exhibit A (Dckt. 80 at 2) lists the name of the transferee entity receiving the property as
>
> Randhawa**n** Trucking, LLC
>
> Exhibit A, Dckt. 80 at 2 (triple emphasis added). This is noted in the Declaration of a non-party to the Motion that was filed with the court.
>
> It may be that the asserted violation of the automatic stay is the result of something as simple as a finger brushing the wrong additional key when the deed transferring title to the Debtor was prepared.
>
> The court notes that missing from the Debtor in Possession's exhibits is the nice, polite, professional letter from Debtor in Possessions counsel to the believed wrongdoer of the asserted violation, of all the bad things that could happen, and asking them, politely, to correct the violation (void act). After sending such a letter, there would be no doubt that there was actual knowledge of the bankruptcy, the stay, and no honest, good faith belief that there could be an automatic stay.

Id.

RESPONDENT'S SUPPLEMENTAL OPPOSITION

Respondent and Rajinder Sharma filed an Opposition on June 20, 2019. Dckt. 100. In the Opposition Respondent and Rajinder Sharma argue they were aware of this bankruptcy case, but not that the Modesto Property had been deeded to ΔIP. *Id.* at p. 19-25.

The Opposition further states that while EFC was hired to process the foreclosure, their research did not turn up an applicable bankruptcy case because the Modesto Property was owned by Randhawan Trucking, LLC, and not ΔIP.

The Opposition asserts that all foreclosure efforts were halted once they received notice of this Motion, and that this Motion could have been avoided through an informal demand.

DISCUSSION

Respondent argues that once they learned the Modesto Property was within the bankruptcy case that they ceased all foreclosure proceedings. However, it is not clear what steps Respondent has taken to undo the recorded notice of default.

At the hearing, counsel for Rajinder Sharma, The Sharma Family Trust, Paramjit Rai, Shakuntala Rai, and Dalbir Singh, though having filed a prior declaration by Rajinder Sharma and a opposition to the Motion for his clients (subject to the Fed. R. Bankr. R. 9011 certificates), he did not "know" what his clients

"knew" about the Debtor owning the 1200 6th Street Property as that relates to the alleged violation of the stay.

It appears that the parties in this Bankruptcy Case may be suffering from "prosecution paralysis," unable to prosecute any plan in this case.

6.	**18-90428-E-11** **GMW-1**	**RANDHAWA TRUCKING, LLC** **Brian Haddix**	**CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY** **10-10-19 [108]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in possession, Debtor in possession's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on October 10, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion for Relief from the Automatic Stay is continued to 10:00 a.m. on xxxxx, 2020, to allow the Chapter 7 Trustee to substitute in as the real party in interest for the Bankruptcy Estate.

Continuance of December 19, 2019 Hearing

Brian Haddix, counsel for the Debtor in Possession, reporting that creditor PG 14, LLC and its counsel, James Mootz, will be shortly filing a Chapter 11 creditor's plan that has general creditor support. Movant did not oppose the continuance of this hearing.

Continuance of November 7, 2019 Hearing
Possible Creditor Plan

At the hearing the Debtor in Possession, counsel for Movant, and counsel for PG14, LLC addressed the court concerning a Chapter 11 plan being developed by PG14, LLC and ongoing discussions concerning the consensual presentation of such plan to the court. The Parties requested, in light of their efforts and the anticipated filing of such plan shortly, that this hearing be continued for a scheduling conference, if such is necessary.

REVIEW OF MOTION

Rajinder K. Sharma, Paramjit Rai, Shakuntala Rai and Dalbir Singh ("Movants") seek relief from the automatic stay with respect to Randhawa Trucking, LLC's ("Debtor in Possession") real property commonly known as 1200 6th Street, Modesto, California ("Store Property"). Movants have provided the Declaration of Rajinder K. Sharma to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movants argue that neither the Debtor nor the Bankruptcy Estate have any equity in the Property.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in possession filed an Opposition on October 24, 2019. Dckt. 119. Rajinder K. Sharma, Declarant for the Debtor in Possession, alleges that the deed of trust he possesses has a due date of October 2024 and that he was unaware of the existence of Movant's deed of trust with a Note due date of October 2017. Further, Declarant asserts that Debtor in Possession has been in negotiations with Movants to reach a settlement with respect to Movants' claim and asserted violation of the automatic stay.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $823,000.00 (Declaration, Dckt. 114), while the value of the Property is determined to be $1.3 million, as stated in Schedules B and D filed by Debtor.

Trustee's Motion to Convert Case

On October 30, 3019, Trustee filed a Motion to Convert Case from, Chapter 11 to Chapter 7. Dckt. 129. Trustee's pending motion set to be heard on December 19, 2019, requests the case be converted on two grounds: (1) Debtor's failure to timely file monthly operating reports, and (2) Debtor in Possession's failure to file a plan under Rule 1121(e)(2) which dictates that small business debtors must file a plan 300 days after filing the Petition.

The Debtor designated itself as a "small business debtor" as defined in 11 U.S.C. § 105(51D). Petition, Question 8; Dckt. 1 at 2. With the Debtor in Possession failing to file a Plan in the time period specified in 11 U.S.C. § 1121(e)(2), that opportunity has closed. While a creditor could step forward with a plan, none have.

It appears that this case will be converted from Chapter 11 to Chapter 7. With that, the Chapter 7 Trustee can engage in a discussion with the holder of the junior deed of trust for which there is approximately $400,000 of value in the collateral to see if there is a collaborate effort by which the Estate and the junior lien creditor are financially better off than allowing the significantly oversecured Movants foreclosing. However, until the case is converted and trustee appointed, that chair at the table for the bankruptcy estate is empty.

11 U.S.C. § 362(d)(1): Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

Here, Movants argue several allegations for cause. Debtor has not been diligent in carrying out its duties in its bankruptcy case. Further, Movants contend that the case was filed in bad faith for the purpose of delaying foreclosure. Movants argue that the bad faith can be inferred by the fact that the case is now 16 months old and Debtor has not proposed any type of organization.

Movants also assert that Debtor has failed to filed the required monthly operating reports including June 2019 until present. A look at the docket reflects that Debtors submitted five monthly operating reports for May through September 2019 on October 28, 2019. Dckts. 124-128. As it is also a point made by the U.S. Trustee, Debtor has demonstrated that they cannot submit the required timely operating reports.

Additionally, Movants have been receiving a $5,000.00 a month interest payment from the Estate. In addition to being of benefit to Movants, it has reduced the erosion of value that exists for the junior lien claim and possibly the Bankruptcy Estate.

11 U.S.C. § 362(d)(1): Equity Cushion

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movants obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Property for Movants' claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movants have

not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1). Indeed, Creditor appears to have substantial equity cushion as being first in timer for the Store Property. Movants are owed $823,000. There is $40,240.50 owed in delinquent property taxes. The Store Property is valued at $1.3 million. Thus, Movant has an estimated $400,000.00 equity cushion.

Further, Debtor has been paying monthly interest payments to Movants. According to the monthly operating reports, Debtor has been making monthly interest payments of $5,000.00 to Falcon Investments. A search of Falcon Investments in the California Secretary of State website shows that the LLC has Movant Rajinder K. Sharma as its agent of service of process.

11 U.S.C. § 362(d)(2): Debtor and Equity

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988).

It may be that the Estate has no equity in the Store Property, or that the ability of the Trustee to effectively and efficiently sell the Property has recoverable value in the Store Property as it relates to the interests of the junior lien creditor who would otherwise have to deal with satisfying the $800,000+ senior lien to protect the remaining value in the Property.

At this juncture, the court cannot determine that there is no value in the property for the Bankruptcy Estate. The interests of Movants are more than adequately protected by the substantial equity cushion and the monthly payments of $5,000 Movants have been receiving.

7. 19-90960-E-7 ROGER/DEBRA WILLIAMS
Pro Se

TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
11-21-19 [13]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors (*pro se*), creditors, and Office of the United States Trustee on November 23, 2019. By the court's calculation, 47 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is granted, and the case is dismissed.

The Chapter 7 Trustee, Michael D. McGranahan ("Trustee"), seeks dismissal of the case on the grounds that Roger Williams and Debra Williams ("Debtors") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

Alternatively, if Debtor's case is not dismissed, Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 11:30 a.m. on January 7, 2020. If Debtor fails to appear at the continued Meeting of Creditors, Trustee requests that the case be dismissed without further hearing.

DISCUSSION

Debtor did not appear at the Meeting of Creditor's. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

Based on the foregoing, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 7 case filed by The Chapter 7 Trustee, Michael D. McGranahan ("Trustee"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted, and the case is dismissed.

8. 19-90382-E-7 TRACY SMITH MOTION FOR DEFAULT JUDGMENT
19-9013 MWH-3 11-29-19 [22]
KALRA V. SMITH

Tentative Ruling: The Motion For Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor on November 29, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is granted.

Paula Kalra ("Plaintiff") filed the instant Motion for Default Judgment on November 29, 2019. Dckt. 22. Plaintiff seeks a default judgment against Tracy Emery Smith("Defendant") in the instant Adversary Proceeding No. 19-09013.

The instant Adversary Proceeding was commenced on July 29, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 29, 2019. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on September 11, 2019. Dckt. 9.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint to determine dischargeability of debt under 11 U.S.C. §§ 523(a)(2), 523(a)(4), and 523(a)(6). The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff is a Creditor of Defendant, and assignee of Barbara Holdings, Inc., an entity created by Plaintiff to hold his retirement funds. Complaint, ¶2.

B. Defendant is indebted to Plaintiff in the sum of $150,000.00. *Id.* at ¶4.

C. In September 2017, Defendant "convinced Plaintiff to initially invest $150,000.00 with him and his company, Downkicker Investment, Inc. ("Downkicker")" *Id.* at ¶6.

D. Plaintiff further alleges that "Defendant falsely stated to Plaintiff that he had a net worth of $434,850 and an annual income of $96,000." *Id.*

E. On September 18, 2017, "in reliance on Defendant's representations, Barbara Holdings, Inc., entered into a written agreement with Downkicker Investments, Inc., entitled "Promissory Note" and invested $150,000 with Downkicker Investments, Inc." *Id.* at ¶7.

F. Under the Promissory Note, Downkicker promised that "proceeds of this note are to be kept in a separate operating account for the benefit of funding real estate projects directly to escrow." *Id.*

G. The Note also stated that Downkicker would make monthly interest payments and to repay all funds by September 30, 2018. *Id.*

H. On July 11, 2019, Barbara Holdings, Inc. assigned all its rights under the Note to Plaintiff. *Id.*

I. Defendant signed a Guaranty for the Promissory Note, also on September 18, 2017. Defendant's signature was notarized for both the Note and the Guaranty. *Id.* at ¶8.

J. On September 28, 2017, Barbara Holdings wired $150,000.00 to a business account of Downkicker held by U.S. Bank. *Id.* at ¶9.

K. Sometime during the first week of November 2017, Plaintiff asked to see Defendant's financial records, which showed that the $150,000.00 investment amount had been put into Defendant's "personal projects outside of escrow," in violation of the Note. *Id.*

L. In December of 2017, Barbara Holdings, Inc., sued Defendant for fraud in Santa Clara County Superior Court, Case Number 17-CV-320282. *Id.* at ¶10.

M. Defendant then defaulted in Santa Clara County Superior Court, which was set for prove-up hearing for a default judgment on April 29, 2019. *Id.* at ¶11.

N. However, on the morning of April 29, Defendant filed his present bankruptcy petition and the state court action subject to the automatic stay. *Id.*

Prayer

Plaintiff requests the following relief in the Complaint's prayer:

A. Determine the debt of $150,000.00 as nondischeargeable;

B. That Plaintiff has judgment against Defendant for $150,000.00;

C. Further relief it deems just such as reasonable costs, attorneys' fees; and

D. Award punitive damages appropriate to punish and deter such misconduct.

RELIEF SOUGHT IN MOTION FOR DEFAULT JUDGMENT

On November 29, 2019, Plaintiff filed the Motion for Default Judgment, accompanied by: Declaration of Paul Kalra, Dckt. 24, Declaration of Mark Hostetter, Dckt. 26, and Exhibits A through U. Dckts. 25.

In the Motion, Plaintiff requests the following relief:

Judgement against the defaulting Defendant for $235,866.00, which includes:

1. $150,000.00 in compensatory damages,

2. $50,000.00 in exemplary damages,

3. $28,208.00 in prejudgment interest,

4. $6,600.00 in attorney's fees, and

5. $1,058.00 in costs.

MOTION'S ARGUMENT

The Motion states with particularity grounds for relief, with citations to the evidence presented, which are outlined by the court below.

First Claim for Relief—Violation of 11 U.S.C. § 523(a)(2)(A): False Representations

Under Plaintiff's Motion for Default Judgment ("Motion"), Plaintiff alleges the following for the First Cause of Action:

A. Defendant represented that he had a net worth of $434,850 and showed Plaintiff the loan application dated September 5, 2017. (Exhibit D) Motion at 3.

B. At that time, Mr. Smith had a federal tax lien for $157,962.97 from 2016 and civil judgment by CAPITALVEST LLC for $42,091.35. (Exhibit N.) Further, Mr. Smith owed $475,000 to William Cristal, another senior citizen, from 2014. (Exhibit L.) *Id.*

C. Thus, Defendant knew that his net worth representation was false, and that his net worth was negative, when he made the representation to Mr. Kalra in September of 2017. *Id.*

D. Defendant also represented that the U.S. Securities and Exchange Commission had authorized him to offer securities up to $5,000,000. (Exhibit B.) Id. at 4. Defendant also provided Mr. Kalra with examples of the private placement memoranda offering securities to investors (Exhibit C). *Id.*

E. In fact, Defendant was a convicted felon (Exhibit M) who was not authorized to sell securities to the public. Defendant knew of his conviction and concealed it from Plaintiff. *Id.*

G. Defendant represented on his website that his company offered "transparency," "Up To Date Status Reporting" and "Fixed Rates 8-15%." (Exhibit A.) In fact, he provided misinformation, false financial reports and total loss of investment. (Kalra Decl. § 8.) *Id.* at 5.

H. Defendant signed and delivered to Plaintiff a Promissory Note representing that "The proceeds of this note are to be kept in a separate operating account (Holding Account) for the benefit of funding real estate projects directly to escrow." (Exhibit F paragraph 4.) *Id.* at 6.

I. However, Defendant's bank records show that upon receipt of Plaintiff's $150,000, he immediately transferred the funds into his other accounts outside of escrow, in violation of the Note. (Exhibit J.) *Id.*

J. In the Promissory Note, Defendant also represented to make monthly interest payments to Plaintiff and to repay all investment funds by September 30, 2018. (Exhibit F paragraph 2.) *Id.* at 7.

K. Instead, Defendant took Plaintiff's money for his own use, failed to return the money within one year and admitted that he would not voluntarily return the money. (Exhibit I.) *Id.*

L. Defendant knew that the representations in the Promissory Note were false, and that he never intended to abide by it. These representations were made with the intention to deceive Plaintiff and obtain Plaintiff's money. *Id.* at 8.

M. Plaintiff justifiably relied on all of the aforementioned misrepresentations, and on September 25, 2017 wired Defendant $150,000 (Exhibit H). *Id.* at 9.

N. Defendant's represented net worth made his personal guaranty viable and was important information for an investor to rely on (Exhibit G). *Id.*

O. Defendant's representation of securities authorization suggested that he and Downkicker were experienced and qualified for such transactions. *Id.*

P. Plaintiff justifiably relied on Defendant's representations in the Promissory Note which assured Plaintiff of a separate account for his funds and escrow process, and return of funds within one year (Exhibit F). *Id.*

Second Claim for Relief—Violation of 11 U.S.C. § 523(a)(2)(A): Actual Fraud

Plaintiff alleges the following for the Second Cause of Action:

A. Defendant failed to disclose that he had filed a Chapter 7 Bankruptcy petition on September 19, 2016 (Case No. 16-90856) or that his case was dismissed without a discharge on January 16, 2017 due to his failure to appear at four separate creditor meetings. *Id.* at 11.

B. Defendant also failed to disclose his large debts such as $475,000 to William Cristal. (Exhibit L.) *Id.*

C. Defendant also failed to disclose his felony conviction from 2014 (Exhibit M). *Id.*

D. These concealments were made with the intention to deceive Plaintiff and obtain Plaintiff's money. *Id.* at 12.

E. Plaintiff would not have invested $150,000 if Defendant had disclosed accurate information. (Kalra Decl. ¶¶ 4, 13.) *Id.*

F. Within one week of taking Plaintiff's $150,000, Defendant purchased four properties in Southern California through his four companies 807 Barr LLC, 2173 El Norte Project LLC, 2006 Catalina LLC and 574 Mariscal LLC. (Exhibits P and O.) *Id.* at 13.

G. On January 31, 2018, Defendant was served with Plaintiff's state court lawsuit, Santa Clara County Case number 17-CV-320282. (Exhibit K.) *Id.* at 14.

H. On February 2, 2018, Defendant transferred the properties from 2006 Catalina, LLC to 2006 Catalina Fund, LLC, and from 574 Mariscal, LLC to 574 Mariscal Fund, LLC, respectively, without consideration and to hinder Plaintiff. (Exhibits Q and R.) *Id.*

I. Defendant obtained loans of $1,045,000 by 574 Mariscal Fund, LLC and $521,024 by 2173 El Norte Project, LLC. (Exhibit S.) *Id.*

J. Defendant failed to renovate the properties and defaulted on the loans, never re-paying Plaintiff. (Exhibit S.) *Id.*

K. Plaintiff's loss of the $150,000 investment was a proximate result of Defendant's concealments and fraudulent transfers. (Exhibit H.) *Id.* at 15.

Third Claim for Relief—Violation of 11 U.S.C. §523(a)(2)(B): False Financial Statement

Plaintiff alleges the following for the Third Cause of Action:

A. Defendant provided Plaintiff with a written financial statement that he had a net worth of $434,850 in the form of his loan application dated September 5, 2017. (Exhibit D.) The statement was materially false and Defendant had a negative net worth. *Id.* at 16.

B. At that time, Defendant had an undisclosed federal tax lien for $157,962.97 from 2016 and civil judgment by CAPITALVEST LLC for $42,091.35 (Exhibit N). *Id.*

C. Defendant also owed $475,000 to William Cristal, another senior citizen, from 2014 (Exhibit L). *Id.*

D. Plaintiff reasonably relied on Defendant's written loan application. *Id.* at 17.

E. Mr. Smith's alleged positive net worth made his personal guaranty viable and was important information for an investor to rely on. *Id.*

F. A negative net worth would have made Mr. Smith's personal guaranty worthless. (Exhibit G.) *Id.*

G. Defendant made this false financial statement while enticing Plaintiff to invest and with the intention to deceive Plaintiff and obtain Plaintiff's $150,000. (Exhibit H.) *Id.* at 18.

H. Plaintiff's loss of the $150,000 investment was a proximate result of his reliance on Defendant's written financial statement. *Id.* at 19.

Fourth Claim for Relief—Violation of 11 U.S.C. § 523(a)(4): Embezzlement

Plaintiff alleges the following for the Fourth Cause of Action:

A. On September 25, 2017, Defendant appropriated $150,000 from Plaintiff (Exhibit H). Defendant obtained these funds through misrepresentations about: (1) his net worth (Exhibit D), (2) transparent status reporting (Exhibit A), (3) payment of interest and return of principal in one year (Exhibit F), and (4) use of a separate operating account and escrow for Plaintiff's funds entrusted to Defendant (Exhibit F). *Id.* at 20.

B. Within one week of taking Plaintiff's $150,000, Defendant began to move Plaintiff's funds from the account established to hold Plaintiff's funds for investments into Defendant's personal accounts accessible only to him (Exhibit J). *Id.* at 21.

C. Without informing Plaintiff or using escrow services, Defendant used Plaintiff's funds to purchase four properties in Southern California through his four companies 807 Barr LLC, 2173 El Norte Project LLC, 2006 Catalina LLC and 574 Mariscal LLC. (Exhibits P and O.) *Id.*

D. When Plaintiff demanded the return his investment funds, Defendant refused to return the money and said he would not discuss it further until Plaintiff obtains a court judgment. (Exhibit I.) *Id.* at 22.

E. To this day, Defendant still has not returned the money, despite the Promissory Note's due date of September 30, 2018. (Exhibit F paragraph 2; Kalra Decl. § 8.) *Id.*

F. On the day when Plaintiff was set for hearing on entry of default judgment in state court, Defendant filed his present bankruptcy petition. (Exhibit T.) *Id.* at 23.

Fifth Claim for Relief—Violation of 11 U.S.C. § 523(a)(6): Willful and Malicious Injury

Plaintiff alleges the following for the Fifth Cause of Action:

A. Defendant had a subjective motive to injure Plaintiff. The conversion of Plaintiff's money was not a mistake, but rather was another instance in a long history of unlawful conduct. *Id.* at 24.

B. Defendant has a 2014 order of felony conviction for violation of Penal Code section 451(c) in the Stanislaus County Superior Court, Case No. 1405123 (Exhibit M). *Id.*

C. Defendant owed $475,000 to William Cristal, another senior citizen, from 2014. (Exhibit L.) *Id.*

D. Defendant filed a Chapter 7 Bankruptcy petition on September 19, 2016 (Case No. 16-90856) and his case was dismissed without a discharge. *Id.*

E. Defendant had a federal tax lien for $157,962.97 from 2016 and civil judgment by CAPITALVEST LLC for $42,091.35. (Exhibit N.) *Id.*

F. Likewise, Defendant's conversion of Plaintiff's funds was intentional, as he used the funds to obtain millions of dollars in loans (Exhibits O, R, S). *Id.* at 25.

G. Conversion of Plaintiff's $150,000 is a wrongful act, which is certain to cause injury a retiree such as Plaintiff (Exhibit H). *Id.* at 26.

H. Defendant had no just cause or excuse for his fraud and conversion. *Id.*

I. Upon service of Plaintiff's state court lawsuit, Defendant filed another Chapter 7 Bankruptcy petition (Case No. 18-90104) and his case was dismissed without a discharge (Exhibit L). *Id.*

J. On the day when Plaintiff was set for hearing on entry of default judgment in state court, Defendant filed yet another bankruptcy petition. (Exhibit T.) *Id.*

EVIDENCE IN SUPPORT OF THE MOTION

On November 29, 2019, Plaintiff filed two declarations and 21 exhibits. Dckt. 24, 25, 26.

The Declaration of Paul Kalra provides testimony under penalty of perjury that:

A. Plaintiff relied on the following representations to make his $150,00 investment:

1. Downkicker's web page; (Exhibit A)

2. Defendant's Form D Notice on the Securities and Exchange Commission website; (Exhibit B)

3. Examples of securities offered by Defendant; (Exhibit C)

4. Uniform Residential Loan Application; (Exhibit D) and

5. Downkicker's 2016-2017 Balance Sheet and Profit and Loss Statement. (Exhibit E)

B. On September 2017, Plaintiff received a Promissory Note ("Note") on behalf of Downkicker for $300,000.00 which specifically stated that "The proceeds of this note are to be kept in a separate operating account for the benefit of funding real estate projects directly to escrow." (Exhibit F)

C. The note also promised to make monthly interest payments and to repay all of Plaintiff's investment funds by September 30, 2018.

D. Plaintiff also received Defendant's signed Guaranty for the Note. (Exhibit G)

E. Plaintiff relied on the separate account so that he could audit it each month and track his investment funds to and from escrow.

F. On September 25, 2017, in reliance of the representations above and the Note, he withdrew and wired $150,000.00 from Barbara Holdings, Inc. to a separate holding account of Downkicker at U.S. Bank. (Exhibit H)

G. During the first week of November 2017, Plaintiff asked Defendant for Downkicker's financial records (U.S. Bank statements) and saw that his investment funds had been transferred to accounts outside of escrow, in violation of the Note. (Exhibit J)

H. Plaintiff met with Defendant several times at the end of 2017 and demanded the return of his investment funds.

I. Defendant refused to return the funds and said he would not discuss it further with Plaintiff until Plaintiff obtained a court judgment.

J. On November 29, 2017, Plaintiff wrote Defendant a memorandum summarizing their meetings regarding the funds. (Exhibit I)

K. Plaintiff visited Downkicker's address and found that it is merely a post office box.

L. After this, Plaintiff authorized his attorney to file a Complaint for breach of written contract, fraud, conversion, equitable relief and punitive damages with the Santa Clara County Superior Court (Case No. 17-CV-320282). (Exhibit K)

M. Defendant was served on January 31, 2018.

N. On February 20, 2018, Plaintiff received notice that Defendant had filed a bankruptcy petition where he declared he had no assets and owed large amounts including the $150,00 owed to Plaintiff, but the bankruptcy was dismissed soon thereafter. (Exhibit L)

O. Over the past two years, Plaintiff has investigated Defendant and learned that he had stolen from other victims.

P. Plaintiff also learned that Defendant was convicted for felony arson to defraud insurance. (Exhibit M)

Q. Plaintiff researched Stanislaus County Recorder records and learned that Defendant has a federal tax lien for $157,962.97 from 2016 and a civil abstract for judgment for $42,091.35 dated October 3, 2017. (Exhibit N)

R. Plaintiff also learned that within a week of taking Plaintiff's investment funds, Defendant purchased four properties through Defendant's four companies (807 Barr LLC, El Norte Project LLC, 2006 Catalina LLC, and 574 Mariscal LLC). (Exhibit P)

S. On February 2, 2018, two days after Defendant was served with Plaintiff's Santa Clara Complaint, Defendant transferred the properties from 2006 Catalina, LLC to 2006 Catalina **Fund,** LLC and from 574 Mariscal, LLC to 574 Mariscal **Fund**, LLC. (Emphasis added.) (Exhibit Q)

T. Plaintiff also learned that Defendant then quickly borrowed large amounts of money against these two properties from Center Street Lending Fund IV SPE, LLC, among others. (Exhibit R)

U. During the fall of 2018, Plaintiff learned that Defendant's companies had defaulted on the Center Street Lending Fund loans for the original sum of $1,045,000.00 by 574 Catalina Fund LLC and $521,024.00 by El Norte Project LLC. (Exhibit S)

V. After Defendant defaulted on the Santa Clara case with the matter set for a default prove up hearing on May 29, 2019, Defendant filed another bankruptcy petition (the current bankruptcy proceeding) which prevented Plaintiff from obtaining a default judgment.

W. On July 11, 2019, before filing the present adversary proceeding, Barbara Holdings, Inc. assigned to Plaintiff its rights against Defendant.

X. As a proximate result of Defendant's false pretenses, false representations, false financial statements, embezzlement, and willful and malicious injury, Plaintiff has sustained compensatory damages in the sum of $150,00.00, which is the amount of Plaintiff's investment, none of which has been repaid by the Defendant.

The Declaration of Mark Hostetter provides testimony under penalty of perjury that Plaintiff has incurred $6,600.00 in attorney's fees. Dckt. 26, at ¶ 4. Mr. Hostetter testifies further that his hourly rate is $350.00 and his actual time for the state court is more than 50 hours. *Id.* Attorney's fees paid to date by Plaintiff include $4,200.00 for the state court action and $2,400.00 in the present bankruptcy adversary proceeding. *Id.*

Mr. Hostetter testifies further that Plaintiff has incurred $1,058.00 in costs. *Id.* at ¶ 5. Costs include:

State Court Action:	
clerk's filing fees	$435
subsequent electronic filing	$51
process server's fees for service on Defendant	$222
Bankruptcy Adversary Proceeding:	
filing fees to file this proceeding's Complaint	$350

Additionally, Mr. Hostetter provides an explanation of how prejudgment interest was calculated for compensatory damages. *Id.* at ¶ 3. Counsel calculated the prejudgment interest as follows: at 10% interest, the daily interest on $150,000.00 is $41 per day. 668 days elapsed between November 1, 2017, the date when Defendant failed to cure his breaches or refund Plaintiff, and September 20, 2019, the date of Plaintiff's initial motion for default judgment at this court. Thus, the prejudgment interest totals $28,208.00. *Id.*

The properly authenticated exhibits filed in support of the Motion are:

Exhibits A - K	**Exhibits L - U**
EX. A: Downkicker Investment Inc. web page for investors	EX. L: Portions of Tracy Smith bankruptcy petition, Case No. 18-90104-E
EX. B: Notice of Exempt Offering of Securities, U.S. Securities and Exchange Commission	EX. M: Order of conviction of Tracy Smith under Penal Code section 451(c) in the Stanislaus County Superior Court, Case Number 1405123 with an article from the Modesto Bee reporting on it
EX. C: Private Placement Memoranda	EX. N: Liens against Tracy Smith recorded in Stanislaus County on July 13, 2016 and October 11, 2017
EX. D: Loan application for Tracy Smith	EX. O: Summary of Deeds with Downkicker Investment's press release
EX. E: Downkicker Investment, Inc. financial statements	EX. P: Quitclaim Deeds
EX. F: Promissory Note	EX. Q: Grant Deeds dated February 2, 2018
EX. G: Guaranty for Promissory Note by Tracy Smith	EX. R: Deeds of Trust dated February 6, 2018

EX. H:	Wire instructions and wire transaction report	EX. S:	Notices of Default
EX. I:	November 29, 2017 memo from Kalra to Smith summarizing meetings	EX. T:	Notices of Stay of Proceedings in Case number 17-CV-320282
EX. J:	US Bank records for Downkicker Investments, Inc.	EX. U:	Assignment
EX. K:	Complaint in Santa Clara County Case number 17-CV-320282		

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

Debts for Money, Property or Services Obtained by False Pretenses or Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

> 11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate five elements:
>
> (1) the debtor made ... representations;
>
> (2) that at the time he knew they were false;
>
> (3) that he made them with the intention and purpose of deceiving the creditor;
>
> (4) that the creditor relied on such representations; [and]
>
> (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz,* 523 U.S. 213, 215 (1998).

Additionally, in 2016 the United States Supreme Court in *Husky International Electronics, Inc. v. Ritz*, __ U.S. __, 136 S. Ct. 1581 (2016) held that "the phrase [. . .] "actual fraud" to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation." *Husky International Electronics, Inc. v. Ritz*, __ U.S. __, 136 S. Ct. 1581 (2016).

Debts for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by use of a statement in writing that is materially false pursuant to 11 U.S.C. § 523(a)(2)(B)

11 U.S.C. § 523(a)(2)(B) sets forth the grounds for nondischargeability when the obligation arises from the use of a false financial statement, providing:

> (a)A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> > (2)for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> >
> > . . .
> >
> > (B)use of a statement in writing—
> >
> > (i)that is materially false;
> >
> > (ii)respecting the debtor's or an insider's financial condition;
> >
> > (iii)on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv)that the debtor caused to be made or published with intent to deceive.

As recently addressed in *Lamar, Archer & Cofrin, LLP v. Appling*, __ U.S. __, 138 S. Ct. 2752 (2018), the Court concluded that for misrepresentations of one's financial condition, those statement must be in writing, not oral representations.

Debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny pursuant to 11 U.S.C. § 523(a)(4)

In section 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny." Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

The required elements of embezzlement are: (1) appropriation of funds for the debtor's own benefit by fraudulent intent or deceit; (2) the deposit of the resulting funds in an account accessible only to the debtor; and (3) the disbursal or use of those funds without explanation of reason or purpose. *In re Bryant*, 28 C.B.C.2d 184, 147 B.R. 507 (Bankr. W.D. Mo. 1992). For purposes of section 523(a)(4) it is improper to automatically assume embezzlement has occurred merely because property is missing, since it could be missing simply because of noncompliance with contractual terms. *In re Hofmann*, 27 C.B.C.2d 1291, 144 B.R. 459 (Bankr. D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993); *see also In re Rose*, 934 F.2d 901 (7th Cir. 1991).

In short, section 523(a)(4) excepts from discharge debts resulting from the fraudulent appropriation of another's property, whether the appropriation was unlawful at the outset, and therefore a larceny, or whether the appropriation took place unlawfully after the property was entrusted to the debtor's care, and therefore was an embezzlement. 4 Collier on Bankruptcy P 523.10 (16th 2019)

Debt for Willful and Malicious Injury Pursuant to 11 U.S.C. § 523(a)(6)

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby),* 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury "involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted).

For a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the "ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

DISCUSSION

Debts for Money, Property or Services Obtained by False Pretenses or Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

Here, Plaintiff has meets the elements required by 11 U.S.C. § 523(a)(2)(A).

Plaintiff testifies that Defendant made false representations about his net worth; Defendant failed to inform him of liens and judgements against him; debts to other parties. Defendant also misrepresented his authority to sell securities to the public. Defendant concealed his felony conviction for arson. Defendant failed to disclose his prior bankruptcy case. Defendant signed a Promissory note with a specific provision to keep the investment funds in a separate account and yet Defendant transferred them to his personal account aa week later. The Note required Defendant, by way of Downkicker, to make monthly interest payments that were never made. The Note required for the return of the investment within one year and yet Defendant did not make such return on the due date.

With the investment funds wired by Plaintiff, Defendant purchased four properties in Southern California through his four separate companies. Defendant obtained two loans, failed to renovate the properties, and defaulted on said loans.

Defendant knew that the representations he made were false and purposely concealed important information. Defendant intended to deceive Plaintiff in order to obtain Plaintiff's money. Plaintiff justifiably relied on all the information and documents provided by Defendant.

Plaintiff sustained the loss of $150,000.00 as a proximate result of the misrepresentations made by Defendant.

Sufficient grounds have been established for the obligation to be nondischarageable pursuant to 11 U.S.C. § 523(a)(2)(A).

11 U.S.C. § 523(a)(2)(B): False Financial Statement

Here, Plaintiff has established that Defendant presented a false financial statement in order to induce Plaintiff into investing in Defendant's company in that, at the time the statement was presented Defendant knew he did not have the funds he represented to Plaintiff by way of the financial statement. Defendant owed money to others.

Plaintiff reasonably relied on Defendant's loan application and Downkicker's financial statements. The loan application showed that he had a positive net worth and therefore a personal guaranty would be viable.

For the "financial statement," the Exhibit provided by Plaintiff is a Uniform Residential Loan Application. Exhibit D, Dckt. 25. While the legibility of this Exhibit is not the best, the court can see the financial information. The total assets are shown by Defendant-Debtor to be $434,900, which the total liabilities are stated to be only ($24,000). As Plaintiff-Debtor has shown, Defendant-Debtor's liabilities were significantly greater.

Sufficient grounds have been established for the obligation to be nondischarageable pursuant to 11 U.S.C. § 523(a)(2)(B).

11 U.S.C. § 523(a)(4): Embezzlement

Plaintiff has provided the court with evidence that he transferred the $150,000.00 to Defendant-Debtor to be deposited into a separate account for the benefit of funding real estate projects. Though deposited into an account for Plaintiff, and to be withdrawn only to be paid directly into the specific escrow for each specific real estate project, Defendant-Debtor immediately transferred the monies into his personal account for his personal investments. Defendant-Debtor obtained the monies from Plaintiff, had the monies deposited into the specific account to be used for Plaintiff's investments, and then diverted the monies received into Defendant-Debtor's personal account.

Sufficient grounds have been established for the obligation to be nondischarageable pursuant to 11 U.S.C. § 523(a)(4).

Debt for Willful and Malicious Injury Pursuant to 11 U.S.C. § 523(a)(6)

Here, Plaintiff has established the elements for willful and malicious injury.

The evidence shows that Defendant must have had a subjective motive to injure Plaintiff. Defendant took Plaintiff's $150,000.00. This was not a mistake. When he was confronted by Plaintiff with a request to return the investment funds Defendant did not do so. The Note requires Defendant to return such funds after a year and Defendant did not do so. It seems from the testimony provided by Plaintiff that Defendant has done this before, to another person back in 2014.

Defendant used Plaintiff's investment funds to purchase other properties and obtained two loans for $1,045,000 and $521,024, respectively that he later defaulted on.

This was a malicious injury because conversion of Plaintiff's funds is a wrongful act. Defendant was supposed to keep these funds in a separate account. The funds were to be used to fund real estate for the benefit of Plaintiff. Instead, Defendant took the money and put them in his own personal account. He did it intentionally. It caused an injury because Plaintiff lost $150,000.00. These are funds that would be necessary for Plaintiff, who is a retired 72 year old man. Defendant has no just cause for the fraud and conversion he committed.

Sufficient grounds have been established for the obligation to be nondischarageable pursuant to 11 U.S.C. § 523(a)(6).

Computation of Judgment Amount

<u>Investment Damages</u>

The amount of the Judgment begins with the $150,000.00 principal amount of the investment.

Pre-Judgment Interest

The Motion in Section IX seeks the allowance of contract damages at the rate of 10% per annum based on California Civil Code § 3289, which provides:

> § 3289. Limit of rate by contract
>
> (a) Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.
>
> (b) If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach.
> For the purposes of this subdivision, the term contract shall not include a note secured by a deed of trust on real property

Plaintiff seeks interest at the rate of 10% per annum is computed at the rate of $41.00 a day from the date of the default, November 1, 2017, to the filing of the Motion for Default Judgment on September 20, 2019 - 688 days. Multiplying the $41 a day times the 688 days equals the $28,208.00 in pre-judgment interest requested by Plaintiff.

The court awards $28,208.00 in pre-judgment interest to be included in the judgment.

Attorneys' Fees and Costs

Moving to costs, Plaintiff requests in connection with the State Court Proceeding $435.00 in filing fees, $51.00 in electronic filing fees, and $222.00 in process server fees. Additionally, Plaintiff requests $4,200.00 in attorneys' fees incurred in connection with the State Court Action as damages.

For the Bankruptcy Adversary Proceeding, Plaintiff requests attorneys' fees of an additional $2,400.00 and the additional $350.00 filing fee for the Adversary Proceeding.

The evidence of such fees and costs are the testimony of Plaintiff's counsel of the total amounts, with no billing records. No basis for the attorneys' fees is stated in the Motion.

Federal Rule of Bankruptcy Procedure 7054(b) specifies that attorneys' fees shall be requested pursuant to Federal Rule of Civil Procedure 54(d)(2)(A)-(C) and (E). Such request shall be made by post-judgment motion. Here, all of the attorneys' fees, beginning with the State Court proceeding and continuing today are part of enforcing the obligation, and not damages (such as attorneys' fees incurred in litigating with a third-party due to the defendant's conduct). Plaintiff shall request attorneys' fees, and identify the contractual or statutory basis, in a post-judgment motion, if Plaintiff chooses to seek such attorneys' fees.

The State Court costs are damages and will be included within the judgment issued by this court in the amount of $708.00.

For the costs in this Adversary Proceeding, Plaintiff may file a costs bill as provided in Federal Rule of Bankruptcy Procedure 7054.

Punitive Damages

Plaintiff seeks an additional award of $50,000.00 in punitive damages due to the Defendant-Debtor's conduct. This $50,000.00 request is less than 1/3 of the actual damages, well under the reasonable amount limits enunciated by the U.S. Supreme Court.

While asking for such damages, Plaintiff does not identify the legal basis for such damages.

To determine that punitive damages should be awarded the court would have to assemble the law and advocate for the Plaintiff. The court declines the opportunity to do such.

Amount of the Judgment

The judgment to be entered by this court is in the amount of $178,916.00, computed as follows:

Investment Damages.....	$150,000.00
Pre-Judgment Interest.....	$ 28,208.00
Cost Damages.....	$ 708.00
Total Judgment.....	$178,916.00

Plaintiff shall request attorneys' fees and the additional costs relating to this Adversary Proceeding as provided in Federal Rule of Bankruptcy Procedure 7054.

The above judgment is nondischargeable for separate independent grounds of 11 U.S.C. § 523(a)(2)(A), § 523(a)(2)(B), § 523(a)(4), and § 523(a)(6).

The Motion is granted and the court shall enter a judgment as stated above.

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default Judgment filed by Plaintiff Paul Kalra ("Plaintiff"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Default Judgment is granted and judgment shall be entered for Plaintiff and against Defendant-Debtor Tracy Emery Smith in the amount of $178,916.00, which judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(a)(2)(B), 11 U.S.C. § 523(a)(4), and 11 U.S.C. § 523(a)(6).

Counsel for Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order.

Any motion for attorney's fees sought by Plaintiff and a bill of costs for the costs incurred in this Adversary Proceeding, if sought to be recovered by Plaintiff,

shall be sought as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

FINAL RULINGS

9.	**18-90959-E-7** **BLF-5**	**MICHAEL/JOANNE LAFRANCE** **Michael Germain**	**MOTION FOR COMPENSATION FOR LORIS L. BAKKEN, TRUSTEES ATTORNEY(S)** **11-18-19 [66]**

Final Ruling: No appearance at the January 9, 2020 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2019. By the court's calculation, 52 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Bakken Law Firm, the Attorney ("Applicant") for Michael D. McGranahan, the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period March 21, 2019, through January 9, 2020. The order of the court approving employment of Applicant was entered on April 1, 2019. Dckt. 29. Applicant requests fees in the amount of $2,880.00 and costs in the amount of $138.80.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of

Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include providing Trustee legal advice and general case administration and strategies on how to handle property of the estate and assisted Trustee in 1) employment of an auctioneer and sale of property at public auction and 2) a sale to Debtors of the estate's nonexempt interest in a vehicle. The Estate has $9,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 3.4 hours in this category. Applicant prepared fee agreement and employment application and fee application; and anticipates attending the hearing on the fee application by telephone.

Sale of Vehicles: Applicant spent 9.6 hours in this category. Applicant assisted Trustee with the employment of auctioneer to sell Debtors's disclosed vehicles: a 1992 Chevrolet motorhome, a 2001 Mercedes Benz M-Class, and a 2012 Kia Sportage by preparing the auctioneer's employment agreement, application for compensation and motion to sell the vehicles .

Sale to Debtors of Estate's Nonexempt Interest in Vehicle: Applicant spent 0.3 hours in this category. Applicant reviewed Trustee's motion for court approval of the sale and discussed with Trustee Debtors's actions regarding the sale..

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
Loris L. Bakken	13.3	$300.00	$3,990.00
	0	$0.00	$0.00
Total Fees for Period of Application			$3,990.00

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $138.80 pursuant to this application.

The costs requested in this Application are,

Description of Cost	Per Item Cost, If Applicable	Cost
Copying	$0.10 per page	$70.80
Postage		$68.00
		$0.00
Total Costs Requested in Application		$138.80

FEES AND COSTS & EXPENSES ALLOWED

Fees

Applicant seeks a reduced rate of $2,880.00 for its fees incurred for Client. First and Final Fees and Costs in the amount of $3,018.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Costs & Expenses

First and Final Costs in the amount of $138.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$2,880.00
Costs and Expenses	$138.80

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Bakken Law Firm ("Applicant"), Attorney for Michael D. McGranahan, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Bakken Law Firm is allowed the following fees and expenses as a professional of the Estate:
>
> Bakken Law Firm, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $2,880.00
> Expenses in the amount of $138.80,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

10. 17-90577-E-7 SSA-5 | **WILSON SARHAD** | **David Johnston** | **MOTION TO SELL** | **12-4-19 [69]**

Final Ruling: No appearance at the January 9, 2020 hearing is required.

Irma Edmonds ("the Chapter 7 Trustee") having filed a Removal of Motion, which the court construes to be an Ex Parte Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Sell was dismissed without prejudice, and the matter is removed from the calendar.**