UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 23, 2020 at 10:30 a.m.

1.	**19-90400-E-7** **SSA-1**	**JUSTAN JOHNSON** **Steve Altman**	**CONTINUED MOTION TO DISMISS CASE** **8-9-19 [24]**

No 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, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 9, 2019. By the court's calculation, 41 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). 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 Motion to Dismiss is xxxxx.

October 17, 2019 Hearing Continuance

At the hearing, Counsel for the Debtor reported that the Parties want to keep this case open, with the hearing continued to January 2019. The Debtor will not be inheriting the property until December 2019. There is also a judgement obtained by a collection agency and the Debtor is working to make sure there is not an abstract of judgment that would complicate the financing to pay all creditors in full.

REVIEW OF MOTION

The debtor, Justan A. Johnson ("Debtor"), filed this Motion seeking to dismiss the Chapter 7 case pursuant to 11 U.S.C. § 707. Debtor's reason for wanting dismissal is straightforward: in less than a month after filing this case, Debtor's grandmother passed away, and Debtor learned he will inherit real property valued at approximately $300,000.00. Declaration, Dckt. 28.

The Debtor argues that with this significant change in financial circumstances, Debtor can procure a secured loan for roughly $50,000.00 to pay all claims in this case, as well as any administrative expenses the Chapter 7 trustee has incurred thus far.

In support of the Motion, Debtor filed the Declaration of Chris Harringfeld, the president and owner of California Mortgage Associates. Declaration, Dckt. 27. Harringfeld testifies that it will be difficult to obtain a loan on the Debtor's new property while in a Chapter 7, and that even in a chapter 13 it would take approximately one year before Debtor is eligible for a loan. *Id*.

CHAPTER 7 TRUSTEE'S OPPOSITION

Garry Farrar, the Chapter 7 Trustee ("Trustee") filed an Opposition on September 5, 2019. Dckt. 30. Trustee argues that despite the Debtor's representations, there is nothing requiring Debtor to pay creditors in the event the case is dismissed.

Trustee argues further that despite Debtor's arguments, Debtor could receive a loan despite being in bankruptcy. The Declaration of Trustee provides testimony that he would be able to get a loan secured by the property for $50,000.00 at 9.75% APR and 3 points over a 10 year term. Declaration, Dckt. 31.

Trustee concludes that allowing him to administer the property would pay all claims in this case and avoid "plain legal prejudice" to creditors.

DEBTOR'S REPLY

Debtor filed a Reply on September 11, 2019. Dckt. 34. Debtor argues the following:

1. Information about a potential loan brought in through Trustee's Exhibit B is inadmissable hearsay.

2. The loan proposed by Trustee is more akin to a "hard money loan."

3. There is no prejudice to any creditor through dismissal of the case because creditors are free to assert their rights outside of bankruptcy. No creditor has filed an opposition to the Motion.

4. Debtor wishes to proceed outside of bankruptcy to preserve his credit and to avoid further administrative costs.

SEPTEMBER 19, 2019 HEARING

At the September 19, 2019 hearing, the parties requested the hearing be continued so they can work out a stipulated order to address the Trustee's concerns. Civil Minutes, Dckt. 38.

DISCUSSION

The court may dismiss a case under Chapter 7 only after notice and a hearing and only for cause. 11 U.S.C. § 707. Colliers provides the following discussion regarding voluntary dismissal:

> When the debtor seeks dismissal of a voluntary case, the relevance of the "cause" requirement has been questioned. Most cases, however, seem to require some cause for dismissal even in this situation, although the cause may simply be that dismissal is in the best interest of the debtor and not prejudicial to creditors. The debtor's best interest lies generally in securing an effective fresh start upon discharge and in the reduction of administrative expenses, leaving resources to work out debts; for creditors, if delay is said to have prejudiced them, the court must determine whether, as section 707(a) provides, the delay has been unreasonable. Thus, for example, the Court of Appeals for the Second Circuit, in Smith v. Geltzer, held that the bankruptcy court must consider whether dismissal would benefit creditors and whether it would enable the debtor to secure an effective fresh start, as well as the costs to the debtor, both in administrative expenses and the possible harm to a debtor's ability to obtain credit or seek bankruptcy relief in the future.
>
> When the debtor seeks dismissal, courts must take care to assure that creditors will not be prejudiced by a dismissal. Debtors are not generally permitted to dismiss cases over the objections of creditors or the trustee in order to refile to gain the benefit of exemptions that had been improperly claimed in the first case. Some courts have refused dismissal of a voluntary petition when the primary purpose was to file a fresh petition that would include debts incurred since the petition sought to be dismissed was filed. Similarly, dismissal may be denied when it is sought because property has been obtained or is expected that could satisfy the debtor's debts, to transfer the case to a different district, to render dischargeable a previously nondischargeable debt, or because fraud on the part of the debtor is discovered. The fact that the debtor has changed his or her mind about invoking bankruptcy jurisdiction to seek relief from debts and giving up the Seventh Amendment right to a jury trial on a claim that has passed to the bankruptcy estate is not, by itself, cause for dismissal.
>
> Generally, it has been held that the trustee has standing to object on behalf of the unsecured prepetition creditors of the debtor, even if no creditor objects. However, some courts have held that the trustee may object only for the purpose of securing the trustee's own costs and expenses.

6 Collier on Bankruptcy P 707.03 (16th 2019).

Here, the cause for dismissal is arguably that payment of claims would be easier and cheaper outside of bankruptcy given Debtor's post-petition change in circumstances. This argument is well-taken.

Dismissing the bankruptcy would reduce administrative expense, avoid more significant detriment to Debtor's credit, and possibly allow for more favorable loan terms.

At the same time, allowing Debtor to dismiss the case would permit Debtor to increase the delay and expense to creditors before recovering on their claims (in the event creditors are forced to seek enforcement themselves, Debtor deciding not to voluntarily pay claims as represented).

Debtor commenced this case with the May 1, 2019 *pro se* filing of his Voluntary Petition. On Schedule D Debtor lists one creditor with a claim of ($13,384.00) secured by Debtor's vehicle stated to have a value of $14,000.00. Dckt. 1 at 19.

Debtor lists having general unsecured claims of ($30,447.00), of which ($17,433) is Capital Bank for credit card debt, ($5,751.00) to Chase Bank for credit card debt, and ($2,485.00) to Chase Card for credit card debt. Schedule D/E, *Id.* at 20-21. Thus, at least 84% of Debtor's unsecured obligations are for credit card debt.

Going to Schedule I Debtor listing having monthly take home income of $2,735. *Id.* at 26-27. On Schedule J Debtor lists having ($2,842.00) in month obligations, leaving him a negative ($106.21) a month after his reasonable and necessary expenses. This includes ($700) a month for rent.

In his Reply Debtor bemoans that the loan the trustee suggests is a "hard money loan" and not reasonable. Given Debtor's income, one questions what other loan he could obtain. This "get a loan and pay creditors" solution is the one given to the Debtor why the case should be dismissed and creditors be left to Debtor voluntarily paying everyone.

The Trustee filed a Reply Declaration to the Reply filed by the Debtor to the opposition addressing the lack of a declaration by a representative of the hard money lender. Dckt. 36. This provides confirmation of a loan to Debtor.

It appears that given Debtor having engaged experienced counsel and there being an experienced, reasonable Chapter 7 Trustee, a possible resolution based on a realistic repayment method could be established. It may be, if the Debtor investigates other lenders that his post-bankruptcy dismissal rate may be better, but only slightly better, given his income and expenses. It may be a year or two after dismissal he could refinance.

Or it may be that a lien or other encumbrance can be placed on the property to insure that the monies from the property, loan or sale, will be used to pay the claims that would be paid through this bankruptcy case filed by Debtor.

JANUARY 23, 2020 CONTINUED HEARING

Nothing further has been filed by any parties since the October 17, 2019 prior hearing.

At the January 23rd hearing, **XXXXXXXXXX**

2. 19-91096-E-7 NOREEN JONES
Wilber Salgado

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-2-20 [11]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on January 4, 2020. The court computes that 19 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on December 19, 2019.

The Order to Show Cause is sustained, and the case is dismissed.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: $335.00.

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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

3. 17-90516-E-7 HCS-7

VERA JOHNSON
Tom Hogan

MOTION TO SELL AND/OR MOTION TO PAY , MOTION FOR COMPENSATION FOR REMAX EXECUTIVE, BROKER(S), MOTION/APPLICATION TO WAIVE STAY UNDER RULE 6004(H)
1-2-20 [111]

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

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 January 2, 2020. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Sell Property is granted.

The Bankruptcy Code permits Gary R. Farrar, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the real property commonly known as 1421 Brannon Avenue, Modesto, California ("Property").

The proposed purchaser of the Property is Alexis Markillie and Edward Anderson, and the terms of the sale are:

A. Sale Price is $249,950.00.

B. Escrow is to close within 15 days of this Court's approval of the sale.

C. The Property is to be sold "as-is."

D. Buyer shall make an initial deposit of $3,000.00 within acceptance subject to liquidated damages.

E. Trustee requests authorization to pay the following from the sale proceeds at the close of escrow:

i. A credit to the Buyers of $7,500 against the Purchase Price, to be applied in escrow. This was necessary because the Buyers could not qualify for financing, based on the appraised value of the house and their finances, at the sales price of $249,950.00.

ii. The estimated amount of $1,043.00 for an owner's title insurance policy issued by First American Title per the Purchase Agreement, with authority to pay the actual amount owed as determined by the title company;

iii. The estimated amount of $575.00 for one-half of the escrow fee to First American Title, with authority to pay the actual amount owed as determined by the title company;

iv. The estimated amount of $100.00 for the notary fee to First American Title, with authority to pay the actual amount owed as determined by the title company;

v. Three percent of the purchase price to Mr. Brazeal in accordance with the Purchase Agreement and the Court's order authorizing his employment;

vi. Three percent of the purchase price to the Buyers' agent, Steven Cleek of Homelink Real Estate, in accordance with the Purchase Agreement;

vii. The estimated amount of $69.00 for the recording fees to First American Title, with authority to pay the actual amount owed as determined by the title company;

viii. County transfer taxes or fees in the estimated amount of $275.00, with authority to pay the actual amounts owed as determined by the title company;

ix. The cost (not to exceed $575.00) of an upgraded one-year home warranty plan, including air conditioner coverage, per the Purchase Agreement;

x. The estimated amount of $99.00 for a natural hazard zone disclosure report including environmental per the Purchase Agreement, with

authority to pay the actual amount owed as determined by the title company;

xi. Outstanding items on the Preliminary Title Report that are liens or encumbrances against the Real Property, as follows: (a) property taxes, assessments, and penalties to the Stanislaus County Tax Collector in an amount that is estimated to be approximately $3362.41, with authority to pay the actual amount owed as determined by the title company; (b) a lien in favor of the City of Modesto in the approximate amount of $597.99 for utilities, with authority to pay the actual amount owed as determined by the title company; and (c) a lien in favor of John J. Hollenback, Jr., in the amount of $10,000, plus any accrued interest, fees, or other charges owing, with authority to pay the actual amount owed as determined by the title company; and

xii. The amount of $63.72 to reimburse the Trustee from personal funds he advanced to Modesto Irrigation District.

Proposed Overbidding Procedures

Trustee offers the following proposed overbidding procedures for the sale:

A. Any overbidder must agree to purchase the Real Property on the same (or more favorable to the estate) terms contained in the Purchase Agreement;

B. At or before the hearing on this motion, the overbidder must deposit with the Trustee (or the title company, if he so designates) at least as much as the deposit of $3,000 that the Buyers deposited;

C. At or before the hearing on this motion, any overbidder must qualify by showing the Trustee and the Court proof that they have immediately available funds to enable them to pay the full balance of the sales price within seven days after entry of an order granting this motion. Overbidders can do this by providing, at or before the hearing, (a) issued cashier's checks in sufficient amounts, (b) copies of bank account statements dated within the previous 30 days that show unencumbered balances of at least the remaining balance of the sales price and by representing to the Trustee and the Court at the hearing that those funds will be available and unencumbered, (c) a signed loan commitment letter in a sufficient amount from an established lender that contains no conditions to funding other than the entry of an order authorizing the sale to the overbidder, or (d) such other documents as the Trustee may, in his discretion, accept; and

D. The overbidding to start at $252,500.00 and increase in increments of $2,500.

Proposed Payment of Realtor Commission

The court, by prior order, has authorized the Trustee to employ Bob Brazeal, of Remax Executive, as a Realtor to assist the Trustee in evaluating, marketing, and selling the Property. Order, Dckt. 59. The Motion addresses the services provided by Mr. Brazeal with particularity, including the marketing of the Property leading to the present sale now presented to the court.

The Motion states that the real estate commission of 6% is to be divided equally between Mr. Brazeal receiving 3% as the seller's Realtor, and Steven Cleek, of Homelink Real Estate, as the Realtor for Buyer.

DISCUSSION

At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: **xxxxxxxxxx**.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The price is fair and reasonable and, thus, provides the Bankruptcy Estate significant capital.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because it is in the best interests of the Buyers and Trustee. A waiver would also assist any prospective overbidder and the creditors.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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 Sell Property filed by Gary R. Farrar, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Gary R. Farrar, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Alexis Markillie and Edward Anderson or nominee ("Buyer"), the Property commonly known as 1421 Brannon Avenue, Modesto, California ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $249,950.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit C, Dckt. 115, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred to effectuate the sale.

C. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

D. The Chapter 7 Trustee is authorized to pay a real estate broker's commission in the aggregate amount of not more than six percent (6%) of the purchase, with one-half of the commission (3%) paid to Bob Brazeal, or Remx Executive, as the Realtor for Seller Chapter 7 Trustee, and one-half of the commission (3%) to Steven Cleek, of Homelink Real Estate, as the Realtor for Buyer.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

4. 11-90218-E-7 TOG -2 | **ISMAEL PINA AND TERESA COVARRUBIAS** Thomas Gillis | **MOTION TO AVOID LIEN OF CALPLY** 1-2-20 [30]

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on January 2, 2020. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion to Avoid Judicial lien filed by Ismael Pina and Teresa Covarrubias ("Debtor") requests an order avoiding the judicial lien of CALPLY ("Creditor") against property of Debtor commonly known as 106 West Tuolumne Road, Ceres, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $7,069.10. Exhibit A, Dckt. 33. An abstract of judgment was recorded with Stanislaus County on March 23, 2010, that encumbers the Property. *Id.*

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $250,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $341,200.00 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140 in the amount of $9,694.10 on Amended Schedule C. Dckt. 25.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Ismael Pina and Teresa Covarrubias ("Debtors") 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 judgment lien of CALPLY, California Superior Court for Stanislaus County Case No. 643990, recorded on March 23, 2010, Document No. 2010-0026547-00, with the Stanislaus County Recorder, against the real property commonly known as 106 West Tuolumne Road, Ceres, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

5. 19-91119-E-7 BSH-1 — ERIK/ILIANA CLAROS — Brian Haddix — MOTION TO COMPEL ABANDONMENT — 12-28-19 [7]

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and parties requesting special notice on December 28, 2019. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Compel Abandonment is granted.

After notice and a hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or is of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

The Motion filed by Erik Alfredo Claros and Iliana Claros ("Debtors") requests the court to order Michael D. McGranahan ("the Chapter 7 Trustee") to abandon the following property:

Asset	Value	Encumbrance	Equity	Exemption and Exempt Amt.
1708 Pantaleo Dr., Modesto, CA – Primary Residence	$314,500.00	($266,075.00)	$88,425.00	CCP §704.730

1999 Honda Civic LX (175,000 miles)	$3,000.00	$0.00	$3,000.00	CCP §704.010
1988 Honda Civic (180,000 miles)	$300.00	$0.00	$300.00	CCP §704.010
Debtors' Household Goods & Furnishings	$5,625.00	$0.00	$5,625.00	CCP §704.020
Debtors' Personal Consumer Electronics	$3,025.00	$0.00	$3,025.00	CCP §704.020
Golf clubs, fishing gear, carpentry tools	$425.00	$0.00	$425.00	CCP §704.020
Colt 1911, Windham Weaponry AR15, Spikes Tactical AR15, Sikkens Lower Receiver	$1,850.00	$0.00	$1,850.00	CCP §704.020
Debtors' personal clothing	$1,650.00	$0.00	$1,650.00	CCP §704.020
1 dog	$1.00	$0.00	$1.00	CCP §704.020
US Bank Checking 7181	$215.07	$0.00	$161.30	CCP §704.070
US Bank Savings 8551	$150.00	$0.00	$112.50	CCP §704.070
401(k) through Tesla	$38,231.13	$0.00	$38,231.13	CCP §704.115(a)(1) & (2)

The Declaration of Erik Alfredo Claros has been filed in support of the Motion and values of the Property listed above. Dckt. 10.

The court finds that the debt secured by the Property exceeds the value of the Property and that there are negative financial consequences to the Estate caused by retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate and orders the Chapter 7 Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not 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 Compel Abandonment filed by Erik Alfredo Claros and Iliana Claros ("Debtors") 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 Compel Abandonment is granted, and the Property identified as:

Asset	Value	Encumbrance	Equity	Exemption and Exempt Amt.
1708 Pantaleo Dr., Modesto, CA – Primary Residence	$314,500.00	($266,075.00)	$88,425.00	CCP §704.730
1999 Honda Civic LX (175,000 miles)	$3,000.00	$0.00	$3,000.00	CCP §704.010
1988 Honda Civic (180,000 miles)	$300.00	$0.00	$300.00	CCP §704.010
Debtors' Household Goods & Furnishings	$5,625.00	$0.00	$5,625.00	CCP §704.020
Debtors' Personal Consumer Electronics	$3,025.00	$0.00	$3,025.00	CCP §704.020
Golf clubs, fishing gear, carpentry tools	$425.00	$0.00	$425.00	CCP §704.020
Colt 1911, Windham Weaponry AR15, Spikes Tactical AR15, Sikkens Lower Receiver	$1,850.00	$0.00	$1,850.00	CCP §704.020

Debtors' personal clothing	$1,650.00	$0.00	$1,650.00	CCP §704.020
1 dog	$1.00	$0.00	$1.00	CCP §704.020
US Bank Checking 7181	$215.07	$0.00	$161.30	CCP §704.070
US Bank Savings 8551	$150.00	$0.00	$112.50	CCP §704.070
401(k) through Tesla	$38,231.13	$0.00	$38,231.13	CCP §704.115(a)(1) & (2)

and listed on Schedule A / B by Debtor is abandoned by the Chapter 7 Trustee, Michael D. McGranahan ("Trustee") to Erik Alfredo Claros and Iliana Claros by this order, with no further act of the Trustee required.

6. 19-90122-E-11 MF-32

MIKE TAMANA FREIGHT LINES, LLC
Reno Fernandez

MOTION FOR APPROVAL OF ADEQUATE PROTECTION STIPULATION BETWEEN DEBTOR AND VOLVO FINANCIAL SERVICES, A DIVISION OF VFS US LLC
12-19-19 [416]

Tentative Ruling: The Motion For Approval of Adequate Protection Stipulation 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 creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 19, 2019. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Approval of Adequate Protection Stipulation with Volvo Financial Services 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 Approval of Adequate Protection Stipulation with Volvo Financial Services is XXXXXXXXXX.

The debtor in possession, Mike Tamana Freight Lines, LLC ("ΔIP") filed this Motion seeking approval of Stipulation to set adequate protection payments to creditor Volvo Financial Services, a division of VFS US, LLC ("Creditor"), holding a claim secured by several of ΔIP's day cabs (listed fully in the Motion (Dckt. 416)).

The Motion is supported by the Declaration of Amanjot Tamana, the Responsible Individual for the ΔIP. Dckt. 418. The Tamana Declaration states Creditor's collateral here is essential to the operation of ΔIP's business. *Id.*, ¶ 8.

As of the Petition date, Volvo Financial Services contends that the Debtor owes Volvo Financial Services a combined monthly amount of $49,534.21 under the MLS Agreement, July 2015 Loan Documents, Second July 2015 Loan Documents, December 2015 Loan Documents, May 2016 Loan Documents and July 2016 Loan Documents, and all related documents thereto (collectively, the "Loan Documents"), with a combined accelerated balance due of $958,704.56 under the Loan Documents.

Key provisions of the Stipulation (Dckt. 420) include the following terms and conditions:

A. The first paragraph of the Stipulation (p. 1, emphasis added) identifies the parties to the Stipulation:

> Volvo Financial Services, a division of VFS US LLC ("Volvo Financial Services"), by and through its counsel, Gordon Rees Scully Mansukhani LLP, and Mike Tamana Freight Lines, LLC (**"Debtor"**), by and through its counsel, hereby enter into this **Stipulation for Debtor's Payment of Adequate Protection** Payments to Volvo Financial Services (this "Stipulation") and agree as follows: . . .

On its face, the only parties to the Stipulation are Volvo, a creditor (11 U.S.C. § 101(10)) and Mike Tamana Freight Lines, LLC stated to be the Debtor, see 11 U.S.C. § 101(13), which defines the word "Debtor" as: "(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced." The Stipulation goes further, stating that it is the Debtor who will make the adequate protection payments.

B. However, at the start of the portion of the Stipulation that states the agreed terms, it states that the parties to and agreeing to the terms of the Stipulation are stated to be the Debtor in Possession and Volvo Financial Services.

> NOW, THEREFORE, in consideration of the foregoing, **Debtor in Possession** and Volvo Financial Services hereby **agree** as follows

Stipulation, p. 9 (emphasis added).

C. Paragraph 1 of Stipulation, p. 9 (emphasis added) provides for adequate protection payments to be made as follows:

> 1. As adequate protection of Volvo Financial Services' interest in the Collateral, beginning immediately upon entry of an order approving this

> Stipulation, **Debtor shall pay** Volvo Financial Services the amounts coming due under the Loan Documents on and after the date the Court approves this Stipulation in accordance with the contractual due dates imposed by the Loan Documents (the "Adequate Protection Payment"), and any amount due under the Loan Documents between the date of this Stipulation and the date the Court approves this Stipulation, and each month thereafter shall continue to make the Adequate Protection Payment to Volvo Financial Services on the date that such payment is due pursuant to the Loan Documents until (i) Debtor's case is converted or dismissed; (ii) Debtor confirms a plan of reorganization; (iii) the obligations due to Volvo Financial Services are satisfied; (iv) Debtor surrenders the Collateral or (v) further order of this Court; and . . . .

Thus, the Debtor in Possession agrees with Volvo that the Debtor itself will make the adequate protection payments.

D. In Paragraph 2 of the Stipulation, p. 9-10 (emphasis added) provides for additional obligations to be performed by the Debtor, stating:

> 2. At all times, **Debtor shall**: (i) **maintain** adequate property and **liability insurance** with respect to the Collateral, naming VFS US LLC as loss payee, in amounts and under such insurance policies as are required by the Loan Documents and applicable schedules and Debtor upon Volvo Financial Services' request shall immediately provide Volvo Financial Services with copies of documentation evidencing the existence of such insurance policies; (ii) **maintain the Collateral** in good repair and cause such maintenance and repairs to be performed with respect to the Collateral as are customarily performed in connection with property of this type and as required under the Loan Documents; and (iii) **permit Volvo** Financial Services or its agents **access to the Collateral** to conduct an appraisal or inspect the Collateral within four calendar days' notice . . . ; and . . . .

E. Paragraph 4 of the Stipulation, p. 10 (emphasis added) has the Debtor making a representation concerning the ownership of the Collateral which, in light of 11 U.S.C. § 541(a), appears problematic:

> 4. **Debtor affirms** and agrees that **it is and shall remain the sole owner of the Collateral** and Volvo Financial Services holds a valid, properly perfected, first-priority lien against the Collateral. **Nothing contained in this Stipulation shall preclude or prohibit Volvo** Financial Services from **exercising and enforcing such rights** and remedies as are necessary for Volvo Financial Services to protect and preserve its claims pursuant to the Loan Documents and applicable law **against (i) Debtor**, (ii) any guarantor of the repayment of the amounts owed under the Loan Documents, and **(iii) Debtor's bankruptcy estate**

including, but not limited to, filing a proof of claim in this bankruptcy case; and . . .

F. Moving to Paragraph 6 of the Stipulation, p. 11 (emphasis added), provision is made for defaults by Debtor.

> 6. Upon the occurrence of a default under this Stipulation, **Volvo Financial Services shall provide Debtor with notice of the default** via email to Matthew J. Olson and Daniel E. Vaknin, Debtor's counsel, at matt@macfern.com and daniel@macfern.com. **Debtor shall have ten calendar days** (the "Cure Period") after the email is sent to Debtor's counsel **to cure such default**. If **Debtor does not cure** the default within the Cure Period, Volvo Financial Services **may file an affidavit of default** and submit an order granting Volvo Financial Services relief from stay, and such order may be entered by the Court without any further proceedings, to allow Volvo Financial Services to pursue its legal and contractual remedies, including repossession and foreclosure of the Collateral. **Debtor shall only have the opportunity to cure two defaults** and the automatic stay shall be lifted upon filing of an affidavit of default and submission of an order to the Court upon Debtor's third default and Volvo Financial Services may pursue its legal and contractual remedies, including repossession and foreclosure of the Collateral, without further notice to Debtor; and . . . .

In addition to the Debtor being the person who is made to appear as responsible for property of the bankruptcy estate in this case, it also includes a provision outside of the Federal Rules of Bankruptcy Procedure and tries to have an "affidavit" procedure to get an order.

This court has long used an *ex parte* motion procedure for such adequate protection stipulations, which complies with the Federal Rules of Bankruptcy Procedure as adopted by the United States Supreme Court, and also creates a low cost, streamline process for getting such post-stipulation default orders. No basis has been shown for this court overruling the procedures adopted by the Supreme Court for issuing orders.

G. In paragraph 7 of the Stipulation, p. 11 (emphasis added), the Debtor only binds the Debtor, and Debtor's successors and assigns, stating:

> 7. By executing this Stipulation**, Debtor, for itself and its successors and assigns**, but not including any subsequently appointed Trustee: (a) specifically acknowledges that Volvo Financial Services holds a valid, perfected, first-priority, non-avoidable security interest and lien in the Collateral and (b) specifically acknowledges and agrees to the validity and enforceability of the Loan Documents; and . . .

As of the signing of the Stipulation, the Bankruptcy Estate in this case has existed for three hundred and forty nine (349) days. The Bankruptcy Estate is not a future successor or assign, and the court is not aware of a legal basis for an assignee of rights and interests in the past, can then in the future retroactively alter those rights or interests. It is unclear whose rights and interests are being altered.

According to Debtor, Volvo has applied the Debtor in Possession's post-petition payments to the Debtor in Possession's pre-petition balance. Volvo has assured the Debtor in Possession that it cannot declare a default to obtain relief from stay if payments by the Debtor in Possession are timely made despite Volvo's application of such payments. This is so because Volvo explained to the Debtor in Possession that the adequate protection stipulation governs the submission, not application, of payments, i.e., that payments will be made by a date certain and amount certain.

The Motion has been filed for the Debtor in Possession by the attorneys authorized to be employed by the Debtor in Possession, and who are not attorneys for the "Debtor."

The court also notes that it is not the designated representative for the Debtor in Possession that has signed the Stipulation, but the attorney authorized to be employed by the Debtor in Possession.

DISCUSSION

The Stipulation here provides for $47,077.63 per month to be paid by ΔIP each month. The Stipulation will allow ΔIP to retain the collateral described as a series of day cabs (Motion, Dckt. 416), which are essential to ΔIP's continued business operations.

While on its face an adequate protection stipulation with these terms may be financially reasonable, it appears that the necessary parties, if this Stipulation is to relate to property of the Bankruptcy Estate and future relief is to be obtained against property of the Bankruptcy Estate, are not parties to this Stipulation.

At the hearing, **xxxxxxxxxx**

~~The court finds that the Stipulation terms are reasonable, and in the best interest of the creditors and Estate. Therefore, the Motion is granted and the Stipulation is approved.~~

~~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 Approval of Adequate Protection Stipulation filed by the debtor in possession, Mike Tamana Freight Lines, LLC ("ΔIP") 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 Approval of Adequate Protection Stipulation is granted, and ΔIP shall make adequate protection payments to creditor~~

~~Volvo Financial Services, a division of VFS US, LLC on the terms set forth in the Stipulation. Dckt. 420.~~

7.	**19-90122-E-11** **MF-4**	**MIKE TAMANA FREIGHT LINES, LLC** **Reno Fernandez**	**CONTINUED MOTION TO USE CASH COLLATERAL** **2-12-19 [21]**

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(c).

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 12, 2019. By the court's calculation, 2 days' notice was provided. The court set the hearing for February 14, 2019. Dckt. 29.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Authority to Use Cash Collateral is granted and the hearing is continued to xxxxxx xx, 20xx, at xx:xx a.m. for consideration of further use of Cash Collateral.

Debtor in Possession Mike Tamana Freight Lines, LLC filed this First Day Motion to use cash collateral to pay necessary expenses for the estate to continue to operate the transportation business that is included in the estate. The Debtor in Possession is continuing to operate on interim post-petition financing terms.

The Expenses to be paid with cash collateral are set forth in Exhibit C (Dckt. 23) filed in support of this Motion.

The court has conducted a series of prior hearing, issuing prior orders and making findings thereon. A review of the prior hearings is set forth in the Civil Minutes from the August 29, 2019 prior hearing. Dckt. 349.

SIXTH SET OF SUPPLEMENTAL PLEADINGS FOR JANUARY 23, 2020 HEARING

On January 9, 2020 Debtor in Possession filed its Sixth Set of Supplemental Exhibits and Declaration of Amanjot Tamana, the Responsible Representative of the Debtor in Possession. Dckts. 425, 426.

The Debtor in Possession projected the following financial consequences of operating under the cash collateral budget for the 13 week period starting February 9, 2020:

Total Revenue.....$5,590,000
Total Expenses.....($5,498,738)

Net Operating Income For the 13 Week Period.....$91,262

Exhibit H, Dckt. 426. [FN. 1]

FN. 1. It appears that the cash collateral budget submitted contains a clerical error in referring to the year for the months being 2019, rather than 2020. The court considers the request for 2020.

The court also notes that the spreadsheet contains very small text as is of questionable legibility unless the graphics are enhanced. In the future, counsel should break such tables up into several tables in which the numbers are clearly legible without such enhancements.

Week Starting On:	09-Feb-2019	16-Feb-2019	23-Feb-2019	02-Mar-2019	09-Mar-2019	16-Mar-2019	2
Income							
Revenue	$430,000	$430,000	$430,000	$430,000	$430,000	$430,000	
Brokerage Revenue	$0	$0	$0	$0	$0	$0	
Total Income	*$430,000*	*$430,000*	*$430,000*	*$430,000*	*$430,000*	*$430,000*	
Expenses							
Payroll - Paylocity (incl. driver payroll, office payroll, office pay roll taxes, driver, officer salary)	$115,000	$115,000	$115,000	$115,000	$115,000	$115,000	
Benefits	$0	$0	$0		$18,500	$0	
Workers Comp	$0	$0	$0	$0	$28,300	$0	
Diesel/DEF/Reefer	$90,000	$90,000	$90,000	$90,000	$90,000	$90,000	
Carrier Pay	$25,000	$25,000	$25,000	$25,000	$25,000	$25,000	
Insurance	$0	$0	$0	$0	$93,400	$0	
Stonemark Insurance	$0	$0	$0	$0	$13,600	$0	
Car	$0	$0	$0	$0	$0	$0	
Ceres Yard	$0	$0	$0	$6,800	$0	$0	
Houston Yard	$0	$0	$0	$0	$0	$0	
Unloading/ Lumpers	$13,000	$13,000	$13,000	$13,000	$13,000	$13,000	
Scales	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	
Truck and Trailer Washing	$1,200	$1,200	$1,200	$1,200	$1,200	$1,200	
Tolls	$500	$500	$500	$500	$500	$500	
Gps/Elogs/Trailer Temp	$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	
Transflo	$400	$400	$400	$400	$400	$400	
Recruiting	$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	
Maintenance	$16,000	$16,000	$16,000	$16,000	$16,000	$16,000	
Safety	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	
Oregon Tax/NM Tax	$0	$0	$0	$27,000	$0	$0	
IT Expense/Software	$0	$0	$0	$8,000	$0	$0	
Miscellaneous	$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	
Utilities	$1,300	$1,300	$1,300	$1,300	$1,300	$1,300	
Carrier Cure Payments from Assumption**	$3,900	$3,900	$3,900	$3,900	$3,900	$3,900	
Other Expenses	$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	
Equip. Adq. Protection Pmts:							
Allegiance Fin. Group	$6,321	$24,092	$0	$0	$0	$30,414	
Banc of America	$0	$0	$0	$0	$17,061	$0	
BB&T Commercial Equip.	$0	$0	$0	$26,048	$0	$0	
First Midwest	$0	$0	$0	$6,128	$0	$0	
Hitachi	$0	$3,818	$0	$0	$0	$3,818	
Lee Financial	$59,828	$0	$31,641	$0	$59,828	$0	
People's Capital	$12,391	$0	$28,663	$0	$6,308	$6,083	
Signature Financial	$0	$0	$0	$0	$14,219	$0	
TAB Bank	$0	$8,034	$2,344	$0	$0	$0	
TCF Equipment Fin.	$0	$0	$3,831	$12,790	$0	$0	
Volvo	$0	$0	$12,964	$34,114	$0	$0	
Wells Fargo Equip. Fin.	$3,686	$6,061	$20,143	$16,379	$16,476	$6,061	
Daimler Financial	$0	$31,641	$0	$0	$0	$31,641	
Other Expenses							
Special Counsel: Subject to Crt. Approval	$4,067	$0	$0	$0	$0	$0	
Crestmark DIP Fees	$4,200	$4,200	$4,200	$4,200	$4,200	$4,200	
US Trustee Fees	$0	$0	$0	$0	$0	$0	
Total Expenses	*$368,994*	*$356,346*	*$382,485*	*$419,959*	*$550,392*	*$360,717*	
Net Income/(Loss)	*$61,006*	*$73,654*	*$47,515*	*$10,041*	*-$120,392*	*$69,283*	
Cumulative Free Cash	$61,006	$134,660	$182,175	$192,215	$71,823	$141,107	

**The DIP will file a motion to assume carrier-executory contracts, and thus, this row reflects amounts for cure payments.

23-Mar-2019	30-Mar-2019	06-Apr-2019	13-Apr-2019	20-Apr-2019	27-Apr-2019	04-May-2019	Total
$430,000	$430,000	$430,000	$430,000	$430,000	$430,000	$430,000	$5,590,000
$0	$0	$0	$0	$0	$0	$0	$0
$430,000	*$430,000*	*$430,000*	*$430,000*	*$430,000*	*$430,000*	*$430,000*	*$5,590,000*
$115,000	$115,000	$115,000	$115,000	$115,000	$115,000	$115,000	$1,495,000
$0	$0	$18,500	$0	$0	$0	$18,500	$55,500
$0	$0	$28,300	$0	$0	$0	$28,300	$84,900
$90,000	$90,000	$90,000	$90,000	$90,000	$90,000	$90,000	$1,170,000
$25,000	$25,000	$25,000	$25,000	$25,000	$25,000	$25,000	$260,000
$0	$0	$93,400	$0	$0	$0	$93,400	$280,200
$0	$0	$13,600	$0	$0	$0	$13,600	$40,800
$0	$0	$0	$0	$0	$0	$0	$0
$0	$6,800	$0	$0	$0	$6,800	$0	$20,400
$0	$0	$0	$0	$0	$0	$0	$0
$15,000	$15,000	$15,000	$15,000	$15,000	$15,000	$15,000	$195,000
$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$13,000
$1,200	$1,200	$1,200	$1,200	$1,200	$1,200	$1,200	$15,600
$500	$500	$500	$500	$500	$500	$500	$6,500
$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$19,500
$400	$400	$400	$400	$400	$400	$400	$5,200
$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$19,500
$16,000	$16,000	$16,000	$16,000	$16,000	$16,000	$16,000	$208,000
$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$13,000
$0	$27,000	$0	$0	$0	$27,000	$0	$81,000
$0	$8,000	$0	$0	$0	$8,000	$0	$24,000
$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	$32,500
$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$1,500	$19,500
$3,900	$3,900	$3,900	$3,900	$3,900	$3,900	$3,900	$50,700
$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	$2,500	$32,500
$0	$0	$0	$6,321	$24,092	$0	$0	$91,241
$0	$0	$17,061	$0	$0	$0	$17,061	$51,182
$0	$26,048	$0	$0	$0	$0	$26,048	$78,145
$0	$6,128	$0	$0	$0	$0	$6,128	$18,385
$0	$0	$0	$0	$3,818	$0	$0	$11,453
$31,641	$0	$59,828	$0	$31,641	$0	$0	$274,409
$28,663	$0	$0	$12,391	$0	$28,663	$0	$123,161
$0	$0	$14,219	$0	$0	$0	$14,219	$42,656
$10,378	$0	$0	$0	$10,378	$0	$0	$31,733
$0	$16,621	$0	$0	$0	$3,831	$12,790	$49,863
$12,964	$31,363	$2,751	$0	$0	$12,964	$34,114	$141,233
$20,143	$16,379	$12,790	$9,747	$10,448	$9,695	$16,379	$164,385
$0	$0	$0	$0	$31,641	$0	$0	$94,924
$0	$0	$0	$0	$0	$0	$0	$4,067
$4,200	$4,200	$4,200	$4,200	$4,200	$4,200	$4,200	$54,600
$0	$0	$0	$0	$60,000	$0	$0	$60,000
$386,688	*$421,039*	*$543,149*	*$311,179*	*$454,918*	*$379,652*	*$363,289*	*$3,498,738*
$43,312	*$8,961*	*-$113,149*	*$118,841*	*-$24,918*	*$50,348*	*-$133,289*	*$91,262*
$184,419	$193,380	$80,231	$199,071	$174,153	$224,501	$91,262	

DISCUSSION

Debtor in Possession has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for expenses necessary for the estate to continue to operate the transportation business that is included in the estate. The Motion is granted, and Debtor in Possession is authorized to use the cash collateral for the period February 2, 2020 through May 4, 2020. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by Debtor in Possession.

The court continues the hearing to **10:30 a.m. on xxxxxxx xx, 2020**, for Debtor in Possession to file a Supplement to the Motion to extend authorization. That Supplement shall be filed and served on or before **xxxxxx xx, 2020**, with any opposition to be presented orally at the continued hearing.

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 Use of Cash Collateral filed by Mike Tamana Freight Lines, LLC ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that hearing on the Motion to Use Cash Collateral is continued to April XX, 2020, at 10:30 a.m. Supplemental pleadings requesting further use of cash collateral shall be filed and served on or before April XX, 2020.
>
> **IT IS FURTHER ORDERED** that the use cash collateral as set forth in the budget filed as Exhibit H (Dckt. 426) is authorized for the period February 9, 2020, through May 4, 2020.

8. 19-91034-E-11 **LORENA ALVARADO**
Anh Nguyen

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
11-22-19 [1]

Debtor's Atty: Anh V. Nguyen

Notes:
Continued from 1/9/20 to be conducted in conjunction with the Motion to Convert Case.

The Status Conference is xxxxxxxxxx

9. 19-91034-E-11 AVN-1 | **LORENA ALVARADO** / **Anh Nguyen** | **MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 13** / **12-11-19 [17]**

Tentative Ruling: The Motion to Convert Case to Chapter 13 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 creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 11, 2019. By the court's calculation, 43 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. 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 to Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 13 is xxxxxxxxxx.

This Motion to Convert the Chapter 11 bankruptcy case of Lorena Alvarado ("Debtor") to a case under Chapter 13 has been filed by Lorena Alvarado ("Movant"), the Debtor. Movant asserts that the case should be converted based on the following grounds:

A. Debtor's intention was to file a Chapter 13 case but due to an error on the part of Debtor's counsel, the case was unintentionally filed under chapter 11.

B. This case has not been previously converted.

C. Debtor is eligible for relief under Chapter 13.

The Motion is accompanied by the Declaration of Anh V. Nguyen, Debtor's Counsel. Dckt. 17.

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:

> (d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—
>
> (1) the debtor requests such conversion;
>
> (2) the debtor has not been discharged under section 1141(d) of this title . . . .

11 U.S.C. § 1112(d)(1) & (2).

As another bankruptcy court has noted, neither the Code nor its legislative history explain how the court should exercise discretion when considering a motion to convert a Chapter 11 case to one under Chapter 13. *In re Tornheim*, 181 B.R. 161, 169 (Bankr. S.D.N.Y. 1995). Courts have analyzed the reverse position, therefore—conversion from Chapter 13 to Chapter 11 under 11 U.S.C. § 1307(d). *See, e.g.*, *id.*

Additionally, conversion to Chapter 13 is limited by the provisions of 11 U.S.C. § 1112(f). Under that section of the Code, "the debtor must already meet the eligibility requirements" of the requested chapter. *In re Tornheim*, 181 B.R. at 169. What a debtor seeks from the court is not absolute relief to convert to Chapter 13; it is discretionary relief. *See id.*

A debtor must show "both eligibility to be a debtor under the new chapter and a reasonable prospect for a successful [rehabilitation]." *Id.* (citing *In re Funk*, 146 B.R. 118, 124 (D.N.J. 1992)). Part of what a court considers is whether a debtor "has caused unreasonable or prejudicial delay or is unable to effectuate a plan." *Id.* (citing *In re Funk*, 146 B.R. at 122–23; *Anderson v. United States ex rel. Small Bus. Admin. (In re Anderson)*, 165 B.R. 445, 448–49 (S.D. Ind. 1994)).

DISCUSSION

Debtor's counsel testifies under penalty of perjury that this Chapter 11 was filed in error and that it was meant to be a Chapter 13 case.

Here, Debtor's case has not been converted previously, and Debtor qualifies for relief under Chapter 13. Moreover, a look at the filed schedules shows that Debtor has two creditors with secured claims (Fay Servicing with a claim of $80,000 and Shellpoint with a $158,000 claim), one (1) creditor with an unknown amount, and another unsecured creditor with a $0.00 total claim. Schedules A, D, and E/F; Dckt. 15.

However, a close look of Debtor's filed Schedules show several problems. First Debtor's Schedule I states a $2,500.00 monthly contribution from Debtor's fiancé. *Id.* at 20.

However, on Debtor's Statement of Financial Affairs, there is $1,500.00 for the year 2018, and $6,000.00 for years 2016 and 2017. *Id.* at 27. This is grossly different than the $30.,000 represented on Schedule I. No explanation is given as to the wide difference between monthly and yearly contributions by the fiancé.

Following Debtor's Schedule I, there are two documents:

A. October 2017 - March 2018 Profit and Loss Claudia A. Rocha

B. Debtor's Monthly Rent and Income from Two (2) Rental Properties

No context is provided as to either of these documents. The court does not know who Claudia Rocha is. Even if this court were to take this Claudia Rocha document as an employer document, Debtor's Schedules state Debtor is a self-employed hair-stylist working from her residence, 4912 Dunn Road.

On the Statement of Financial Affairs (Question 27) Debtor states under penalty of perjury that she has no sole proprietorship or other business. This conflicts with Schedule I.

The rental properties page is devoid of any details– specifically, what are the expenses related to the "$100 expense" listed for each property.

More interestingly, Debtor lists two properties from which she receives rental income: (1) 4448 Elm Street and (2) 5019 Morgan Street. Debtor's Schedule A/B lists the following properties: 4912 Dunn Road and 5019 Morgan Street. And so it seems that Debtor might own a third property: 4448 Elm Street. The court is not clear as to this property.

The court turns to Debtor's Schedule J. Debtor lists four dependents: three (3) daughters and one (1) son. Yet, line 9 lists an expense of $100.00 for clothing, laundry, and dry cleaning. Line 10 lists an expense $50.00 for personal care products and services. Line 13 lists $100.00 for entertainment and recreation costs. These amounts sound unrealistic for a family of five.

Without an accurate picture of Debtor's financial situation, income, and property, the court cannot convert to chapter 13. Debtor and Debtor's Counsel should go back to the drawing board and ensure that the petition and related documents are correctly completed.

~~Cause does/ not exist to convert this case pursuant to 11 U.S.C. § 1112(d). The Motion is xxxxxxxxxx.~~

~~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 the Chapter 11 case to one under Chapter 13 filed by Lorena Alvarado ("the Debtor") 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 Convert is xxxxxxxxxx.~~

10. 18-90847-E-7 IMELDA PADILLA
MF-5 Thomas Gillis

CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-17-19 [112]

Tentative Ruling: The Objection to Claim of Exemptions 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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, parties requesting special notice, and Office of the United States Trustee on October 17, 2019. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Certificate of Service states that the Objection and supporting pleadings were served on: (1) the Debtor, (2) U.S. Trustee, and (3) Synchrony Bank. Dckt. 114. It does not state that the Objection was served on counsel for the Debtor.

At the hearing, Counsel for the Trustee requested that the hearing be continued so that proper service can be document and this matter resolved by stipulation of the parties (part of a larger stipulation of issues in this case).

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is xxxxx.

The Chapter 7 Trustee, Michael D. McGranahan ("Trustee") objects to Imelda Padilla's ("Debtor") claimed exemptions under California law, Trustee asserts that the exemptions claimed exceed the lawful amount allowed under California law. Specifically, Debtor claimed an exemption of $26,800.00 exemption in the 3921 Pheasant Lane, Modesto, California property, citing Cal. C.C.P. § 703.140(b)(1). Debtor then claims another $16,921.00 exemption in the Pheasant Lane property pursuant to Cal. C.C.P. § 703.140(b)(5). Amended Schedule C, Dckt. 105 at 9.

Cal. C.C.P. § 703.140(b)(1) allows for a homestead exemption of $24,060. Cal. C.C.P. § 703.140(b)(5) provides for a "wild card" exemption of $1,425.00 that the debtor may use and combine within any unused amount of the § 703.140(b)(1) homestead exemption.

Thus, the total exemption that can be claimed for the Pheasant Lane property is $25,485.00.

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014).

In the Motion, Trustee states that an agreement has been reached the Trustee's demand for turnover of the Pheasant Lane property and the 2018 tax refund (which the court has previously ordered to be turned over). Further, that a settlement is to be documented and presented to the court.

At the hearing, xxxxxxxxxx

11. 12-92049-E-7 ROBERT/KATHERINE MATTEUCCI
12-9032
GRANT BISHOP MOTORS, INC. V. MATTEUCCI ET AL

MOTION FOR EXAMINATION OF ROBERT ANTHONY MATTEUCCI
12-30-19 [98]

Pursuant to the Order issued on January 6, 2020, Dckt. 106, the Motion for Examination of Robert Anthony Matteucci has been granted. **The matter is set for the examination to be conducted at 10:30 a.m. on February 27, 2020, at this court.**

12. 12-92049-E-7 ROBERT/KATHERINE MATTEUCCI
12-9032
GRANT BISHOP MOTORS, INC. V. MATTEUCCI ET AL

MOTION FOR EXAMINATION OF KATHERINE SHERICE MATTEUCCI
12-30-19 [99]

Pursuant to the Order issued on January 6, 2020, Dckt. 107, the Motion for Examination of Katherine Sherice Matteucci has been granted. **The matter is set for the examination to be conducted at 10:30 a.m. on February 27, 2020, at this court.**

13. 19-91053-E-7 BSH-2 | **ERNIE/PATRICIA VALDEZ** Brian Haddix | **MOTION TO AVOID LIEN OF COLLECTIBLES MANAGEMENT RESOURCES, GP** **12-28-19 [24]**

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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, and Creditor on December 28, 2019. By the court's calculation, 26 days' notice was provided. 14 days' notice is required.

However, the Certificate of Service has not been signed. Dckt. 28. ~~At the hearing, counsel reported that this had been addressed, reporting~~ ~~xxxxxxxxxxxxx~~

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Collectibles Management Resources, GP ("Creditor") against property of the debtor, Ernie Valdez and Patricia Valdez ("Debtors") commonly known as $523.57 in garnished funds held in custody by the Stanislaus County Sheriff.

A Wage Garnishment Order was entered against Debtor in favor of Creditor in the amount of $5,535.87 on February 6, 2019. Exhibit B. Dckt. 26.

Pursuant to Debtor's Amended Schedule A, the subject personal property has an approximate value of $532.57 as of the petition date. Dckt. 22. The unavoidable consensual liens that total $5,535.87 (plus any statutory post-judgment interest) as of the commencement of this case. Earnings Withholding

Order, Exhibit B, Dckt. 26. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $532.57 on Amended Schedule C. Dckt. 22.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the personal property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Ernie Valdez and Patricia Valdez ("Debtors") 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 judgment lien of Collectibles Management Resources, GP, California Superior Court for Stanislaus County Case No. CV-18001707, entered on February 6, 2019 against the personal property known as $523.57 in garnished funds held in custody by the Stanislaus County Sheriff is avoided in its entirety for the $532.57 in said monies in the Sheriff's custody pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

14. 19-91072-E-7 **DASHEIL SMITH**
Pro Se

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-6-20 [19]

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*), Creditor's, and Chapter 7 Trustee as stated on the Certificate of Service on January 8, 2020. The court computes that 15 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $31.00 due on December 23, 2019.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

15. 17-90577-E-7 17-9019

WILSON SARHAD

GARCIA V. SARHAD

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO (1) DETERMINE DISCHARGEABILITY OF PARTICULAR DEBT; AND (2) DETERMINE DISCHARGEABILITY OF ALL DEBTS 11-6-17 [1]

Plaintiff's Atty: Michael R. Dennis
Defendant's Atty: David C. Johnston

Adv. Filed: 11/6/17
Answer: 12/3/17
Nature of Action:
Dischargeability - willful and malicious injury
Objection/revocation of discharge

Notes:
Continued from 11/21/19 to be conducted in conjunction with the Motion to Dismiss the Second Cause of Action.

REVIEW OF ISSUES TO BE TRIED IN FEDERAL COURT

The Complaint seeks to have this court determine that a judgment and the obligations thereunder entered in the California Superior Court is nondischargeable. The grounds for determining nondichargeability are stated to be based on the findings and conclusions made by the jury, as the finder of fact, in the State Court Action.

In reviewing the pre-trial statements, the Plaintiff lists a long set of witnesses to be presented. The Defendant-Debtor lists two, indicating in the pre-trial statement that the findings and conclusions upon which this judgment is to be made in federal court shall be based upon the findings and conclusions made in the State Court Action.

The bankruptcy court may give preclusive effect to a state court judgment as the basis for excepting a debt from discharge. As stated by the Supreme Court in *Grogan v. Garner*, 498 U.S. 279, 285 (1991). In applying the principles of Collateral Estoppel, it is important to distinguish Collateral Estoppel issue preclusion, which prevents the re-determination of issues which were part of an earlier judgment, and *Res Judicata* action preclusion which prevents the subsequent filing of an action. Many of the cases in which the courts have held that *Res Judicata* does not apply to a state court judgment have been when the debtor attempts to assert that a creditor's judgment for breach of contract precludes the creditor from subsequently filing a nondischargeability action for fraud.

In *Cal-Micro, Inc. v. Cantrell,* 329 F.3d 1119 (9th Cir. 2003), the Ninth Circuit Court of Appeals restated the established rule of law that 28 U.S.C. §1738 [FN.1] requires the federal courts to give full faith and credit to a state's (California's) collateral estoppel principles, citing to the earlier Ninth Circuit decision, *Gayden v. Nourbakhsh*, 67 F.3d 798, 800 (9th Cir. 1995). *See also Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir. 2001). The court applies the forum state's law of issue preclusion. *Id.*

FN.1. 28 U.S.C. § 1738.

> § 1738. State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Commonly, when there has been a trial in the state court and the underlying issues of the defendant's conduct has been adjudicated, the application of Collateral Estoppel leads to the presentation of such findings and conclusions to the court via a summary judgment motion, as the federal court will not retry the factual determinations already made in state court.

At the Pre-Trial Conference, the parties addressed the proper application of the principles of Collateral Estoppel under the Doctrine of Res Judicata, xxxxxxxxxx

SUMMARY OF COMPLAINT

Leonani Garcia ("Plaintiff") filed a Complaint (Dckt. 1) to have Plaintiff's debt determined nondischargeable pursuant to 11 U.S.C. § 523(a)(6) and that Defendant-Debtor be denied a discharge pursuant to 11 U.S.C. § 727(a)(2) [property of the debtor]. Plaintiff alleges that she obtained a state court judgment for failure to pay wages, harassment, and punitive damages. Further, Plaintiff alleges that an abstract of judgment was recorded in Stanislaus County in May 14, 2014, and a Notice of Judgment Lien filed with the Secretary of State on July 9, 2014.

It is further alleged that W.S. Towing, Inc., one of the two judgment debtors, was converted by Defendant-Debtor to a partnership two months before the commencement of a prior Chapter 13 bankruptcy case in 2014. The Complaint alleges further conduct relating to contentions that assets of W.S. Towing, Inc., one of Plaintiff's two state court judgment debtors (for which the judgment lien had been filed with the Secretary of State) were transferred into Defendant-Debtor's partnership or Defendant-Debtor.

The allegations continue, asserting that Defendant-Debtor purports to no longer have these business assets, but purports to have transferred them to his non-debtor wife.

SUMMARY OF ANSWER

Wilson Sarhad ("Defendant-Debtor") has filed an Answer (Dckt. 8) that admits and denies specific allegations in the Complaint. Defendant-Debtor also asserts seven affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. § 1334 and 157(b)(2), and 11 U.S.C. § 523 and § 727 and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(l) [and J]. Complaint ¶ 1, Dckt. 1. In his Answer, Defendant-Debtor admits the allegations of jurisdiction and core proceedings, and consents to the bankruptcy judge issuing final orders and judgments. Answer ¶ 1, Dckt. 8. To the extent that any issues in the existing Complaint as of the Status Conference at which the PreTrial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.

B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2020**.

C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2020**.

D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before **----------, 2020**.

E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before **----------, 2020**.

F. The Trial shall be conducted at **----x.m. on ----------, 2020**.

The Parties in their respective Pretrial Conference Statements, Dckts. 44, 42, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff(s)	Defendant(s)
Jurisdiction and Venue: Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. § 1334 and 157(b)(2), and 11 U.S.C. § 523 and § 727 and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(l) [and J]. Complaint ¶ 1, Dckt. 1. In his Answer, Defendant-Debtor admits the allegations of jurisdiction and core proceedings, and consents to the	

bankruptcy judge issuing final orders and judgments. Answer ¶ 1, Dckt. 8. To the extent that any issues in the existing Complaint as of the Status Conference at which the PreTrial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.	
Undisputed Facts: 1. Plaintiff prosecuted a state court action against Defendant-Debtor and W.S. Towing, Inc., Stanislaus County Superior Court Case No. 679149 2. On May 6 ,2014 entered a judgment for Plaintiff and against Defendant-Debtor and W.S. Towing, Inc. 3. On May 14, 2014 Plaintiff recorded an abstract of judgment with the Stanislaus County Clerk. 4. On July 9, 2014, Plaintiff recorded a Notice of Judgment Lien with the California Secretary of State. 5. The State Court Judgment was entered in the amount of $234,985.48. 6. The findings of the jury in the state court action include that Plaintiff was: "[s]ubjected to unwanted harassing conduct by W.S. TOWING, INC., because of her sex ... The harassment was severe or pervasive ... A reasonable woman in [Plaintiff's] circumstances would have considered the work environment to be hostile or abusive ... [Plaintiff] considered the work environment to be hostile or abusive ... [Defendant-Debtor] participated in the harassing conduct.. .. The harassing conduct was a substantial factor in causing harm to [Plaintiff]. .. W.S. TOWING, INC., failed to take steps to prevent the harassment... [and] W.S. TOWING, INC.'s, failure to prevent the harassment was a	Undisputed Facts: 1. State Court Action was commenced by Plaintiff against Defendant-Debtor and W.S. Towing, Inc. 2. Judgment was entered for Plaintiff, with the total damages, including statutory attorneys' fees, in the judgment being $234,985. 3. Partial payments on the judgment (in an unknown amount) have been received by Plaintiff.

substantial factor in causing harm to [Plaintiff]." 7. In awarding punitive damages, the judge found that Defendant-Debtor "engaged in harassing conduct with malice, oppression, or fraud." 8. On June 17, 2014, Defendant-Debtor filed a Fictitious Business Name Statement with the Stanislaus County Recorder's Office, purporting to transform the corporation, W.S. Towing, Inc., into a partnership between Defendant-Debtor and his wife. 9. On August 24, 2014, Defendant-Debtor filed for Chapter 13 bankruptcy jointly with his wife, listing W.S. Towing as his "DBA". 10. Defendant's bankruptcy petition was subsequently dismissed for failure to have a plan confirmed. 11. Defendant-Debtor filed for Chapter 13 bankruptcy again on September 8, 2015. 12. On October 5, 2015, defendant filed with the California Secretary of State a Domestic Stock Corporation Certificate of Dissolution. According to Defendant-Debtor, the corporation W.S. Towing, Inc., had elected to dissolve and "[t]he corporation never incurred any known debts or liabilities." 13. Defendant's bankruptcy petition was subsequently dismissed for failure to have a plan approved. 14. On August 5, 2016, Defendant-Debtor filed Chapter 13 bankruptcy for the third time in three years. 15. Defendant-Debtor's bankruptcy petition was subsequently dismissed for failure to timely file all the required documents. 16. Defendant filed for Chapter 7 bankruptcy on July 14, 2017.	

17. Pursuant to defendant's current Chapter 7 bankruptcy petition, he stopped running his tow business, W.S. Towing, in "early 2017." 18. At the §341 meeting, defendant disclosed that he had transferred his two tow trucks to his wife. 19. Defendant entered into a settlement with the bankruptcy trustee, which the court has approved.	
Disputed Facts: 1. 2. 3.	Disputed Facts: 1. Plaintiff intends to dismiss the Second Cause of Action seeking the denial of Defendant-Debtor's discharge pursuant to 11 U.S.C. § 272(a)(2). 2. 3.
Disputed Evidentiary Issues: 1. None Anticipated	Disputed Evidentiary Issues: 1. None Anticipated
Relief Sought: 1. Judicial Determination that Defendant-Debtor's obligation to Plaintiff is nondischargeable. 2. Plaintiff seeks to abandon her second cause of action seeking to have Defendant-Debtor denied a discharge pursuant to 11 U.S.C. § 727(a).	Relief Sought: 1. The Complaint seeks denial of discharge for the entire State Court Judgment, not just that portion for the hostile work environment.
Points of Law: 1. 11 U.S.C. § 523(a)(6) 2. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62	Points of Law: 1. 11 U.S.C. § 523(a)(6) 2. Portions of the judgment are not based upon

(1998). 3. *In Re Gee*, 173 B.R. 189 (B.A.P. 9th Cir. 1994). 4. *In Re Littleton,* 942 F.3d 551, 555. 5. *In Re Britton*, 950 F.2d 602, 605 (9th Cir. 1991). 6. *In re Smith*, 270 B.R. 544, 550 (Bankr. D.Mass. 2001).	"willful and malicious injury by the debtor to another entity" 3. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998) 4. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702 (9th Cir. 2008) 5. *Peklar v Ikerd (In re Peklar)*, 260 F.3d 1035 (9th Cir. 2001) 6. *United States Credit Bureau, Inc., v. Digoras*, 169 Cal.App.2d 673, 337 P.2d 866 (1959) 7. *In re Niles*, 106 F.3d 1456 (9th Cir. 1997)
Abandoned Issues: 1. The Plaintiff seeks to abandon her second cause of action.	Abandoned Issues: 1. Plaintiff will seek to abandon the second cause of action.
Witnesses: 1. Leonani Garcia 2. Wilson Sarhad 3. Avelain Sarhad 4. Rochelle Barker 5. Melissa Hunter 6. Rafid Khoshaba 7. Melissa Etchinson	Witnesses: 1. Leonani Garcia. 2. Wilson Sarhad
Exhibits: 1. Court Reporter's Transcript from civil trial; 2. Clerk's Record from civil trial; Judgment on Verdict in Jury Trial entered by the Stanislaus	Exhibits: 1. The state court complaint. 2. The jury's verdicts.

County Superior Court on May 6, 2014. A Notice of Entry of Judgment was filed on May 9, 2014. The amount of the judgment is $234,985.48; debtor Wilson Sarhad and his business, W.S. Towing, Inc., were held jointly and severally liable to Plaintiff for the entire amount. The case was tried before a jury between January 14 and January 22, 2014; 3. Abstract of Judgment filed with the Stanislaus County Clerk and recorded on May 14, 2014. This Abstract of Judgment recorded the above Judgment entered against debtor Wilson Sarhad and his business, W.S. Towing, Inc., in favor of Plaintiff; 4. Notice of Judgment Lien, No. 14-7419688775, filed on July 9, 2014, with the California Secretary of State: The Notice of Judgment Lien was filed against debtor Wilson Sarhad's business, W.S. Towing, Inc.; 5. Financial records and disclosures filed by Wilson Sarhad in the underlying bankruptcy action; 6. Copies of Fictitious Business Name filings for W.S. Towing and Wilson Sarhad with the Stanislaus County Clerk, obtained online; 7. Copies of Corporate Status for W.S. Towing, Inc., obtained from the California Secretary of State's website.	3. The state court judgment
Discovery Documents: 1. Plaintiffs deposition was taken in the civil court action. Excerpts from her deposition transcript include the following: Page Lines 18 3-9 40 21-25 42 10-15 46 3-23 47 3-21 48 1-23	Discovery Documents: 1. None

49 1-23 51 9-13 58 4-21 60 1-23 67 3-17 74 19-22 76 5-7 77 2-4 84 1-23 99 18-24 100 1-23 101 15-25 103 1-23 106 5-9 107 1-23 114 3-21 117 10-22 120 1-23 122 1-11	
Further Discovery or Motions: 1. None Anticipated	Further Discovery or Motions: 1. None Anticipated
Stipulations: 1. None anticipated	Stipulations: 1. Possible
Amendments: 1. Plaintiff desires to dismiss second cause of action.	Amendments: 1. None anticipated
Dismissals: 1. Plaintiff desires to dismiss second cause of action.	Dismissals: 1. None, except anticipated that Plaintiff will seek to dismiss the second cause of action.
Agreed Statement of Facts: 1. Feasible	Agreed Statement of Facts: 1. Possible
Attorneys' Fees Basis:	Attorneys' Fees Basis:

1. Plaintiff was awarded her attorney's fees in the civil court action based upon the Fair Employment and Housing Act violations.	1. "Plaintiff did not seek attorney's fees in the adversary complaint. The claim is not a "consumer debt" so the Defendant is not entitled to attorney's fees under 11 U.S.C. § 523(d). "
Additional Items 1. Unknown	Additional Items 1. None
Trial Time Estimation: 1-2 Days	Trial Time Estimation: One-half day

16. 17-90577-E-7 WILSON SARHAD
17-9019 DCJ-3
GARCIA V. SARHAD

CONTINUED MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
11-7-19 [37]

No 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.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Plaintiff's Attorney, Defendant-Debtor, Defendant's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 7, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss Cause of Action was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. No opposition was stated at the hearing.

The Motion for Authorization For Plaintiff to Dismiss Second Claim for Relief in Adversary Complaint is xxxxx.

Continuance of Hearing

At the hearing, counsel for the Chapter 7 Trustee appeared and reported that the Trustee believes she has identified other assets of the Debtor that were not listed on the Schedules (which Debtor signed under penalty of perjury) or disclosed to the Trustee. These assets include interests in real estate and the right to payment which Debtor and his state court counsel were attempting to litigate in state court.

Counsel for Defendant-Debtor in this Adversary Proceeding and the Bankruptcy Case stated that he became aware of the asserted assets only when notified by counsel for the Trustee. He is attempting to communicate with the Debtor and Debtor' state court counsel, but to date that has not been productive. Bankruptcy counsel for Debtor indicated that it may be necessary for him to file a motion to withdraw as bankruptcy counsel for Debtor (including this Adversary Proceeding).

REVIEW OF MOTION

Wilson Sarhad ("Defendant-Debtor") moves for the court to issue an order authorizing dismissal of Plaintiff's second claim for relief in Leonani Garcia's ("Plaintiff") Complaint pursuant to Federal Rule Bankruptcy Procedure 7041. Plaintiff's second claim seeks a denial of the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2).

APPLICABLE LAW

Rule 41 of the Federal Rules of Civil Procedure applies in adversary proceedings, except that as a complaint objecting to the debtor's discharge shall not be dismissed art the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper. FED. R. BANKR. P. 7041.

DISCUSSION

Plaintiff and Debtor-Defendant have provided notice to all interested parties, including the Trustee and the United States Trustee according to the notice filed as part of this motion. Dckt. 38. Both Trustee and the U.S. Trustee were served on November 7, 2019. Dckt. 41.

Further, as part of the August 26, 2018 settlement agreement, the Trustee agreed to the following:

"7. Section 727. Provided the Debtor and Debtor's Wife make the settlement payment, the Trustee will not intervene in or pursue the adversary complaint filed by creditor Leonani Garcia which seeks both a determination of the dischargeability of a claim and the denial of the Debtor's discharge."

17. 19-90382-E-7 TRACY SMITH
19-9012 RLF-1
ALVAREZ V. SMITH ET AL

MOTION FOR ENTRY OF DEFAULT JUDGMENT
12-26-19 [22]

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-Debtor, Chapter 7 Trustee, and Office of the United States Trustee on December 26, 2019. By the court's calculation, 28 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 xxxxxxxxxx.

Tina Alvarez ("Plaintiff") filed the instant Motion for Default Judgment on December 26, 2019. Dckt. 22. Plaintiff seeks an entry of default judgment against Tracy Emery Smith and his wholly owned corporation, Sharp Investor Inc. ("Defendant-Debtor" or "Defendants") in the instant Adversary Proceeding No. 19-09012.

The instant Adversary Proceeding was commenced on July 26, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 26, 2019. Dckt. 3. The complaint and summons were properly served on Defendant-Debtor. Dckt. 6, 7.

Defendant-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on October 16, 2019. Dckt. 13, 15.

REVIEW OF COMPLAINT

Plaintiff filed a complaint for nondischargeability of debt and injunctive relief against Defendant-Debtor. The Complaint contains the following general allegations as summarized by the court:

A. On or about November 30, 2018, Defendant Tracy Emery Smith ("Defendant Smith"), on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 (the "Property") and located at 4837 Faith Home Rd, #58, Ceres, CA.

B. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor, Inc.

C. He also represented that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances.

D. Additionally, that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount of $40,000.

E. Defendant Smith further represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. Plaintiff agreed to buy the Property on those terms.

F. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract.

G. While Defendants did provide a bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property.

H. Plaintiff is now informed and believes that Defendants do not have title to the Property and that Plaintiff has not yet been approved as a resident of the mobile home park.

I. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants $40,000.00, the agreed upon purchase price for the Property.

J. Since February 2019, Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but have continuously refused to do so.

K. Plaintiff demands that Defendants honor the agreement and transfer clear and valid title to the Property, free off all liens and encumbrances, and pay

damages associated with the delay and other failures to meet their obligations, and that Defendants honor their promises as alleged above.

L. In the alternative, Plaintiff seeks damages according to proof against both Defendants in excess of $40,000.00. Plaintiff also seeks a determination that Defendant Tracy Emery Smith's obligations are nondischargeable in bankruptcy.

M. Plaintiff alleges that Defendants defrauded her out of $40,000.00, and caused additional damages according to proof at trial, plus interest according to proof at trial.

N. In addition, Plaintiff has been damaged in an amount according to proof for the lost use of the Property and for any excess value in the Property over the contract amount if the property cannot be conveyed.

O. Defendants' actions as specified herein were outrageous and despicable, malicious, fraudulent and oppressive, and Plaintiff is entitled to punitive damages in an amount to be determined by the court as a result.

First Claim for Relief—Obtaining Money By False Pretenses, False Representations And/Or Fraud - 11 U.S.C. §523(a)(2)

Plaintiff-Debtor alleges the following for the First Cause of Action:

A. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Property, and had no intention or the ability to transfer said title and possession of the Property upon payment of the agreed amount.

B. Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park.

C. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely of Defendants' misrepresentations, all to Plaintiff's damage as specified herein.

D. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations.

E. As a result, if clear title to the Property is not conveyed without encumbrances, Plaintiff has been damaged by at least $40,000.00 plus the lost use of the property and other damages including but not limited to damages for inconvenience according to proof.

F. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein.

G. Plaintiffs' claims against Defendants are for money and property obtained by false pretenses, based on one or more false representations and/or actual fraud, and, as a result, Defendants' obligations are nondischargeable in bankruptcy.

H. As such, Plaintiff is entitled to a determination that her claim for the transfer of the Property and damages are non-dischargeable under 11 U.S.C. §523(a)(2) and Plaintiff requests that the Court find that to be the case.

I. Plaintiff seeks the conveyance of the Property, without encumbrances and with good and clear title, plus damages according to proof in excess of $10,000 for the lost use of the property and the inconvenience associated therewith.

J. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of $40,000.00.

Second Claim for Relief—Intentional Injury Under 11 U.S.C. §523(a)(6)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

A. Defendants' actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff.

B. Plaintiff suffered damages of $40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions.

C. In light of the foregoing, Defendant Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6).

Third Claim for Relief—Larceny Under 11 U.S.C. §523(a)(4)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

A. Defendants wrongfully and with fraudulent intent converted money for their own use and totaling $40,000.00.

B. Defendants actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable.

Fourth Claim for Relief—For Conveyance of the Property and Damages Against Defendants

Plaintiff-Debtor alleges the following for the Second Cause of Action:

A. Defendants breached their contract with Plaintiff, and obtained money by false pretenses, false representations and/or fraud.

B. As a result of Defendants' actions, Plaintiff is entitled to the conveyance of the Property, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse claims, plus damages according to proof in excess of $10,000 for the lost use of the property and the inconvenience associated therewith.

C. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of $40,000.00.

Prayer

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

A. For a determination that the debts owed to Plaintiff and Plaintiff's claims against Defendant Smith are non-dischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);

B. For an order that Defendants Sharp Investor Inc. and Tracy Emery Smith convey the Property, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse claims, plus damages for the lost use of the property in an amount according to proof in excess of $10,000.00, or, in the alternative, that they pay damages in an amount according to proof totaling $40,000.00,or more, and other damages, in a sum according to proof in excess of $10,000.00, and said judgment be determined to be nondischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);

C. For interest on those damages, according to proof;

D. For punitive damages according to proof;

E. For costs of suit herein, including reasonable attorney's fees; and

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

RELIEF SOUGHT IN MOTION FOR ENTRY OF DEFAULT JUDGMENT

On December 26, 2019, Plaintiff filed the Motion for Entry of Default Judgment, accompanied by a Declaration and two (2) exhibits: Declaration of Tina Alvarez; Exhibit A to the Declaration– Original Written Agreement; and Exhibit B to the Declaration– Bill of Sale. Dckt. 24.

In the Motion, Plaintiff requests the following relief:

1. For a determination that the debts and obligations owed to Plaintiff and Plaintiff's claims against Defendant Smith are non-dischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6),

2. For an order that Defendants convey the Property, with clear and valid title, free off all liens and encumbrances, and pay damages associated with the delay and other failures to meet their obligations in an amount to be determined after final transfer of the Property, and that Defendants be ordered to pay the fair rental value of the property of 1,000.00 per month since the breach of contract (which will total $11,000.00 as of the hearing date). Further, if that cannot be finally accomplished, Plaintiff be granted nondischargeable damages either in the amount of the contract, $40,000.00, plus the fair rental value of the property of 1,000.00 per month, or, such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is 1,000.00 per month since February 21, 2019 (which will total 11,000.00 as of the hearing date),

3. For interest on those damages, at the legal rate,

4. For costs of suit herein, and

5. For such other and further relief as the court determines just and proper.

MOTION'S ARGUMENT

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

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

A. Smith previously provided a bill of sale to Plaintiff for the Property, after Plaintiff fully performed all of her obligations under the contract, but Defendants have failed and refused to deliver possession. Motion at 1.

B. Further, contrary to his repeated representations, neither Defendant Smith nor his co-defendant corporation held title clear title to the Property. *Id.* at 2.

C. In reliance on his representations to the contrary, Plaintiff gave him $40,000.00, which she would not have done had she known he did not have clear title and he did not intend to deliver title to her. *Id.*

D. Default was entered against Defendants on 10/16/2019 as neither defendant filed any responsive pleading. *Id.*

E. Defendants were validly served at their respective addresses as shown on the proof of service filed in this action and in the supplemental Declaration of Shane Reich regarding service. *Id.*

F. Plaintiff Tina Alvarez is an individual and creditor of Defendants. *Id.*

G. Defendant Smith is the sole owner of Sharp Investor Inc. which he claims has no assets. Defendant Sharp Investor Inc. is a corporation, wholly owned by Defendant Smith, that does business in Stanislaus County. Defendant Smith is an officer of Defendant Sharp Investor Inc. *Id.* at 2, 3.

H. Prior to the filing of the Chapter 7 petition that initiated the above-referenced bankruptcy case, on or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 (the "Property") and located at 4837 Faith Home Rd, #58, Ceres, CA. *Id.* at 3.

I. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor Inc., that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount, which was initially $43,000 but was later reduced by agreement between Plaintiff and Defendants to $40,000. *Id.*

J. Defendants further represented and agreed that Defendant Smith had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*

K. Plaintiff agreed to buy the Property on those terms. (Exhibit 1, Declaration of Plaintiff, ¶3 and Exhibit 2).

L. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract. While Defendants did provide a bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property. (Exhibit 1, Declaration of Plaintiff, ¶4, and Exhibit 3).

M. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants $40,000.00 which was the agreed upon purchase price for the Property. (Exhibit 1, Declaration of Plaintiff, ¶5).

O. Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. (Exhibit 1, Declaration of Plaintiff, ¶7).

P. After paying the full amount due under the contract, Plaintiff is now informed and believes that Defendants do not have clear and valid title to the Property. *Id.* at 4.

Q. Plaintiff, as the owner of the property, is entitled to testify about its rental value. Her declaration established that she has been damaged in an amount of 1000.00 per month for the lost use fo the property, which will total $11,000.00 as of the hearing date. *Id.*

R. Based on the foregoing, and based on Defendant's admissions due to his failure to answer the complaint, it has been established that Defendant Smith's obligations and debt to Plaintiff are nondischargeable due to his obtaining money by false pretenses, false representations and/or fraud - 11 U.S.C. §523(a)(2)). *Id.*

S. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Property, and Defendants did not intend or have the ability to transfer said title and possession of the Property upon payment of the agreed amount. Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*

T. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely of Defendants' misrepresentations, all to Plaintiff's damage as specified herein. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations. As a result, if clear title to the Property is not conveyed without encumbrances, Plaintiff has been damaged by at least $40,000.00 plus the lost use of the property and other damages including but not limited to damages for inconvenience according to proof. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein. *Id.* at 5.

U. The elements of deceit are (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in justifiable reliance on the representation, (5) to that person's damage. *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal. App. 3d 750, 765. Fraud may be proved by inference and circumstantial evidence because it is often impossible to prove directly. The circumstances surrounding the transaction and the relationship of the parties will often be facts from which fraud may be inferred. *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 192. *Id.*

V. Defendants 's actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff. Plaintiff suffered damages of $40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions. In light of the foregoing, Defendant Tracy Emery Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6). *Id.*

W. As it is clear from the foregoing that Defendants wrongfully and with fraudulent intent converted money for their own use and totaling $40,000.00. Defendants' actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable under that subsection as well. *Id.* at 6.

X. Finally, Defendants should convey the Property immediately as the contract was fully performed and a bill of sale delivered long before the bankruptcy was initiated. *Id.*

EVIDENCE IN SUPPORT OF THE MOTION

On December 26, 2019, Plaintiff filed three (3) exhibits. Dckt. 24. The properly authenticated exhibits filed in support of the Motion are:

A. Declaration of Plaintiff Tina Alvarez (which is not an "exhibit," but Plaintiff's testimony in support of this Motion, which must be filed as a separate document and not as an exhibit - See L.B.R. 9004-2(c) and 9014-1);

B. Exhibit A: Original Written Agreement; and

C. Exhibit B: Bill of Sale

The Declaration of Tina Alvarez provides testimony under penalty of perjury that:

A. Plaintiff relied on the following representations:

1. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented to me and agreed, both orally and in writing that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount, which was initially $43,000 but was later reduced by agreement between me and Defendants to $40,000. Mr. Smith agreed to reduce the amount because we prepaid an additional amount. (Exhibit A) Declaration at ¶3.

2. Mr. Smith further told me that was an officer of Defendant Sharp Investor Inc. and that he was the owner of that business. *Id.*

3. Defendant Smith, further represented and agreed that he had already arranged for me and my spouse to be approved as renters of the mobile home park. *Id.*

4. Mr. Smith further represented and agreed that the mobile home would be improved according to specifications we both agreed upon. *Id.*

5. I agreed to buy the Property on those terms. Pursuant to the agreement, Mr. Smith was to transfer the property on or before January 5th, 2019. *Id.*

6. I paid the agreed upon amounts. In reliance on Defendants' representations and agreements, I paid Mr. Smith $40,000.00 which was the agreed upon purchase price for the Property. While Defendants did provide a bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property. (Exhibit B) *Id.* at ¶¶ 4, 5.

7. When I made the last payment on the Property, Mr. Smith promised he would give the keys to the property. After that he made repeated and changing excuses as to why he could not give me the keys to the property. Thereafter, my husband and I both told Mr. Smith that we would take the property as is, but he still failed and refused to give possession of the property. *Id.* at ¶6.

8. Since February 2019, I have repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. *Id.* at ¶7.

9. I estimate that the fair rental value of the property was at least $1,000 per month since January 5, 2019. *Id.* at ¶8.

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-Debtor'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-Debtor 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 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

First Claim for Relief—Obtaining Money By False Pretenses, False Representations And/Or Fraud - 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 Smith made false representation about his representation that Defendant Sharp Investor, Inc. had clear and valid title to the Property, with no encumbrances, and that they would transfer said title and possession of the Property upon payments of the $40,000.00. Additionally, Defendant Smith represented that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. Plaintiff relied on Defendant's misrepresentation that after she made the last payment, he would give her keys to the Property. A misrepresentation because after repeated and

changing excuses as to why he could not give her the keys, he failed to give Plaintiff possession of the Property. Defendant Smith could not give what he did not have as it seems Defendants do not have title to the Property.

Defendant Smith 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 $40,000.00 as a proximate result of the misrepresentations made by Defendant.

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

Second Claim for Relief—Intentional Injury Under 11 U.S.C. §523(a)(6)

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

The evidence shows that Defendant Smith must have had a subjective motive to injure Plaintiff. Defendant Smith took Plaintiff's $40,000.00. This was not a mistake. When he was confronted by Plaintiff with a request to perform under the contract and give title to the Property, Defendants refused and continue to refuse to do so.

This was a malicious injury because conversion of Plaintiff's funds is a wrongful act. Defendant Smith was supposed to convey title to the Property to Plaintiff in exchange for the $40,000.00 Instead, Defendant Smith took the money and though giving a bill of sale, Defendant Smith did not convey title to Plaintiff nor give her the keys. He did it intentionally. It caused an injury because Plaintiff lost $40,000.00. Defendant Smith has no just cause for the fraud and conversion he committed.

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

Third Claim for Relief—Larceny Under 11 U.S.C. §523(a)(4)

Plaintiff has provided the court with evidence that there was a sale. The Bill of Sale, signed by Defendant Smith, certifies that there was a transaction for which Plaintiff paid $1,000.00 as consideration for sale of the Property. Through her declaration, Plaintiff testifies under penalty of perjury that she paid Defendant Smith $40,000.00. It is however unknown when exactly this last payment was made– either January 2019 or February 2019.

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

Fourth Claim for Relief—For Conveyance of the Property and Damages Against Defendants

In addition to the monetary award for the damages, the Motion states the following additional relief requested:

26. Finally, Defendants should convey the Property immediately as the contract was fully performed and a bill of sale delivered long before the bankruptcy was initiated.

Motion, ¶ 26; Dckt. 22.

This appears to be a request for specific performance or a mandatory injunction. No points and authorities is provided concerning such relief or how such relief is properly granted when the court is issuing a monetary judgment for the damages caused by the breach of the contract and fraud. Clearly, the Plaintiff cannot get the Property and also "pocket the cash" for the damages for not getting the Property.

At the hearing, counsel for Plaintiff addressed this additional requested relied, **xxxxxxxxxx**

Computation of Judgment Amount

Compensatory Damages

Plaintiff seeks an award of the compensatory damages either:

1. in the amount of $40,000.00, plus the fair rental value of the Property of $1,000.00 per month since the breach of contract, or,

2. such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is $1,000.00 per month since February 21, 2019 (which will total $11,000.00 as of the hearing date).

The amount of the Judgment begins with the $40,000.00 principal amount of the investment.

Interest

Plaintiff seeks an award of interest on the compensatory damages on the basis for lost use of the Property and the inconvenience associated therewith. However, Plaintiff fails to give a calculation for awarding such interest and does not identify the legal basis for such damages.

Attorney's Fees and Costs

Moving to costs, Plaintiff requests costs of suit herein. (Under Plaintiff's Complaint, the prayer for relief included reasonable attorney's fees as part of the costs.). However, no amounts or evidence of billing records in provided. 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. 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.

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

Monetary Amount of the Judgment
Compensatory Damages

The Plaintiff seeks damages first in the amount of $40,000.00, which is the purchase priced paid for the Property. Not having received the Property, Plaintiff asserts to recover the purchase price in lieu of having received the Property. This appears to be a simple request. Default judgment is granted for the $40,000.00 damages.

The Plaintiff then seeks further damages of $1,000.00 a month for the "rental value" of the Property with was not delivered. Thus, it appears that Plaintiff wants to not have paid for the Property, Defendant-Debtor having defrauded Plaintiff out of the $40,000.00, and recover the $40,000.00, but then desires to recover rental value for the Property that was not purchased.

No legal authority is provided for the court granting a $40,000.00 judgment for breach of the contract and fraud in purporting to sell Property that Defendant-Debtor could not sell, and then giving Plaintiff $1,000.00 a month rental value for the Property which Plaintiff did not purchase. Entry of Default Judgment is denied for the additional "rental value" damages.

Monetary Amount of Judgment
Punitive Damages

The prayer in Plaintiff's Complaint requests that "punitive damages according to proof." Complaint, p. 6:28; Dckt. 1. In the Motion for Entry of Default Judgment, no mention is made with respect to punitive damages.

It is unclear whether Plaintiff is waiving and dismiss any request for punitive damages, or whether Plaintiff believes that such relief cannot be awarded pursuant to the Complaint as drafted.

There being no request for punitive damages, such relief cannot be granted pursuant to this Motion.

At the hearing, counsel for Plaintiff addressed this issue, stating **xxxxxxxxxx**

Request for Specific Performance or
Mandatory Injunction

After stating the grounds for a monetary judgment and that said monetary judgment, the Motion the perfunctory request that the Property should be turned over. The prayer in the Motion inverts the requested relief, appearing to ask for an "order" for the Property to be turned over and a nondischargeable monetary judgment for loss of use, and then if the Property is not turned over, a monetary judgment for the fraud and breach of contract. Paragraph 2 of the prayer states this requested relief (emphasis added):

> 2. For **an order** that Defendants Sharp Investor Inc. and Tracy Emery Smith **convey the Property**, **with clear and valid title**, free off all liens and encumbrances, **and pay damages associated with the delay** and other failures to meet their obligations in an amount **to be determined after final transfer of the Property**, and

> that Defendants be ordered to **pay the fair rental value of the property of 1,000.00 per month since the breach of contract** (which will total $11,000.00 as of the hearing date). Further, **if that cannot be finally accomplished, Plaintiff be granted nondischargeable damages either in the amount of the contract, $40,000.00**, plus the fair rental value of the property of 1,000.00 per month, or, such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is 1,000.00 per month since February 21, 2019 (which will total 11,000.00 as of the hearing date),

Motion, p. 6:12-21; Dckt. 22.

It appears that Plaintiff is requesting a judgment for specific performance and a mandatory injunction for deliver of the Property, plus some loss of use damages. No points and authorities are provided as to whether such relief is proper and how the court should properly construct such relief in a judgment.

Further, while demanding $1,000.00 a month in rental value damages, the court has little evidence of what that entails, other than Plaintiff testifying "I estimate that the fair rental value of the property was at least $1,000 a month since January 5, 2019." Declaration, Dckt. 24. It is not clear if this represents a gross rental value, net rental monthly profit, or Plaintiff's rental damages by being deprived the use of the Property for which she paid $40,000.00.

The Plaintiff has not given the court a basis for awarding the $1,000.00 a month additional damages.

With respect to the request for possession, the requested relief appears similar when a trustee or debtor in possession requests the turnover of a fraudulent conveyance and then a monetary judgment if not turned over within the reasonable time specified in the judgment. 11 U.S.C. § 550. The court is uncertain if that is the relief being requested.

At the hearing, counsel for Plaintiff addressed this requested relief, **xxxxxxxxxx**

Interest

While requesting interest at the "legal rate," the Motion does not provide the court with a computational analysis of what that would be.

Nondischargeability of Monetary Judgment

As discussed above, Plaintiff has stated grounds for which the monetary obligation for the $40,000.00 paid is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), § 523(a)(4) [larceny], and § 523(a)(6). While citing those Code sections, Plaintiff provided the court with no legal authorities or analysis why such $40,000.00 amount would be nondischargeable, relying upon the graciousness of the court's law clerk to provide such analysis.

Plaintiff provides the court with no legal authorities or analysis of why any additional amounts beyond the $40,000.00 of which she was defrauded/taken by larceny/willfully and maliciously injured would

be nondischargeable. While such may be possible, the court's law clerk did not provide such additional service. [FN. 2]

FN. 2. Interestingly, Plaintiff did cite to two cases in support of its Motion for Entry of Default Judgment in this Federal Court based on Federal law arising under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). These are two California District Court of Appeal decisions relating to fraud and deceit - under state law. No analysis of applicable federal law is provided.

The Motion for Entry of Default Judgment is **xxxxxxxxxx**

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 Tina Alvarez ("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 **xxxxxxxxxx**

18. **19-90382-E-7** **TRACY SMITH** **CONTINUED STATUS CONFERENCE**
19-9012 **RE: COMPLAINT**
ALVAREZ V. SMITH ET AL **7-26-19 [1]**

Plaintiff's Atty: Shane Reich
Defendant's Atty: unknown

Adv. Filed: 7/26/19
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury
Dischargeability - fraud as fiduciary, embezzlement, larceny
Recovery of money/property - other

Notes:
Continued from 12/19/19

The Status Conference is xxxxxxxxxx

FINAL RULINGS

19.	**18-90600-E-7 BSH-3**	**CORAZON HERNANDEZ Brian Haddix**	**MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13 1-2-20 [80]**

Final Ruling: No appearance at the January 23, 2020 hearing is required.

The Motion to Convert Case from Chapter 7 to Chapter 13 is dismissed without prejudice, and the matter is removed from the calendar.

This appears to be a duplicate filing of the Motion filed as Docket No. 76 and using the same Docket Control Number, BSH-3. Both were filed on January 2, 2020. The Debtor has filed a notice of dismissal for the Motion with Docket Control Number BSH-3. Dckt. 87.

The Dismissal states that it is dismissing the motion (identified as document 81) and all related pleadings. Docket entry 81 is the notice of hearing on the motion which is filed as Docket entry 80. The Motion filed as Docket entry 80 and its related pleadings are the same as the Motion filed as Docket Entry 76 and its supporting pleadings.

Counsel for the Movant Debtor confirmed with the Clerk's Office that there was an error that resulted in the duplicate filing, and there was only one motion to convert being prosecuted by Debtor. Further, that the Dismissal Without Prejudice of the Motion to Convert is to dismiss that matter completed at this time. This is consistent with the Debtor's and counsel's discussion at the January 9, 2020 hearings on related matters and that Debtor and counsel would be moving forward with a new motion to convert that included the what will be the proposed plan.

To ensure that the court's file is clear that both the Motion BSH-3 filed as Docket No. 76 and the Motion BSH-3 filed as Docket 80 have been dismissed, the court expressly determines that the Debtor's dismissal (Dckt. 87) applies to both.

Corazon Maria Hernandez ("Debtor") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Convert Case from Chapter 7 to Chapter 13(Dckt. 80) was dismissed without prejudice, and the matter is removed from the calendar.**

20. 18-90600-E-7 BSH-3 — CORAZON HERNANDEZ — Brian Haddix — MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13 — 1-2-20 [76]

Final Ruling: No appearance at the January 23, 2020 hearing is required.

The Motion to Convert Case from Chapter 7 to Chapter 13 (Dckt. 76) is dismissed without prejudice, and the matter is removed from the calendar.

This appears to be a duplicate filing of the Motion filed as Docket No. 80 and using the same Docket Control Number, BSH-3. Both were filed on January 2, 2020. The Debtor has filed a notice of dismissal for the Motion with Docket Control Number BSH-3. Dckt. 87.

The Dismissal states that it is dismissing the motion (identified as document 81) and all related pleadings. Docket entry 81 is the notice of hearing on the motion which is filed as Docket entry 80. The Motion filed as Docket entry 80 and its related pleadings are the same as the Motion filed as Docket Entry 76 and its supporting pleadings.

Counsel for the Movant Debtor confirmed with the Clerk's Office that there was an error that resulted in the duplicate filing, and there was only one motion to convert being prosecuted by Debtor. Further, that the Dismissal Without Prejudice of the Motion to Convert is to dismiss that matter completed at this time. This is consistent with the Debtor's and counsel's discussion at the January 9, 2020 hearings on related matters and that Debtor and counsel would be moving forward with a new motion to convert that included the what will be the proposed plan.

To ensure that the court's file is clear that both the Motion BSH-3 filed as Docket No. 76 and the Motion BSH-3 filed as Docket 80 have been dismissed, the court expressly determines that the Debtor's dismissal (Dckt. 87) applies to both.

Corazon Maria Hernandez ("Debtor") having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Convert Case from Chapter 7 to Chapter 13 (Dckt. 76) was dismissed without prejudice, and the matter is removed from the calendar.**

21. 19-91052-E-7 BSH-1 | **BURT VANDYKE** **Brian Haddix** | **MOTION TO DISMISS DUPLICATE CASE** **12-16-19 [12]**

Final Ruling: No appearance at the January 23, 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 Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 16, 2019. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Duplicate Case 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 to Dismiss Duplicate Case is granted.

On November 29, Debtor filed a voluntary Chapter 7 petition, case number 19-91050. On November 30, 2019, Debtor's counsel inadvertently filed a duplicate case, case number 19-91052.

A look at the petition and other documents filed on both cases reflect that they are in fact identical cases.

Thus, the motion is granted and case number 19-91052 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 Duplicate Case filed by Santander Consumer USA Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the Motion to Dismiss Duplicate Case is granted.

IT IS FURTHER ORDERED that bankruptcy case number 19-91052 is dismissed.

22. 19-90382-E-7 TRACY SMITH
19-9013 MWH-3
KALRA V. SMITH

CONTINUED MOTION FOR ENTRY OF DEFAULT JUDGMENT
11-29-19 [22]

Final Ruling: No appearance at the January 23, 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 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.

Paul 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.

JANUARY 13, 2020
SUPPLEMENTAL POINTS AND AUTHORITIES ON PUNITIVE DAMAGES

In the Motion for Entry of Default Judgment, Dckt. 22, Plaintiff sought an additional award of $50,000.00 in punitive damages due to the Defendant-Debtor's conduct. While asking for such damages, Plaintiff did not identify the legal basis for such damages.

At the hearing on January 9, 2020, Movant's counsel reported that a clerical error had occurred and the punitive damages materials were inadvertently not included. They had been included in the prior motion.

The court continued the hearing to allow for the filing of the supplemental materials.

On January 13, 2020, Plaintiff filed a Supplemental Points and Authorities on the legal basis for punitive damages sought by Plaintiff. Dckt. 32. Plaintiff argues that he should be awarded punitive damages in the amount of $50,000.00 under California Civil Code section 3294 which provides that:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
> . . .
> (c) As used in this section, the following definitions shall apply:
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Cal. Civ. Code § 3294.

Plaintiff contends that Defendant's fraudulent and malicious actions satisfy the fraud and malice stands under C.C.C. § 3294. Plaintiff alleges the following:

A. Defendant committed fraud;

B. Defendant knowingly misrepresented his net worth;

C. Defendant showed Plaintiff a false loan application;

D. Defendant concealed his federal tax lien for $157,962.97 from 2016, a civil judgment for $42,091.35, as well as his $475,000 debt to William Cristal from 2014.

E. Defendant made specific misrepresentations on his website;

F. Defendant signed and delivered to Plaintiff a Note misrepresenting that the proceeds would be "kept in a separate operating account for thee benefit of funding real estate projects directly to escrow."

G. Defendant concealed his felony conviction for arson to defraud insurance;

H. Within one week of taking Plaintiff's $150,000.00 investment funds, Defendant purchased four properties outside of escrow through Defendant's four companies: 807 Barr LLC, 2173 El Norte Project LLC, 2006 Catalina LLC, and 574 Mariscal LLC.

I. Within one week after Defendant was served with Plaintiff's state court lawsuit (Exhibit K), 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.)

J. Defendant failed to renovate the properties and defaulted on the loans, never re-paying Plaintiff.

K. Plaintiff's loss of the $150,000 investment was a proximate result of Defendant's misrepresentations, concealments and fraudulent transfers.

L. In addition to his felony conviction and several bankruptcies and adversarial proceedings in this Court, Defendant's schemes have also made him the defendant in Stanislaus County case numbers 1971204, 1808496, 1440440, 1745756, 1646787, 1411136, 1405597, 1405123, 1283945, 394809, 798217 and 933455.

Thus, for all the reasons stated above Plaintiff contends that Defendant's pattern of unlawful behavior warrants a modest award of $50,000.00 in punitive damages.

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

Investment Damages

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. Plaintiff has provided the court with the applicable California law and evidence to support the awarding of $50,000.00 in punitive damages.

The court considers the proportionality of the punitive damages to the compensatory damages awarded to the Plaintiff-Debtors. The rule in both the Ninth Circuit and in California is that punitive damages must be proportional and be reasonably related to compensatory damages. [FN.1.] However, there is no fixed ratio or formula for determining the proper proportion between the two. [FN.2] In a 2004 decision, *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408 (2004), the Supreme Court discussed the Constitutional reasonableness requirement in determining the amount of punitive damages. While not setting a maximum ratio between punitive damages and compensatory damages, the Supreme Court stated that punitive damage awards that are a single digit multiple of the compensatory damages are more likely to withstand constitutional scrutiny. [FN.3]

The Court in *State Farm* cited to its earlier holding in *BMW of North America v. Gore* [FN.4] that a punitive damage award (that in *Gore* was 500 times the compensatory damages) in excess of four times the compensatory damages might be close to the line of constitutional impropriety.

FN. 1. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1162-63 (9th Cir. 1987).

FN. 2. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir. 1985).

FN. 3. *Cooper Industries v. Leatherman Tool Group*, 532 U.S. at 425.

FN. 4. 517 U.S. at 582.

With respect to this Defendant-Debtor, Plaintiff points to the evidence of his using various entities to purchase multiple properties, obtaining seven figure loans, and operating in a rarified economic environment. In reviewing Defendant-Debtor's Schedule I (19-90382; Dckt. 17 at 23-24), Debtor is continuing in the operation of his business (no attachment to Schedule I identifying the business or providing a profit and loss statement) which generates $4,510.78 a month in profit. His spouse also has monthly income as a teacher's aide.

On the Statement of Financial Affairs Defendant-Debtor states that he is an officer, director, or managing executive of a corporation, but fails to identify the entity and the period he has been or had served as such. *Id.*; p. 38.

The purpose of a punitive damage award the court considers the reprehensibility of the defendant's conduct and the amount of damages that would have a future deterrent effect. *Century Surety Co. v. Polisso*, 129 Cal.App. 4th 922, 947 (2006). An award of punitive damages is not merely a personal issue for the plaintiff, but:

> A creature of statute (Civ. Code, § 3294), the purpose of punitive damages "is a purely public one. The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110, 284 Cal.Rptr. 318, 813 P.2d 1348.)

Power Standards Lab, Inc. V. Federal Express Corp., 127 Cal.App 4th 1029, 1046-1047 (2005).

Here, the actual damages are $178,208 (just principal and prejudgment interest, and not including the costs and attorneys' fees sought). This $50,000.00 request is less than 1/3 of the actual damages, which is under the reasonable amount limits enunciated by the U.S. Supreme Court. For the size of the transaction involved and the "gain" to have been made by the fraud, the court determines that $50,000.00 of punitive damages is a reasonable and necessary amount to have a deterrent effect for not only the Defendant-Debtor, but other potential wrong-doers.

As to this Defendant-Debtor and his ongoing financial position, $50,000.00 is not unreasonable. He has engaged in a big dollar scheme. He continues to operate some business generating significant monies. His efforts have given him a financial setback do not give Defendant-Debtor an exemption from punitive damages.

The court awards Plaintiff $50,000.00 in punitive damages, which damages are nondischargeable arising from the underlying nondischargeable debt. *Cohen v. De La Cruz*, 523 US 213, 221 (1998).

Amount of the Judgment

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

Actual Damages.....$150,000.00
Pre-Judgment Interest.....$ 28,208.00
Cost Damages.....$ 708.00
Punitive Damages.....$ 50,000.00

Total Judgment.....$228,916.00

Plaintiff shall request attorneys' fees and the additional costs, if any, 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 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 Paul Karla 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 granted for Plaintiff Paul Karla and against Defendant-Debtor Tracy Emery Smith for:
>
> (1) A monetary judgment in the amount of $228,916.00, which is comprised of the following:
>
> Actual Damages.....$150,000.00
> Pre-Judgment Interest.....$ 28,208.00
> Cost Damages.....$ 708.00
> Punitive Damages.....$ 50,000.00; and
>
> (2) Determining that the $228,016.00 above judgment, plus attorneys' fees, costs, and expenses allowed and post-judgment interest, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), § 523(a)(4), and

§ 523(a)(6), and each of them, as separate and independent grounds for determining the judgment nondischargeable.

Counsel for Plaintiff shall lodge with the court a proposed judgment consistent with this Order and the Ruling on the Motion for Entry of Default Judgment on or before February 14, 2020.