UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

January 29, 2015 at 10:30 a.m.

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1. 14-91327-E-7 JITENDRA DUTT — MOTION TO COMPEL ABANDONMENT
JAD-1 Jessica A. Dorn — 12-9-14 [14]

Final Ruling: No appearance at the January 29, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 9, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property 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). 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 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 Motion to Abandon Property is granted.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or 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 Jitendra Dutt ("Debtor") requests the court to order the Trustee to abandon property commonly known as 2000 Ginnywood Way, Modesto, California (the "Property"). This Property is encumbered by the lien of Citimortgage, Inc., securing claim of $139,692.00. The Debtor has claimed an exemption in the Property in the amount of $38,308.00 pursuant to C.C.P.

§ 704.730. The Declaration of Mark C. Verschelden, a Certified Real Estate Appraiser, has been filed in support of the motion and values the Property to be $178,000.00. Dckt. 17 and 18, Exhibit A.

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 retaining the Property. The court determines that the Property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

CHAMBERS PREPARED ORDER

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 Abandon Property filed by Jitendra Dutt ("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 Compel Abandonment is granted and that the Property identified as:
>
> 1. 2000 Ginnywood Way, Modesto, California
>
> and listed on Schedule A by Debtor is abandoned to Jitendra Dutt by this order, with no further act of the Trustee required.

2. 14-91231-E-7 MALUK/RANJIT DHAMI
HSM-3 Nelson F. Gomez

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
12-23-14 [52]

Final Ruling: No appearance at the January 29, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 23, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor 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). 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 Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is granted.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion to Extend Time to File Objection to Discharge on December 23, 2014. Dckt. 52.

The Trustee states that the discharge of the Debtors should not be entered as the Debtors scheduled an interest in real property located at 1986 Bridget Marie Drive, Modesto, California (the "Property") on their Schedule A. Based on a Property profile and copy of a recorded deed of trust viewed by the Trustee, and the Debtors' statements at the First Meeting of Creditors, the Property appears to be encumbered by a $600,000.00 deed of trust, recorded on January 3, 2014 and disclosed on Schedule D. Based on the Debtors' Schedule D, the beneficiary of the deed of trust is Hardev Singh Dhami, who the Trustee is informed by the Debtors is an insider of the Debtors. The Trustee has concluded, based upon his investigation, that the recording of the deed of trust clearly constitutes an avoidable transfer. The Trustee and the Debtors are engaged in negotiations to resolve certain disputes concerning the deed of trust. The Debtors' cooperation in unwinding the transaction pursuant to which the deed of trust was recorded, or otherwise recovering the value of the estate's equity in the Property, is critical to the Trustee's administration

of the estate, and is one factor in the Trustee's evaluation of the Debtors' conduct, and any possible objection to discharge.

The bar date for objecting to discharge is currently set for December 29, 2014. The Trustee requests that the deadline is extended to and through February 27, 2015, to allow the Trustee time to investigate Debtors' financial affairs, to consult with counsel, and to determine if a complaint objecting to the discharge is warranted.

Federal Rule of Bankruptcy Procedure 1017(e)(1) provides that the court may extend for cause the time for filing a motion pursuant to 11 U.S.C. § 707(b). The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 9006(b)(1).

Seeing as no objections and for cause, the court grants the Motion and extends the deadline to file a complaint objecting to discharge of the Debtors to March 23, 2015.

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 to extend the Deadline to File a Complaint Objecting to the Discharge of the Debtors filed by the Trustee having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and the deadline to file a complain objecting to discharge of the Debtors is set for February 27, 2015.

3. 14-90252-E-7 RITA CASTRO **MOTION TO REOPEN CHAPTER 7**
Pro Se **BANKRUPTCY CASE**
1-6-15 [19]

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

The Order to Set Hearing on the Motion to Reopen this Bankruptcy Case was served by the Clerk of the Court on Rita Castro, Pro Se, ("Debtor"), Trustee, and other parties in interest on January 12, 2015. The court computes that 17 days' notice has been provided.

The Order to Set Hearing on the Motion to Reopen this Bankruptcy Case was issued due to the Motion of the Debtor.

The Motion to Reopen this Bankruptcy Case is xxxxxxx.

Rita Castro, the Debtor ("Movant") filed this petition for relief on February 25, 2014. The case was dismissed and closed by the court on June 11, 2014 for failure to appear at Meeting of Creditors. Dckt. 15. Movant asserts the following grounds as the basis for reopening this bankruptcy case:

> I am asking that my case be reopened due to the reason that in the process fo the filing of my paperwork, my preparer Jean Turner passed away. Before her passing, it was brought to my attention that she transposed my address and she was trying to correct it with the courts when she passed. I never received anything because she was never able to fix my correct address.

Dckt. 19.

ORDER SETTING HEARING

The court issued an Order to Set Hearing on the Motion to Reopen this Bankruptcy Case on January 12, 2015. Dckt. 21. In the Order, the court noted some concerns the court has concerning the reopening of the case. The Order specifically stated the following:

> "Rita Castro, the Chapter 7 Debtor ("Debtor") filed a 'Motion to Reopen' her dismissed bankruptcy case. Motion, Dckt. 19. Debtor has paid the $260.00 filing fee for the Motion to Reopen. Debtor is representing herself in pro se in this case. Because of the facts and circumstances of this case, the court has ordered a hearing on the Motion to Reopen to address these proceedings with the Debtor.
>
> This bankruptcy case was filed on February 25, 2014. On

April 21, 2014, the Chapter 7 Trustee filed a Motion to Dismiss the Chapter 7 case. Dckt. 10. The Motion was filed based on the Debtor failing to attend the First Meeting of Creditors. On May 24, 2014, the court filed an order dismissing this Chapter 7 case based on Debtor's failure to appear at the First Meeting of Creditors. Order, Dckt. 15; Trustee's Report of Debtor's Non-Appearance, May 15, 2014 Docket Entry.

Debtor's Motion to Reopen states that the Bankruptcy Petition Preparer assisting her passed away while Debtor was in the process of filing the Petition, Schedules, and Statement of Financial Affairs. Debtor states that an error was made in her address on the pleadings by the Petition Preparer, which error was not noticed by the Debtor when the documents were filed.

Debtor provides an explanation is one which can befall anyone accessing the courts and availing themselves of the benefits under the Bankruptcy Code. Unfortunately, in the eight months which have passed since the case was dismissed, various deadlines for parties in interest to file pleadings or take action to protect their rights (such as filing objections to exemptions, objections to discharge, or for determination of nondischargeability of debts).

On Schedule A the Debtor does not list any real property, but states, '***Property real description RMC***.' Dckt. 1 at 9. The court does not understand this description of real property.

On Schedule B Debtor lists a modest number of assets of the type that one would expect for a consumer debtor. Dckt. 1 at 10-12.

No secured claims are listed on Schedule D and no priority unsecured claims are listed on Schedule E. Dckt. 1 at 14-17. On Schedule F Debtor lists general unsecured claims totaling $63,457.00. Dckt. 1 at 18-21. Debtor lists income of $515.00 a month in family support and three minor dependants on Schedules I and J. Dckt. 1 at 24-28. For the Statement of Financial Affairs, all questions are answered 'None,' including Questions 1 and 2 requiring Debtor to disclose gross income in the current year, from whatever source. Dckt. 1 at 32-42.

Even if the court construes the Motion to Reopen as also a Motion to Vacate the order dismissing the bankruptcy case, the court must reset significant dates in the case for creditors. It may be that the Chapter 7 Trustee finds the Schedules and Statement of Financial Affairs problematic, leaving the Debtor in the situation of having to amend those documents.

It may well be in the Debtor's best interests not to

reopen this case and vacate the dismissal. The Debtor filing a new bankruptcy would afford her the opportunity to obtain relief under the Bankruptcy Code and not create the confusion of retroactively resurrecting this case. If the court determines that the order dismissing the case should not be vacated, the court will order the Clerk of the Court to refund the $260.00 filing fee for the Motion to Reopen (which will be denied) and the Debtor can use the monies to prosecute the new case."

DISCUSSION

A review of the Debtor's Motion and in consideration of the concerns the court pointed out in the Order setting the hearing, the court believes that it is in the best interest of not only the Debtor but also the creditors that the Motion is denied without prejudice and the Debtor refile a new case.

The Schedules as currently filed contain ambiguities that the court cannot discern and, as the Debtor admits, there may be errors in the information provided in the petition and schedules that the Debtor's petition preparer was not able to correct before her passing. The uncertainty of the accuracy of the currently filed petition and schedules lends the court to believe that denying the instant Motion and having the Debtor file a new case is in the best interest of all parties.

As the court noted in the Order, merely reopening the case does not "resurrect" the case. There are substantial administrative tasks, such as resetting dates for creditors, editing and amending schedules, providing notice to all parties, etc. At this point, it appears that reopening the case will lead to more complications rather than the Debtor taking a clean state and refiling a new case.

While the court is sympathetic to the circumstances, as they could have happened to anyone, the court finds that it is in the best interest of the Debtor and the Creditors to start fresh rather than attempting to raise a closed case from the bankruptcy ether. The motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Reopen the Bankruptcy Case filed by Rita Castro, the Debtor ("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 the Motion is xxxxxxxxxx.
>
> **[IT IS FURTHER ORDERED** that the Clerk of the Court shall/shall not refund the Debtor the $260.00 filing fee for the Motion to Reopen.]

4. 14-91359-E-7 UST-2 — CHRISTOPHER/MICHELLE WILKENS, Pro Se — MOTION TO DISMISS CASE PURSUANT TO 11 U.S.C. SECTION 707(B) AND/OR MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13, 12-23-14 [19]

Final Ruling: No appearance at the January 29, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion of Dismiss 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). 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 the Chapter 7 Bankruptcy Case is granted and the case is dismissed.

This Motion to Dismiss the Chapter 7 bankruptcy case of Christopher Wilkens and Michelle Wilkens ("Debtor") has been filed by United States Trustee Tracy Hope Davis, "Movant," the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds:

A. The case be dismissed as presumptively abusive under 11 U.S.C. § 707(b)(2) because Debtors, with annualized current monthly income of $169,284.00 appear to have monthly disposable income of $7,142, exceeding the statutory threshold of $207.92 that triggers the presumption of abuse.

B. The case should be dismissed as an abuse under 11 U.S.C. § 707(b)(3) because Debtors appear able to repay their unsecured debts.

The Trustee states that according to the petition, Debtors' debts are primarily consumer debts, which is supported by their liability schedules that show debt of $234,995 on their Primary Residence, $28,888.00 on their 2014 Toyota Camry LE, $26,612.00 on their 2005 Chevy Silverado, $15,872.00 on student loans, $53,194.00 on federal and state income taxes, and $46,795.00 on "credit account[s]" and "credit card account[s]," $25,365.00 on an "unsecured loan," $1,907.00 on an "installment account," and $1,664.00 on a "[c]ollection." Dckt. 1, Schedules D, E, and F.

Debtors' Form 22A, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, asserts that (amounts are rounded to the nearest dollar):

1. Debtors' household size is 6 (line 14b);

2. Debtors' Total Current Monthly Income ("CMT") is $9,492.00 and Annualized Current Monthly Income is $113,906.00 (lines 12 and 13)

3. Debtors' total of all deductions allowed under § 707(b)(2) is $4,934.00 (lines 47 and 49);

4. Debtors' monthly disposable income is $0.00 and sixty-month disposable income is $4,558 (lines 50 and 51); and

5. The presumption does not arise because Debtors' 60-month disposable income is less than $7,475.00 (line 52).

The Trustee alleges that the Debtors have made a number of errors on their Form 22A. The most significant is the very large under reporting of Debtor Christopher Wilkens' gross wages. Debtor Christopher Wilkens' pay stubs show his reported gross wages of $9,132.00 should have been $13,747.00:

Pay Date	YTD Gross Wages	YTD Taxes
09/26/2014	$122,126.00	$10,766.00
03/28/2014	$39,647	$7,421.00
6 months totals (April-September)	$82,479.00	$7,421.00
1 month averages	$13,747.00	$1,237

Dckt. 23.

Trustee asserts that the Debtors should have reported Total CMI as $14,107.00 (Debtor Christopher Wilkens at $13,747.00 and Debtor Michelle Wilkens at $360.00), not as $9,492. The net result is an under reporting of $4,615.00 ($14,107.00 - $9,492.00).

Based on these calculations, the Trustee argues that the Debtors should have a reported $1,237.00 for monthly taxes at line 25, not $0.00.

The Trustee then asserts that, after adjusting for under reported CMI and

taxes, Debtors' monthly disposable income is not $0.00, but $7,142 as follows:

Current Monthly Income, as filed		$9,492.00
Add: under reported wages		$4,615.00
Revised CMI		$14,107.00
§ 707(b)(2) deductions, as filed	$4,934.00	
Add: under reported taxes	$1,237.00	
Add: chapter 13 expenses [10% or (revised CMI of $14,107.00 minus revised § 707(b)(2) deductions of $6,171.00)]	$794.00	
Revised Line 49, allowed § 707(b)(2) deductions		$6,965.00
Revised Line 50, monthly disposable income		$7,142.00

RULING

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 court may dismiss or, with the debtor's consent, convert an individual debtor's case for abuse under § 707(b) only on motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entity as the court directs. Fed. R. Bankr. P. 1017.

Cause exists to dismiss this case pursuant to 11 U.S.C. § 707(b). As the Trustee outlines, the presumption of abuse exists under 11 U.S.C. § 707(b)(2) as evidenced by the calculation of currently monthly income. The Debtors appear to have under reported not only the taxes but also the actual current monthly income on the taxes. The Debtors have not responded to the instant Motion to dismiss to try and rebut the presumption. Therefore, cause exists under § 707(b)(2).

Furthermore, given the new calculation of current monthly income, it

appears that the Debtors can, in fact, repay unsecured creditors. Under § 707(b)(3), this also raises a presumption of bad faith and is an additional ground for cause to dismiss.

The motion is granted and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 7 case filed by the United States Trustee Tracy Hope Davis having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

5. 14-91565-E-11 RHS-1 — RICHARD SINCLAIR, Pro Se — ORDER TO SHOW CAUSE, 1-5-15 [50]

Final Ruling: No appearance at the January 29, 2015 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Richard Carroll Sinclair ("Debtor"), Trustee, and other such other parties in interest as stated on the Certificate of Service on January 6, 2015. The court computes that 23 days' notice has been provided.

The Order to Show Cause was issued due to Debtor's failure to file the following documents in this case: Means Test-Form 22B.

The court's decision is to discharge the Order to Show Cause.

The court's docket reflects that the default has been cured. Debtor has filed the Means Test-Form 22B on January 15, 2015. Dckt. 54

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 case shall proceed in this court.

6.	**12-92570-E-12**	**COELHO DAIRY**	**MOTION FOR PREVAILING PARTY ATTORNEY'S FEES BY BLACKROCK MILLING**
	DJD-6	**Thomas O. Gillis**	**1-14-15 [564]**

Tentative Ruling: The Motion for Allowance of Professional Fees wasset for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the 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 offers 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.

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)(iii).

Local Rule 9014-1(f)(2) Motion.

Correct Notice Not Provided. Movant failed to provide a Proof of Service. Without a Proof of Service, the court cannot determine if proper notice was given to necessary parties. 28 days' notice is required. L.B.R. 9014-1(f)(1); (f)(2)(A).

The Motion for Prevailing Party Attorneys' Fees was properly set for hearing on 15 days notice. The Plan Administrator/Debtor filed an Opposition on January 23, 2015. In light of the tremendous amount of attorneys' fees and time expended by both sides and the need for additional information, rather than denying the motion without prejudice, the court sets a briefing schedule to afford all parties a fair opportunity to address these issues.

The hearing on the Motion for Attorney Fees Pursuant to Contract is continued to 10:30 a.m. on xxxxxxxxxxxx, 2015..

Black Rock Milling Co., LLC ("Creditor") filed the instant Motion for Attorney Fees pursuant to the contract between the parties. Dckt. 564. FN.1.

FN.1. While titled as a Motion for Attorneys Fees Pursuant to California Civil Code § 1717, that Civil Code Section does not grant the right to attorneys' fees. That code section merely states that when a contract specially provides that attorneys' fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or the prevailing party," then which ever party is the prevailing party (even if the contract does not provide for that party to receive attorneys' fees) shall have the right to the contractual attorneys' fees. While a fine point, and Movant does correctly identify for the court the contractual basis, such a distinction is important in considering the actual right to attorneys' fees.

Creditor is seeking reimbursement of reasonable attorneys' fees and costs incurred by Creditor in the legal representation by its counsel in Evidentiary Hearing regarding Creditor's claim in this case against Coelho Dairy ("Plan Administrator/Debtor") both prior to and in this bankruptcy case and in the representation of Creditor in connection with the related state court action.

Creditor is seeking total fees and expenses in the amount of $127,313.00.

BACKGROUND

Creditor is an organic feed supplier. Beginning in 2002, Creditor began providing feed to Debtor-in-Possession. From 2002 to 2010 Creditor provided Debtor with feed for their cows. Creditor alleges that it continually worked with Debtor on its outstanding balance, even allowing Debtor to accumulate an unpaid balance of over $400,00.00 before Creditor ceased providing feed to the Debtor.

In 2012, Creditor filed the a lawsuit in California State Court against Debtor. Soon after, the Debtor filed the instant bankruptcy case.

On or about February 11, 2014, Debtor-in-Possession filed an objection to Creditor's claim. Debtor-in-Possession argued that Creditor was not entitled to any additional funds from the Debtor and that Debtor had, in fact, overpaid creditor in the amount of $129,219.68.

On November 5, 2014, the court held an evidentiary hearing regarding Creditor's claim and Debtor-in-Possession's objection. On November 25, 2014, the court issued a ruling finding that Debtor-in-Possession owed Creditor a principal amount of $114,281.22 as well as interest in the amount of $246,009.58 for a total of $360,290.80. Dckt. 558. The court noted that the total amount does not include attorneys' fees and that such fees would be determined by post-hearing motion.

REVIEW OF MOTION

Creditor argues that it is entitled to attorney's fees based on the following arguments: (1) the action is based on a contract because the current debt and resulting litigation is based on a contract; (2) Creditor is the

prevailing party because the court found that Creditor had a legitimate claim against Debtor-in-Possession and as a result suffered damages in excess of $360,000.00; (3) the fees requested are reasonable under 11 U.S.C. § 330 because they reflect the reasonable market value of the services provided.

Creditor provides the following break down of the fees and costs that arose in connection with the civil state case and the bankruptcy case:

Civil Case Cost	$1,635.00
Civil Attorney's Fees	$32,372.00
Bankruptcy Case Cost	$7,756.00
Bankrutpcy Case Attorney's Fees	$85,550.00
TOTAL FEES AND COSTS	$127,313.00

Attached to Creditor's Motion is the raw data time sheets, separated by the civil and bankruptcy action. Creditor does not provide task billing for the services rendered.

PLAN ADMINISTRATOR/DEBTOR LIMITED NON-OPPOSITION

Debtor-in-Possession filed a limited non-opposition to instant Motion on January 23, 2015. Dckt. 570. Debtor-in-Possession objects on the following basis:

II. The format of the fee claim does not comply with federal rules, in that the attorney fees are not broken down into categories.

III. The attorney fees for litigating issues of bankruptcy law should be disallowed pursuant to 11 U.S.C. § 506(b).

IV. It is bad policy for the court to allow an unsecured creditor to accumulate $85,550 in attorney fees and $7,756.00 in costs for a half day hearing on proof of their unsecured claim in bankruptcy.

V. The Creditor's itemization on numerous tasks are improperly grouped and thus cannot be dissected to determine the time allocated to each separate task.

VI. The multiple "legal research" entries should be disallowed or limited to the research performed related to the issues litigated at the hearing on the objection to the claim.

VII. The client conferences were unnecessary and unreasonable. Debtor-in-Possession argues that the conferences should be stricken because most do not state the subject of these long conferences.

VIII. The review of document fees are excessive.

IX. With the exception of the hearings directly related to the

objection to the claim objection, attorney fees should be disallowed as not necessary and not productive.

X. The costs are not reasonable or legally justified. There is no itemization of time, invoices, experience, qualifications, necessity, proof of payment, or other evidence to support these costs. It should be noted that only the Debtor-in-Possession produced an expert witness at the Evidentiary Hearing.

Debtor-in-Possession concludes by stating that the Creditor has the burden of proof of his claim and that the attorney fee and cost claim should be greatly reduced as not proven.

APPLICABLE LAW

The right to attorneys' fees begins (but does not end) with the contract between the parties. In connection with this claim, the contract states,

> "2. Customer agrees to pay all costs and attorney fees incurred of all past due invoices and accounts."

Credit Information, Terms and Conditions; Exhibit 4, Dckt. 565. FN.2.

FN.2. The court notes that Movant has attached the exhibits to a declaration, creating a 35 page electronic document. This is not the practice in the Bankruptcy Courts in the Eastern District of California. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents,¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1).

This Rule exists for a very practical reason. The court, operating in a near paperless environment cannot be wading through one electronic document, hundreds of pages in length, consisting of multiple documents. Filing the pleading as Movant does makes it all but unreadable without creating significant otherwise necessary work for the court and staff. While on any given motion an attorney might argue, "but it's really simple here, the court does not need to enforce the rule," the court does not leave attorneys guessing when rules will be ignored and when they will jump up and bite them.

Again in light of the fees and costs expended by the parties to date in connection with this claim, the court waives this minor noncompliance with the document requirements.

California Civil Code § 1717

California Civil Code § 1717, in pertinent part, [emphasis added] states:

> (a) In any action on a contract, **where the contract**

> **specifically provides** that **attorney's fees** and costs, which are **incurred to enforce that contract**, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be **the party prevailing** on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
>
> ...
>
> (b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the **party prevailing** on the contract shall be the party **who recovered a greater relief in the action on the contract**. The court may also determine that there is no party prevailing on the contract for purposes of this section.
>
> ...

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's

fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

Failure to Attach Proof of Service

Creditor has failed to file a Proof of Service to the instant Motion. Without the Proof of Claim, the court cannot determine if proper notice was provided to necessary parties. However, the Plan Administrator/Debtor has responded. Additionally, the court is requiring further briefing, which will insure that all parties had proper notice and sufficient opportunity to respond.

Failure to Provide Task Billing

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals representing fiduciaries in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Plaintiff to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Creditor to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included, in the motion is Creditor's counsel's raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Creditor and Creditor's counsel, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Creditor, instead leaving it to Creditor and Creditor's counsel who intimately knows the work done and its billing system to correctly assemble the information.

The present dispute highlights the need for task billing. Litigation concerning the debt upon which Creditor's claim is base spans three years and two courts. The state court litigation commenced in February 2012. The legal services included seeking a writ of attachment. In September 2012, Debtor commenced the current bankruptcy case. The total attorneys' fees stated by Creditor is $32,372.00 for the state court litigation. Exhibit 6 attached to Declaration, Dckt. 565. However, it appears that some of the fees are for legal work done in the state court action after the September 28, 2012 commencement of this bankruptcy case. Given that there were other defendants in that action, such prosecution does not appear to be unexpected, but such legal fees may relate to those defendants (who are the general partners of the Debtor). Further explanation as to how and why such legal fees are part of the present claim, as opposed to the defendants in the state court action which necessitate those fees.

The legal fees relating to the bankruptcy case in the amount of $85,550.00 are listed on Exhibit 8 attached to the Declaration. *Id.* These legal services cover a broad range of issues, including (1) reviewing the bankruptcy petition and Chapter 12 proceedings; (2) monitoring the bankruptcy case; (3) mediation; (4) a proposed settlement; (5) default under the proposed settlement; (6) confirmation of the Chapter 12 Plan; (7) borrowing motions; (8) administrative expense motions; (9) discovery; and the present claim objection. This work covers a 26 month period.

Without a task billing analysis, the court is left adrift in considering the motion and the merits of the opposition. Creditor's attorneys, who know what was done and the billing methodology, are the persons in the best position to clearly break out what has been done in the different areas of this case and present the arguments not only why such services were necessary, but also reasonable.

Prevailing Party

Because of the variety of issues and legal services rendered in connection with this bankruptcy case, the task billing and consideration of the various contested matters and actions is necessary. Merely because Creditor asserts it prevailed on the objection to claim, that does not mean it was the "prevailing party" on the other matters for which payment of legal fees is requested.

In the Objection to Claim, the Plan Administrator/Debtor asserted that "BlackRock Milling has overcharged the Debtor by $129,219.68" on the original filed claim in the amount of $332,608.51. Proof of Claim No. 24. By the time of the evidentiary hearing, with the asserted post-petition interest and additional amounts, Creditor asserted that the claim had increased to $421,074.02.

The court ultimately determined that the amount of Creditor's claim in this case was $360,290.80. Order, Dckt. 558. The parties stipulated at the hearing to the principal amount of the claim to be $114,281.22. The court overruled the Objection to Claim on all substantive federal and state law issues (including the assertion that the contract rate of interest violated the California usury limitations), except the court disallowed $60,783.23 of the post-petition finances charges for the unsecured claim.

The Plan Administrator/Debtor asserted that all interest should be disallowed as usurious. Plan Administrator/Debtor's expert's testimony could be interpreted to be that at 18% interest would be only $175,653.96. When added to the agreed principal, it could be that Plan Administrator/Debtor was contending that, if the court did not accept the usury argument, then the claim of Creditor could be no more than $289,935.96. ($114,281.22 agreed principal plus $175,653.96 interest as computed by Plan Administrator/Debtor's expert.)

The $360,290.02 allowed claim is $246,008.80 greater than the principal only claim of $114,281.22 (interest being void under the usury law) and $70,354.06 greater than the principal and interest as computed by the Plan Administrator/Debtor's expert.

JANUARY 29, 2015 HEARING

At the hearing, ----

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 Attorney Fees Pursuant to California Code of Civil Procedure § 1717 filed by Black Rock Milling Co., LLC 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 hearing on the Motion is continued to 10:30 a.m. on xxxxx, 2015.
>
> **IT IS FURTHER ORDERED** that on or before xxxxx, 2015, Black Rock Milling, Co. shall filed and serve supplemental pleadings providing a task billing analysis, and on or before xxxxx, 2015, the Plan Administrator/Debtor shall file and serve a Reply, if any, to the supplemental pleading.

7. 14-91074-E-7 ADJ-2 | **CESAR PIMENTEL AND VERONICA CASTRO** | **Thomas O. Gillis** | **ORDER FOR HEARING ON ENTRY OF DEFAULT** | **12-19-14 [43]**

Final Ruling: No appearance at the January 29, 2015 hearing is required.

The matter being a duplicate of the Objection of Debtors' Claim of Exemptions (Dckt. 36) and being addressed on this calendar, **the Order for Hearing on Entry of Default is removed from the calendar.**

8. 14-91074-E-7 ADJ-2 — CESAR PIMENTEL AND VERONICA CASTRO, Thomas O. Gillis — CONTINUED OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS, 10-24-14 [36]

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, the court will make the following findings of fact and conclusions of law:

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, parties requesting special notice, Kinecta Federal Credit Union and Office of the United States Trustee on October 24, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006).

The Objection to Exemptions is overruled.

Michael McGranahan, the Chapter 7 Trustee, filed the instant Objection to Claim of Exemption on October 24, 2014. Dckt. 36.

The Trustee objects to Cesar Pimentel and Veronica Castro's ("Debtors") claimed exemption for their personal injury claims related to the auto accident involving the Debtors on April 21, 2013. The exemption claimed by the Debtors is C.C.P. 703.140(b)(11)(D) in an indeterminate amount.

The Trustee argues that judicial estoppel bars the personal injury exemption pursuant to Amended Schedule C because the Debtors breached their duty of fully disclose their personal injury claims in their original Schedules and Statement of financial Affairs. Further, the Trustee argues that the Debtors made a false oath in their 341 Meeting of Creditors - Debtor Questionnaire by stating that they did not have any claims against anyone. Morever, the Trustee asserts that if Debtor Pimentel had knowledge of the settlement offers as to the personal injury claim, he gave false testimony when he testified at his 341 Meeting of Creditors that there had been no settlement

offers associated with the personal injury claims.

No opposition was filed to the Objection to Claim of Exemptions.

DECEMBER 18, 2014 HEARING

At the hearing, the court entered the defaults of the Debtors and continued the hearing on entry of the Order on default to 10:30 a.m. on January 29, 2015. Dckt. 43.

TRUSTEE'S SUPPLEMENT

The Trustee filed a supplement to the instant Objection on January 3, 2015. Dckt. 47.

The Trustee states that on December 19, 2014, the court entered its Order setting Hearing on Entry of Default wherein the court entered the defaults of the Debtors pursuant to Fed. R. Civ. P. 55 and Fed. R. Bankr. P. 7055 and 9014. Dckt. 43.

The rest of the supplement is just a repetition of the facts surrounding the original Objection. The Trustee does note that there is a question of whether the Debtors knew of any settlement offers in connection with the personal injury claim due to communications between Debtors' attorney and Debtors being lost or misplaced.

The Trustee ends by stating that the Debtors failed to disclose their claims related to the auto accident in their original schedules and statements. Furthermore, the Trustee alleges that the Debtors both wrote that they are not making, and do not intend to make, any claims against anyone on the 341 Debtor Questionnaire.

DEBTORS' RESPONSE TO TRUSTEE'S SUPPLEMENT

The Debtors filed a response to the Trustee's supplement on January 15, 2015. Dckt. 49. The Debtors respond as follows:

1. The supplement is not supported by evidence. The supplement makes factual allegations that are not supported by declaration, points and authorities, or other evidence.

2. Case law compels the court to overrule the objection. The Debtors argue that *Law v. Siegal*, 134 S.Ct. 1188 (2014), left the Trustee with the only remedy being an Action for Denial of Discharge. The Debtors cite to three additional cases in support of this conclusion.

APPLICABLE LAW

California Code of Civil Procedure § 703.140(b)(11)(D)

California Code of Civil Procedure § 703.140 states,

> (a) In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter, including the

homestead exemption, other than the provisions of subdivision (b) are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

> (1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.
>
> (2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).
>
> (3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):. . .

> (11) The debtor's right to receive, or property that is traceable to, any of the following:. . .
>
> > (D) A payment, not to exceed twenty-four thousand sixty dollars ($24,060), on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent.

Fed. R. Civ. P. 55 and Fed. R. Bankr. P. 7055

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *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.* at 770.

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. 3rd 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, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which 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. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

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.

Judicial Estoppel

Judicial estoppel is an equitable doctrine that encompasses a variety of different situations that revolve around the concern for preserving the integrity of the judicial process. *In re Associated Vintage Group, Inc.*, 283 B.R. at 565. The doctrine extends to incompatible statements and positions in different cases. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996).

> Independent of unfair advantage from inconsistent positions, judicial estoppel may be imposed: out of "general consideration of the orderly administration of justice and regard for the dignity of judicial proceedings;" or to "protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d 778 at 782; *Russell*, 893 F.2d at 1037. Moreover, it may be invoked "to protect the integrity of the bankruptcy process." *Hamilton*, 270 F.3d 778 at 785.

In re Associated Vintage Group, Inc., 283 B.R. at 556. The Ninth Circuit requires that the inconsistent position have been "accepted" by the first court. *Id.*

In addressing judicial estoppel, the Supreme Court has stated,

> "Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its

purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (CA6 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (CA5 1993). See *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (CA4 1982) (judicial estoppel "protects the essential integrity of the judicial process"); *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (CA3 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting Stretch v. Watson, 6 N.J. Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (CADC 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs*, 893 F.2d 1033, 1037 (CA9 1990) (citation omitted)."

New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001)

The Supreme Court identified several typical factors to be considered:

A. "[A] party's later position must be "clearly inconsistent" with its earlier position. *United States v. Hook*, 195 F.3d 299, 306 (CA7 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (CA5 1999); *Hossaini v. Western Mo. Medical Center*, 140 F.3d 1140, 1143 (CA8 1998); *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (CA2 1997)."

B. "[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," *Edwards*, 690 F.2d at 599. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (CA5 1991), and thus poses little threat to judicial integrity. See Hook, 195 F.3d at 306; *Maharaj*, 128 F.3d at 98; *Konstantinidis*, 626 F.2d at 939."

C. "[W]hether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Davis, 156 U.S. at 689; Philadelphia, W., & B. R. Co. v. Howard, 54 U.S. 307, 13 HOW 307, 335-337, 14 L. Ed. 157 (1852); *Scarano*, 203 F.2d at 513 (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"); see also 18 Wright § 4477, p. 782."

D. "In enumerating these factors, [the Supreme Court does not] establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional

considerations may inform the doctrine's application in specific factual contexts."

Id. at 750-751.

In *Ah Quin v. County of Kauai DOT*, 733 F.3d 267 (9th Cir. 2013), the Ninth Circuit Court of Appeals addressed the application of judicial estoppel to bar a debtor from asserting claims in a subsequent law suit with the debtor failed to on the bankruptcy schedules. In deciding whether the debtor was barred from asserting the claims in the subsequent action, the Ninth Circuit determined that even though the debtor had subsequently amended her schedules to list the claim, three primary factors had been met: (1) misstatement which created an inconsistency, (2) bankruptcy court having accepted the contrary position (the schedules having been filed and relied upon), and (3) it was to the debtor's unfair advantage (attempting to get the claim by the bankruptcy trustee and creditors). The issue for remand to the district court was whether it was an inadvertent misrepresentation or intentional.

DISCUSSION

Below is a reiteration of the time-line as it concerns the exemptions claimed in the Debtors' personal injury action:

Debtors' were in an automobile accident	April 21, 2013
Debtors retain attorney in connection with personal injury claim	April 29, 2013
Debtors filed petition without listing the auto accident or potential claim on Schedule B or C	July 25, 2014
Debtors attend First Meeting of Creditors and answer Debtor Questionnaire	September 2, 2014
Debtors file amended Schedule B and C listing the personal injury claim with an indeterminate value	September 26, 2014
Trustee files the instant Objection	October 24, 2014

At the First Meeting of Creditors, while the Debtors did not list a potential claim on the Questionnaire, the Debtors did admit at the Meeting that there may have a claim in which they hired an attorney. Twenty-four days later, the Debtors amended their Schedules B and C to add this personal injury claim in an indeterminate amount.

The Trustee is arguing that under the principles of judicial estoppel, the Debtors have taken two conflicting positions that results in the court being able to disallow the exemptions claimed by the Debtors as to the personal injury claim.

The court recognizes that this area of law following the Supreme Court's decision in *Law v. Siegel* have left trustees, creditors, and debtors to determine the legal basis for disallowing or barring exemptions – rather than a down and dirty § 105(a) "fix." As attorneys and debtors explore this new frontier, the court will have to determine the scope of *Law v. Siegel* and when and under what circumstances there is a sufficient independent state law grounds, whether statutory or common law, that justifies the disallowance of exemptions. However, Debtors' contention that *Law v. Siegel* mandates that exemptions may be improperly asserted with impunity and the only remedy in the federal courts is to have the debtor's discharge denied is incorrect.

In *Law v. Siegel* the Supreme Court instructed that with respect to a debtor's right to exemptions,

A. "Section 522(d) of the Code provides a number of exemptions unless they are specifically prohibited by state law. § 522(b)(2), (d)."

B. "But in exercising those statutory [11 U.S.C. § 105(a)] and inherent powers, a bankruptcy court may not contravene specific statutory provisions."

C. Section 105(a) could not be the basis for surcharging a debtor's exemption in contravention of 11 U.S.C. § 522(k), providing that exemptions cannot be used to pay administrative expenses the bankruptcy case [except for the administrative expenses provided in that paragraph].

D. The Chapter 7 trustee did not seek to have debtor's exemption denied under applicable law, but merely to have the exemption as allowed be surcharged for administrative expenses.

E. "But even assuming the Bankruptcy Court could have revisited Law's entitlement to the exemption, § 522 does not give courts discretion to grant or withhold exemptions based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that will render property exempt. See § 522(b), (d)."

F. A debtor's conduct in connection with claiming exemptions, even if the exemption may be claimed, is subject to denial of discharge, Rule 9011 sanctions, and criminal prosecution.

Law v. Siegel, 132 S.Ct. at 1194 - 1198.

The Bankruptcy Code allows each state to elect to opt-out of the federal exemption scheme provided for in Section 522(d). 11 U.S.C. § 522(a)(2). California has so opted-out of the federal exemption scheme, specifying that only California exemptions may be used. Cal. C.C.P. § 703.130. Thus, when the court considers what exemptions may, or may not, be claimed by a debtor, the court begins with California law. In a bankruptcy case, a debtor may elect the exemptions specially provided for in California Code of Civil Procedure § 703.140(b), or elect to claim the exemptions which may be claimed outside of bankruptcy against a judgment creditor. 11 U.S.C. § 703.140(a).

Here, the Trustee argues that California's and the federal judicial estoppel doctrines allow the court to disallow the exemptions. The Trustee is not seeking to "surcharge" the exemption for administrative expenses. It is asserted that Debtors' conduct is such that if allowed to now assert the exemption it would be a perversion of the judicial process.

At the heart of the judicial estoppel doctrine is to preserve the integrity of the judicial process, namely, preventing a party from taking inconsistent position at the inequitable expense of another. The Trustee has not pleaded any facts that shows either the Debtors in fact took an inconsistent position or that there would be a detriment to the estate and/or the creditors.

The Trustee appears to hinge his argument on the fact that the Debtors original schedules did not list the personal injury claim, the Debtors responded on the Questionnaire that there was no pending claim, and that the Debtors then stated there is a potential claim at the First Meeting of Creditors. The Trustee argues that this is prima facie evidence of conflicting positions, which justifies the court disallowing the exemptions under judicial estoppel principles. The court is not willing to accept the Trustee's assumption that the inadvertent failure to list the claim on the original schedules is part of a scheme in order to get a "free pass" as the Trustee puts it in his Objection.

Furthermore, the fact that the Trustee is uncertain whether the Debtors had knowledge as to any possible settlement offers further undercuts the Trustee's foundational argument that it was a scheme by the Debtors to keep the personal injury claims out of the Debtors' estate.

The Trustee's main contention is that suspicions were raised when the Debtors offered conflicting answers to what appears to be the same question: "Are you making, or do you intend to make any claims against anyone" vs. "If [Debtors] had a claim, and did they have an attorney". However, the court does not find such conflicts as menacing and underhanded as the Trustee appears to present them. The Debtors are not attorneys nor did they attend law school. Their understanding of the term "claim" may not include "possible lawsuits." It was not until the Trustee asked if an attorney was hired that the Debtors "connected the dots" and answered "yes" concerning the personal injury claim.

Once the Debtors understood what "claim" meant, the Debtors then amended their schedules to include the potential claim and what they believe was the appropriate exemption. Even taking the Debtors' default into consideration, there appears to be no evidence of impropriety or an attempt to defraud the bankruptcy system in a plot to "hide the ball" as to the personal injury claim.

The Trustee does not provide any evidence that: (1) the positions of the Debtor are, in fact" inconsistent; (2) that the "first position" was not as a result of ignorance, fraud, or mistake; and (3) if there is any actual harm being done to the parties or the bankruptcy process. Instead, the Trustee argues that an extremely loose reading of the facts fit squarely within California judicial estoppel doctrine – an argument that the court does not find persuasive.

Though not stated as grounds for the Objection, at the point the court

does not determine what exemption has been claimed by Debtors. Rather than a dollar amount claimed as exempt, Debtors only state that an "indeterminate" amount is exempt. The court does not know if it is $1.00 or $1,000,000.00.

Therefore, the court overrules the Trustee's objection to the claim of exemption based on judicial estoppel based on the facts of this case.

The court shall issue an order in 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 Redeem Personal Property filed by Larry Blain Smith and Melissa Ann Smith ("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 Objection is overruled. The court makes no determination of what exemption has been claimed by the Debtors.

9. 14-91286-E-7 MATT/JULIE TSURUI
RLS-1 Richard L. Sheppard

MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC
12-12-14 [17]

Final Ruling: No appearance at the January 29, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Portfolio Recovery Associates, LLC, and Office of the United States Trustee on December 12, 2014. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien 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). 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Matt Tsurui and Julie Ann Tsurui ("Debtor") commonly known as 3738 Pomegranite Avenue, Ceres, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,857.24. An abstract of judgment was recorded with Stanislaus County on July 24, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $215,000.00 as of the date of the petition. The unavoidable consensual liens total $280,455.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 on Schedule C.

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 this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided in it's entirety 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 the Debtor(s) 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 Portfolio Recovery Associates, LLC, California Superior Court for Stanislaus County Case No. 2005356, recorded on July 24, 2014, [Document No. 2014-0047783-00 with the Stanislaus County Recorder, against the real property commonly known as 3738 Pomegranite Avenue, 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.