UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

Bakersfield Federal Courthouse
510 19th Street, Second Floor
Bakersfield, California

WEDNESDAY

FEBRUARY 4, 2015

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. 11-17103-A-13 RANDALL BAKER
MHM-1
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
WITHDRAWN

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-9-14 [40]

Final Ruling

The motion withdrawn, the matter is dropped as moot.

2. 12-13703-A-13 NOEMI MORENO
RSW-2
NOEMI MORENO/MV

MOTION TO INCUR DEBT
1-8-15 [43]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Approve Debtor's Incurring New Debt [Vehicle Loan]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party consistent with the last paragraph of the prehearing disposition

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

The debtor seeks to incur new debt to finance the purchase of a vehicle. Amended Schedules I and J have been filed indicating that the debtor can afford both the plan payment and the proposed monthly loan payment of principal and interest that would result from obtaining this financing *assuming that the monthly principal and interest payment does not exceed the amount proposed* ($450). The court will grant the motion and authorize financing that involves a loan payment not to exceed the monthly amount proposed including principal and interest, and the trustee will approve the order as to form and content.

3. 14-16108-A-13 LORENA VILLAREAL

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-13-15 [10]

DISMISSED

Final Ruling

The case dismissed, the order to show cause is discharged.

4. 14-15909-A-13 ALVARO/LILIA LOPEZ — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
12-29-14 [12]

NIMA VOKSHORI/Atty. for dbt.
$310.00 FILING FEE PAID

Final Ruling

The fee paid in full, the order to show cause is discharged.

5. 14-15516-A-13 FERNANDO/GABRIELA RUIZ — OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK
12-19-14 [15]
MDE-1
THE BANK OF NEW YORK/MV
ROBERT WILLIAMS/Atty. for dbt.
MARK ESTLE/Atty. for mv.

[The hearing on this matter will follow the hearing on the debtor's motions to value collateral in this case having docket control now. RSW-1 and RSW-2.]

Tentative Ruling

Objection: Creditor's Objection to Confirmation of Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Disposition: Pending
Order: Pending

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

The objecting creditor, The Bank of New York, as Indenture Trustee for the holders of a trust containing asset-backed securities, has objected to confirmation, arguing that the debtors intend to avoid the objecting creditor's junior lien according to their plan but a motion to value or motion to avoid junior lien has not been filed, ruled on nor granted.

The debtors have filed, and the court at the hearing will resolve, a motion to value the Bank of New York Mellon's collateral located at 2321 Boyd St., Bakersfield, CA. The lien affected by this motion appears to be the same lien held by the objecting creditor. The objecting creditor asserts that its claim amount is $34,454.91. The amount of debt secured by the lien affected by the debtors' motion to value, as shown in that motion, is the same as the claim amount asserted in the objection. The collateral also appears to be the same in the objection and motion to value.

If the court's disposition of the debtors' motion to value (RSW-1) resolves the objecting creditor's objection, the objecting creditor should indicate this at the hearing at the appropriate time. After the hearing on the motion to value, the court will resolve the objection to confirmation or continue the hearing on the objection if appropriate to coincide with any continued hearing on the motion to value.

6. 14-15516-A-13 FERNANDO/GABRIELA RUIZ
RSW-1
FERNANDO RUIZ/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
1-20-15 [29]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: Written opposition filed by the responding party
Disposition: Continued to March 4, 2015, at 9:00 a.m.
Order: Civil minute order

The motion seeks to value real property collateral that is the moving party's principal residence. The responding party has requested a continuance to obtain a broker's opinion, appraisal or other evidence of the collateral's value. The court will continue the motion to the date indicated. No later than 14 days before the continued date of the hearing, the parties will file a joint status report.

If the parties have not resolved this matter, then the court will hold a scheduling conference on the continued date of the hearing and set an evidentiary hearing under Federal Rule of Bankruptcy Procedure 9014(d). An evidentiary hearing would be required because the disputed, material factual issue of the collateral's value must be resolved before the court can rule on the relief requested.

7. 14-15516-A-13 FERNANDO/GABRIELA RUIZ
RSW-2
FERNANDO RUIZ/MV

ROBERT WILLIAMS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF CALHFA MORTGAGE ASSISTANCE CORPORATION
1-20-15 [33]

Tentative Ruling

Motion: Value Collateral [Real Property; Principal Residence]
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the respondent is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

VALUATION OF COLLATERAL

Chapter 13 debtors may strip off a wholly unsecured junior lien encumbering the debtor's principal residence. 11 U.S.C. §§ 506(a), 1322(b)(2); *In re Lam,* 211 B.R. 36, 40–42 (B.A.P. 9th Cir. 1997); *In re Zimmer,* 313 F.3d 1220, 1222–25 (9th Cir. 2002) (holding that the trial court erred in deciding that a wholly unsecured lien was within the scope of the antimodification clause of § 1322(b)(2) of the Bankruptcy Code). A motion to value the debtor's principal residence should be granted upon a threefold showing by the moving party. First, the moving party must proceed by noticed motion. Fed. R.

Bankr. P. 3012. Second, the motion must be served on the holder of the secured claim. Fed. R. Bankr. P. 3012, 9014(a); LBR 3015-1(j). Third, the moving party must prove by admissible evidence that the debt secured by liens senior to the respondent's claim exceeds the value of the principal residence. 11 U.S.C. § 506(a); *Lam*, 211 B.R. at 40–42; *Zimmer*, 313 F.3d at 1222–25. "In the absence of contrary evidence, an owner's opinion of property value may be conclusive." *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The debtor requests that the court value real property collateral. The collateral is the debtor's principal residence located at 2321 Boyd St., Bakersfield, CA.

The court values the collateral at $142,000. The debt secured by liens senior to the respondent's lien exceeds the value of the collateral. Because the amount owed to senior lienholders exceeds the collateral's value, the respondent's claim is wholly unsecured and no portion will be allowed as a secured claim. *See* 11 U.S.C. § 506(a).

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

The debtor's motion to value real property collateral has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The real property collateral located at 2321 Boyd St., Bakersfield, CA, has a value of $142,000. The collateral is encumbered by senior liens securing debt that exceeds the collateral's value. The respondent has a secured claim in the amount of $0.00 and a general unsecured claim for the balance of the claim.

8. 12-12523-A-13 LASHON FLETCHER
MHM-3
MICHAEL MEYER/MV
STEVEN ALPERT/Atty. for dbt.
WITHDRAWN

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-10-14 [67]

Final Ruling

The motion withdrawn, the matter is dropped as moot.

9. 14-12223-A-13 LKW-6 | ANDRES ALVAREZ AND ELVIRA DE CAMPOS | MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S) 1-14-15 [131]

LEONARD WELSH/Atty. for dbt.

Tentative Ruling

Application: Second Interim Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved; Rule 60(a) correction possible for order approving first interim fee application
Order: Civil minute order

Applicant: Leonard K. Welsh
Compensation approved: $1,927.50
Costs approved: $120.34
Aggregate fees and costs approved in this application: $2,047.84
Retainer held: $0.00
Amount to be paid as administrative expense: $2,047.84

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

DISCUSSION

Second Interim Application for Compensation

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure.

The court notes that fees and costs for this case are beyond that anticipated in a Chapter 13 case. Fees and costs charged before and after the petition total $20,923.25($7,677.50 pre-petition fees + $13,245.75), before considering the instant application. With fees approved by the application total fees are $23,541.50. In fairness to the applicant, this is a complex case. The debtors holdings include seven parcels of real estate and a sole proprietorship business, "Campos Tire." But given the sizeable fees and costs approved to date, subsequent fee applications, if any, should be accompanied by a detailed showing of necessity and reasonableness. Additional fees for routine matters, e.g. de minimis communications with clients or creditors, typical matters of case administration, are unlikely to be approved.

Modification of Order Approving First Interim Application for Compensation

The order approving the applicant's First Interim Fee Application provided, "It is hereby ordered that: (1) the application is approved; (2) fees of $12,985.00 are approved on an interim basis; (3) costs of $260.75 are approved on an interim basis; (4) aggregate fees and costs approved by this application are $13,245.75; (5) applicant Leonard K. Welsh may draw on his retainer of $1,892.50; (6) the Chapter 13 trustee shall pay debtors' counsel, Leonard K. Welsh, $11,353.25 as an administrative expense through the plan in a manner consist with the terms of the most recently confirmed Chapter 13 plan; and (7) the applicant shall finalize those amounts by final application filed not later than the close of the case." Civil Minute Order, filed November 5, 2014, ECF #123.

The amount of the retainer and, by extension, the amount payable as an administrative expense through the plan appear erroneous. According the First Application for Allowance of Fees and Expenses ¶ 6(a)-(c), filed October 7, 2014, ECF #113 the amount of the retainer received, pre-petition fees paid by the retainer and retainer as of the date of the petition are $10,000, $7,677.50 and $1,892.50. Unfortunately, $7,677.50 and $1,892.50 do not total $10,000, which suggest that the retainer held on the petition date was $2,322.50. If that is the case the Civil Minute Order, filed November 5, 2014, ECF #123 needs to be amended to read:

"It is hereby ordered that: (1) the application is approved; (2) fees of $12,985.00 are approved on an interim basis; (3) costs of $260.75 are approved on an interim basis; (4) aggregate fees and costs approved by this application are $13,245.75; (5) applicant Leonard K. Welsh may draw on his retainer of $2,322.50; (6) the Chapter 13 trustee shall pay debtors' counsel, Leonard K. Welsh, $10,923.25 as an administrative expense through the plan in a manner consist with the terms of the most recently confirmed Chapter 13 plan; and (7) the applicant shall finalize those amounts by final application filed not later than the close of the case." (changes are underscored).

Debtors counsel is asked to review his trust records and comment at the hearing. Similarly, the Chapter 13 trustee should be prepared to comment.

CIVIL MINUTE 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 Second Interim Application for Fees and Costs filed by Leonard K. Welsh having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that: (1) the application is approved; (2) fees of $1,927.50 are approved on an interim basis; (3) costs of $120.34 are approved on an interim basis; (4) aggregate fees and costs approved by this application are $2,047.84; (5) applicant Leonard K. Welsh may draw on his retainer of $0.00; (6) the Chapter 13 trustee shall pay debtors' counsel, Leonard K. Welsh, $2,047.84 as an

administrative expense through the plan in a manner consist with the terms of the most recently confirmed Chapter 13 plan; (7) the applicant shall finalize those amounts by final application filed not later than the close of the case; and (8) Chapter 13 trustee Michael H. Meyer is requested to comment affirmatively on all future fee applications filed by the applicant in this case.

10. 14-15526-A-13 DALE CURTEN
MDE-1
THE BANK OF NEW YORK MELLON/MV

OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK MELLON
12-23-14 [23]

MARK ESTLE/Atty. for mv.

Tentative Ruling

Objection: Creditor's Objection to Confirmation of Plan
Notice: LBR 3015-1(c)(4), 9014-1(f)(2); no written opposition required
Disposition: Sustained and confirmation denied without prejudice
Order: Civil minute order

No responding party is required to file written opposition to the motion; opposition may be presented at the hearing. LBR 9014-1(f)(2)(C). If opposition is presented at the hearing, the court may rule on the merits or set a briefing schedule. Absent such opposition, the court will adopt this tentative ruling.

FAILURE TO USE THIS DISTRICT'S FORM PLAN

The debtor has not used the form plan as required by the local rules. The Eastern District of California's form chapter 13 plan is mandatory. *See* LBR 3015-1(a). The court will sustain the objection on this ground.

75-DAY ORDER

A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. *See* 11 U.S.C. § 1307(c)(1).

11. 11-61227-A-13 GUILLERMO/ELVA RUBIO
LKW-5
GUILLERMO RUBIO/MV
LEONARD WELSH/Atty. for dbt.

MOTION TO SELL
1-7-15 [108]

Tentative Ruling

Motion: Authority to Sell Personal Property and Retain Proceeds from Sale
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

For the reasons stated in the motion, the court will grant the motion. Property of the estate vested in the debtors at confirmation, including the property proposed to be sold. However, the confirmed plan prohibits debtors from transferring, encumbering, selling, or otherwise disposing of any personal or real property with a value of $1,000 or more other than in the regular course of debtor's financial or business affairs without first obtaining court authorization. Accordingly, pursuant to the confirmed plan, the court authorizes this sale and the retention of proceeds by the debtors.

12. 11-19832-A-13 JEAN MORGAN — MOTION TO DISMISS CASE
MHM-2 — 12-9-14 [104]
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING
MOTION WITHDRAWN

Final Ruling

The motion withdrawn, the matter is dropped as moot.

13. 14-10134-A-13 LEAH JONES — MOTION TO MODIFY PLAN
RSW-2 — 12-22-14 [47]
LEAH JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(2), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and 3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir.

1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

14. 12-17536-A-13 ERIC/CHRISTIE LUDLOW
MHM-1
MICHAEL MEYER/MV
CURTIS FLOYD/Atty. for dbt.

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-10-14 [22]

Final Ruling

Motion: Dismiss Case
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). No opposition has been filed, and a non-opposition has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

For the reasons stated in the motion, cause exists under § 1307(c)(1) and (6) to dismiss the case. The debtors have failed to make all payments due under the confirmed plan. Payments are delinquent in the amount of $9,133.

15. 14-14646-A-13 SHIRLEY MOBLEY
MHM-1
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-5-14 [35]

ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Case
Notice: LBR 9014-1(f)(1); written response filed by debtor
Disposition: Granted
Order: Civil minute order

TRUSTEE'S MOTION TO DISMISS

The trustee moves to dismiss on the ground of unreasonable delay by the debtor that is prejudicial to creditors, § 1307(c)(1), and based on payments due under the proposed plan not being current.

DEBTOR'S RESPONSE TO MOTION

The debtor's response filed January 21, 2015, states that only $1,789.50 has been paid to the trustee. The response states that the monthly plan payment is $1,789.50 through September 2015 and then $210.53 monthly through the end of the plan.

Thus, the debtor effectively admits that only one plan payment had been made as of January 21, 2015. This case was filed September 20, 2014, so it appears that debtor had 3 payments coming due from October 25, 2014 through December 25, 2014.

The debtor also contemplates the need to modify her plan to account for the direct payments or to obtain a stipulation by the trustee and "the creditor" (presumably referring to the bank who received the direct payments).

REASONS FOR DISMISSAL

The debtor has failed to file a modified plan as of February 2, 2015. The date of service of the motion to dismiss on the debtor and the debtor's attorney was December 5, 2014. From this date of service until the hearing date is approximately 61 days.

The debtor likely did not receive the motion by mail for several days after the date of service, but the debtor should have received the motion at least a few business days after service. The debtor has probably had at least 55 days since the motion to dismiss was served to prepare and file a modified plan to correct the delinquency in payment even if such delinquency caused by a tenant of the debtor's mistake in payment.

The debtor has had ample time to file a modified plan correcting the problems in payment. The court will dismiss the case given that no modified plan has been filed to correct the delinquency in payment.

16. 14-13851-A-13 DAVID/MONICA GARZA
MHM-2
MICHAEL MEYER/MV

MOTION TO DISMISS CASE FOR UNREASONABLE DELAY THAT IS PREJUDICIAL TO CREDITORS AND/OR MOTION TO DISMISS CASE
12-16-14 [25]

PHILLIP GILLET/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

Motion: Dismiss Chapter 13 Case
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Civil minute order

Chapter 13 trustee Michael H. Meyer moves to dismiss debtor David Jr. Garza and Monica Garza's Chapter 13 case, citing unreasonable delay to creditors, i.e., failure to confirm a Chapter 13 plan. After the trustee filed this motion to dismiss, debtors Garza filed an amended plan and a motion to confirm it.

DISCUSSION

No Oral Argument

Bankruptcy Courts in the Eastern District of California need not entertain oral argument. LBR 9014-1(h)("Unless the assigned judge determines that the resolution of the motion does not require oral argument, he or she may hear appropriate and reasonable oral argument...."); *Morrow v. Topping*, 437 F.2d 1155, 1156 (9th Cir. 1971) (approving local rules that authorize disposition without oral argument). Notwithstanding opposition by the debtors, no factual dispute or question of law exists. As a result, the motion will be resolved without oral argument.

Dismissal for Unreasonable Delay is Appropriate

Dismissal of a Chapter 13 case is governed by Section 1307 of the Bankruptcy Code. Applicable portions of that section provides, "Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including--(1) unreasonable delay by the debtor that is prejudicial to creditors..." 11 U.S.C. § 1307(c)(1). Failure to achieve plan confirmation in a timely fashion is one species of unreasonable delay prejudicial to creditors. *In re Paulson*, 477 B.R. 740, 745-46 (8th Cir. B.A.P. 2012). The debtors filed this case July 31, 2014. They have never achieved plan confirmation.

When the debtors' most recently tried–and failed–to achieve plan confirmation this court stated, "...It is hereby ordered that the objection is sustained. A Chapter 13 plan must be confirmed no later than the first hearing date available after the 75-day period that commences on the date of this hearing. If a Chapter 13 plan has not been confirmed by such date, the court may dismiss the case on the trustee's motion. See 11 U.S.C. s 1307(c)(1)." Civil Minute Order, filed October 23, 2014. The 75th day after the hearing date was January 5, 2015. The next available date in Bakersfield after January 5, 2015, was January 7, 2015. Plan confirmation was not achieved by that date.

The debtors oppose the motion with a single sentence opposition. "You are hereby notified that the debtor (sic) oppose the chapter 13 trustee's motion to dismiss on the ground that a plan is set for confirmation on the same date and time." Debtor's Opposition to Trustee's Motion to Dismiss, filed January 22, 2015, ECF #40. This is insufficient grounds to oppose the motion. The debtors dispute neither the applicability of § 1307(c)(1), nor the Chapter 13 trustee's factual assertions that form the basis of relief. After the trustee moved to dismiss this case, debtors Garza did filed an amended plan. See First Modified Chapter 13 Plan, filed December 29, 2014, ECF #34. But even that plan is not confirmable. Chapter 13 Trustee's Opposition, filed January 14, 2015, ECF #38.

For each of these reasons the motion is granted.

CIVIL MINUTE 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 dismiss Chapter 13 case filed by Chapter 13 trustee Michael H. Meyer having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is granted and the case is dismissed.

17. 14-13851-A-13 DAVID/MONICA GARZA — MOTION TO CONFIRM PLAN
PWG-1 — 12-29-14 [29]
DAVID GARZA/MV
PHILLIP GILLET/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

Motion: Confirmation of Chapter 13 Plan
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied as moot
Order: Civil minute order

DISCUSSION

The case dismissed pursuant to the Chapter 13 trustee's motion to dismiss, filed December 16, 2014, ECF #25, the motion is denied as moot.

CIVIL MINUTE 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 confirm the first modified Chapter 13 Plan filed by debtors David Garza and Monica Garza having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is denied.

18. 11-15654-A-13 AMY SCROGGS
MHM-3
MICHAEL MEYER/MV
CURTIS FLOYD/Atty. for dbt.
WITHDRAWN

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-9-14 [77]

Final Ruling

The motion withdrawn, the matter is dropped as moot.

19. 10-12257-A-13 FRANK/VIRGINIA AGUIRRE
RSW-3
FRANK AGUIRRE/MV
ROBERT WILLIAMS/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.

MOTION TO SELL
1-13-15 [53]

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party and approved as to form and content by the Chapter 13 trustee

Property: 13913 Austin Creek Avenue, Bakersfield, CA
Buyer: Harris Family Trust
Sale Price: $369,900
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Confirmation of a Chapter 13 plan revests property of the estate in the debtor unless the plan or order confirming the plan provides otherwise. 11 U.S.C. § 1327(b); *see also In re Tome*, 113 B.R. 626, 632 (Bankr. C.D. Cal. 1990). Here, the subject property is property of the estate because the debtor's confirmed plan provides that property of the estate will not revest in debtors upon confirmation.

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). A Chapter 13 debtor has the rights and powers given to a trustee under § 363(b). 11 U.S.C. § 1303. Based on the motion and supporting papers, the court finds a proper reorganization purpose for this sale. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

20. 10-12257-A-13 FRANK/VIRGINIA AGUIRRE
RSW-4

MOTION FOR COMPENSATION BY THE LAW OFFICE OF WILLIAMS AND WILLIAMS, INC. FOR ROBERT S. WILLIAMS, DEBTORS ATTORNEY(S)
1-13-15 [57]

ROBERT WILLIAMS/Atty. for dbt.

Tentative Ruling

Motion: Compensation by Successor Chapter 13 Counsel
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Civil minute order

Successor Chapter 13 debtors' counsel, Robert S. Williams prays flat fee compensation of $2,000 for completion of this case.

DISCUSSION

"A Chapter 13 debtor's lawyer is entitled to reasonable compensation for "actual, necessary services" and reimbursement for "actual, necessary expenses." 11 U.S.C. § 330(a)(1). The applicant bears the burden of proof. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *In re Roderick Timber Co.*, 185 B.R. 601, 606 (B.A.P. 9th Cir. 1995). In fixing the amount of a reasonable fee the court shall consider all relevant factors. 11 U.S.C. § 330(a)(3)(A)-(F)." *In re Letourneau*, 2013 WL 3146952 * 2(Bankr. E.D. Cal. February 4, 2013).

In the Eastern District of California, Chapter 13 debtors' lawyers may either (1) accept a flat rate fee, which does not require court approval, 11 U.S.C. s 330(a), Fed. R. Bankr. P. 2002(a)(6); or (2) bill by the hour, subject to court approval after noticed motion. Local Bankruptcy Rule 2016-1 provides "The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart. (1) The maximum fee that may be charged is $4,000.00 [$3,500 when this case was filed] in nonbusiness cases, and $6,000.00 in business cases...."

This Chapter 13 was filed by attorney Vincent Gorski on March 10, 2010. Gorksi accepted the flat rate fee of $3,500. The debtors' most recent confirmed plan provides for payments through March 2015. Attorney Robert Williams substituted into the case for on January 14, 2015, and prays a flat fee of $2,000 for work to conclude the case.

Finding the flat fee reasonable, the court will grant the motion. In doing so, the court notes the following reasons. First, absent an attempt to evade the flat fee rule or other suggestion that the fee is unreasonable, the court construes the provisions of LBR 2016-1(c) as applicable to each successive attorney in the case. Second, the fee prayed is reasonable in light of anticipated work. Since being engaged by the clients, Williams has: (1) moved for substitution; (2) moved for approval of fees (the instant motion); and (3) moved for court approval to short sell the debtors' property, located at 13913 Austin Creek Avenue, Bakersfield, California. Third, and finally, the fee prayed is below the flat fee applicable to the case, i.e. $3,500, at the time the case was filed. Additional work, applicable to every or nearly every Chapter 13 case is anticipated. See, LBR 5009-1 ("Closing Procedures in Chapter 13 Cases").

As a result, the motion will be granted and Robert S. Williams is approved for fees and costs of $2,000, which may be paid as an administrative expense by the Chapter 13 trustee. But since the plan does not provide that unpaid administrative expenses survive discharge, Chapter 13 Plan, filed May 9, 2010, ECF #18, absent plan modification, unpaid fees and costs will be discharged. *In re Johnson*, 344 B.R. 104 (9th Cir. BAP 2006).

CIVIL MINUTE 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 for approval of attorneys fees filed by Robert S. Williams having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that: (1) the motion is granted; (2) compensation and costs of $2,000.00 payable to Robert S. Williams is approved and may be paid as an administrative expense by Chapter 13 trustee Michael H. Meyer; (3) absent plan modification that includes a *Johnson* exception to the discharge of § 1328(a), any portion of the fee that remains unpaid by the Chapter 13 trustee will be discharged; and (4) absent a showing of "substantial and unanticipated post-confirmation work" pursuant to Local Bankruptcy Rule 2016-1(c)(3), no additional fees or costs will be allowed.

21. 12-18366-A-7 VICTOR/STACY ANN VALADEZ
MHM-1
MICHAEL MEYER/MV
VINCENT GORSKI/Atty. for dbt.

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-10-14 [68]

Final Ruling

The case converted to chapter 7, the matter is dropped as moot.

22. 10-10369-A-13 REESE/RACHEL TIMONEN
PK-5

MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTORS ATTORNEY(S)
1-12-15 [74]

PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a debtor's attorney in a Chapter 13 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis. The court also approves on a final basis all prior fees in this case, including the flat fee received by the attorney under LBR 2016-1(c).

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Patrick Kavanagh's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $6,000.00 and reimbursement of expenses in the amount of $172.59. The aggregate allowed amount equals $6,172.59. As of the date of the application, the applicant held a retainer in the amount of $0.00. The amount of $6,172.59 shall be allowed as an administrative expense to be paid through the plan, and the remainder of the allowed amounts, if any, shall be paid from the retainer held by the applicant. The applicant is authorized to draw on any retainer held. The court also approves on a final basis all prior fees in this case, including the flat fee received by the attorney under LBR 2016-1(c).

IT IS FURTHER ORDERED that the trustee is authorized to pay the fees allowed by this order from the available funds of the plan in a manner consistent with the distribution priorities of the confirmed plan.

23. 14-14971-A-13 CRYSTAL MARTIN

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-12-15 [25]

PATRICK KAVANAGH/Atty. for dbt.
$77.00 INSTALLMENT FEE PAID

Final Ruling

The installments current, the order to show cause is discharged.

24. 13-16875-A-13 JENNIFER JOHNSON
MHM-2

MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
12-10-14 [30]

MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

25. 14-14878-A-13 BRIAN/DIANA POOLE
MHM-1

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
1-12-15 [23]

ROBERT WILLIAMS/Atty. for dbt.

No tentative ruling.

26. 14-11379-A-13 ROBERTA CUMBERLAND
PK-1

MOTION TO MODIFY PLAN
12-29-14 [38]

ROBERTA CUMBERLAND/MV
PATRICK KAVANAGH/Atty. for dbt.
NEIL SCHWARTZ/Atty. for mv.

Final Ruling

Motion: Confirm Modified Chapter 13 Plan
Notice: LBR 3015-1(d)(2), 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by Chapter 13 trustee, approved by debtor's counsel

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 3015-1(d)(2), 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Chapter 13 plan confirmation is governed by 11 U.S.C. §§ 1322, 1323, 1325, 1329 and by Federal Rules of Bankruptcy Procedure 2002(a)(5) and

3015(g) and Local Bankruptcy Rule 3015-1. The debtor bears the burden of proof as to each element. *In re Barnes,* 32 F.3d 405, 407 (9th Cir. 1994). The court finds that the debtor has sustained that burden, and the court will approve modification of the plan.

27. 13-14289-A-13 PHILLIP RUSSELL
LKW-3

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S)
1-12-15 [65]

LEONARD WELSH/Atty. for dbt.

Tentative Ruling

Application: Allowance of Interim Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a debtor’s attorney in a Chapter 13 case and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1), (4)(B). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Law Offices of Leonard K. Welsh’s application for allowance of interim compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on an interim basis. The court allows interim compensation in the amount of $1657.50 and reimbursement of expenses in the amount of $17.30. The aggregate allowed amount equals $1,674.80. As of the date of the application, the applicant held a retainer in the amount of $0.00. The amount of

$1674.80 shall be allowed as an administrative expense to be paid through the plan, and the remainder of the allowed amounts, if any, shall be paid from the retainer held by the applicant. The applicant is authorized to draw on any retainer held.

IT IS FURTHER ORDERED that the fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330. Such allowed amounts shall be perfected, and may be adjusted, by a final application for allowance of compensation and reimbursement of expenses, which shall be filed prior to case closure.

IT IS FURTHER ORDERED that the trustee is authorized to pay the fees allowed by this order from the available funds of the plan in a manner consistent with the distribution priorities of the confirmed plan.

28. 14-16089-A-13 ARACELY LOPEZ — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-12-15 [14]

DISMISSED

Final Ruling

The case dismissed, the order to show cause is discharged.

29. 15-10162-A-13 JAIME/RUTH GARZA — MOTION TO EXTEND AUTOMATIC STAY
1-28-15 [17]
PK-2
JAIME GARZA/MV
PATRICK KAVANAGH/Atty. for dbt.

Tentative Ruling

Motion: Extend the Automatic Stay
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted except as to any creditor without proper notice of this motion
Order: Prepared by moving party pursuant to the instructions below

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Upon request of a party in interest, the court may extend the automatic stay where the debtor has had one previous bankruptcy case that was pending within the 1-year period prior to the filing of the current bankruptcy case but was dismissed. *See* 11 U.S.C. § 362(c)(3)(B). Procedurally, the automatic stay may be extended only "after notice and a hearing *completed* before the expiration of the 30-day period" after the filing of the petition in the later case. *Id.* (emphasis added). To extend the stay, the court must find that the filing of the *later case* is in good faith as to the creditors to be stayed, and the extension of the stay may be made subject to conditions or limitations the court may impose. *Id.*

For the reasons stated in the motion and supporting papers, the court finds that the filing of the current case is in good faith as to the creditors to be stayed. The motion will be granted except as to any creditor without proper notice of this motion.

10:00 a.m.

1. 11-63273-A-13 DARRIN/ERIN WEDEKING — CONTINUED OBJECTION TO CLAIM OF SALLIE MAE, INC., CLAIM NUMBER 7
SJS-2 — 12-2-14 [45]
DARRIN WEDEKING/MV

SUSAN SALEHI/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

2. 11-63273-A-13 DARRIN/ERIN WEDEKING — STATUS CONFERENCE RE: COMPLAINT
14-1144 — 12-2-14 [1]
WEDEKING ET AL V. SALLIE MAE, INC. ET AL
SUSAN SALEHI/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

3. 14-15581-A-13 SARAH MCKAY-WITT — STATUS CONFERENCE RE: COMPLAINT
14-1145 — 12-4-14 [1]
U.S. TRUSTEE V. MCKAY-WITT
ROBIN TUBESING/Atty. for pl.

No tentative ruling.

4. 14-15581-A-13 SARAH MCKAY-WITT — MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-1145 — UST-1 — 1-8-15 [10]
U.S. TRUSTEE V. MCKAY-WITT
ROBIN TUBESING/Atty. for mv.

Tentative Ruling

Motion: Entry of Default Judgment Dismissing Case with Prejudice and Enjoining Future Serial Filings for Two Years without Leave of Court
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted in part, denied in part
Order: Prepared by moving party

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055.

The plaintiff has requested that the court enter default judgment against the defendant on the claims brought in this action. Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court will grant the motion and enter default judgment for the plaintiff on the claims brought against defendant in this adversary proceeding.

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and are cumulative. *See In re Casse*, 198 F.3d. 327, 337–41 (2d Cir. 1999).

In cases where cause is found under § 349(a), a filing bar may exceed the 180-day limit described in § 109(g). *See, e.g., id.* at 341; *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). *But see In re Frieouf*, 938 F.2d 1099, 1103–04 (10th Cir. 1991). In *Leavitt*, the Ninth Circuit B.A.P. noted that § 349 was intended to authorize courts to control abusive filings, notwithstanding the limits of § 109(g). *See In re Leavitt*, 209 B.R. 935, 942 (B.A.P. 9th Cir. 1997).

Section 349(a) invokes a "cause" standard. In *Leavitt*, the panel held that "egregious" conduct must be present to find "cause" under § 349, but "a finding of bad faith constitutes such egregiousness." *Id.* at 939 (upholding the bankruptcy court's decision that debtors' inequitable proposal of Chapter 13 plan merely to avoid an adverse state court judgment was an unfair manipulation of the Code). In this circuit, a finding of bad faith is sufficient "cause" for barring future filings pursuant to § 349(a). *Id.* at 939. The overall test used to determine bad faith is to consider the totality of the circumstances. *See, e.g.*, *In re Leavitt*, 209 B.R. at 939; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In determining whether bad faith exists, "[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

The court concludes that a filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found. The court may find cause to bar a debtor from re-filing if the debtor: (1) acted inequitably in filing a case or proposing a plan, (2) misrepresented the facts, (3) unfairly manipulated the Code, or (4) proposed a plan in an inequitable manner. These factors are disjunctive.

Based on the undisputed facts, the court finds cause to impose a filing bar exceeding the 180-day limit in § 109(g). The following facts show debtor has unfairly manipulated the Code without genuine intent to prosecute the debtor's cases to discharge or reorganization.

The debtor has failed to disclose prior filings in 4 of the cases she has filed. This failure to disclose was on page two of the voluntary petitions in such cases.

Four of the debtor's cases were dismissed for failure to make chapter 13 plan payments. And 1 case was dismissed for unreasonable delay and failure to provide tax documents.

The case will be dismissed with prejudice. The debtor will be enjoined from filing another bankruptcy petition in the Eastern District of California without leave of court for a two-year period commencing on the entry of the order dismissing the debtor's bankruptcy case. The court does not find a 5-year bar appropriate in this case.

During such time, leave of court will not be granted to file a petition unless the following conditions have been met: (1) the request for leave of court to file a petition is accompanied by a cashier's check made payable to the Clerk of Court for the full amount of the filing fee and documents that include the completed schedules and statements prepared and ready to be filed, (2) reasonable assurances are provided that debtor will appear at the § 341 meeting, and (3) the debtor shows a material change in circumstances that warrant the filing of a subsequent petition.

10:30 a.m.

1. 14-16003-A-7 SHAKEEMAH MILES — MOTION FOR RELIEF FROM AUTOMATIC STAY
VVF-1 — 1-19-15 [14]
HONDA LEASE TRUST/MV
PATRICK KAVANAGH/Atty. for dbt.
VINCENT FROUNJIAN/Atty. for mv.
NON-OPPOSITION

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2012 Honda Accord

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The debtor has filed a non-opposition to the motion at docket 21. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1).

"Where the property is declining in value or accruing interest and taxes eat up the equity cushion to the point where the cushion no longer provides adequate protection, the court may either grant the motion to lift the stay or order the debtor to provide some other form of adequate protection." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1096 (rev. 2011). Adequate protection is also required where the property is declining in value, but "[a]n undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." *See id.* ¶ 8:1065.1 (rev. 2012) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)).

The debtor has defaulted on a substantial number of prepetition payments due on account of the leased property described above. This default has continued for 1 payment postpetition. Thus, the debtor has missed 1 post-petition payment and 18.6 prepetition payments due on the debt under lease of the property described above.

Combined with the debtor's non-opposition, the large number of missed payments prepetition along with one postpetition payment constitute cause for stay relief. The court does not address grounds for relief under § 362(d)(2) as relief is warranted under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

2. 12-18004-A-7 JMV-1 JEFFREY VETTER/MV

LA BONITA, INC., A CALIFORNIA CORPORATION

CONTINUED MOTION FOR COMPENSATION FOR JEFFREY M. VETTER, CHAPTER 7 TRUSTEE(S)
12-9-14 [191]

D. GARDNER/Atty. for dbt.
LISA HOLDER/Atty. for mv.

Final Ruling

The matter is deemed submitted. An order will issue from chambers.

3. 12-18004-A-7 JTW-2 JANZEN, TAMBERI AND WONG/MV

LA BONITA, INC., A CALIFORNIA CORPORATION

CONTINUED MOTION FOR COMPENSATION FOR JANZEN, TAMBERI AND WONG, ACCOUNTANT(S), FEE: $1890.00, EXPENSES: $0.00
1-13-14 [173]

D. GARDNER/Atty. for dbt.

Final Ruling

Application: First and Final Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis as to the amounts requested.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Janzen, Tamberi & Wong's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $1,890.00 and reimbursement of expenses in the amount of 0.00.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

4. 14-13305-A-7 TRICIA JONES
RP-1
RANDELL PARKER/MV

MOTION TO EMPLOY GOULD AUCTION & APPRAISAL COMPANY, LLC AS AUCTIONEER(S) AND/OR MOTION CONDUCT PUBLIC AUCTION SALE 1-7-15 [53]

FRANK SAMPLES/Atty. for dbt.

Final Ruling

Motion: Sell Property and Employ and Compensate Auctioneer
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: Personal property described in the motion and notice
Sale Type: Public auction

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55(c), *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

The Chapter 7 trustee may employ an auctioneer that does not hold or represent an interest adverse to the estate and that is disinterested. 11 U.S.C. §§ 101(14), 327(a). The auctioneer satisfies the requirements of § 327(a), and the court will approve the auctioneer's employment.

Section 330(a) of Title 11 authorizes "reasonable compensation for actual, necessary services" rendered by a professional person employed under § 327 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3). The court finds that the compensation sought is reasonable and will approve the application.

5. 12-11008-A-7 RAFAEL ALONSO
HTK-5
RAFAEL ALONSO/MV

MOTION TO DECLARE LITIGATION NOT TO BE A PROPERTY OF THE ESTATE AND/OR MOTION TO COMPEL ABANDONMENT
1-12-15 [231]

NICHOLAS ANIOTZBEHERE/Atty. for dbt.

Tentative Ruling

Motion: Declare Litigation Not Property of the Estate or, in the Alternative, Abandonment
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied without prejudice
Order: Civil minute order

Debtor Rafael Alonso moves to declare litigation, *Alonso v. Dulcich*, No. S-1500-CV-282651 (Kern County Superior Court December 11, 2014), declared not property of the estate or, in the alternative, to compel the Chapter 7 trustee to abandon the litigation, and all causes of action included therein. The motion will be denied without prejudice.

DISCUSSION

Declaratory Relief (Litigation Not Property of the Estate)

Alonso's request to have *Alonso v. Dulcich*, No. S-1500-CV-282651 (Kern County Superior Court December 11, 2014), and the causes of action described therein, not property of the bankruptcy estate will be denied. And that so for two reasons. First, doing so is procedurally improper. Such relief must be sought by adversary proceeding. "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings...(2) *a proceeding to determine* the validity, priority, or *extent of a lien or other interest in property*, other than a proceeding under Rule 4003(d)..." Fed. R. Bankr. P. 7001(2)(emphasis added). As a result, the debtor must proceed, if at all, by adversary proceeding.

Second, the motion is not supported by evidence demonstrating that the causes of action arose post-petition and, therefore, is not property of the estate. 11 U.S.C. § 541(a). Local Bankruptcy Rule 9014-1(d)(6) provides, "Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(e)." Only two pieces of evidence are offered in support of the motion. The declaration of H. Ty Kharazi does not address accrual of the cause of action against attorney Dulcich. The complaint in *Alonso v. Dulcich*, No. S-1500-CV-282651 (Kern County Superior Court December 11, 2014) is offered and does describe pre-petition acts by attorney Dulcich. But it does not clearly and unequivocally describe an accrual pre–petition. As a result, the debtor has not carried it burden of proof.

Compel Abandonment

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." *See* 11 U.S.C. § 554(a)–(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

But as in the request for a declaration that the litigation is not property of the estate, the motion is unsupported by admissible evidence showing that it a burden to the estate and of no value to it. As a result, the motion will be denied.

CIVIL MINUTE 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 declare litigation not property of the estate or, in the alternative, to compel abandonment filed by debtor Rafael Alonso having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is denied without prejudice.

6. 12-11008-A-7 RAFAEL ALONSO
PWG-13
VINCENT GORSKI/MV
NICHOLAS ANIOTZBEHERE/Atty. for dbt.
VINCENT GORSKI/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO EXTEND TIME
1-22-15 [255]

Tentative Ruling

Motion: Modification of Scheduling Order, filed August 23, 2014, ECF #98
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied
Order: Civil minute order

Chapter 7 trustee, by and through proposed counsel Phillip Gillett, Jr., seeks to modify the Scheduling Order § 1.0, filed August 23, 2014, ECF #98, to extend the close of discovery from February 18, 2015, to August 18, 2015. The motion is opposed by the debtor.

DISCUSSION

Violation of Local Rule 9014-1(c)(4)

In the Bankruptcy Court for the Eastern District of California all motions must include a docket control number. LBR 9014-1(c)(1). Local Rules provide, "Once a Docket Control Number is assigned, all related papers filed by any party, including motions for orders shortening the amount of notice, shall include the same number. However, motions for reconsideration and countermotions shall be treated as separate motions with a new Docket Control Number assigned in the manner provided for above." LBR 9014-1(c)(1).

Gorski, through counsel, has violated LBR 9014-1(c)(4). The underlying motion for turnover was assigned docket control number VG-5. This motion "relates," within the meaning of LBR 9014-1(c), to that motion. But it was assigned PWG-13 and, thus, violates local rules. Future violations may result in summary denial of the motion or sanctions against counsel and/or client.

Modification of Scheduling Order § 1.0

On August 23, 2014, this court issued a scheduling order cutting off discovery on February 18, 2015. Scheduling Order § 1.0, filed August 23, 2014, ECF #98. The scheduling order also provides a process for modification of that order. It states, "Modification of this scheduling order requires court approval. A party may request such modification by filing either a motion or a stipulation. All such motions or stipulations will be considered upon a showing of good cause. Fed. R. Civ. P. 16(b)(4), *incorporated by* Fed. R. Bankr. P. 7016, 9014(c). If the trial date will be affected, a showing of due diligence in complying with existing scheduling orders will also be required." Scheduling Order § 7.10, filed August 23, 2014, ECF #98.

Modification of the scheduling order will impact the trial date because the scheduling order contemplated trial readiness by February 18, 2014 [since extended to April 8, 2015] and expedited setting of an

evidentiary hearing thereafter. If this motion were granted, trial would not occur until after August 18, 2015. As a result, a showing of due diligence is required. The trustee's declaration offered in support does not show due diligence, i.e. no discovery undertaken from July 25, 2014, to December 15, 2014. Declaration of Gorski ¶ 17, filed January 22,, 2015, ECF #257. Settlement discussions, particularly where "materials terms" remained unresolved, are not a sufficient reason to delay discovery. *Id*. As a result, the motion will be denied.

CIVIL MINUTE 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 modify scheduling order filed by Chapter 7 trustee Vincent Gorski having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is denied and, except as otherwise ordered by this court, all provisions of the Scheduling Order, filed August 23, 2014, ECF 98 remain in full force and effect.

7.	11-62509-A-7 HDN-5 HENRY NUNEZ/MV HENRY NUNEZ/Atty. for dbt. RESPONSIVE PLEADING	SHAVER LAKEWOODS DEVELOPMENT INC.	OBJECTION TO CLAIM OF VERLYN GAINES, CLAIM NUMBER 8 12-18-14 [194]

Tentative Ruling

Objection: Claim No. 8 (Veryln Gaines)
Notice: LBR 9014-1(f)(2) / LBR 3007-1(b)(2); no written opposition required
Disposition: Overruled without prejudice
Order: Civil minute order

Creditor Henry Nunez objects to Claim No. 8 filed by Verlyn Gaines. Gaines' claim is for $280,000 and purports to be secured by real property. The claim is the subject of an adversary proceeding by Randell Parker, Chapter 7 trustee. *Parker v. Gaines*, No. 14-1076 (Bankr. E.D. Cal. 2014). Parker has pled the following causes of action: (1) determine the nature, extent and validity of the liens; (2) claim bar by statute of limitations; (3) determination of finders fee; and (4) objection to claim No. 8. Nunez objects to the secured status of the claim, arguing: (1) the scope of the lien; and (2) a lack of perfection. Creditor Gaines opposes the objection.

DISCUSSION

Procedurally Improper

"A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding." Fed. R. Bankr. P. 3007(b).

Relief that must be sought be adversary proceeding includes, "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings...(2) *a proceeding to determine the validity, priority, or extent of a lien* or other interest in property, other than a proceeding under Rule 4003(d)..." Fed. R. Bankr. P. 7001(2)(emphasis added). But the objection appears to do just that. Gaines filed as a secured creditor. Paragraph 13 of the objection makes clear that it seeks to attack the secured status of Gaines' claim, "Therefore, the claim's proof of claim should be relegated as a general unsecured claim." It does so by arguing that the Gaines lien (1) does not extend to sale proceeds, Objection to Claim No. 8 ¶ 6, filed December 18, 2014, ECF #194; and (2) is unperfected, id. at ¶ 11.

Duplicative of *Parker v. Gaines*, No. 14-1076 (Bankr. E.D. Cal. 2014)

Moreover, the relief sought appears duplicative of that in the Chapter 7 trustee's adversary proceeding. And even if the matter were procedurally proper, the court would not rule on such a matter until resolution of the adversary proceeding.

For each of these reasons, the objection is overruled without prejudice.

CIVIL MINUTE 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 Objection to Claim No. 8 filed by creditor Henry Nunez having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that objection is overruled without prejudice.

8. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. MOTION FOR SUMMARY JUDGMENT
HDN-6 1-6-15 [203]
GORDON LOO/MV
HENRY NUNEZ/Atty. for dbt.

Tentative Ruling

Motion: Summary Judgment (Claim No. 10 Shaver Lake Homeowners Association)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied with prejudice
Order: Civil minute order

Creditor Gordon Loo prays summary judgment pursuant to Fed. R. Civ. P. 56, *incorporated by* Fed. R. Bankr. P. 7056, 9014(c), as to his Objection to Claims No. 2 and 10. Claim Nos. 2 and 10 were filed by Shaver Lake Homeowners Association. The motion is opposed by the claimant.

This claim has a somewhat confused history. In the first instance, Shaver Lake Homeowners Association filed an unsecured claim for "defective construction and recoverable costs" in the amount of $2,135,121.65. Claim No. 2, filed February 24, 2012. Attached were spreadsheets detailing the association's damages. Chapter 7 trustee Randell Parker objected to the claim and this court set the matter for an evidentiary hearing. Later, the trustee and the claimant resolved the matter by stipulation. Stipulation, filed April 11,2014, ECF # 140. In the pertinent part, the agreement provided that Shaver Lakewood Home Owners Association would file a new unsecured claim in the amount of $1.5 million. And Shaver Lake Homeowners Association did so. Claim No. 10, field April 9, 2014. Ostensibly the new claim both amended and superseded the original claim. The stipulation was not effective until approved by the court. Based on the stipulation the court vacated the evidentiary hearing but declined to approve the stipulation, requiring a motion under Rule 9019. For reasons unknown, the Chapter 7 trustee never presented such a motion. And it is the original and/or the new claims, i.e. Claims Nos. 2 and 10, to which Loo now objects.

Loo having failed to rebut the presumption of validity and genuine issues of fact remaining, the motion will be denied with prejudice.

DISCUSSION

Evidentiary Objections Presented by Loo

In opposition to the motion, Shaver Lakewood Homeowners Association offers Exhibits A-H. Loo objects to Exhibits A-F. Because these documents were not properly authenticated, Fed. R. Evid. 901(a), the objection is sustained as to Exhibits A, C, D, E and F. Exhibit B (declaration of Michael D. Jundt and his report) are properly authenticated and the objection is overruled. *See* Fed. R. Evid. 901(a); Declaration of Michael D. Jundt ¶ 2, filed January 20, 2015, ECF #215.

Procedural Problems

Significant procedural impediments stand between the movant and an order granting the motion. First and foremost, it is unsupported by evidence. LBR 9014-1(d)(6). The only evidence offered by the movant

is a request for judicial notice, allegedly supported by attached exhibits. The Request for Judicial Notice ¶¶ 1-12, filed January 6, 2015, ECF # 205, seeks judicial notice of Exhibits A-K which it contends are appended to that document. They are not. With the possible exception of the interrogatories and responses thereto (which were also offered by Shaver Lake Homeowners Association), those documents are not otherwise in the record.

Second, the motion is not supported by a memorandum of points and authorities. LBR 9014-1(d)(5). The motion refers to a "strict liability" theory but offers no authorities. While such a memorandum is not always required, the court is unable to follow the movant's line of argument supporting the objection.

Third, the summary judgment improperly expands the scope of the objection. The objection must specify the grounds on which it is made. Fed. R. Bankr. P. 3007, 9013-9014. Rule 9013 requires that the objection state "with particularity the grounds therefore, and shall set forth the relief or order sought." The Objection ¶ 1, filed August 25, 2014, ECF # 164 is narrowly crafted. It states: "The Objector objects to the proof of claim filed by Sierra Pines at Shaver Lake Homeowners Association on the following grounds: A. The defect alleged in the proof of claim does not pertain to the common areas of the development over which the claimant has the responsibility to repair; B. The amount stated in the proof of claim in overinflated (sic) and illegitimate; and C. As a consequence Gordon Loo and the other creditors of the estate will be prejudiced by receiving a diminished dividend from the liquidation of the assets of the estate." Now, in contrast, seems to change the basis of its objection. He cites: (1) lack of strict liability; and (2) inapplicability of the doctrine of alter ego. Motion for Summary Judgement ¶ 7, filed January 6, 2015, ECF #203.

On The Merits

Legal Standards

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving

party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and supporting materials—including facts considered undisputed—show the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).

Application to Claim Nos. 2 and 10

Loo's motion fails for two substantive reasons. First, he has not overcome the presumption of validity. A properly filed claim enjoys a presumption of validity that is difficult to overcome. "A proof of claim form, executed under penalty of perjury and filed with the bankruptcy court, is prima facie evidence of the validity and amount of the claim or interest. [FRBP 3001(f); *In re Southern Calif. Plastics, Inc.* (9th Cir. 1999) 165 F3d 1243, 1247–1248]. To rebut the prima facie evidence, the objecting party must produce substantial evidence in opposition. [*In re Plourde* (1st Cir. BAP 2009) 418 BR 495, 504]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Enforcement of Claims and Interests § 17:1095 (Rutter Group 2013). If the debt is based on a writing, the writing should be attached. Fed. R. Bankr. P. 3001(c). Failure to attach proper documentation removes the presumption of validity. *In re Garner*, 246 B.R. 617, 620 (9th Cir. BAP 2000). Based on construction defects, the debt is not based on a writing within the meaning of Rule 3001(c)(1), and no writing need be attached. Since Claim No. 2 (original claim) and Claim No. 10 (the amended/superseded claim) are both executed and filed, the claims are presumptively valid.

Loo has not produced sufficient evidence, i.e. "substantial" evidence, to overcome that presumption. With the exception of the interrogatories and responses thereto offered by Shaver Lakewood Homeowners Association, the exhibits upon which the movant relies are not before the court. No other evidence is presented. And those two documents (if the same to which the movant refers) are an insufficient

basis to grant the motion. Moreover, to overcome the presumption, the court believes it incumbent on Loo to negate other theories by which the debtor might be found liable for this debt. And he has not done so.

Second, there is a genuine issue of fact present. At least some of the damages claimed appear to pertain to common areas. *See* Jundt Report pp. 16-18, Exh. B-19 thru B-21, which claim damages for the "site" and the "pavement." *See* Field Observations F & G. There is at least an inference that these damages are within the common area of the homeowners association such that it may claim damages on its own behalf, rather than damages to units for which damages might only lie to the actual owner.

For each of these reasons, the motion will be denied.

Violation of Local Rule 9014-1(c)(4)

By Loo

In the Bankruptcy Court for the Eastern District of California all motions must include a docket control number. LBR 9014-1(c)(1). Local Rules provide, "Once a Docket Control Number is assigned, all related papers filed by any party, including motions for orders shortening the amount of notice, shall include the same number. However, motions for reconsideration and countermotions shall be treated as separate motions with a new Docket Control Number assigned in the manner provided for above." LBR 9014-1(c)(1).

Loo, through counsel, has violated LBR 9014-1(c)(4). The underlying objection to claim no. 10 was assigned docket control number HDN-4. This motion for summary judgment seeks to resolve that claim objection and, therefore, "relates" to that claim objection within the meaning of LBR 9014-1(c), to that motion. But the motion for summary judgment was assigned it was assigned HDN-6 and, thus, violates local rules.

By Shaver Lake Homeowners Association

One of the pleadings offered by Shaver Lake Homeowners Association's suffers the same problem. The movant (improperly) designated the motion for summary judgment as "HDN-6." The exhibits offered in opposition were designated "KCR-3."

Future violations may result in summary denial of the motion, striking the opposition or sanctions against counsel and/or client.

CIVIL MINUTE ORDER

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

The motion for summary judgement filed by Gordon Loo having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that: (1) the motion is denied with prejudice; and (2) no partial adjudication pursuant to Fed. R. Civ. P. 56(g), incorporated by Fed. R. Bankr. P. 7056, 9014(c), is rendered.

9. 11-60914-A-7 WADE/CARRIE MOOR
JMV-2
JEFFREY VETTER/MV

CONTINUED MOTION FOR COMPENSATION FOR JEFFREY M. VETTER, CHAPTER 7 TRUSTEE(S)
12-3-14 [86]

D. GARDNER/Atty. for dbt.
LISA HOLDER/Atty. for mv.

Final Ruling

The matter is deemed submitted. An order will issue from chambers.

10. 12-16817-A-7 GREGORY STURGES
JES-5
JAMES E. SALVEN, CERTIFIED PUBLIC ACCOUNTANT/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT(S)
11-19-14 [263]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James Salven’s application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $1282 and reimbursement of expenses in the amount of $172.16.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

11. 14-16024-A-7 VANESSA VASQUEZ — MOTION FOR RELIEF FROM AUTOMATIC STAY
PK-1
DAVID BOGERT/MV
ROBERT WILLIAMS/Atty. for dbt.
PATRICK KAVANAGH/Atty. for mv.
1-21-15 [11]

Tentative Ruling

Motion: Relief from Stay
Disposition: Denied without prejudice unless movant waives on the record the time limits described in § 362(e)(1) and (2), in which case the court will continue the hearing to March 4, 2015, and require that any supplemental proof of service be filed no later than 14 days in advance of the continued hearing
Order: Civil minute order

As a contested matter, a motion for relief from stay is governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 4001(a)(1), 9014(a). In contested matters generally, "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Fed. R. Bankr. P. 9014(a). A motion initiating a contested matter must be served pursuant to Rule 7004. Fed. R. Bankr. P. 9014(b).

The motion must be served on the party against whom relief is sought. *See* Fed. R. Bankr. P. 9014(a)–(b). The debtor and the trustee are ordinarily the parties against whom relief is sought in a typical motion for relief from the automatic stay.

In this case, the service of the motion was insufficient and did not comply with Rules 7004 and 9014. No proof of service has been filed on the docket.

12. 13-16857-A-7 JES-2 JAMES SALVEN/MV CYNTHIA SCULLY/Atty. for dbt.

MENDOZA FAMILY PRACTICE, A MEDICAL CORPORATION

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT(S) 11-21-14 [50]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis. The court notes the voluntary reduction of the compensation for services to $3,500.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James Salven's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $3500.00 and reimbursement of expenses in the amount of $303.87.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

13. 14-13873-A-7 MARIO/STACY PRUDENCIO
RP-1
RANDELL PARKER/MV
VINCENT GORSKI/Atty. for dbt.

MOTION TO SELL
1-7-15 [19]

Tentative Ruling

Motion: Sell Property
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Property: 2005 Chevrolet Silverado 1500
Buyer: Debtors
Sale Price: $6545 ($3645 cash plus $2900 exemption credit)
Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

14. 14-11478-A-7 LANCE/JANICE ST PIERRE
DMG-2
JEFFREY VETTER/MV

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LANCE WILLIAM AND JANICE DENISE ST PIERRE
1-20-15 [83]

VINCENT GORSKI/Atty. for dbt.
D. GARDNER/Atty. for mv.

Tentative Ruling

Motion: Approve Compromise or Settlement of Controversy
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by moving party

Parties to Compromise: Trustee and debtor/debtors
Dispute Compromised: Debtor's postpetition encumbrance of a vehicle that was estate property after the trustee's turnover demand for the vehicle, an action that is the basis for denial of discharge as well as a void transaction
Summary of Material Terms: Debtors have tendered $10,285.00 to the trustee, which amount is held by the trustee. By inference, the

trustee will not bring claims to avoid the encumbrance on the vehicle or to deny debtors' discharge.

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Based on the motion and supporting papers, the court finds that the compromise is fair and equitable considering the relevant *A & C Properties* factors. The compromise will be approved.

15. 14-14982-A-7 BRYAN WOOLARD
BHT-620221
MATRIX FINANCIAL SERVICES CORPORATION/MV
ROBERT WILLIAMS/Atty. for dbt.
BRIAN TRAN/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-6-15 [16]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 941 West Willow Avenue, Ridgecrest, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for

liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

16. 14-14891-A-7 DEANNA MARKS
RP-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
12-23-14 [12]

STEVEN STANLEY/Atty. for dbt.

Tentative Ruling

Motion: Dismiss Case and Extend Trustee's Deadlines
Notice: LBR 9014-1(f)(1); written opposition required or case dismissed without hearing
Disposition: Conditionally denied in part, granted in part
Order: Civil minute order

The Chapter 7 trustee has filed a Motion to Dismiss for Failure to Appear at the § 341(a) Meeting of Creditors and Motion to Extend Deadlines for Filing Objections to Discharge. The debtor opposes the motion.

DISMISSAL

Chapter 7 debtors shall attend the § 341(a) meeting of creditors. 11 U.S.C. § 343. A continuing failure to attend this meeting is cause for dismissal of the case. *See* 11 U.S.C. §§ 105(a), 343, 707(a); *see also In re Nordblad*, No. 2:13-bk-14562-RK, 2013 WL 3049227, at *2 (Bankr. C.D. Cal. June 17, 2013).

The court finds that the debtor has failed to appear at the first date set for the meeting of creditors. Because the debtor's failure to attend the required § 341 creditors' meeting has occurred only once, the court will not dismiss the case provided the debtor appears at the continued date of the creditor's meeting. This means that the court's denial of the motion to dismiss is subject to the condition that the debtor attend the continued meeting of creditors. But if the debtor does not appear at the continued meeting of creditors, the case will be dismissed on trustee's declaration without further notice or hearing.

EXTENSION OF DEADLINES

The court will grant the motion in part to the extent it requests extension of the trustee's deadlines to object to discharge and to dismiss the case for abuse, other than presumed abuse. Such deadlines will be extended so that they run from the next continued date of the § 341(a) meeting of creditors rather than the first date set for the meeting of creditors. The following deadlines are extended to 60 days after the next continued date of the creditors' meeting: (1) the trustee's deadline for objecting to discharge under § 727, *see* Fed. R. Bankr. P. 4004(a); and (2) the trustee's deadline for bringing a

motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, *see* Fed. R. Bankr. P. 1017(e).

CIVIL MINUTE ORDER

The court will issue a minute order that conforms substantially to the following form:

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

The trustee's Motion to Dismiss for Failure to Appear at § 341(a) Meeting of Creditors and Motion to Extend the Deadlines for Filing Objections to Discharge and Motions to Dismiss 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 denied on the condition that the debtor attend the continued § 341(a) meeting of creditors scheduled for February 17, 2015, at 11:00 a.m. But if the debtor does not appear at this continued meeting, the case will be dismissed on trustee's declaration without further notice or hearing.

IT IS ALSO ORDERED that following deadlines shall be extended to 60 days after the continued date of the creditors' meeting: (1) the trustee's deadline for objecting to discharge under § 727, *see* Fed. R. Bankr. P. 4004(a); and (2) the trustee's deadline for bringing a motion to dismiss under § 707(b) or (c) for abuse, other than presumed abuse, *see* Fed. R. Bankr. P. 1017(e).

11:00 a.m.

1. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1003 PARKER V. RODRIGUEZ
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: COMPLAINT
1-6-14 [1]

Tentative Ruling

COURT'S RULING ON WHETHER DEFENDANT RODRIGUEZ HAS A RIGHT TO A JURY TRIAL ON HER COUNTERCLAIMS

BACKGROUND

Defendant Rodriguez has demanded a jury trial on the counterclaims she has filed against the trustee in this adversary proceeding. According to the allegations of Rodriguez's counterclaim: (i) The chapter 7 trustee and Rodriguez entered into a several-party settlement agreement, approved by the court, under which Rodriguez agreed to transfer her interests in certain real property; (ii) The court infers from the facts alleged that the transfer was to the trustee of the estate of Shaver Lakewoods Development, Inc.; and (ii) As part of this settlement, the trustee agreed to reinstate any debt and/or obligation that the debtor owed to Rodriguez as of October 2, 2009.

The debtor's petition was filed November 17, 2011. So the date to which Rodriguez's claim was reinstated under the settlement was a prepetition date. Rodriguez has brought two counterclaims against the trustee in this adversary case.

The first counterclaim is for specific performance. This claim seeks to require the trustee to perfect Rodriguez's security interest based on her interpretation of the settlement agreement.
Rodriguez states in this claim that she lacks an adequate remedy at law and does not seek damages.

The second counterclaim is for declaratory relief. This claim requests a judicial determination that Rodriguez has a valid security interest or lien. Essentially, Rodriguez requests declaratory relief to give him a valid security interest based on obligations purportedly flowing from the settlement agreement.

LEGAL STANDARDS

The Seventh Amendment of the U.S. Constitution provides, "*In Suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

The Supreme Court "[has] consistently interpreted the phrase 'Suits at common law' to refer to suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (citation omitted) (internal quotation marks omitted). In *Granfinanciera*, the Supreme Court explained: "As *Katchen* makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989).

The Supreme Court has also held as follows: "[B]y filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction.* As such, there is no Seventh Amendment right to a jury trial. If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial." *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (citations omitted) (internal quotation marks omitted).

The Second Circuit has similarly held that "filing a proof of claim is a necessary but not sufficient condition to forfeiting a creditor's right to a jury trial. Rather, a creditor loses its jury trial right only with respect to claims whose resolution affects the allowance or disallowance of the creditor's proof of claim or is otherwise so

integral to restructuring the debtor-creditor relationship." *In re CBI Holding Co., Inc.*, 529 F.3d 432, 466 (2d Cir. 2008).

"An action that bears directly on the allowance of a claim is integrally related to the equitable reordering of debtor-creditor and creditor-creditor relations. If an equitable reordering cannot be accomplished without resolution of what would otherwise be a legal dispute, then that dispute becomes an essential element of the broader equitable controversy." *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993).

ANALYSIS

Rodriguez has filed a secured proof of claim against this estate for $464,615.99, and the court reduced the amount of this claim somewhat at summary judgment to $451,045.48. By filing her secured claim, she has submitted to the equitable jurisdiction of this court as to proceedings integral to the restructuring of the debtor-creditor relationship.

Rodriguez's counterclaims are integral to the restructuring of the debtor-creditor relationship. They relate to the nature of her claim against the estate—Rodriguez wants her claim to be secured and a valid lien to be created or declared. The estate's position is that Rodriguez does not have a secured claim.

Rodriguez's counterclaims constitute an assertion of her claim or rights against the estate for a share of the res that the estate represents. The counterclaims represent essentially the same relief sought by Rodriguez's proof of claim—a larger recovery of a share of the estate or better rights against the estate (i.e., a secured claim based on a created or declared security interest). The prayer for relief at the end of Rodriguez's counterclaims supports this conclusion: she specifically requests adjudication of her proof of claim's enforceability as a secured claim in bankruptcy and further for judgment that she has a valid security interest.

CONCLUSION

Accordingly, the court finds that Rodriguez's counterclaims are integral to the restructuring of the debtor-creditor relationship. The resolution of her counterclaims affects the allowance or disallowance of her proof of claim as a secured claim. Rodriguez thus has no right to a jury trial on her counterclaims, even if her counterclaims were legal, an issue the court need not decide.

2. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1004 PARKER V. LOO
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: COMPLAINT
1-6-14 [1]

Tentative Ruling

COURT'S RULING ON WHETHER DEFENDANT LOO HAS A RIGHT TO A JURY TRIAL ON HIS COUNTERCLAIMS

BACKGROUND

Defendant Loo has demanded a jury trial on the counterclaims he has filed against the trustee in this adversary proceeding.

According to the allegations of Loo's counterclaim: (i) The chapter 7 trustee and Loo entered into a several-party settlement agreement, approved by the court, under which Loo agreed to transfer his interests in certain real property; (ii) The court infers from the facts alleged that the transfer was to the trustee of the estate of Shaver Lakewoods Development, Inc.; and (iii) As part of this settlement, the trustee agreed to reinstate any debt and/or obligation that the debtor owed to Loo as of October 2, 2009.

The debtor's petition was filed November 17, 2011. So the date to which Loo's claim was reinstated under the settlement was a prepetition date.

Loo has brought two counterclaims against the trustee in this adversary case. The first counterclaim is for specific performance. This claim seeks to require the trustee to perfect Loo's security interest based on his interpretation of the settlement agreement. Loo states in this claim that he lacks an adequate remedy at law and does not seek damages.

The second counterclaim is for declaratory relief. This claim requests a judicial determination that Loo has a valid security interest or lien. Essentially, Loo requests declaratory relief to give him a valid security interest based on obligations purportedly flowing from the settlement agreement.

LEGAL STANDARDS

The Seventh Amendment of the U.S. Constitution provides, "*In Suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

The Supreme Court "[has] consistently interpreted the phrase 'Suits at common law' to refer to suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (citation omitted) (internal quotation marks omitted). In *Granfinanciera*, the Supreme Court explained: "As *Katchen* makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the

estate." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989).

The Supreme Court has also held as follows: "[B]y filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction.* As such, there is no Seventh Amendment right to a jury trial. If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial." *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (citations omitted) (internal quotation marks omitted).

The Second Circuit has similarly held that "filing a proof of claim is a necessary but not sufficient condition to forfeiting a creditor's right to a jury trial. Rather, a creditor loses its jury trial right only with respect to claims whose resolution affects the allowance or disallowance of the creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship." *In re CBI Holding Co., Inc.*, 529 F.3d 432, 466 (2d Cir. 2008).

"An action that bears directly on the allowance of a claim is integrally related to the equitable reordering of debtor-creditor and creditor-creditor relations. If an equitable reordering cannot be accomplished without resolution of what would otherwise be a legal dispute, then that dispute becomes an essential element of the broader equitable controversy." *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993).

ANALYSIS

Loo has filed a proof of claim against this estate for $577,214.21 ($516,682.62 of which claimed to be secured). By filing this claim, he has submitted to the equitable jurisdiction of this court as to proceedings integral to the restructuring of the debtor-creditor relationship.

Loo's counterclaims are integral to the restructuring of the debtor-creditor relationship. They relate to the nature of his claim against the estate—Loo wants his claim to be secured and a valid lien to be created or declared. The estate's position is that Loo does not have a secured claim.

Loo's counterclaims constitute an assertion of his claim or rights against the estate for a share of the res that the estate represents. The counterclaims represent essentially the same relief sought by Loo's proof of claim—a larger recovery of a share of the estate or better rights against the estate (i.e., a secured claim based on a created or declared security interest). The prayer for relief at the end of Loo's counterclaims supports this conclusion: he specifically requests judicial adjudication of his proof of claim's enforceability as a secured claim in bankruptcy and further for judgment that he has a valid security interest.

CONCLUSION

Accordingly, the court finds that Loo's counterclaims are integral to the restructuring of the debtor-creditor relationship. The resolution of his counterclaims affects the allowance or disallowance of his proof of claim as a secured claim. Loo thus has no right to a jury trial on his counterclaims, even if his counterclaims were legal, an issue the court need not decide.

3. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1005 PARKER V. NUNEZ
1-6-14 [1]
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: COMPLAINT

Tentative Ruling

COURT'S RULING ON WHETHER DEFENDANT NUNEZ HAS A RIGHT TO A JURY TRIAL ON HIS COUNTERCLAIMS

BACKGROUND

This adversary proceeding is filed in the underlying bankruptcy case of the debtor Shaver Lakewoods Development, Inc. (also described by the parties as "Shaver Lake Woods Development, Inc.). Shaver Lakewoods Development, Inc. is the debtor in the underlying bankruptcy. The debtor's petition was filed November 17, 2011.

Defendant Nunez has demanded a jury trial "on the issues presented in his "Counter-Claim." Nunez's counterclaim alleges facts relating to a retainer agreement between Nunez on the one hand and Gordon Loo, Robert Rodriguez and Angela Rodriguez, individually, and Shaver Lakewoods Development, Inc. Nunez alleges that he performed as indicated in the retainer agreement and rendered the legal services as promised and agreed. He further asserts that Shaver Lake Woods Development, Inc. (now the debtor in the underlying bankruptcy case), breached the retainer agreement by failing to honor the attorney's lien provision in the retainer agreement and joint and several liability obligation set out in the retainer agreement. He claims damages in excess of $88,501.18.

He further mentions his proof of claim that he filed at paragraph 16 on page 4 of the Counterclaim. A review of the claims register shows that Nunez has in fact filed a proof of claim in the underlying bankruptcy case of the debtor. His proof of claim asserts a secured claim in the amount of $88,501.18, the same amount as claimed as damages at paragraph 16 on page 4 of the Counterclaim. A copy of a retainer agreement is attached to the proof of claim, and that copy contains language indicating it is the same retainer agreement quoted and relied on by Nunez's counterclaim.

Nunez's counterclaim also mentions that the real property lots as to which he seeks a determination of his rights have been sold and liquidated (paragraph 21, p. 5 of the counterclaim). He seeks to resolve his dispute with the chapter 7 trustee, Randell Parker, over his asserted secured interest in such proceeds, and whether his

secured interest is superior to the trustee's interest (See prayer for relief at p. 8 of the counterclaim).

The first counterclaim is to quiet title. Nunez alleges that the trustee claims an interest in the proceeds and that the trustee's claim is adverse to Nunez's claim to the proceeds. He asserts that the trustee's "title" to the proceeds is based on the trustee's status as a hypothetical lien creditor, a power that gives the trustee "the ability to avoid and cancel all unperfected interests against the estate." See Counterclaim ¶ 22, at 5 (emphasis added). By this claim, Nunez wants the court to determine that his claim to the proceeds from the sale of the real property lots "is superior in right, title and interest to all others who might claim an interest in" them. Counterclaim ¶ 23, at p. 6.

The second counterclaim is for specific performance. In this claim, Nunez states he "has no adequate remedy at law and do[es] not seek damages." Counterclaim ¶ 37, at p. 7. He would require the trustee to specifically perform the attorney's lien provision of the retainer agreement and the liability clause of that agreement.

The last claim is framed as request for declaratory relief. This claim asserts the existence of an actual controversy over the interpretation of a Settlement Agreement and Release, although it is unclear from the allegations how that settlement agreement relates to Nunez's claims. But the relief sought overlaps the relief sought by the first counterclaim to quiet title. Nunez wants a "judicial adjudication" of whether he "possesses a secured claim based on his attorney's lien"; whether his "lien attaches to the proceeds from the sale of the debtor's lots"; and whether his "secured interest in the proceeds from the sale of the debtor's lots is superior to the trustee's interest." Counterclaim ¶ 40, at p. 8.

Nunez's declaratory relief request also seeks the court's determination that his secured interest "takes priority over all subsequently filed or recorded interests in this case, including that possessed by" the trustee. This portion of the relief appears to request an adjudication of Nunez's secured claim vis-à-vis the trustee and other creditors.

LEGAL STANDARDS

The Seventh Amendment of the U.S. Constitution provides, "*In Suits at common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

The Supreme Court "[has] consistently interpreted the phrase 'Suits at common law' to refer to suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (citation omitted) (internal quotation marks omitted). In *Granfinanciera*, the Supreme Court explained: "As *Katchen* makes clear, however, by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989).

The Supreme Court has also held as follows: “[B]y filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power. If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. In other words, the creditor’s claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court’s *equity jurisdiction.* As such, there is no Seventh Amendment right to a jury trial. If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.” *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (citations omitted) (internal quotation marks omitted).

The Second Circuit has similarly held that “filing a proof of claim is a necessary but not sufficient condition to forfeiting a creditor's right to a jury trial. Rather, a creditor loses its jury trial right only with respect to claims whose resolution affects the allowance or disallowance of the creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship.” *In re CBI Holding Co., Inc.*, 529 F.3d 432, 466 (2d Cir. 2008).

“An action that bears directly on the allowance of a claim is integrally related to the equitable reordering of debtor-creditor and creditor-creditor relations. If an equitable reordering cannot be accomplished without resolution of what would otherwise be a legal dispute, then that dispute becomes an essential element of the broader equitable controversy.” *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993).

ANALYSIS

Nunez has filed a proof of claim against the estate in the underlying bankruptcy case. By filing this claim, he has submitted to the equitable jurisdiction of this court as to proceedings integral to the restructuring of the debtor-creditor and creditor-creditor relationships.

Nunez’s counterclaims are integral to the restructuring of the debtor creditor relationship. They assert the rights represented in his claim against the estate. His counterclaims are based on a retainer agreement and asserted lien rights arising from such agreement that he claims gives him a secured claim against the proceeds of the subject real property that was sold by the trustee.
By his counterclaims, Nunez seeks to enforce the rights embodied by his proof of claim—he requests a judgment that his secured claim amount is $129,687.18 with interest (see prayer for relief), and a determination that his secured interest “takes priority over all subsequently filed or recorded interests in this case, including that possessed by” the trustee. He requests a judicial determination that his right and interest in the proceeds from the subject real property is superior to all others that might claim an interest in them. He requests a specific performance of the retainer agreement.

In short, all his counterclaims and requests for relief represent his attempt to assert and enforce the rights evidenced by his proof of claim against the estate, and that such rights are valid and superior to other adverse claimants including the trustee. By bringing his

counterclaims, Nunez has asserted whatever rights he has as a secured creditor against a share of the estate's res. Nunez's counterclaims do nothing more than attempt to determine his asserted share of the estate and protect that share as against the adverse claims of the trustee and other creditors.

As a result, the resolution of Nunez's counterclaims is integral to the restructuring of the debtor-creditor relationship and the relationship between Nunez and other creditors. Even if his counterclaims were legal, an issue that the court does not decide, they are within the court's equitable jurisdiction and no corresponding right to a jury trial attaches to them.

CONCLUSION

Accordingly, the court finds that Nunez's counterclaims are integral to the restructuring of the debtor-creditor relationship and creditor-creditor relationships. The resolution of his counterclaims affects the allowance or disallowance of his proof of claim as a secured claim. Nunez thus has no right to a jury trial on his counterclaims.

4. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC. HDN-1
14-1005 PARKER V. NUNEZ ADJUDICATION

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY

12-31-14 [129]

HENRY NUNEZ/Atty. for mv.

Tentative Ruling

Motion: Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied with prejudice
Order: Civil minute order

Creditor Henry D. Nunez, an attorney, moves for summary judgment as to Chapter 7 trustee Randell Parker's adversary proceeding under 11 U.S.C. § 544(a)(3) (the strong arm powers) against him and as to his adversary proceeding against Parker for declaratory relief. The guts of this complaint and counterclaim are (1) whether Nunez, who represented the debtor in state court civil litigation prior to its bankruptcy petition, has a valid charging lien against the debtor's real property (and the proceeds thereof); and (2) if Nunez holds a valid--albeit unrecorded--charging lien, does that lien trump a Chapter 7 trustee's strong arm powers.

Having signaled its thinking on the later question, See Civil Minutes, filed September 17, 2014, ECF #110, this motion focuses on the former query. For the reasons set forth below, the motion will be denied with prejudice.

DISCUSSION

Legal Standards

Summary Judgment

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and supporting

materials—including facts considered undisputed—show the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).

Charging Liens

The validity of an attorney's charging lien is governed by Rule of Professional Conduct 3-300. *Fletcher v. Davis*, 33 Cal.4th 61, 71-72 (2004). Rule 3-300 provides, "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition." The remedy for non-compliance with Rule 3-300 is that the lien cannot be enforced. *Fletcher v. Davis*, 33 Cal.4th 61, 71-72 (2004).

Applied to Nunez' Charging Lien

Most of the facts–though likely not the inferences therefrom–are undisputed. Prior to Shaver Lakewoods Development, Inc.'s bankruptcy, the principals of that company approached attorney Henry D. Nunez for representation in an action pending against Shaver Lakewood Development, Inc. pending in Fresno County Superior court. The action involved five parcels of real property. On January 14, 2011, Nunez and the debtor signed a fee agreement. The fee provided for a hybrid fee agreement, including both an hourly and contingent fee component. The type-written portion of the fee agreement provided, "The hourly compensation for the Firm's service shall be the sum of $300 per hour for Attorney and $200 per hour for Associate's service. Payment of the fee shall be payable on demand (sic) unless other payment arranges are made in writing between client and the Attorney. Appropriate billing statements shall be mailed to client. Any delinquent balance shall bear interest 10% (sic) per month. Pus $25.00 for returned checks." Below the text the parties hand wrote and initialed, "The parties agree that the fees shall not exceed 1/3 of the value of lots owned by Clients and attorney shall option (sic) to accept 1/3 of value of lots recovered. The lien shall apply to these lots." Exhibit A to Complaint in Parker v. Nunez, No. 14-1005 (Bankr. E.D. Cal. 2014), filed January 6, 2014, ECF #1. The agreement also stated, "The undersign (sic) is advised to seek independent review of this lien and agreement and shall have ten (10) days to cancel said terms upon written notice to the attorney. If not second opinion (sic) is obtained the undersign (sic) has voluntarily elected not to do so." *Id*.

Terms Fair and Reasonable

At a very minimum, competing inferences exist as to whether the terms are fair and reasonable. At the outset the agreement places all risk of an adverse outcome on the client. The attorney, at his option, may select an hourly fee of $300 per hour or a contingent fee of one-third. If the attorney prosecutes the action and loses, he will recover his hourly fee. If he wins, at his option he can claim a one-third recovery. By structuring the fee agreement in that fashion an inference could be drawn that the agreement is not fair and

unreasonable to the client. Typically an attorney must elect an hourly rate (in which he does not share in particularly favorable outcomes) or a contingent fee (in which he shares either in the favorable or unfavorable outcome). Sometimes hybrid agreements are negotiated, which involve both an hourly and a contingent fee component. But when that is the case the attorney take something less than the full hourly rate and the full contingent fee.

Moreover, depending on time, spent, risk of an adverse result and other factors such a contingent fee could be unfair to the client. Consider a full recover of the real estate with only minimal time spent and risk incurred by the attorney. Such a contingent fee agreement might well produce an unfair result to the client. But the record is insufficient to judgment the fairness of the terms. In a vacuum the court cannot ascertain whether a one-third fee agreement was, in fact, reasonable given the facts of this case. Reasonableness if a fact driven word. These five lots ultimately sold for $354,000. *See* Exhibit E in support of Motion. From that it follows that the attorney would opt for a fee of one-third that amount, i.e. $118,000. And there is an insufficient record by which the court can decide whether such a fee is reasonable.

Beyond that the failure to provide the warning mandated by Business and Professions Code 6147(a)(4) suggests an actual lack of fairness. That provision states, "Unless the claim is subject to the provisions of Section 6146 [not applicable here], a statement that the fee is not set by law but is negotiable between attorney and client."

Terms Fully Disclosed

When an attorney seeks a charging lien from a client, California law specifies the attorney must given all the reasonable advice against himself that he would have given the client against a third person. *Fair v. Bakhtaiar*, 195 Cal.App.4th 1135, 1155 (2011). This contemplates communication not only of the terms of the fee agreement but also of adverse consequences flowing those terms.

Other than the fee agreement, the is no evidence of the warnings, if any, given to the client. And there are serious potential adverse consequences: (1) the attorney's ability to select from the more favorable fee arrangement notwithstanding the outcome; (2) windfall fees to the attorney for a favorable outcome obtained for minimal effort; (3) increased difficulties associated with settlement, occasioned by a lien; and (4) the difficult of reorganizing a financially distressed debtor faced with a lien against one of its principle assets. These warnings must be transmitted "in a manner which should reasonably have been understood by the client." Rule 3-300(A). No such showing has been made here.

Much like the fairness element of Rule 3-300, the failure to disclose in the fee agreement, or other written, document suggests not just competing inference on the issue of full written disclosure but an actual lack of full disclosure.

Advice to Seek Independent Lawyer

Competing inferences are possible from the warning to seek legal advice." "The undersign (sic) is advised to seek independent review of this lien and agreement and shall have ten (10) days to cancel said terms upon written notice to the attorney. If not second opinion (sic) is obtained the undersign (sic) has voluntarily elected not to

do so." Exhibit A to Complaint in Parker v. Nunez, No. 14-1005 (Bankr. E.D. Cal. 2014), filed January 6, 2014, ECF #1. The admonition does not indicate that the client should seek advice from a lawyer, but rather speaks of an "independent review." On one hand, independent review of a legal document does suggest review by a lawyer. And on the other hand, the in-artfully wording and the omission of the word "attorney" or "lawyer" gives rise to an inference of insufficiency of the warning. This alone is a basis to defeat the summary judgment.

Reasonable Opportunity to Seek Independent Legal Advice

The fee agreement appears to been executed on the first day discussed. *Compare*, Fee Agreement (signed January 14, 2011), *with* Declaration of Angela Rodriguez ¶¶ 1, 3 (attended meeting January 14, 2011 and signed fee agreement). The agreement purports to give the client 10 days to consider and back out of the fee agreement. A ten day cooling off period is not, as a matter of law, a reasonable opportunity. Competing inferences are again possible. One inference is that 10 days is sufficient. Another inference is that 10 days is not sufficient. Reasonableness is fact specific and cannot be decided in a vacuum. This again presents a genuine dispute of fact.

Timing of Execution of the Fee Agreement

Finally, it appears that such a fee agreement that grants an attorney a lien on the same date that it was first discussed does not comply with Rule 3-300. Rule 3-300 requires fair and reasonable terms, fully disclosed, a warning to seek independent counsel and then consent. Rule 3-300 ("The client thereafter consents in writing....") The court is aware of no authority and the parties cite none for the proposition that the client may consent to such an agreement on the same day as the other conditions of Rule 3-300.

Because the court finds genuine issues of fact, it need not address the other contentions of the parties and the motion will be denied.

CIVIL MINUTE ORDER

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

The motion for summary judgment filed by Henry D. Nunez having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that: (1) the motion is denied with prejudice; and (2) no partial adjudication pursuant to Fed. R. Civ. P. 56(g), incorporated by Fed. R. Bankr. P. 7056, 9014(c), is rendered.

5. 11-62509-A-7 SHAVER LAKEWOODS DEVELOPMENT INC.
14-1076
PARKER V. GAINES
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: COMPLAINT
7-28-14 [1]

No tentative ruling.

6. 14-11429-A-7 STEPHEN DAKE
14-1068
GBC INTERNATIONAL BANK V. DAKE
JUSTIN SANTAROSA/Atty. for pl.
RESPONSIVE PLEADING

RESCHEDULED STATUS CONFERENCE RE: COMPLAINT
7-14-14 [1]

No tentative ruling.

7. 14-13041-A-7 EVARISTO OLMOS
14-1114
OLMOS V. UNION ADJUSTMENT COMPANY, INC.
PATRICK KAVANAGH/Atty. for pl.
DISMISSED

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-29-14 [1]

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

8. 12-17166-A-7 BILLY JOHNSON
12-1150
U.S. TRUSTEE V. JOHNSON
GREGORY POWELL/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-7-12 [1]

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

9. 14-10279-A-7 DONNIE PRICE
14-1044
EXPRESS SERVICES, INC. V. PRICE
RICHARD MONAHAN/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
10-24-14 [56]

No tentative ruling.

11:15 a.m.

1. 12-11008-A-7 RAFAEL ALONSO — HEARING ON DISCOVERY DISPUTE RE: MOTION/APPLICATION FOR
PWG-9
MARKO ZUBCIC/MV
EXAMINATION
11-5-14 [134]

NICHOLAS ANIOTZBEHERE/Atty. for dbt.
PHILLIP GILLET/Atty. for mv.

No tentative ruling.

11:30 a.m.

1. 14-15919-A-7 CELIA VEGA — PRO SE REAFFIRMATION AGREEMENT WITH ALTAONE FEDERAL CREDIT UNION
12-31-14 [9]

FRANK SAMPLES/Atty. for dbt.

Final Ruling

An amended reaffirmation filed which is signed by attorney for debtor, the matter is dropped as moot.

2. 14-15334-A-7 DAVID/PATRICIA ENOX — PRO SE REAFFIRMATION AGREEMENT WITH ALTAONE FEDERAL CREDIT UNION
1-7-15 [12]

D. GARDNER/Atty. for dbt.

Final Ruling

The reaffirmation agreement having been filed without the signatures of the creditor, debtors, or debtor’s attorney, it is disapproved.

1:30 p.m.

1. 14-12637-A-11 TOURE/ROLANDA TYLER — MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S).
LKW-7 — 1-13-15 [147]

LEONARD WELSH/Atty. for dbt.

Tentative Ruling

Application: Interim Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Approved
Order: Prepared by applicant

Applicant: Leonard K. Welsh
Compensation approved: $7,417.50
Costs approved: $154.73
Aggregate fees and costs approved in this application: $7,572.23
Retainer held: $473.22
Amount to be paid as administrative expense: $7,099.01

DISCUSSION

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by counsel for the debtor in possession in a Chapter 11 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on an interim basis. Such amounts shall be perfected, and may be adjusted, by a final application for compensation and expenses, which shall be filed prior to case closure. The moving party is authorized to draw on any retainer held.

CIVIL MINUTE 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 Third Interim Fee Application filed by Leonard K. Welsh, attorney at law, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the motion is granted and that: (1) compensation of $7,417.50 is approved on an interim basis; (2) costs of $154.73 are approved on an interim basis; (3) fees and costs approved aggregate $7,572.23; (4) of that amount $473.22 will be paid from the retainer held; (5) the remainder, $7,099.01 shall be paid as an administrative expense; and (6) those amounts shall be finalized prior to the conclusion of the case and in a manner consistent with the terms of the confirmed plan.

2. 14-14241-A-11 ARTHUR FONTAINE

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
8-25-14 [1]

D. GARDNER/Atty. for dbt.

No tentative ruling.

3. 14-14241-A-11 ARTHUR FONTAINE
DMG-9

DISCLOSURE STATEMENT FILED BY DEBTOR ARTHUR B. FONTAINE
12-23-14 [112]

D. GARDNER/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

4. 15-10366-A-11 ELLIOTT MANUFACTURING COMPANY, INC.
PLF-1

EMERGENCY MOTION FOR USE OF CASH COLLATERAL
2-3-15

P. FEAR/Atty. for dbt.

No tentative ruling.