UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

February 12, 2015 at 10:30 a.m.

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1. 11-94410-E-7 HSM-31 | **SAWTANTRA/ARUNA CHOPRA** **Robert M. Yaspan** | **MOTION TO EXTEND TIME TO FILE OBJECTIONS TO DEBTORS' CLAIMS OF EXEMPTIONS 12-12-14 [1161]**

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Extend Time to File Objections to Debtors' Claims of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend Time to File Objections to Debtors' Claims of Exemptions is continued to 10:30 a.m. on March 26, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion for Order Extending Time to File Objections to the Debtors' Claims of Exemptions. Dckt. 1161.

The current deadline to file objections to the Debtors' claims of exemptions is presently set for December 15, 2014. Dckt. 1092, Notice of Conversion to Chapter 7, Meeting of Creditors, and Deadlines. The Trustee requests that the deadline for the Trustee to object to the Debtors' claims of exemptions be extended until February 16, 2015. The Motion to Extend the deadline was filed on December 12, 2014.

The Trustee argues that cause exists because, prior to the conversion of the case to Chapter 7, the Debtors filed a number of schedule amendments. The Debtors' most recent Schedule B, filed September 20, 2013, lists the following assets:

Sawtantra Chopra MD, Inc., Profit Sharing Plan Assets in the Profit Sharing Plan including the following: Chase Acct# ending in 7539 - $463,755 Wells Fargo Investment Account - Approximate value of $1 million Note & Deed of Trust in favor of Sawtantra Chopra MD, Inc., Profit Sharing Plan as Beneficiary, Onkar Inc., as Trustor secured by properties with the following APNs 033-044-099, 033-044-010, 033-044-012, 033-044-013, 033-044-014, and 033-044-019 - The face value of this note is $350,000, but Debtor is not sure of the actual value of the note due because Debtor is not sure how much equity exists in these properties. Other Notes - See Attached.	H	$1,813,755.00

In the Debtors most recent Schedule C, filed September 20, 2013, the Debtors claimed the retirement plans as exempt in their entirety pursuant to 11 U.S.C. § 522(b)(3)(C).

Prior and subsequent to the Meeting of Creditors, the Trustee and his counsel have requested current account statements for the retirement plans and original documentation related to the loans scheduled as assets of this estate, including those purportedly in the retirement plans, but non have been provided. By email dated November 6, 2014, Debtors' counsel informed the Trustee that the Debtors do not have the originals of the promissory notes although they are still looking for them. Dckt. 1165, Exhibit C.

At the Meeting of Creditors, held November 13, 2014, the Trustee requested on the record that the Debtors provide the Trustee with a current account statement for the Debtors' retirement assets. The Debtors have not provided him with the requested statements. The only documents the Trustee states the Debtors have provided in response to the Trustee's request are tax returns for their pension plan for the years 2001-2012.

Additionally at the Meeting of Creditors, the Trustee questioned the Debtors concerning the carious deeds of trust, for which the Debtors and/or the Sawtantra Chopra MD Profit Sharing Plan were scheduled as beneficiaries the Debtors' responses did not satisfy the Trustee's inquiry into the process and reasons by which one or more deeds of trust, of which Joint-Debtor Aruna Chopra, individually, was the original beneficiary, came to be included in the Debtors' retirement plans.

Trustee states that on November 18, 2014, Trustee's counsel reiterated to Debtors' counsel the Trustee's request for current account statement for the Debtors' retirement plans and discussed issues related to the notes/deeds of trust purportedly in the plans. Trustee's counsel followed up the call with an email to Debtors' counsel. By email on November 21, 2014, Trustee's counsel

followed up with a more detailed email to Debtors' counsel, reiterating the Trustee's request again. Trustee states that no current account statement has been provided to the Trustee or Trustee's counsel.

Obtaining a precise accounting of the retirement plans, their balance, and information concerning exactly what assets are currently contained in the plans, and how those assets came to be in the plans, is important to the Trustee's evaluation of the Debtors' claims of exemptions.

DEBTORS' OPPOSITION

The Debtors filed an opposition to the instant Motion on January 29, 2015. Dckt. 1187. The Debtors state that the Motion should be denied because it: (1)it fails to establish cause to grant relief; (2) the Trustee is guilt of laches; and (3) granting the Motion would significantly impair Debtors' Sixth Amendment right to representation. The Debtors make the following arguments:

1. The time frame for objection to Debtors' exemptions has expired under applicable Ninth Circuit law. Under *In re Smith*, 235 F.3d 472 (9th Cir. 2000), 11 U.S.C. § 348 "preserve[s] actions already taken in the case before conversion. . . section 348(a) establishes the general rule that, in a converted case, the dates of filing, the commencement of the case, and the order for relief remain unchanged." Id. at 477. In short, the Debtors argue that once the time frame for objecting to an exemption has expired, the exempt property revests in the debtor and is no longer subject to objection. In this case, the Debtors state that the time to object to Debtors' claim of objection expired in April 2014.

2. The recent changes to Fed. R. Bankr. P. 1019 cannot change the substantive law on the issue. The Debtors argue that 28 U.S.C. § 2075 sets forth the rule making power of the court and the limitations thereon, making the Bankruptcy Court rules procedural and not creating substantive rights. The 2010 amendment to Fed. R. Bankr. P. 1019 that added section (2)(B) cannot affect this case since it attempts to change the substantive law of the Ninth Circuit. The provision purports to create a new time period for filing objections to exemptions after a conversion. However, since the Smith court established the law on this issue in the ninth Circuit and ruled that the exempt property vested in the debtor and that there was no provision in the Bankruptcy Code that could bring the exempt property back into an estate after conversion. The Bankruptcy Rules cannot create substantive rights that are not provided under the Bankruptcy Code. As such, the Trustee cannot rely on Fed. R. Bankr. P. 1019 to bring this Motion and the Motion should be denied.

3. The Motion fails to establish cause for the requested relief. Even if the motion were timely, the Trustee has failed to establish the requisite "cause" under Fed. R. Bankr. P. 4003. Although Rule 4003 does not provide any clarification regarding the meaning of cause, it should be presumed that cause means good cause not just any excuse. As the Bankruptcy Court are courts of equity, the issue of good cause should be determined by balancing the respective benefits and burdens of parties along with other equitable considerations including the

principles of laches. The time period to object to the exemptions has been extended at least five times for a total time period of almost three years. The Trustee has been a party to the last four of the extension. The Trustee entirely fails to adequately explain why it has taken almost two years to determine whether to object to the exemptions, why he has not been able to make the decision at this time, and why he should be entitled to more time to do so. The Debtors contend that the Motion fails to provide any specificity regarding the information the Trustee is looking for and what issues, if any, he has with the exemptions. The Debtors argue that an extension of time is extremely prejudicial to Debtors because they are under criminal prosecution and need access to exempt assets to fund their defense. Debtors have been unable to use the funds to pay their criminal attorneys and will soon be deprived of representation in their cases which implicates their Sixth Amendment rights.

4. The motion should be denied because it will significantly impair Debtors' Sixth Amendment Rights. The Trustee has sent letters that have effectively frozen the accounts. Debtors have been unable to use the funds to pay for their criminal attorneys. The trustee is interfering with Debtors' Sixth Amendment right to representation and any extension of time to file the objections will further impair Debtors' constitutional rights. In the present case, the Trustee has sent letters to the investment managers for Debtors' profit sharing plan, effectively freezing the accounts in violation of the Debtors' Sixth Amendment rights. See *United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008).

APPLICABLE LAW

Fed. R. Bankr. P. 1019 states in relevant part:

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:...

(2) New filing periods

....

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to chapter 7 unless:

(I) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

Fed. R. Bankr. P. 1019

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b)(1). The court may extend this deadline, so long as the request for the extension of time was filed prior to the expiration of the deadline. Fed. R. Bankr. P. 4004(b)(1).

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1197.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on March 26, 2015.

Therefore, the court continues the hearing to 10:30 a.m. on March 26, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for to extend the Deadline to File a Objection To Claim of Exemptions of the Debtors filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is continued to 10:30 a.m. on March 26, 2015.

2. 11-94410-E-7 SAWTANTRA/ARUNA CHOPRA
HSM-32 Robert M. Yaspan

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
12-23-14 [1167]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on December 23, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge of the Debtor is continued to 10:30 a.m. on March 26, 2015.

Gary Farrar, the Chapter 7 Trustee, filed the instant Motion to Extend Deadline to File a Complain Objecting to Discharge of the Debtor on December 23, 2014. Dckt. 1167.

The Trustee states that the deadline to file a complaint objecting to the discharge of the Debtors is set for December 29, 2014. The Trustee requests that the deadline for the Trustee to file a complaint objecting to the discharge of the Debtors be extended until February 27, 2015.

The Trustee argues that cause exists because this is an extraordinarily complex case, involving many assets, and intense disputes between the Debtors and creditors regarding allegations of pre-petition criminal wrongdoing. This case was pending for some time in a Chapter 11 to provide the Debtors an opportunity to confirm a plan based around the Dale Road Project. The efforts to reorganized failed and all the estate's real property assets were abandoned except a single Dale Road Parcel and an office building in Modesto. The case was converted to a Chapter 7 and the Trustee is attempting to administer the estate's remaining assets.

The Trustee states that he has been diligent in his investigation of the Debtors' financial affairs. An undisclosed issue which arose in the Debtors' disclosure statement filed prior to the conversion of the case was a $310,000.00 loan from the Debtors' adult son and daughter-in-law which was discovered at the Meeting of Creditors. The Trustee requires additional time to consider the responses of the Debtors concerning this loan and whether additional investigation is needed. Furthermore, the Debtors stated that they would file amended schedule of creditors who were not previously listed.

The Trustee is also awaiting records of the current account statement for the Debtors' retirement assets as well as information concerning various notes and deeds of trusts, which the Debtors have not yet provided. The Trustee states that he expects the Debtors will provide this information voluntarily or the Trustee will make additional motions for the production of such information.

APPLICABLE LAW

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

ORDER CONTINUING THE HEARING

On February 9, 2015, the Trustee filed an ex-parte Motion to Approve Stipulation to continue the hearing based on the agreement of Debtors and Trustee. Dckt. 1200.

On February 10, 2015, the court signed an Order Approving the Stipulation between Debtors and Trustee and continued the hearing on the instant Motion to 10:30 a.m. on March 26, 2015.

Therefore, the court continues the hearing to 10:30 a.m. on March 26, 2015.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for to extend the Deadline to File a Complaint Objecting to the Discharge of the Debtors filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is continued to 10:30 a.m. on March 26, 2015.

3. 11-94427-E-7 DFH-6 — BIEN BANH AND UT QUACH — Drew Henwood — MOTION TO AVOID LIEN OF TD AUTO FINANCE, LLC, MERCEDES BENZ FINANCIAL AND DAIMLERCHRYSLER FINANCIAL SERVICES AMERICAS, LLC — 1-7-15 [64]

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. Debtor failed to provide a Proof of Service. Without a Proof of Service, the court cannot determine if proper notice was given to necessary parties. 28 days' notice is required.

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

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of TD Auto Finance, LLC, Mercedes Benz Financial, and DaimlerChrysler Financial Services Americas, LLC ("Creditor") against property of Bien Banh and Ut Quach ("Debtor") commonly known as 3013 Poppypatch Drive, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $24,721.50. An abstract of judgment was recorded with Alameda County on January 7, 2009 which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $100,100.00 as of the date of the petition. The unavoidable consensual liens total $144,076.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.720 in the amount of $0.00 on Schedule C.

FAILURE TO PROVIDE PROOF OF SERVICE

Debtor failed to provide a Proof of Service. Without a Proof of Service, the court cannot determine if proper notice was given to necessary parties. The failure of the Debtor to provide a Proof of Service is sufficient as an independent ground to deny the Motion.

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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES

ALTERNATIVE RULING

This Motion requests an order avoiding the judicial lien of TD Auto Finance, LLC, Mercedes Benz Financial, and DaimlerChrysler Financial Services Americas, LLC ("Creditor") against property of Bien Banh and Ut Quach ("Debtor") commonly known as 3013 Poppypatch Drive, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $24,721.50. An abstract of judgment was recorded with Stanislaus County Recorder on November 13, 2008 which encumbers. An additional abstract of judgment was recorded with Alameda County on January 7, 2009 which encumbers the Property. Both abstracts refer to the same case.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $100,100.00 as of the date of the petition. The unavoidable consensual liens total $144,076.00 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.720 in the amount of $0.00 on Schedule C. FN.1.

FN.1. While the Debtor did take an exemption, the better practice in order to ensure that 11 U.S.C. § 522(f) is applicable is to claim a nominal value instead of $0.00 so that the judicial lien is, in fact, impairing Debtor's exemptions.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of TD Auto Finance, LLC, Mercedes Benz Financial, and DaimlerChrysler Financial Services Americas, LLC, California Superior Court for Stanislaus County Case No. 628104, recorded on November 13, 2008, Document No. 2008012128800 with the Stanislaus County Recorder, against the real property commonly known as 3013 Poppypatch Drive, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

IT IS FURTHER ORDERED that the judgment lien of TD Auto Finance, LLC, Mercedes Benz Financial, and DaimlerChrysler Financial Services Americas, LLC, California Superior Court for Alameda County Case No. 628104, recorded on January, 7 2009, Document No. 2009003168 with the Alameda County Recorder, against the real property commonly known as 3013 Poppypatch Drive, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4. 14-91231-E-7 MALUK/RANJIT DHAMI
NFG-1 Nelson F. Gomez

CONTINUED MOTION TO DISMISS CASE
10-17-14 [19]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on October 17, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss the Bankruptcy Case is denied.

Maluk S. Dhami and Ranjit K. Dhami ("Debtor") has filed the Motion to Dismiss this Chapter 7 bankruptcy case. Debtor offers the Declaration of Maluk Dhami where Debtor asserts that the reason for filing this bankruptcy petition was due to several judgments which had been granted to creditors in different civil cases who had sought collection. Since filing several of the creditors have indicated a willingness to settle their claims through negotiations. In order to properly negotiate Debtor states this Bankruptcy case must be dismissed.

OPPOSITION

The Interim Trustee opposes the motion due to his findings from a preliminary investigation. Trustee has found Debtor has provided an insider with a $600,000.00 second deed of trust on the property described as 1986 Bridget Marie Drive, Modesto, California ("Property"). There is no explanation of the receipt and use of the $600,000.00 in this filing. Trustee notes that if the deed of trust was found to be invalid or voidable, Debtor would hold a non-exempt equity position that could be potentially liquidated for the benefit of creditors.

NOVEMBER 24, 2014 ORDER

On November 24, 2014, the court issued an Order continuing the hearing on the Motion to 10:30 a.m. on December 18, 2014 pursuant to a stipulation between the parties.

ORDER CONTINUING HEARING

The court issued an order continuing the hearing on the instant Motion to 10:30 a.m. on February 12, 2015. Dckt. 46.

DISCUSSION

Debtor claims this property is their residence but on Schedule A filed by the Debtor they indicate that only 25% is owned by the Debtor. (Dckt. 14). FN. 1. Exhibit B provided by the Trustee only lists Ranjit and Kamaldip Dhami as the owners of the Property. Dckt. 26, Exhibit B. FN.2. Schedule D lists Hardev Dhami as the holder of the second lien of $600,000.00 with no indication of when the lien occurred. However in Exhibit A and B provided by the Trustee this lien occurred on January 2014. Dckt. 25, 26. Additionally no property exemptions were taken on Schedule C. Dckt. 14. Since this lien was given to an insider within a year of filing and no further explanation has been given, Debtor may be in violation of 11 U.S.C. § 547(b)(4)(B) and § 548(a)(1).

FN.1. The exhibits provided by the Trustee indicate Ranjit is a joint tenant which would give Ranjit a 50% ownership of the Property. However on Schedule A Debtor indicated they only own a 25% interest.

FN.2. The Petition lists the Debtors' names as Ranjit and Maluk Dhami however on the Deed and Property Detail provided by the Trustee Ranjit and Kamaldip Dhami are listed at the joint tenant holders of the Property. (Dckt. 25, 26).

If this case were to be dismissed the Debtor would have the ability to allow the time to run on the statute of limitations for potential preference and fraud claims before filing a new bankruptcy case. Debtor gives the reason for wanting to dismiss is due to the fact that their creditors are willing to settle through negotiations. However upon inspection of Schedules A and B, Debtor has no income or assets that could be used to pay any settlements. Dckt. 14. Debtor indicates that they rely on their daughter who is unnamed on the schedules. Additionally, the Debtor's listed income and taxes do not match with what is listed in their Schedule I. This court does not find it plausible that Debtor would be able to pay for any the settlement of any claims. If this case

were dismissed and the Debtor was unable to pay creditors through negotiations the creditors would be prejudiced.

Additionally, the U.S. Trustee has selected this case for audit. The court finds it interesting that shortly after the U.S. Trustee filed its Selection for Audit, the Debtors filed a Motion to Dismiss.

As the Interim Trustee notes, without further investigation, the court cannot determine whether, at this stage, dismissal is proper.

Since the multiple continuations of this hearing, no supplemental pleadings have been filed in connection with the instant Motion.

Therefore, the Motion is denied.

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 bankruptcy case filed by Maluk S. Dhami and Ranjit K. Dhami 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.

5. 10-91346-E-7 DANIEL/CANDIDA OSIAS
KRW-1 Kenneth R. Wachtel

MOTION FOR CONTEMPT AND/OR MOTION FOR SANCTIONS
12-16-14 [35]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on December 16, 2014. By the court's calculation, 58 days' notice was provided. 28 days' notice is required.

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

The Motion for Contempt and/or Motion for Sanctions is denied without prejudice.

Candida Osias ("Debtor") filed the instant Motion for Contempt and for Sanctions on December 16, 2014. Dckt. 35. The Debtor is seeking a court order holding Wells Fargo Bank, N.A. dba America's Servicing Company ("Creditor") in contempt for a willful violation of the court's discharge injunction by its conduct in a state action and sanctions be imposted against Creditor in the value of Debtor's attorney's time and costs plus a sum to compensate Debtor for the emotional distress she has suffered as a result of Creditor's alleged bad acts.

BACKGROUND

The mortgage was entered into between Creditor and Debtor on July 26, 2004. As required by the mortgage, Debtor had purchased a policy of fire insurance. The Rhode Island property commonly known as 531 and 531.5 Union

Avenue, Providence Rhode Island (the "Property") secured that mortgage. A subsequent fire broke out, resulting in destruction of improvements made to the property. The insurance company then issued insurance proceed checks totaling $205,000.00, which required Creditor and Debtor's endorsement. However, Debtor asserts that Creditor would not endorse the checks.

Debtor filed bankruptcy on April 12,2010 declared the mortgage and the insurance proceed checks in her schedules. Although Creditor received notice of the bankruptcy case and submitted a Request for Special notice on April 30, 2010, Creditor filed no "claim" for the insurance proceeds. Additionally, Creditor made no effort to recover the insurance proceeds out of this bankruptcy and made no attempt to challenge Candida's section 727 discharge. Though not stated by the Debtor, the court notes that this was a "No Asset Case," and that creditors were told by the Clerk of the Court not to file proofs of claim. "**It is unnecessary to file claims at this time** because it does not appear from the schedules that enough assets are available for payment of a dividend to creditors. If sufficient assets become available, you will be sent a Notice to File Claims." Notice, Dckt. 6 (Emphasis in Original).

More than 19 months after Debtor's bankruptcy discharge was issued and served on Creditor, Creditor filed the state action against Debtor. The action was based solely on pre-petition obligations from the mortgage. Creditor claims Debtor still owes a deficiency on the mortgage and seeks a permanent mandatory injunction, prejudgment interest, and attorneys' fees in excess of $45,000.00. Creditor claims Debtor remains personally liable for a pre-petition provisions deficiency balance of $209,138.36 on the Mortgage. Creditor went as far as to threaten to sue Debtor for fraud based on the pre-petition Mortgage application.

Debtor states that the state action alleges that Debtor remains personally liable for a pre-petition deficiency on the mortgage. Debtor states that the Creditor's principal area of inquiry at the Debtor's deposition was her pre-petition actions with the mortgage, which Debtor alleges is in violation of the Debtor's discharge. The Debtor argues that the deposition in the state case which concentrated on the Debtor's loan application's accuracy does not survive the Debtor's bankruptcy.

Debtor further alleges that Creditor threatened to sue Debtor for fraud based on the pre-petition mortgage application following the deposition. Creditor's claims Debtor should be ordered to pay Creditor's attorney's fees in the state action based on the mortgage.

Debtor's counsel attempted to give notice to Creditor that it was violating the court's discharge injunction. However, Creditor did nothing to alter its course in the state action where Creditor still claims a personal deficiency and seeks an adjudication from Debtor of attorneys' fees of over $45,000, prejudgment interest and other undefined relief in connection with the mortgage

MOTION

Debtor alleges the following grounds in support of the relief sought:

<u>Debtor's life has Been Unnecessarily Disrupted by Creditors's Wrongful Acts and Violation of the Court's Discharge Injunction</u>

Creditor's conduct in the state action has made Debtor a "nervous wreck" which Debtor alleges led to an automobile accident as Debtor was en route to a deposition in that case. Debtor and her co-debtor husband filed this bankruptcy case in order to receive a fresh start from their obligations, which included a claim for deficiency by Creditor. Creditor is pursuing her as much as it pursued her pre-petition, except pre-petition Creditor had not filed a lawsuit against her as it has now. Debtor argues that Creditor caused such emotional and physical distress and is entitled to relief.

An Award of Monetary Sanctions Against Creditor is Appropriate Here

The effect of a discharge is that any of the creditors who could have asserted claims against Debtor are permanently enjoined by the statutory discharge injunction imposed by 11 U.S.C. § 524. The law is clear that a party who violates the Discharge Injunction, even carelessly, can be held in contempt and ordered to pay sanctions to the offended party. 11 U.S.C. §105(a); Walls v. Wells Fargo Bank, N.A. 276 F.3d 502 (9th Cir 2002).

After filing her bankruptcy, debtor fully disclosed her obligation to Creditor and the insurance proceeds checks and with Creditor's knowledge. Creditor participated in this case, without filing a claim, motion or adversary proceeding. Now Creditor's actions are more than careless, they are intentional, willful and in bad faith.

The Debtor argues that Creditor had two very acceptable and effective alternatives other than a personal suit against Candida:

(1) It could have filed claim or adversary proceeding before this case was closed; or

(2) If Creditor truly believed that Debtor has no interest in the (uncashed) Insurance Proceeds Checks it could have filed suit against the insurer on the same grounds on which it is suing Candida in The State Action. Such an action would not result in a personal claim against Candida for breach of contract, prejudgment interest, attorney's fees or for a deficiency.

However, Debtor states that Creditor did neither. Instead, Creditor sought to bring a personal suit against Debtor in state court.

Therefore, the Debtor seeks the court to issue an order holding Creditor in contempt for a willful violation of the court's discharge injunction by its conduct in a state action and sanctions be imposted against Creditor in the value of Debtor's attorney's time and costs plus a sum to compensate Debtor for the emotional distress she has suffered as a result of Creditor's alleged bad acts.

CREDITOR'S OPPOSITION

Creditor filed an opposition to the instant Motion on January 29, 2015. Dckt. 41.

Background

Debtor filed for Chapter 7 bankruptcy on April 12, 2010 and obtained her discharge on July 26, 2010. Among the assets she listed fire insurance proceeds on a the Union Street property in Rhode Island of $205,000.00 as“uncollectible.” Subsequently, Creditor, the servicer of the loan on the Property, filed state law action seeking Declaratory Relief on the contention that the fire insurance proceeds are the property of Creditor pursuant to the Mortgage Agreement signed by Debtor and the loss payable clause in the insurance policy.

On March 8, 2011, Rhode Island Joint Reinsurance Association issued two checks totaling $204,082.80 for insurance proceeds on the fire made jointly payable to Creditor and Debtor as the insured parties. Debtor refused to endorse the checks.

Creditor subsequently filed a compliant for declaratory relief on March 22, 2012. Debtor sought to demurrer the complaint on the grounds the case violated bankruptcy discharge. Debtor’s demurrer was overruled.

Creditor filed a motion for summary judgment at the end of discovery. The court did not consider Debtor’s issue regarding bankruptcy discharge when making its ruling. Although the Court denied Creditor’s Motion as it believed the deficiency amount had not been properly established, the Court concluded that Creditor“is entitled to the insurance proceeds paid out on the property pursuant to the terms of the mortgage (Dckt. 42, Ex,. 6 ¶ 5) in an amount that does not exceed the unpaid balance of the secured debt owing from the Trustee’s Sale of the property. …The only factual dispute resulting in the denial of summary judgment is the amount of the deficiency.” (Dckt. 42, Ex. 7.)

Grounds for Opposition

Creditor opposes the motion on the following grounds:

Creditor is not attempting to collect a debt

Nowhere in 11 U.S.C. §524 does it prohibit Creditor from seeking a judicial determination that the insurance proceeds are the property of Creditor. Section 524 prohibits a party from attempting “to collect, or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2).”

However,“[t]he discharge injunction does not preclude an action naming the discharged debtor as a party in litigation in a nonbankruptcy forum where it is clear that recovery will be limited to insurance proceeds.” *In Re Munoz*, 287 B.R. 546, 550, fn 2 (B.A.P. 9th Cir. 2002)(citing *Inex Re Beeney*, 142 B.R. 360, 363 (B.A.P. 9th Cir. 1992).

Further,“[t]he Bankruptcy Appellate Panel of the Ninth Circuit has addressed the issue of whether pursuing an action post-discharge against a named debtor solely in order to collect on an insurance policy is permissible. See *In re Beeney*, 142 B.R. 360 (B.A.P. 9th Cir. 1992). The Court concluded that such actions are permissible so long as the plaintiff“does not intend to enforce any judgment against [the defendant] or his property.” Id. at 363. Thus, suits by plaintiff-creditors against named defendant-debtors “for the limited purpose of establishing the latter’s liability” do not violate the

discharge injunction of 11 U.S.C. § 524(a) Id. at 364." *In Re Cutter*, 2014 U.S. Dist. WL 1153054 *3 (C.D. Cal. March 11, 2014).

The *Beeney*, *Munoz,* and *Cutter* cases are similar to the present case. Because the Debtor refused to sign the Insurance Proceeds checks, Creditor has no choice but to file a lawsuit in order to seek a judicial determination that the proceeds were for the benefit of Creditor. Creditor made no attempt to seek personal liability against Debtor and only seeks to have the insurance proceeds tendered to Creditor to cure the deficiency after the foreclosure sale Creditor's efforts did not violate the discharge injunction.

The Insurance Proceeds Were Assigned to Creditor by Written Agreement

Debtor alleges that she listed the Insurance Proceeds as personal property in Schedule B and Creditor made no claim to those proceeds. Dckt. 35 at 2. Therefore, Debtor should get those proceeds. However, Debtor characterizes the Insurance Proceeds as payment of a debt rather than funds that were assigned to Creditor in a written agreement.

Furthermore, Debtor herself, under penalty of perjury, represented to the Bankruptcy Court that the Insurance Proceeds were "uncollectible." (See Dckt. 42 at Ex. 3 and Dckt. 1). As such, Debtor declared that the Insurance Proceeds could not be used to satisfy any of her debts however, Debtor now contends that she is the rightful owner of the Insurance Proceeds in their entirety.

The present case is similar to In re Natale, 174 B.R. 362 (Bankr. R.I. 1994), where a mortgagee retained its right to insurance proceeds even where the mortgagor had failed to name him as loss payee on the policy. The mortgagor, who was in bankruptcy, collected the policy proceeds after a casualty loss and included it in the bankruptcy estate. Debtor was entitled to hold the funds subject to lien, rendering the proceeds of the property of the mortgagee and not of the Debtor's estate in bankruptcy. Id. At 364.

Debtor has cited to no cases or statutes that would somehow allow Debtor to represent to a Bankruptcy Court that a purported asset was uncollectible, obtain a full discharge as to creditors, and then subsequently assert that she is entitled to $205,000.00 free and clear of any rights of her creditors. Creditor, for its part, simply contends that the Insurance Proceeds are the rightful property of Creditor.

Creditor is not seeking any Damages or Attorney's Fees that arise out of pre-petition obligation on the Mortgage

Contrary to Debtor's assertions, Creditor' complaint is not attempting to collect on any pre-petition mortgage obligation. The discharge injunction operates against the"continuation of an action,…to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524.

There was no attempt to seek collection against the debtor personally arising out of a pre-petition debt. Any interest or attorney fees sought were in conjunction with the attempt to seek that judicial determination. This is not an attempt to collect on a pre-petition debt. As set forth previously, the Insurance Proceeds are property of Creditor, not a debt of the Debtor.

Laches Prohibits Seeking a Violation of the Discharge Injunction

Lastly, even if an argument could be made that Creditor's actions are subject to contempt, which they are not, Debtor should be barred from raising this argument under the doctrine of laches.

The doctrine of laches can be invoked where an argument that could have been made much sooner but is delayed for no other reason than to prejudice a party. Its application depends on the facts and circumstances of the case.

In this case, Debtor acknowledges that Creditor was violating the discharge injunction at the inception of the State Court Litigation in 2012, but did not bring this motion until 2015. See Dckt. 35 at 5-8. A three year delay without clear reason is prejudicial to Creditor. Therefore the doctrine of laches applies to the extent Debtor has grounds to assert Creditor's actions were violating the discharge injunction.

DEBTOR'S REPLY

Debtor filed a reply on February 4, 2015. Dckt. 45. The Debtor replies in the following manner:

The Nature of Creditor's Contempt

In the State Action, Creditor is seeking personal liability against Candida for Creditor's attorney's fees in excess of $45,000 specifically based on the pre-petition Mortgage. In so doing Plaintiff is knowingly seeking personal liability for a discharged obligation.

Creditor is seeking to impose a mandatory Permanent Injunction against Candida to have the state court force Candida to comply with alleged pre-petition obligations. However, the declaratory relief action alone would result in the same result without the personal state court injunctive compulsion sought by Creditor.

Furthermore, Creditor is seeking personal liability against Candida for "prejudgment interest at the highest lawful rate" and admits that this claim for prejudgment interest relates back to pre-petition Mortgage Agreement. California law only allows the award of prejudgment interest where one party is seeking to recover monetary damages against another party. See California Code of Civil Procedure § 3287(a).

Creditor admits that an "attempt to seek personal liability against the debtor…" violates the Discharge Injunction. (Dckt. 41. At 6) That is what Creditor is intentionally and willfully doing in the State Action.

Creditor cites to *In re Munoz* 287 BR 546, 550 (B.A.P. 9th Cir. 2002) and *In re Beeney*, 142 B.R. 360 (B.A.P. 9th Cir. 1992) and argues that the Discharge Injunction does not preclude suit against a debtor "where it is clear that recovery will be limited to insurance proceeds." But Creditor is seeking to recover a debt as a personal liability of the debtor. Plaintiff's state action claim against Debtor is not "limited to insurance proceeds." Instead of filing a suit to recover the insurance proceeds from the insurer, Creditor instead sought to recover non-insurance damages from Candida.

Creditor's Indiscretions that are not Contempt

While Debtor listed the Insurance Proceeds checks as "uncollectible," Creditor knew what these checks were and knew they were uncollectible to Debtor only because the checks lacked Creditor's endorsement. Creditor said nothing and made no effort to recover these checks- checks representing the same insurance company obligation that are subject of the state action. Had Creditor made a claim for these checks, it is likely that the proceeds would have been shared amongst the remaining unsecured creditors.

Reply to Other Issues Raised in Creditor's Opposition

Contrary to Creditor's Argument that the trial court in the State Action never ruled on the applicability of the Discharge Injunction to that case (Dckt. 41 at 2,4.)Jurisdiction to make such a determination is solely within the jurisdiction of the bankruptcy court. Nothing done by the state court can affect this court's jurisdiction on this issue.

The doctrine of laches does not apply in this case. Debtor was not sleeping on her rights. As stated in the opening brief, Debtor has made consistent efforts to convince Creditor to cease its violations. It would have been precipitous to have filed a motion without such a meet and confer process. A good faith meeting does not constitute laches.

Contrary to Creditor's argument Creditor only states that it has suffered prejudice, but does not identify any prejudice it may have suffered as a result of its refusal to comply with Candida's efforts to meet and confer.

Lastly, contrary to Creditor's argument, Candida prevailed on Creditor's summary judgment motion in the State Action. Creditor failed to establish the existence and amount of the deficiency to establish entitlement to the Insurance Proceeds Checks.

DEBTOR'S OBJECTIONS TO EVIDENCE

Debtor filed objections to evidence on February 4, 2015. Dckt. 46. The Debtor makes the following objections:

1. Exhibit 1 - Mortgage: Creditor's request that the court take judicial notice of Exhibit 1 should be denied because the document is not authenticated by any evidence or testimony.

2. Exhibit 2 - Foreclosure Deed: Creditor's request that the court should take judicial notice of Exhibit 2 - Foreclosure Deed should be denied because the document is not authenticated by any evidence or testimony.

3. Opposition to Motion, Page 2: 18-20: Debtor objects to the passage as it lacks foundation and is not supported by any admissible evidence.

4. Opposition to Motion, Page 2: 36, Page 3: 3-9: Debtor objects to this passage as it lacks foundation and is not supported by any admissible evidence. Part of the passage depends on the

admissibility of the Mortgage to which Debtor argues is inadmissible.

5. Opposition to Motion, Page 3: 12-17: Debtor objects to this passage as it lacks foundation and is not supported by any evidence.

6. Opposition to Motion, Page 4: 5-8: Debtor objects to the passage to the extent it is being offered for the truth of the matter asserted. If it is being submitted merely to establish the existence of allegations (without proof) in the complaint, the passage is irrelevant.

7. Opposition to Motion, Page 4: 9-11 (to "As such"): Debtor objects to this passage as it lacks foundation and is not supported by any admissible evidence. The phrase "As such" incorporates the inadmissible evidence from the prior paragraph.

8. Opposition to Motion, Page 5: 15-21: Debtor objects to this passage as it lacks foundation and is not supported by admissible evidence.

REVIEW OF COMPLAINT

Debtor provides a copy of the state action complaint filed by Creditor on March 22, 2012. Dckt. 39, Exhibit A. A review of the complaint shows that the Creditor's Prayer for Relief states the following:

1. For a judicial declaration that [Creditor] is the sole owner of the Insurance Proceeds;

2. For a Permanent Injunction ordering [Debtor] to endorse the Insurance Proceeds checks for payment to [Creditor];

3. For appointment of an Elisor to endorse the Insurance Proceeds checks on behalf of [Debtor], if she refuses to endorse the checks;

4. For prejudgment interest at the highest lawful rate;

5. For costs of suit, including reasonable attorneys' fees by agreement or statute; and

6. For such other and further relief as the Court may deem proper.

Dckt. 39, Exhibit A.

APPLICABLE LAW

Motion for Contempt

"Civil contempt is the normal sanction for violation of the discharge injunction." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). 11 U.S.C. § 105 does not itself create a private right of action, but

it does provide a bankruptcy court with statutory contempt powers in addition to whatever inherent contempt powers the court may have. Because these powers inherently include the ability to sanction a party, a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction and order damages for the debtor if appropriate on the merits. *Id.* at 506-507.

A contempt proceeding by the United States trustee or a party in interest in bankruptcy is a contested matter. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1189 (9th Cir. 2011). Contempt proceedings are not listed under Bankruptcy Rule 7001 and are therefore contested matters not qualifying as adversary proceedings. *Id.* Contempt proceedings for a violation of § 524 must be initiated by motion in the bankruptcy case under Rule 9014 and not by adversary proceeding. *Id.*

A creditor who attempts to collect a pre-petition discharged debt in violation of the discharge injunction is in contempt of the bankruptcy court that issued the order of discharge. *Eady v. Bankr. Receivables Mgmt. (In re Eady)*, 2008 Bankr. LEXIS 4696 (B.A.P. 9th Cir. 2008). In addition to the bankruptcy court's inherent power to impose an order for contempt only upon a showing of "bad faith," section 105 grants statutory contempt powers and a creditor may be liable under section 105 if it willfully violated the permanent injunction of section 524. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002); *Walls*, 276 F.3d at 509.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contempnor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see also* 11 U.S.C. § 105(a).

The party seeking contempt sanctions has the burden of proving by clear and convincing evidence that the contempnors violated a specific and definite order of the court. *Bennett*, 298 F.3d at 1069. The burden then shifts to the contempnors to demonstrate why they were unable to comply. *Id.* The movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction. *Id.* For the second prong, the court employs an objective test and the focus of the inquiry is not on the subjective beliefs or intent of the alleged contempnor in complying with the order, but whether in fact their conduct complied with the order at issue. *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R. 747, 758 (9th Cir. B.A.P. 2000)(*rev'd on other grounds*, 285 F.3d 882 (9th Cir. 2002)).

11 U.S.C. § 524

Pursuant to 11 U.S.C. § 524,

> A discharge in a case under this title --
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged

under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived

The Ninth Circuit has found "that a post-discharge action against a debtor solely in order to collect on an insurance policy is permissible, so long as the creditor does not intend to enforce any judgment against the debtor or debtor's property." In re Wallace, No. BAP NV 11 1681 KIPAD, 2012 WL 2401871, at *6 (B.A.P. 9th Cir. June 26, 2012) (citing Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546, 550 (9th Cir.BAP2002)("Where the purpose of an action is to collect from a collateral source, such as insurance, ... and the plaintiff makes it clear that it is not naming the debtor as a party for anything other than formal reasons, no bankruptcy court order is necessary."); Patronite v. Beeney (In re Beeney), 142 B.R. 360, 363 (9th Cir.BAP1992) (allowing plaintiff's suit against debtor to collect on an insurance policy merely leaves debtor in the position of a witness who would appear at trial). It must be clear that recovery will be limited to insurance proceeds. In re Munoz, 287 B.R. at 550 n. 2.

DISCUSSION

Here, it appears that the Debtor is arguing that because the Creditor is seeking attorneys' fees and interest that the Creditor is violating the discharge injunction by seeking the insurance proceeds. In sum, the Debtor seems to be arguing that because the state court complaint states "[t]he Insurance Proceeds are less than the total deficiency balance owed after the foreclosure proceedings, making the Insurance Proceeds due and owing to [Creditor]" that Creditor is violating the discharge injunction.

The court does not find this position persuasive. The complaint explicitly states in the prayer that the Creditor is seeking the insurance proceeds and any attorneys' fees and interest that arise from the Creditor seeking to enforce its right to the insurance proceeds. The Debtor does not argue that the Creditor is seeking to enforce a judgment against the Debtor. The Debtor instead is arguing that the discharge absolved the Debtor from any duty to turn over the insurance proceeds to the Creditor and should be entitled to the windfall of the insurance proceeds based on the discharge. This is not true.

The discharge of the Debtor does not negate the lien that the Creditor has not the insurance proceeds. The discharge does not remove the Creditor's lien. The discharge is not a novation of the underlying contract or note. Debtor and Debtor's counsel appears to be contending that the request for post-petition attorneys' fees based on post-petition conduct of the Debtor – refusing to endorse the insurance check – is per se conduct for in violation of the discharge injunction for a pre-petition debt of the Debtor. Additionally, Debtor seems to assert that a prayer for interest which may be due based on the post-petition conduct of the Debtor in refusing to negotiate the check is per se a violation of the discharge injunction.

The State Court Complaint itself only states a Cause of Action for a declaration of who is the rightful owner of the insurance proceeds. The ownership interests or lien of Creditor is not something which is "discharged" in bankruptcy. On the face of the Complaint provided by Debtor, there appears to be a dispute with competing rights and interests of the parties being asserted under the loan documents and insurance policy. If such post-petition rights are asserted under such contracts, and such contracts provide for the prevailing party in asserting those rights, it has not been shown that the post-petition assertion of the rights under the contract would not also give rise to asserting the additional contract right to attorneys' fees.

From the face of the Complaint and evidence presented, it has not been shown that Creditor is seeking to hold the Debtor personally liable for the debt that was discharged, but to determine the respective rights and interests in the insurance proceeds and asserting the right to post-petition attorneys' fees relating to the post-petition litigation to resolve the post-petition disputes concerning the parties respective rights and interests in the insurance proceeds.

The Complaint itself does not state a "claim" for interest. It states that interest is requested at "the highest legal rate." The "highest legal rate" could well be such amount which can be legally recovered post-discharge. Further, the request for attorneys' fees expressly states that it is for such fees, in addition to costs of suit, as provided by "agreement or statute." Again, this could well mean any agreement or statute upon which the post-discharge Debtor has an obligation to pay such costs and attorneys' fees.

Debtor argues that Debtor is "not getting that fresh start" promised by the Bankruptcy Code. It appears that Debtor believes that the "fresh start" includes the windfall of over $200,000.00 in insurance proceeds by having "discharged" Creditor's lien on and interest in the insurance proceeds. The taking of property rights from a creditor is not what the Bankruptcy Code provides for a debtor's "fresh start." The Debtor relies on "ethos argumentation," citing a car accident Debtor was involved in while attending a deposition by the Creditor and the general goals of the bankruptcy process. But it appears that the Debtor was having to go to the deposition as part of her asserting her rights and interests in the insurance proceeds as being superior to the rights and interests of Creditor in the insurance proceeds.

As the Ninth Circuit Bankruptcy Appellate Panel in *In re Wallace* has found, a creditor seeking insurance proceeds against a discharged debtor is not a violation of the discharge injunction as long as it is not intended to be enforced against the debtor personally. The Creditor here falls right within that exception.

The Debtor has failed to meet its burden by clear and convincing evidence" that the Creditor "willfully" violated the discharge injunction. See In re Wallace, No. BAP NV-11-1681-KIPAD, 2012 WL 2401871, at *5 (B.A.P. 9th Cir. June 26, 2012).

Because the issue relates to the Discharge Injunction and these insurance proceeds, the court denies the Motion without prejudice. The Motion, as drafted, does not present the court with claims stated with particularity (Fed. R. Bankr. P. 9013) to proceed. Rather than either (1) having the parties careen forward with discovery and to an evidentiary hearing on the claim as

presented or (2) make Federal Rule of Civil Procedure 12 and Federal Rule of Bankruptcy Procedure 7012 applicable in this contested matter, the court denies the Motion without prejudice. If Debtor believes that there are grounds for asserting that the discharge injunction has been violated for pre-petition obligations which have been discharged, such a motion may be filed.

The court also notes that there is a significant asset which was listed on Schedule B by the Debtor — $205,000.00 in insurance proceeds. Dckt. 1 at 15. Debtor states under penalty of perjury for this asset that it is "uncollectable." From what is alleged in the Motion and the Opposition, it appears that the insurance proceeds were not "uncollectable," but that one of the joint payees (the Debtor) refused to provide the endorsement so that the check could be negotiated (even if to have the monies deposited with the Clerk of the Bankruptcy court and the parties then address any disputes in this court or in a proceeding in state court).

A Rhode Island property is listed on Schedule A with the Debtor stating under penalty of perjury that the value of the property is "unknown" and the amount of the secured claim is "unknown." *Id.* at 12. On Schedule D Debtor lists several creditors as having an interest in a Rhode Island Property. These creditors are:

America's Servicing Company, First Mortgage
Value of Property.....$0.00
Amount of Claim.....($219,051.55)

American Home Mtg Svg
Value of Property.....$unknown
Amount of Claim.....($221,713.00)

Real Time Resolutions
Value of Property.....$unknown
Amount of Claim.....($ 42,125)

Id. at 18-19.

In her Declaration, Debtor Candida Osias states that one of her concerns is that Creditor has waited to litigate its rights and interests in the insurance proceeds until now, after the Debtor obtained her discharge, stating, "It troubles me that WFB [Creditor] may have waited to file The State Action until after my discharge so it would not have to share the Insurance Proceeds with my other unsecured creditors." Declaration, pg. 2:15-17; Dckt. 37.

The court appreciates the Debtor's concern, whether Creditor is entitled to the monies for a secured claim (11 U.S.C. §§ 506(a), 552, and *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992)), or whether the $205,000.00 of heretofore stated to be "uncollectable" monies are divided among all of the creditors who hold general unsecured claims to the extent that Creditor does not have an interest in or lien against the insurance proceeds.

This court is gravely concerned that there is a $205,000.00 insurance payment, for which the Debtor or Creditor (the court does not know if it was forced place insurance) paid insurance premiums that has not been negotiated.

While in this day and age it is not common for insurance companies to fail, it does happen, and one cannot count on government bail-outs. If the insurance company itself were to fail, then the check which is at the subject of this dispute would become worthless.

To facilitate the concerns of the Debtor and the rights in the insurance proceeds asserted by Creditor, the court order and authorizes Creditor to negotiate the insurance checks and have the monies deposited with the Clerk of the United States Bankruptcy Court. The court shall set a deadline for any person who asserts an interest in the monies to file a motion for an other authorizing the Clerk of the Court to release the monies to that person. If competing interests are asserted, the court shall then allow those parties to proceed with the necessary litigation to determine their respective rights and interests – whether that is in the existing State Court Action or in a new proceeding in this court if appropriate.

Therefore, the Motion is denied without prejudice, and the insurance proceeds are ordered to be deposited with the Clerk of the United States Bankruptcy Court, to be held pending further order of this court.

CHAMBERS PREPARED ORDER

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

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

The Motion for Contempt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

IT IS FURTHER ORDERED that Wells Fargo Bank, N.A. is authorized to endorse the two insurance checks listed below, as the authorized signatory for Candida Osias, as provided in this order and only for such checks or replacement checks,

Payor: Rhode Island Joint Reinsurance Association
Check No. M0000519646
Date: 03/08/2011
Pay to the Order of America’s Servicing Company and Candida Osias
Amount: $180,000.00

Payor: Rhode Island Joint Reinsurance Association
Check No. M0000519647
Date: 03/08/2011
Pay to the Order of America’s Servicing Company and Candida Osias
Amount: $24,082.80

IT IS FURTHER ORDERED that Wells Fargo Bank, N.A. is authorized to place the following endorsement on each of the above checks, or replacement

checks issued, for Candida Osias, due to her apparent inability to provide such endorsement:

Candida Osias

by _____,
[printed name]
Wells Fargo Bank, N.A.
Authorized Endorser Pursuant to
Order of the US Bankruptcy Court
E.D. Cal. Case No. 10-91346

IT IS FURTHER ORDERED that such authorization for endorsement is only for the purpose of negotiating the instruments by which the insurance proceeds which such checks, or replacement checks, represent can be obtained and deposited with the Clerk of the United States Bankruptcy Court for the Eastern District of California.

IT IS FURTHER ORDERED that if the two checks identified above cannot now be negotiated due to the passage of time, Rhode Island Joint Reinsurance Association, or such successor responsible for making payment of the insurance proceeds represented by the above checks is authorized to issue two new checks for the two checks listed above or one check for the combined total of the two checks listed above, with the payees listed as: America’s Servicing Company and Candida Oasis, and transmit such check or checks to counsel for Wells Fargo Bank, N.A. in this Contested Matter: Severson & Werson, Attn: Adam Barasch, Esq., One Embarcadero Center, Suite 2600, San Francisco, California 94111.

IT IS FURTHER ORDERED that Wells Fargo Bank, N.A. is authorized to negotiate the above checks, obtain the insurance proceeds monies, and then shall immediately deposit with the Clerk of the United States Bankruptcy Court for the Eastern District of California the full amount of the monies obtained as insurance proceeds. The Clerk of the Court shall hold such monies until further order of this Court.

6. 13-91349-E-7 JASON RIVERS
13-9034 MLG-1
MODESTO IRRIGATION DISTRICT V. RIVERS

CONTINUED MOTION FOR COMPENSATION BY PREVAILING PARTY
11-21-14 [62]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant (*pro se*) on November 21, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and Plaintiff is Awarded Prevailing Party Attorneys' Fees in the amount of $32,500.00 and costs of $2,500.00

Modesto Irrigation District, the Plaintiff ("Plaintiff"), makes a Request for the Allowance of Fees and Expenses in this case.

The Plaintiff is seeking reimbursement of reasonable attorneys' fees and costs incurred by Plaintiff in the legal representation by its counsel in Adversary Proceeding No. 13-9034 pursuant to California Civil Code § 1882.2.

BACKGROUND

On October 2, 2013, Plaintiff filed its complaint initiating the Adversary Proceeding pursuant to 11 U.S.C. § 523(a)(2), (4), and (6), as well

as Cal. Civ. Code § § 1882-1882.6 to object to the dischargeability of the underlying debt owed to Plaintiff by Jason Rivers ("Defendant-Debtor").

On October 22, 2014, the court issued a judgment in favor of Plaintiff in the amount of $65,273.52, plus fees and costs as awarded.

JANUARY 15, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on February 12, 2015 to allow the Plaintiff to file supplemental pleadings providing task billing. Dckt. 70.

PLAINTIFF'S SUPPLEMENTAL PLEADING

On January 22, 2015, the Plaintiff filed supplemental pleadings with the task billing of services. Dckt. 72. The Plaintiff states that they have charged a significant portion of its time at a zero hourly rate and has, in addition, voluntarily reduced the overall charges by $10,000.00. In order to take those reductions into account, to determine Plaintiff's actual, effective rate, Plaintiff has divided the requested, reduced fees by the number of hours charged, resulting in an effective rate of $312.90.

Attached to the original Motion was a description of the Plaintiff's attorneys backgrounds. Merle C Meyers is a principal of the firm and has specialized in bankruptcy law since 1978. Michele Thompson is an associate at the firm and has been a member of the California bar since 2006.

The supplemental pleading provides the following:

1. Draft Complaint, Research

Plaintiff spent 10.35 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	1.45	$620.00	$899.00
Michele Thompson	.6	$0.00	$0.00
Michele Thompson	8.3	$420.00	$3,486.00
Subtotal	10.35		$4,385.00
Total	**10.35**	**$312.90**	**$3,238.52**

2. General Communications with Client

Plaintiff spent 5.3 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	.75	$0.00	$0.00

Merle C. Meyers	.7	$620.00	$434.00
Michele Thompson	.2	$0.00	$0.00
Michele Thompson	3.65	$420.00	$1,533.0
Subtotal	5.3		$1,967.00
Total	**5.3**	**$312.90**	**$1,658.37**

3. Initial Disclosures, Discovery Conference

Plaintiff spent 10.7 hours in the following category

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	.9	$620.00	$558.00
Michele Thompson	.5	$0.00	$0.00
Michele Thompson	9.3	$420.00	$3,906.00
Subtotal	10.7		$4,464.00
Total	**10.7**	**$312.90**	**$3,348.09**

4. Status Conference

Plaintiff spent 3.95 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	2.25	$210.00	$472.50
Michele Thompson	1.7	$420.00	$714.00.00
Subtotal	3.95		$1,185.50
Total	**10.35**	**$312.90**	**$1,235.96**

5. Depositions of Rivers, Covert, Schluter

Plaintiff spent 21.9 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	6.5	$210.00	$1,365.00
Michele Thompson	15.4	$420.00	$6,468.00

Subtotal	21.9		$7,833.00
Total	**21.9**	**$312.90**	**$6,852.51**

6. Pretrial Statement/Conference

Plaintiff spent 17.65 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	2.0	$620.00	$1,240.00
Michele Thompson	5.75	$210.00	$1,207.50
Michele Thompson	9.9	$420.00	$4,158.00
Subtotal	17.65		$6,605.50
Total	**17.65**	**$312.90**	**$5,522.69**

7. Propounding Interrogatories/Document Production

Plaintiff spent 4.4 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	4.4	$420.00	$1,848.00
Subtotal	4.4		$1,848.00
Total	**4.4**	**$312.90**	**$1,376.76**

8. Responding Interrogatories/Document Production

Plaintiff spent 3.5 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	.5	$620.00	$310.00
Michele Thompson	3.0	$420.00	$1,260.00
Subtotal	3.5		$1,570.00
Total	**3.5**	**$312.90**	**$1,095.15**

9. Trial Brief, Trial Preparation, Witness Declarations, Exhibits

Plaintiff spent 31.5 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	1.0	$0.00	$0.00
Michele Thompson	30.5	$420.00	$12,810.00
Subtotal	31.5		$12,810.00
Total	**31.5**	**$312.90**	**$9,856.35**

10. Trial

Plaintiff spent 12 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	4.0	$210.00	$840.00
Michele Thompson	8.0	$420.00	$3,360
Subtotal	12.0		$4,200.00
Total	**12.0**	**$312.90**	**$3,754.80**

11. Motion for Attorneys' Fees, Bill of Costs

Plaintiff spent 10 hours in the following category.

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	4.0	$420.00	$1,680.00
Michele Thompson	6.0	$420.00	$2,520
Subtotal	10.0		$4,200.00
Total	**10.00**	**$312.90**	**$3,129.00**

Based on the evidence provided by the Plaintiff's counsel, the total amount of fees sought at the reduced rate is $41,068.14. The court notes that

while the Motion suggests additional costs to be granted, no evidence has been provided to support the request.

APPLICABLE LAW

Cal. Civil Code § 1882

Under California Civil Code § 1882.1:

> A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts any of the following acts:
>
> a. Diverts, or causes to be diverted, utility services by any means whatsoever.
>
> b. Makes, or causes to be made, any connection or reconnection with property owned or used by the utility to provide utility service without the authorization or consent of the utility.
>
> c. Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means.
>
> d. Tampers with any property owned or used by the utility to provide utility services.
>
> e. Uses or receives the direct benefit of all, or a portion, of the utility service with knowledge of, or reason to believe that, the diversion, tampering, or unauthorized connection existed at the time of the use, or that the use or receipt, was without the authorization or consent of the utility.

If a utility is successful in any civil action brought pursuant to § 1882.1, "the utility may recover as damages three times the amount of actual damages, if any, plus the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2.

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides

an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

Upon review of the Motion and the Adversary Proceeding resulting in final judgment in favor of Plaintiff, the court finds that the Plaintiff is the prevailing party. As the prevailing party, pursuant to Cal. Civ. Code § 1882.2, the Plaintiff's are entitled to reasonable attorney costs and fees.

In the Supplemental Pleading Plaintiff states that the court should take into account that "MLG has charged a significant portion of its time at a zero hourly rate,..." Dckt. 72 at pg. 2:20-21. Of the 131.25 hours billed, a review of the task billing identifies 3.05 hours billed at a $0.00 hourly rate. This represents 2% of the total billings, which does not strike the court as a "significant portion" of the time billed at $420.00 and $620.00 an hour.

The aggressive use of the word "significant" in describing 2% of the total billings is also indicative of the aggressive position taken by Plaintiff in this Adversary Proceeding. Though Plaintiff could not document the actual stolen power, it argued that the court should extend the theft period all the way back to when the Defendant first obtained service from Plaintiff – October 2004 (the oldest records which Plaintiff could locate). The amount prayed for in the complaint was $109,315.65, which Plaintiff sought to be trebled to $327,946.95.

The court awarded $32,636.76 in damages for stolen power (30% of what was demanded). This was for the years 2011 and 2012. The court did not award damages for any earlier period, finding that the evidence did not support such a finding for periods prior to 2011. The court further doubled that amount, and did not treble it, for a total damages award of $65,273.52 (20% of the total judgment sought).

This case was not one fraught with discovery fights and delays. For attorneys billing $620.00 and $420.00 an hour, it was a relatively straightforward proposition. It may have been this case could never have settled if Plaintiff only sought $30,000.00 of damages. Plaintiff may have been able to prosecute the case at less expense, commensurate with $30,000.00 in damages, if Plaintiff had not as aggressively sought damages for which it could not present evidence to the court support such damages.

In reality, the court having doubled the damages, collection of the damages award may well be challenging for Plaintiff. The award of attorneys' fee may well be illusory. However, merely because a defendant may not have the current ability to pay, the court does not deny reasonable attorneys' fees to the prevailing party.

The reasonable fees, in this Adversary Proceeding, for prosecuting the claim for two years of stolen power is $32,500.00. It appears that the greater amounts may well have been caused by the overly aggressive tactic of Plaintiff to seek damages (for which there was no evidence) dating back to 2004. Defendant-Debtor cannot be heard to complain that the court awards $32,500.00 in attorneys' fees for actual damages of "only" $32,636.76. The court found that Defendant-Debtor stole the power and also that doubling the damages was proper.

The fact that the court did not grant all of the damages sought by Plaintiff and did not treble the damages does not mean that Plaintiff did not prevail. It also does not mean that the court found Defendant-Debtor not to have stolen power. It is just that the evidence which Plaintiff could produce did not support any greater damages. FN.1.

FN.1. The fact that the court did not grant all of the fees billed by counsel does not mean that such work was not "necessary" for the client." Plaintiff may well reasonably need to pay for counsel and Plaintiff for "learning" how to successfully prosecute these cases. Counsel did obtain a significant result for Plaintiff, being able to provide sufficient evidence for the court to extrapolate two years back from the termination of the service. These damages were doubled. All told, Plaintiff will recover over $100,000.00 if it can collect all of the damages (without taking into account interest on the judgment). Even paying counsel in full for all of the fees billed, if the $100,000.00 is collected, Plaintiff will recover more than the power which was stolen.

Plaintiff also requests $4,490.00 in costs. Unfortunately, the court cannot find a detail of the costs which make up the $4,490.00. It is clear that there were substantial photocopies required for the trial. In addition, reasonable travel was required for trial (counsel effectively using telephonic appearances where appropriate). The court having adjusted the attorneys' fees to $32,500.00, it would be unfair to deny recovery of any costs. It may well have been when Plaintiff presented its reduced fees, it just rolled the costs into the $41,068.14 fee request. In light of no separate costs being presented, the court makes an upward adjustment of $2,500.00 to the fees.

Therefore, the Motion is granted and the Plaintiff is awarded $37,000.00 in reasonable attorneys' fees and costs as the prevailing party. Jason Rivers, Defendant-Debtor, is ordered to pay Plaintiff $37,000.00 in reasonable attorneys' fees and costs as part of the judgment.

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 Allowance of Fees and Expenses filed by Modesto Irrigation District, the prevailing Plaintiff in this Adversary Proceeding, ("Plaintiff") having been presented to the court and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and Plaintiff is awarded $35,000.00 in attorneys' fees and costs as the prevailing party.

This award of attorneys' fees and costs shall be enforced as part of the Judgment entered by this court in this Adversary Proceeding. Judgement, Dckt. 59.

7. 13-91194-E-7 ARACELI RICO
13-9033 MLG-1
MODESTO IRRIGATION DISTRICT V. RICO

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF MEYERS LAW GROUP, P.C. FOR MICHELE THOMPSON, PLAINTIFF'S ATTORNEY(S)
11-21-14 [48]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on November 21, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

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

The Motion is granted and Plaintiff is Awarded Prevailing Party Attorneys' Fees in the amount of $34,500.00 and costs of $2,500.00.

Modesto Irrigation District ("Plaintiff") makes a Request for the Allowance of Fees and Expenses in this case.

The Plaintiff is seeking reimbursement of reasonable attorneys' fees and costs incurred in the legal representation by its counsel in Adversary Proceeding No. 13-9033 pursuant to California Civil Code § 1882.2.

The Plaintiff is seeking total fees and expenses in the amount of $55,113.86.

BACKGROUND

On October 2, 2013, Client filed its complaint initiating the Adversary Proceeding pursuant to 11 U.S.C. § 523(a)(2), (4), and (6), as well as Cal. Civ. Code § § 1882-1882.6 to object to the dischargeability of the underlying debt owed to Client by Araceli Rico, Defendant-Debtor.

On October 29, 2014, the court issued a judgment in favor of client in the amount of $45,631.44, plus fees and costs as awarded.

OPPOSITION

The court notes that both the Defendant-Debtor and Plaintiff filed rather lengthy opposition and reply. Defendant-Debtor argues that this was a $15,210.48 case, which when trebled as provided under California law, the damages award $45,631.43. Defendant-Debtor also objects to the $620.00 and $420.00 hourly rates for which Modesto Irrigation District seeks to have the attorneys' fees computed.

There is also an objection that Defendant-Debtor believes that there is either double billing or fees from another case involving the same issue but different defendant as part of the current fee request. Defendant-Debtor further contends that he is being asked to pay for work which had to be repeated due to errors by Plaintiff's counsel.

JANUARY 15, 2015 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on February 12, 2015 to allow the Plaintiff to file supplemental pleadings providing task billing. Dckt. 70.

PLAINTIFF'S SUPPLEMENTAL PLEADING

On January 22, 2015, the Plaintiff filed supplemental pleadings with the task billing of services. Dckt. 72. The Plaintiff states that they have charged a significant portion of its time at a zero hourly rate and has, in addition, voluntarily reduced the overall charges by $10,000.00. In order to take those reductions into account, to determine Plaintiff's actual, effective rate, Plaintiff has divided the requested, reduced fees by the number of hours charged, resulting in an effective rate of $307.02.

Attached to the original Motion was a description of the Plaintiff's attorneys backgrounds. Merle C Meyers is a principal of the firm and has specialized in bankruptcy law since 1978. Michele Thompson is an associate at the firm and has been a member of the California bar since 2006.

The supplemental pleading provides the following:

1. **Draft and Complaint Research**

Plaintiff seeks total compensation of $3,300.47 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	2.45	620.00	1,519.00
Michele Thompson	8.3	420.00	3,486.00

Subtotal	10.75		$5,005.00
Adjusted Total	**10.75**	**307.02**	**$3,300.47**

2. General Communications with Client.

Plaintiff seeks total compensation of $951.76 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	.75	0.00	0.00
Michele Thompson	2.35	420.00	987.00
Subtotal	3.1		$987.00
Adjusted Total	**3.1**	**307.02**	**$951.76**

3. **Initial Disclosures, Discovery Conference**

Plaintiff seeks total compensation of $951.76 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	3.1	420.00	1,302.00
Subtotal	3.1		$1,302.00
Adjusted Total	**3.1**	**307.02**	**$951.76**

4. **Status Conference**

Plaintiff seeks total compensation of $1,059.22 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	2.25	210.00	472.00
Michele Thompson	1.2	420.00	504.00
Subtotal	3.45		$976.00
Adjusted Total	**3.45**	**307.02**	**$1,059.22**

5. **Depositions of Rico, Erriguin, Rocio-Rico**

Plaintiff seeks total compensation of $7,522.69 for this category:

Timekeeper	Hours	Rate	Amount
Michele Thompson	8.0	210.00	1,680.00
Michele Thompson	16.6	420.00	6,972.00
Subtotal	24.6		$8,652.00
Adjusted Total	**24.6**	**307.02**	**$7,552.69**

6. Pretrial Statement

Plaintiff seeks total compensation of $3,515.38 for this category:

Timekeeper	Hours	Rate	Amount
Merle C. Meyers	.4	0.00	0.00
Merle C. Meyers	.9	620.00	682.00
Michele Thompson	1.75	210.00	367.50
Michele Thompson	8.4	420.00	3,528.00
Subtotal	11.45		$4,453.50
Adjusted Total	**11.45**	**307.02**	**$3,515.38**

7. **Propounding Interrogatories/Document Production**

Plaintiff seeks total compensation of $1,442.99 for this category:

Timekeeper	Hours	Rate	Amount
Michele Thompson	4.7	420.00	1,974.00
Subtotal	4.7		$1,974.00
Adjusted Total	**4.7**	**307.02**	**$1,442.99**

8. **Responding Interrogatories/Document Production**

Plaintiff seeks total compensation of $3,469.33 for this category:

Timekeeper	Hours	Rate	Amount
Michele Thompson	11.3	420.00	4,746.00

Subtotal	11.3		$4,746.00
Adjusted Total	**11.3**	**307.02**	**$3,469.33**

9. Trial Brief

Plaintiff seeks total compensation of $2,241.25 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	.8	620.00	496.00
Michele Thompson	6.5	420.00	2,730.00
Subtotal	7.3		$3,226.00
Adjusted Total	**7.3**	**307.02**	**$2,241.25**

10. Trial Preparation, Witness Declarations, Exhibits, Request for Judicial Notice

Plaintiff seeks total compensation of $5,127.23 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Merle C. Meyers	2.9	0.00	0.00
Michele Thompson	13.8	420.00	5,796.00
Subtotal	16.7		$5,796.00
Adjusted Total	**16.7**	**307.02**	**$5,127.23**

11. Stipulation Re Undisputed Facts

Plaintiff seeks total compensation of $1,105.27 for this category:

Timekeeper	**Hours**	**Rate**	**Amount**
Michele Thompson	3.6	420.00	1,512.00
Subtotal	3.6		$1,512.00
Adjusted Total	**3.6**	**307.02**	**$1,105.27**

12. Trial

Plaintiff seeks total compensation of $12,526.42 for this category:

Timekeeper	Hours	Rate	Amount
Merle C. Meyers	10.0	0.00	0.00
Merle C. Meyers	1.4	620.00	868.00
Michele Thompson	8.0	210.00	1,680.00
Michele Thompson	21.4	420.00	8,988.00
Subtotal	40.8		$11,536.00
Adjusted Total	**40.8**	**307.02**	**$12,536.42**

13. Responding to Evidentiary Objection

Plaintiff seeks total compensation of $3,714.94 for this category:

Timekeeper	Hours	Rate	Amount
Merle C. Meyers	2.3	620.00	1,426.00
Michele Thompson	1.0	420.00	0.00
Michele Thompson	8.8	420.00	3,696.00
Subtotal	12.1		$5,122.00
Adjusted Total	**12.1**	**307.02**	**$3,714.94**

14. Motion for Attorneys' Fees, Bill of Costs

Plaintiff seeks total compensation of $4,528 for this category:

Timekeeper	Hours	Rate	Amount
Michele Thompson	4.0	420.00	1,680.00
Michele Thompson	6.0	420.00	2,520.00
Michele Thompson	4.75	420.00	2,000.00
Subtotal	14.75		$6,200.00
Adjusted Total	**14.75**	**307.02**	**$4,528.55**

Based on the evidence provided by the Plaintiff's counsel, the total amount of fees sought at the reduced rate is $51,487.26. The court notes that while the Motion suggests additional costs to be granted, no evidence has been provided to support the request.

DEFENDANT-DEBTOR'S RESPONSE

Defendant-Debtor filed a response to the Plaintiff's supplemental pleading on January 29, 2015. Dckt. 76. The Defendant-Debtor objects on the following grounds:

Costs

Plaintiff seeks $4,809.61 in costs which include $110.00 in additional estimated costs requested by Plaintiff's Supplemental Declaration. Originally, Plaintiff requests $4,699.61 in costs and submitted a Bill of Costs requesting approval of said amount on November 21, 2014. On or around December 2, 2014, the Bankruptcy Court Clerk's Memorandum denied $2,290.80 of the requested costs for failure to categorize these costs pursuant to 28 U.S.C. § 1920. Dckt. 77. The Clerk's Memorandum states that under Fed. R. Bankr. P. 7054(b), the Plaintiff could have moved the court to review the Clerk's actions within seven (7) days of the issuance of the Clerk's Memorandum.

The Plaintiff never filed such a motion and the seven day deadline had run on December 9, 2014. Moreover, the Defendant believes that no effort to categorize these costs was made even in the Plaintiff's Supplemental Declaration. Therefore, Defendant asks that the amount of $2,290.80 be denied for the reasons provided above. The Defendant further requests that the additional $110.00 in costs requested in Plaintiff's Supplemental Declaration be denied for failure to categorize or explain the nature of those costs as required by 28 U.S.C. § 1920. The Defendant asks that the Plaintiff's costs be limited to the $2,408.81 already approved by the Bankruptcy Court Clerk.

Hourly Rate

Plaintiff's Supplemental Declaration asks for compensation for billable work in the amount of $51,488.00 for 167.70 billable hours of work completed. Plaintiff has adjusted their billing rate to $307.02 per hour ($51,488.00/167.70 hours=$307.02/hour). The Defendant and Plaintiff agree that the $307.02 rate is both reasonable and appropriate as Plaintiff's counsel voluntarily reduced its fees to reach the rate.

Since both parties appear to agree on the rate the Defendant asks that the Court hold Plaintiff to that rate for both Mr. Meyers and Ms. Thompson and that any adjustments to the total billable hours requested by the Defendant that are approved by the Court reflect the $307.02 per hour rate.

Total Fees Sought by Plaintiff are Unreasonable

Plaintiff's counsel seeks to recover $56,297.61 in attorneys' fees and costs even though they were only awarded $45,631.43 in damages. The actual damages suffered by the Plaintiff amounted to $15,210.48, which were trebled to reach the total damage award of $45,631.43. The Defendant acknowledges that the Plaintiff has a duty to recover damages, but should also factor in the likelihood of prevailing in court based on the evidence it has available.

Before filing the Adversary Proceeding the Plaintiff was aware that its power use records only went back to July 27, 2012. The Court ruled that Plaintiff's damages could only be calculated back to July 27, 2012 and reduced Plaintiff's requested damages accordingly.

The damages originally requested by the Plaintiff were $327,946.95 and made it difficult for the Defendant to make a reasonable settlement offer to avoid trial. The Defendant believes that if the Plaintiff had only sought the damages it could actually prove, the parties may have been able to reach a settlement agreement that would have avoided the instant fees and costs that Plaintiff now seeks.

The $46,631.43 awarded to the Plaintiff was a 86.09% reduction in damages from the $327,946.95 initially requested. The Defendant believes that given the reduction in damages awarded by the court that the court should also reduce the attorneys' fees being sought. Defendant believes that had Plaintiff been reasonable in its original request for damages, this matter could have been settled prior to trial.

Therefore, the Plaintiff would have avoided all fees and costs associated with the trial. The Plaintiff seeks a total of $29,243.66 in attorney's fees for 1) preparing a trial brief ($2,241.25); 2) trial preparation, witness declarations, exhibits, a Request for Judicial Notice ($5,127.23); 3) a Stipulation of Undisputed Facts ($1,105.27); 4) Trial ($12,526.42); 5) responding to an evidentiary objection ($3,714.94); and 6) a motion for Attorney's Fees, and a bill of costs ($4,528.55). Defendant believes all of these fees could have been avoided had Plaintiff sought reasonable damages from the outset of the Adversary Proceeding, and asks that Plaintiff's attorney's fees be reduced by $29,243.66 to a total of $22,244.34 for the reasons stated above.

Unreasonable, Unnecessary, and Duplicative Fees

Plaintiff's Exhibit "A" shows that Michele Thompson billed for 2 hours of time on June 19, 2014 for the preparation of a second set of interrogatories to Rosaura Rocio-Rico and Aid Erriguin. Ms. Thompson also billed for another 1.3 hours on June 27, 2014 for the preparation of a revised second set of interrogatories. The reason for the revised set of interrogatories was that Ms. Thompson mistakenly addressed the original second set of interrogatories and document requests to Defendant's witnesses instead of to the Defendant herself. Ms. Thompson claims that she was left with the impression from Defendant's counsel that it was appropriate to do so. However, no such agreement or understanding was had by the Defendant.

Upon receiving the Defendant's second set of interrogatories, Ms. Thompson realized her mistake and sent out the revised second set of interrogatories and document requests addressed directly to the Defendant. Although, Ms. Thompson requested an additional day to fix her mistake, which Defense counsel provided, Defendant's counsel was not aware she planned to bill for both drafts, and would not have granted her the additional day.

Defendant believes it is highly unconscionable that Plaintiff would now seek recovery of fees for a mistake its counsel made through no fault of the Defendant. Therefore, the Defendant requests that the 2 hours billed on June 19, 2014 be disallowed.

According to Exhibit "A" of the Plaintiff's motion, Ms. Thompson spend 0.9 hours of billable work on July 1, 2014 in preparing two subpoenas for depositions of Rosaura Roci-Rico, and Aide Erriguin. Plaintiff's counsel held in its Motion that they had substantial litigation experience. The Defendant

believes that a party with substantial litigation experience should be more familiar with the subpoena process.

The subpoena is a two page form that requires little information to complete, and is something a paralegal, not Ms. Thompson, could have filled out at a lower rate. Furthermore, Defendant believes that Ms. Thompson should not have taken 0.9 hours to prepare two subpoenas. Therefore ,the Defendant asks that the Court disallow the 0.9 hours billed on July 1, 2014 be disallowed.

According to Exhibit "A" of Plaintiff's motion, Ms. Thompson spent a total of 7.3 billable hours preparing and filing a pretrial brief and trial brief between August 13, 2014 and October 2, 2014 (Task Code 9 on Exhibit "A"). Defendant argues that neither document were required to be filed with the court and Plaintiff has failed to justify why such work was necessary.

The Defendant further notes that the court never cited the pretrial or trial briefs in its holdings as a reason for reaching its holding. Therefore, since the documents were not necessary to obtain a verdict in its favor, Defendant believes these billable hours are unreasonable and should not be allowed. The Defendant asks the Court to reduce the Plaintiff's total billable hours by 7.3 billable hours.

According to Exhibit A of Plaintiff's motion, MLG billed 12.1 hours to prepare a response to the Defendant's evidentiary objection. In the court's June 19, 2014 Notice of an Order for Trial, the court limited the length on an evidentiary objection and any subsequent response to that objection to 5 pages. Plaintiff's response weighed in at 15 pages, or three times the allowable limit. As Plaintiff's response was three times longer than what was allowed under the Court's Notice and Order for Trial, Plaintiff's billable hours should be reduced to 1/3 of the requested amount, which comes out to 4.03 hours (12.1/3=4.03). Accordingly, Defendant asks that Plaintiff's billable hours for preparing a response to Defendant's Evidentiary Objection be reduced by 8.07 hours.

<u>Defendant-Debtor's Request</u>

1. That the total costs recoverable by Plaintiff be reduced to $2,408.81, and/or

2. That the hourly billing rate for Plaintiff's counsel be set at $307.02 per hour, and/or

3. That the two billable hours billed on June 19, 2014 for the preparation of a Second Set of Interrogatories and Document Requests be denied and that Plaintiff's total attorneys' fees be reduced by $614.04, and/or

4. That the two billable hours billed on June 19, 2014 for the preparation of a Second Set of Interrogatories and Document Requests be denied and that Plaintiff's total attorney's fees be reduced by $614.04, and/or

5. That the 0.9 billable hours billed on July 1, 2014, for the preparation and service of two deposition subpoenas be denied

and that Plaintiff's total attorney's fees be reduced by $276.32, and/or

6. That the 7.3 billable hours billed between August 13, 2014 and October 2, 2014, for the preparation of a pretrial brief and trial brief be denied and that Plaintiff's total attorney fees by reduced by $2,241.25, and/or

7. That 8.07 hours of the 12.1 hours billed between June 13, 2014 and October 16, 2014 for the preparation of a response to Defendant's Evidentiary Objection be denied and that Plaintiff's total attorney's fees be reduced by $2,477.65, and/or

8. That Plaintiff's attorney's fees for the billable hours associated with the trial be denied and that Plaintiff's total recoverable attorney fees be set at $22,244.34 or the amount deemed appropriate by the court.

9. For any further relief that the court deems necessary and appropriate.

The bottom line for Defendant-Debtor is that the fees should be allowed in an amount of $22,244.34 and costs allowed in the amount of $2,408.81.

PLAINTIFF'S REPLY

Plaintiff filed a reply on February 5, 2015. Dckt. 79. The Plaintiff replies as follows:

Defendant's Argument Regarding Hourly Rates Misses the Point.

Defendant misses the point on the $307.02 hourly rate. Plaintiff's counsel does not bill at that rate or that the higher, nominal rates are not reasonable. The point of the $307.02 hourly rate was to show that in light of the fees already voluntarily waived by Plaintiff's counsel, the rate was much lower than the nominal rates.

However, Plaintiff believes that a further reduction of Plaintiff's counsel's fees would be extremely unfair to Plaintiff. If hours are reduced by the court (beyond the voluntary reductions already made by Plaintiff and counsel), all remaining hours should be billed at Plaintiff's counsel's normal rates. Defendant's facile attempt to apply an effective rate that is calculated by the whole of the hours, to reduce the fees on a lesser amount of hours, is not appropriate.

Defendant Misrepresents Settlement Efforts.

In Defendant's Response they argue that any trial-related fees be reduced because the amount requested by Plaintiff was too high making it "impossible" for the Defendant to make a reasonable settlement offer to avoid trial. The Plaintiff believes that it is never impossible to make a reasonable settlement offer, and that the Defendant refused to make such an offer after Plaintiff invited one.

As stated in the Thompson Declaration, Plaintiff made a good faith settlement offer that was a fraction of the damages requested in the Adversary Proceeding. The offer was rejected and the Defendant was prompted by the Plaintiff to propose a number that was "within her means." No counteroffer was submitted by Defendant in response to Plaintiff's invitation, or at any other time. Therefore, the Plaintiff believes it was not the amount of damages requested in the complaint that impeded settlement discussions, it was the Defendant's refusal to engage in such discussions, which then compelled a trial.

Time Spent Responding to Evidentiary Object was Appropriate.

Defendant's objection sought to exclude virtually all of Plaintiff's meter data, on a theory of spoliation. The Plaintiff believes if that motion had succeeded they would not have been unable to obtain a judgment in its favor. Therefore, the time spent to respond to Defendant's evidentiary objection was reasonable.

Additionally, the Plaintiff believes that the Defendant's Response is factually misleading. Defendant states that Plaintiff's response was 15 pages, but in reality Plaintiff' response is barely over eight pages (Dckt. 35). Moreover, the Court's Order does not state a page limit for opposition to any evidentiary objection, but may limit the evidentiary objection itself (Dckt. 26).

Plaintiff's Counsel's Preparation of Interrogatories for Deponents was Proper and Compensable.

As stated on page 11 of the Objection Reply Ms. Thompson propounded the interrogatories upon the new witnesses. However, there was a disconnect of agreements between the Defendant and Plaintiff, compelling revisions of the interrogatories. The Plaintiff believes that given the late disclosure of the witnesses, language barrier, and trial date, it would have been helpful to allow the pre-depositions interrogatories, making the depositions less costly. Therefore, the preparation of the interrogatories was not a mistake, it was a reasonable reflection of Ms. Thompson's understanding of counsel's agreement, and those services are fully compensable.

Costs Requested are Separate and Distinct

Cal. Civil Code § 1882.2 allows for recovery up to treble damages, the cost of the suit, and reasonable attorneys' fees. Plaintiff holds this as separate and distinct from costs awarded by the Clerk fo the Court under 28 U.S.C. § 1920. As the award of the "cost of the suit" is allowed under a separate statute in this case, the $2,290.80 in costs denied by the Clerk may be awarded as costs reasonably incurred by the Plaintiff. *Hertz Corp. Caulfield*, 796 F.Supp. 225, 228-29 (E.D. La. 1992). The $110.00 in costs objected to by the Defendant in the Defendant's Response, are research fees, hotel charges, travel charges, postage fees, courier service, and Federal Express charges, which are all reasonable costs incurred, and regularly charged to the client. Therefore, the Court should award these costs to Plaintiff.

APPLICABLE LAW

Cal. Civil Code § 1882

Under California Civil Code § 1882.1:

> A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts any of the following acts:
>
> a. Diverts, or causes to be diverted, utility services by any means whatsoever.
>
> b. Makes, or causes to be made, any connection or reconnection with property owned or used by the utility to provide utility service without the authorization or consent of the utility.
>
> c. Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function by tampering or by any other means.
>
> d. Tampers with any property owned or used by the utility to provide utility services.
>
> e. Uses or receives the direct benefit of all, or a portion, of the utility service with knowledge of, or reason to believe that, the diversion, tampering, or unauthorized connection existed at the time of the use, or that the use or receipt, was without the authorization or consent of the utility.

If a utility is successful in any civil action brought pursuant to § 1882.1, "the utility may recover as damages three times the amount of actual damages, if any, plus the cost of the suit and reasonable attorney's fees." Cal. Civ. Code § 1882.2.

Prevailing Party Attorneys' Fees

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

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward

or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

DISCUSSION

Upon review of the Motion and the Adversary Proceeding resulting in final judgment in favor of Plaintiff, the court finds that the Plaintiff is the prevailing party. As the prevailing party, pursuant to Cal. Civ. Code § 1882.2, the Plaintiff's are entitled to reasonable attorney costs and fees.

In the Supplemental Pleading Plaintiff states that the court should take into account that "MLG has charged a significant portion of its time at a zero hourly rate,..." Dckt. 72 at pg. 3:2-3. Of the 167.7 hours billed, a review of the task billing identifies 15.05 hours billed at a $0.00 hourly rate. This represents 8.9% of the total billings, which does not strike the court as a "significant portion" of the time billed at $420.00 and $620.00 an hour.

The aggressive use of the word "significant" in describing 8.9% of the total billings is also indicative of the aggressive position taken by Plaintiff in this Adversary Proceeding. Though Plaintiff could not document the actual stolen power, it argued that the court should extend the theft period all the way back to April 5, 2000 to December 8, 2012. The amount prayed for in the complaint was $123,792.97, which Plaintiff sought to be trebled to $371,387.91.

The court awarded $45,631.44 in damages for stolen power (12.2% of what was demanded after treble).

This case was not one fraught with discovery fights and delays. For attorneys billing $620.00 and $420.00 an hour, it was a relatively straightforward proposition. It may have been this case could never have settled if Plaintiff only sought $15,000 to $20,0000 of damages, before trebling. Plaintiff may have been able to prosecute the case at less expense, commensurate with $30,000.00 in damages, if Plaintiff had not as aggressively sought damages for which it could not present evidence to the court support such damages.

In reality, the court having tripled the damages, collection of the damages award may well be challenging for Plaintiff. The award of attorneys' fee may well be illusory. However, merely because a defendant may not have the current ability to pay, the court does not deny reasonable attorneys' fees to the prevailing party.

The reasonable fees, in this Adversary Proceeding, for prosecuting the claim for multiple years of stolen power is $34,500.00. It appears that the greater amounts may well have been caused by the overly aggressive tactic of Plaintiff to seek damages (for which there was no evidence) dating back to 2004. Defendant-Debtor cannot be heard to complain that the court awards $34,500.00 in attorneys' fees for actual damages of "only" $45,631.44. The

court found that Defendant-Debtor stole the power and also that tripling the damages was proper.

The fact that the court did not grant all of the damages sought by Plaintiff does not mean that Plaintiff did not prevail. It also does not mean that the court found Defendant-Debtor not to have stolen power. It is just that the evidence which Plaintiff could produce did not support any greater damages. FN.1.

FN.1. The fact that the court did not grant all of the fees billed by counsel does not mean that such work was not "necessary" for the client." Plaintiff may well reasonably need to pay for counsel and Plaintiff for "learning" how to successfully prosecute these cases. Counsel did obtain a significant result for Plaintiff, being able to provide sufficient evidence for the court to extrapolate the amount of power theft. These damages were tripled. All told, Plaintiff will recover nearly $100,000.00 if it can collect all of the damages (without taking into account interest on the judgment).

As to the Defendant-Debtor objections, the court's reduction of the fees has resolved any specific issues to specific billables that Defendant-Debtor argues. While the court does not rule line by line on each objection, the analysis provided supra takes into consideration some of the Defendant-Debtor's arguments.

As to the Defendant-Debtor's argument concerning that the case could have been settled, Defendant-Debtor does not provide any evidence that Defendant-Debtor made any offers to Plaintiff in attempt to settle. Under Fed. R. Civ. P. 68, the Defendant-Debtor could have offered an Offer of Judgment to the Plaintiff. If Plaintiff did reject the Offer of Judgment, the Defendant-Debtor could have provided that as evidence to support the Defendant-Debtor's argument.

Alternatively, Defendant-Debtor could have made settlement offers. While the settlement offers are not admissible for proving the underlying obligation, they would have been admissible to the question of whether Plaintiff's prosecution of this Adversary Proceeding was "reasonable" and "necessary."

But Defendant-Debtor merely argues in the "what could have been" based on the judgment. This is not a persuasive argument. Furthermore, taking the Plaintiff's response at face value, it appears that Defendant-Debtor was the one to reject offers.

Plaintiff also requests $4,809.61 in costs. Unfortunately, the court cannot find a detail of the costs which make up the $4,809.61. It is clear that there were substantial photocopies required for the trial. In addition, reasonable travel was required for trial (counsel effectively using telephonic appearances where appropriate). The court having adjusted the attorneys' fees to $34,500.00, it would be unfair to deny recovery of any costs. It may well have been when Plaintiff presented its reduced fees, it just rolled the costs into the $51,487.26 fee request. In light of no separate costs being presented, the court makes an upward adjustment of $2,500.00 to the fees.

Therefore, the Motion is granted and the Plaintiff is awarded $37,000.00 in reasonable attorneys' fees and costs as the prevailing party. Jason Rivers, Defendant-Debtor, is ordered to pay Plaintiff $37,000.00 in reasonable attorneys' fees and costs as part of the judgment.

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 Allowance of Fees and Expenses filed by Modesto Irrigation District, the prevailing Plaintiff in this Adversary Proceeding, ("Plaintiff") having been presented to the court and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Plaintiff is awarded $37,000.00 in attorneys' fees and costs as the prevailing party.
>
> This award of attorneys' fees and costs shall be enforced as part of the Judgment entered by this court in this Adversary Proceeding. Judgement, Dckt. 45.

8. 14-90358-E-7 RAMON/MARIA LOMELI — MOTION FOR TURNOVER OF PROPERTY
MHK-5 Thomas O. Gillis — 1-14-15 [100]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 14, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion for Turnover is denied without prejudice.

Eric J. Nims, Chapter 7 Trustee, ("Trustee") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 4203 Tapestry Way, Turlock, California.

The Trustee states that on July 23, 2014, the court authorized broker Bob Brazeal of PMZ Real Estate to serve as the real estate broker for the Trustee in regard to the sale of the Property. Dckt. 26. By way of an order on September 8, 2014, the court granted the Trustee's earlier motion to compel the Debtors to turnover the Property, requiring access on specific dates as well as reasonable access. Dckt. 41. After further hearing, the court entered an order on October 3, 2014, granting the Trustee's earlier Motion to Compel the Debtors to turn over the Property. Dckt. 56. This order provided that the Debtors were to provide access on yet another specific date, after the Debtors had not given previous access.

The Trustee states that the Debtors have ignored communications from the Trustee's real estate broker and thereby have prevented him from even

starting the reasonable marketing of the Property that is necessary to sell it. Such marketing efforts must include the showing of the Property to prospective buyers on reasonable advance notice to the Debtors. These efforts include "open house" events, maintaining a lockbox on the Property so real estate professionals and prospective buyers can enter and view the home, placing and maintaining a "For Sale" sign on the Property, and keeping the Property reasonably clean and tidy.

Trustee argues that during the single instance the broker was given access to the Property, by second order of the court, the Debtor who was present expressed her refusal to cooperate in regard to marketing of the Property.

On two occasions after the last hearing, the Trustee's counsel requested that the Debtors permit access to the Property by way of reasonable and specific acts, including the installation of a lockbox and erection of a "for sale" sign at the Property, so that Trustee's broker could market the Property. The Trustee states that the Debtors' counsel has not responded those communications.

The Trustee requests that the court enter an order that:

1. Requires the Debtors to turn possession of the Property to the Trustee and to vacate the Property, which events shall occur no later than March 1, 2015; or alternatively

2. Require the Debtors immediately to permit the reasonable marketing of the Property by way of the following and any other actions reasonably necessary: (I) to permit the Trustee, his broker, and his agents to have a lock-box installed at the Property; (ii) to turn over a full set of keys to the Property for use in connection with the lock-box; (iii) to permit the Trustee's broker and/or agents to install a for-sale sign at the front of the Property; and (iv) to cooperate with reasonable marketing of the Property, communicate with the Trustee, his broker, and agents in regard to marketing of the Property and to refrain from any acts that would interfere with the Trustee, his broker and agents in showing of the Property, bot exterior and interior and including any out-buildings, to prospective buyers who may be accompanied by either their own broker or by the Trustee's broker.

DEBTORS' OPPOSITION

The Debtors filed an opposition to the instant Motion on January 29, 2015. Dckt. 112. The Debtors respond as follows:

1. Contrary to the suggestion of the Trustee, Debtors have been cooperating with the Trustee. Debtors state that their counsel has had at least four length conversations with the Trustee's counsel on the legal implications of the case. They discussed the legal effect of the claims of Real Time Resolutions and the cooperation Debtors offered in allowing the realtor to examine the property. Debtors' counsel argues that he agreed to an examination of the Property but disagreed with the Trustee's

attorney on the urgency of putting "for sale" signs and door access locks on the doors prior to a final hearing on the objection to the claim of Real Time Resolutions. Debtors' counsel states that two letters were sent to the Trustee's attorney and that an office manager at Debtors' counsels firm contacted the Trustee's realtor on four occasions to arrange an inspection of the Property. The Debtors argue that the realtor and Trustee were allowed to inspect the house twice. Further, the Debtors' counsel states that another office manger at the firm corresponded with the Trustee but did not receive a reply.

2. There is no pressing reason for the Trustee to push forward with the sale of the Property. The Debtors reside in the Property with five children, including an infant. The Property has equity of at least $240,000.00 in equity because the first mortgage is only about $187,332.00. The Property is worth at least $431,000.00 according to the Debtors. Even if the unsecured claim of $100,000.00 filed by Real Time Resolution survives the objection to their claim, set for hearing on February 12, 2015, there are ample funds for the Trustee. Accordingly, there is no rush to sell the Property.

Debtors conclude by saying that a ruling on the instant Motion should be postponed until a final ruling on Debtors' Objection to the Claim of Real Time Resolutions.

SEPTEMBER 8, 2014 ORDER

On September 8, 2014, the court issued on Order Granting Trustee's Motion to Compel Turnover of Property, which explicitly stated:

> **IT IS ORDERED** the Motion to Compel turnover of the Property is granted, and the Debtor shall provide ***access*** to the real property located at 4203 Tapestry Way, Turlock, California, to the Chapter 7 Trustee and the representatives and professionals designated by the Chapter 7 Trustee, at September 7, 9, or 11, 2014, at 2:00 p.m., and such other reasonable times thereafter as requested by the Trustee.

Dckt. 41 (emphasis added).

OCTOBER 3, 2014 ORDER

On October 3, 2014, the court issued an Order Granting Trustee' Motion to Compel Turnover of Property, which explicitly stated:

> **IT IS ORDERED** that the Motion is granted, and Ramon Lomeli and Maria Lomeli shall provide ***access*** to the real property commonly known as 4203 Tapestry Way, Turlock, California, ***the interior of the house***, ***any attached structures and any outbuildings or other structures on said Property***, to Robert Brazeal and Eric J. Nims, the Chapter 7 Trustee, or other representative of the Trustee, at 10:00 a.m. on October 9, 2014.

Dckt. 56 (emphasis added).

APPLICABLE LAW

11 U.S.C. § 542 and Federal Rule of Bankruptcy Procedure 7001(1) permit a motion to obtain an order for turnover of property of the estate if the debtor fails and refuses to turnover an asset voluntarily. Federal Rule of Bankruptcy Procedure 7001(1) defines an adversary proceeding as,

> (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002.

In this case, Trustee has initiated this proceeding to compel Debtors deliver property to the Trustee. Federal Rule of Bankruptcy Procedure permits the trustee to obtain turnover from the Debtor without filing an adversary proceeding. This Motion for the injunctive relief, in the form of a court order requiring that Debtors turnover specific items of property, is therefore appropriate under Federal Rule of Bankruptcy Procedure 7001(1).

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." If the debtor has an equitable or legal interest in property from the filing date, then that property falls within the debtor's bankruptcy estate and is subject to turnover. 11 U.S.C. § 542(a).

A bankruptcy court may order turnover of property to debtor's estate if, among other things, such property is considered to be property of the estate. *In re Hernandez*, 483 B.R. 713 (B.A.P. 9th Cir. 2012); *See also* 11 U.S.C.A. §§ 541(a), 542(a). Section 542(a) requires one in possession of property of the estate to deliver such property to the Trustee. Pursuant to 11 U.S.C. § 542, a Trustee is entitled to turnover of all property of estate from Debtors. Most notably, pursuant to 11 U.S.C. § 521(a)(4), the Debtor is required to deliver all of the property of the estate and documentation related to the property of the estate to the Chapter 7 Trustee.

DISCUSSION

This is now the court’s fourth time having to address the Debtors and Debtors’ counsel inability to satisfactorily work with the Chapter 7 Trustee – the person entitled to possession and control of all property of the bankruptcy estate. 11 U.S.C. §§ 323(a), 704, and *Estate of Thelma V. Spirtos v. One San Bernardino County Superior Court Case Numbered SPR 02211, et al.*, 443 F.3d 1172, 1176 (9th Cir. 2006.

One of Debtors and Debtors’ counsel’s main arguments is that they do not understand the urgency of the need to sell the Property. Based on this conclusion, the Debtors have been “dragging their feet” in complying with an explicitly clear court order. The Debtors apparently are under the belief that because there is equity in the Property, there is no need to press the sale. The Debtors then attempt to invoke the sympathies of the court by stating that

the Debtors' have five children, including an infant, residing on the Property. While the court understands the stresses that come with parenthood, that is not a legal basis to blatantly violate a court order.

It is not the Debtors nor Debtors' counsel's decision of the nature and urgency of the sale. The Chapter 7 Trustee, in his capacity as such, and after receiving court permission, has the right and duty as the fiduciary of the estate to sell the Property in a reasonable manner.

Instead of allowing the Trustee to execute any selling efforts of the Property, the Debtors have avoided their obligation repeatedly under the guise of pending motions and lack of communication. As this is the fourth time the court has had to address the Debtors concerning the turnover of the Property, the court is no longer sympathetic to the Debtors' constant and repeated excuses.

The court issued its initial order for Debtors to provide access to the Trustee and real estate agent, rather than forcing them to move out of the Property and deliver possession to the Trustee. September 8, 2014 Order, Dckt. 41. This access order should have been very simple for the Debtors, Trustee, Real Estate Agent, and their respective attorneys, to comply with – if all of them were acting in good faith.

However, the Parties did not comply with the court's September 8, 2014 Order. Instead of providing such access, the Debtors filed new Schedules A, D, and C, changing their statements under penalty of perjury as to the liens against the Property. The secured claim of Faviloa Cisneros disappears from Schedule D, as mist before the morning sun.

No explanation is provided for how the Debtors and their attorney could have provided such prior statements under penalty of perjury, which if they are now believed, were grossly false.

At the continued hearing the court was clear as to who violated the court's September 8, 2014 Order. It was not the Trustee, not the Trustee's real estate agent, or the Trustee's counsel.

> "The Court's order filed on September 8, 2014, is clear and precise – The Debtors shall provide the Trustee access to the real property commonly known as 4203 Tapestry Way, Turlock, California at 2:00 p.m. on September 8, 9, or 11, 2014. These alternative dates were arranged with the participation of Debtors' counsel for the convenience of the parties. The Debtors have now chosen to violate the court's order.
> ...
> At this juncture, the Debtors have made it clear that they are not complying with the order of this court. Though the court will not sua sponte issue an Order to Show Cause re contempt, at this time, the Trustee may file a motion seeking appropriate non-monetary and monetary compensatory and corrective sanctions. Non-monetary sanctions may include incarceration of either or both Debtors until they choose to comply with the order, detention of the Debtors while the Trustee's representative is given access to the property with law enforcement escort (with Debtors being financially

> responsible for the cost and expense of the law enforcement escort), or increasing monetary fines for which liens are imposed on the Debtors' property."

Civil Minutes, Dckt. 59.

The Debtors contempt for the court and the court's prior order led to the issuance of the equally clear, and easy to comply with, October 3, 2014 Order – allow the Trustee and Trustee's representative access to the Trustee at a specific time and date. Dckt. 56.

The Debtors' repeated failure to allow the Trustee and the Trustee's representative access to the Property after two separate, explicit orders by this court is extremely concerning.

The Trustee raises multiple points that show Debtors have directly violated this court's order requiring the Debtors to permit the Trustee to examine the Property for purposes of selling the Property.

The court has denied the Debtors' Motion for Abandonment and Objection to Claim of Real Resolutions, Inc. The Debtors have no more pending motions or objections to further delay the inevitable – the previously ordered turnover of the Property.

The time for the Debtors to cooperate with the Trustee in the selling of the Property has come and gone since the two previous orders to turnover were basically ignored by the Debtors. The time has come for the Trustee to be able to proceed with his efforts in selling the Property for the benefit of the estate without Debtors or Debtors' counsel further hindering his good-faith and legal efforts.

DENIAL OF MOTION WITHOUT PREJUDICE

Though the Debtors conduct (and misconduct) warrants the granting the Motion, a serious question exists as to what unsecured claims may exist in this case beyond the $487.01 filed by Capital One Bank (USA), N.A. The court has sustained, without prejudice to filing an amended motion, the objection to the one other claim filed in this case.

The sustaining of the objection to claim was not based on the objection as filed by Debtors, but on the information provided by JPMorgan Chase Bank, N.A. in responding. The Bank accurately and truthfully disclosed the nature of the claim. That truthful and clear disclosure raises questions for the court as to what "unsecured claims" exist in this case and whether the Chase Bank, N.A. claim is a "secured claim" in this case. Even if unsecured, issues arise as to the effect of the court, in this judicial proceeding, ordering the payment of a claim to Chase Bank, N.A., and the effect on its security. Additionally, issues arise as to what action the Trustee will take, or rights he will assert, against the collateral for the Chase Bank, N.A. claim (if the collateral is not property of the estate) or against the co-obligor. Merely stating that the Trustee will pay the claim in full as filed does not mean that the other possible rights of the estate can be ignored by the Trustee (even if they would and have been ignored by the Debtors).

Therefore, the court denies the Motion without prejudice. With respect to any prior repeated violations of orders of the court, the Trustee can seek sanctions as appropriate for the costs and expenses occurred for the Trustee, Attorney for the Trustee, and Broker for the Trustee.

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 Turnover of Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Turnover of Property is denied without prejudice.

9. 14-90358-E-7 RAMON/MARIA LOMELI MOTION TO COMPEL ABANDONMENT
TOG-5 Thomas O. Gillis 12-16-14 [86]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the U.S. Trustee, Debtor, Debtor's Counsel, Chapter 7 Trustee, and Creditors. The Certificate of Service does not state that it was served on counsel for the Trustee who has appeared in this case. (May 24, 2014 Order, Dckt. 18; first appearance of counsel for Trustee on May 14, 2014, Dckt. 15). Service was made on January 14, 2015. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Property is denied.

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

The Motion filed by Ramon Lomeli and Maria Lomeli ("Debtors") requests the court to order the Trustee to abandon property commonly known as 4203 Tapestry Way, Turlock, California (the "Property").

In Debtor's declaration, Debtor states that on April 20,2007, Jimmy Cloninger and Debtor signed a note and second mortgage in favor of Washington

Mutual, secured by the Property. Dckt. 88. The note was for $105,000.00 and the first mortgage on the property was also held by Washington Mutual Mortgage for about $350,000.00.

On February 28, 2007, Debtors state that they sold the Property to Jimmy Cloninger, who currently resides and owns the property. Debtors state they had no interest in the Property on the date of filing Bankruptcy, but however, remained on the second mortgage on the property as an obligor.

On January 25,2013, Mr. Cloninger executed a mortgage modification agreement with Chase Mortgage. Debtor states that they did not agree to, or sign the mortgage modification and it was entered into as a part of a confidential settlement of the action Cloninger v. WaMu, Case #651796, Stanislaus Superior Court. The mortgage modification agreement modified the original note and mortgage terms to the financial detriment of the Debtors, without Debtors' consent.

Debtor's move the court to compel Trustee to abandon the estate claim to the real property for the following reasons:

1. Only one unsecured claim was filed in the captioned case for an amount less than $487.01.

2. A timely secured claim filed by Real Time Resolutions was amended at the urging of the Trustee to be an unsecured claim.

3. Real Time Resolutions claim to represent money owed by Debtors on a second mortgage secured by real property, which is not property of the estate.

4. Jimmy Cloninger is still the owner of 2289 Autumn Moon Way, Turlock CA and has an agreement with Chase Mortgage agreed to a mortgage modification in 2013.

5. Real Time Resolutions's claim is invalid, as either a secured or unsecured claim in the present case.

6. On December 16, 2014, Debtor filed an objection to the claim of Real Time Resolutions.

7. Real Time Resolution's Claims are invalid because those claims violate the "One-Action Rule" and "Security-First Rule" as stated in California Code of Civil Procedure § 726(a).

8. Debtor was not a party to the loan modification and has been prejudiced by this modification, rendering the second mortgage void as to the debtor.

9. Without Real Time Resolution's claim, the only claim that exists is that of $481.01 filed by Capitol One Bank.

For these reasons, Debtor asserts that the sale of the Property will not benefit the estate and is forbidden by U.S. Trustee guidelines. Debtors

state that they will pay $481.01 to the Trustee, if the Trustee requires payment of said debt.

TRUSTEE'S OBJECTION

Eric Nims, the Chapter 7 Trustee, file an opposition to the instant Motion on January 23, 2015. Dckt. 103.

The Trustee state that on Debtors' Schedule A, as amended, Debtors value the residence at $431,101.00. On Debtors' Schedule D, as amended, Debtors identify one claim secured by the Property, in favor of PNC Mortgage in the amount of $187,332.00. On Debtors' Schedule C, as amended, Debtors claim in regard to the Property the amount of $100,000.00 as exempt under California Code of Civil Procedure § 703.730(a)(2). The Trustee has not objected to Debtor's claim of exemption. Equity exists in the Property by Debtor's own admission, for the approximate amount of $143,769.00.

Debtors request that the court "compel the Trustee to abandon the estate claim on the [Residence]." Dckt. 86 at 3. The basis of this request is on the following grounds: "Without the claim of Real Time Resolutions, the only claim is that of $481.01, filed by Capitol One Bank. The sale of the [Residence] will not benefit the estate and is forbidden by US Trustee guidelines." Debtors allege they will pay the claim of Capitol One Bank. *Id.*

Trustee objects to Debtor's Motion on the following grounds:

Proof of service filed for Debtor's Motion indicates that only the Trustee, his counsel, and the United States Trustee had been served. Notice of the Motion was not served on the holder of the deed of trust against the residence or on unsecured creditors. As such, the notice of hearing on the Motion was not proper.

Debtor's Motion is not supported by any evidence that the Property is burdensome or of inconsequential value to the estate as required by 11 U.S.C. §554. To the contrary, given the Debtor's valuation of the Property, their exemption claim, and allegations regarding the amount of the mortgage against the residence, the residence has significant equity that stands to benefit claim holders.

Trustee has sought to sell the residence to realize the equity for the benefit of the estate and its creditors. See Dckt. 28 and Dckt. 100.

Because the Trustee seeks to sell the residence to realize equity for the benefit of unsecured claims against the estate, the Trustee requests the Debtor's Motion be denied.

DISCUSSION

This court has discussed in detail the Debtors failure to comply with prior orders of this court in connection with the Motion to Compel Turnover. There exists a possible significant general unsecured claim of U.S. Bank, N.A. in this case. Though the court sustained the objection to Proof of Claim No. 1, for which U.S. Bank, N.A. is the creditor, it was not on the grounds asserted by the Debtors. Left to the Objection alone, the Debtors would have lost that Contested Matter.

In light of the Debtors' conduct and prosecution of the case, it could well be that this asset will have to be sold by the Trustee to pay significant general unsecured claims in this case. It cannot be found that this property is burdensome or of inconsequential value to the estate. Given the alleged failure to comply with prior orders of this court, it may be that compensatory sanctions are ordered to be paid by Debtors, which may then have to be paid from the proceeds of this property liquidated by the Trustee. Given the conduct of the Debtors and the strategy in this case by Debtors and Debtors' counsel, the court is not confident that the Debtors would comply with an order of this court to pay sanctions.

Therefore, the Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Ramon Lomeli and Maria Lomeli ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is denied.

10. 14-90358-E-7 RAMON/MARIA LOMELI
TOG-7 Thomas O. Gillis

OBJECTION TO CLAIM OF REAL TIME RESOLUTIONS, CLAIM NUMBER 1 AND/OR MOTION FOR SANCTIONS 12-16-14 [80]

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

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

Below is the court's tentative ruling.

Local Rule 3007-1 Objection to Claim - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Chapter 7 Trustee, and Office of the United States Trustee on December 16, 2014. By the court's calculation, 58 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Objection to Proof of Claim Number 1 of Real Time Resolutions is sustained, without prejudice to JPMorgan Chase Bank, N.A. filing an amended proof of claim (as amending proof of claim no. 1, on or before March 1, 2015.

Ramon Lomeli and Maria Lomeli, the Debtor ("Objector") requests that the court disallow the claim of Real Time Resolutions ("Creditor"), Proof of Claim No. 1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $99,810,87.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual

basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Debtor states that on April 20,2007, Jimmy Cloninger and Debtor signed a note and second mortgage in favor of Washington Mutual, secured by the property located at 2289 Autumn Moon Way, Turlock, California. The note was for $105,000.00 and the first mortgage on the property was also held by Washington Mutual Mortgage for about $350,000.00.

On February 28, 2007, Debtors sold the property to Jimmy Cloninger, who currently resides and owns the property. Debtors state they had no interest in the property on the date of filing Bankruptcy, but however, remained on the second mortgage on the property as an obligor.

On January 25,2013, Mr. Cloninger executed a mortgage modification agreement with Chase Mortgage. Debtor states that they did not agree to, or sign the mortgage modification and it was entered into as a part of a confidential settlement of the action *Cloninger v. WaMu*, Case #651796, Stanislaus Superior Court. The mortgage modification agreement modified the original note and mortgage terms to the financial detriment of the Debtors, without Debtors consent.

Debtor Objects to Real Time Resolutions Claim for the following reasons:

1. The amended claim of Real Time Resolutions is invalid under California law. Any kind of creditor activity that seeks to appropriate unpledged assets of the debtor to retire the debt before the security itself has been first exhausted, violates California Code of Civil Procedure § 726(a).

2. California Code of Civil Procedure § 726(a) provides for sanctions against a creditor who violates the Security-First Rule.

3. The second mortgage is invalid against Debtor because the note and mortgage were modified without Debtor's consent. All of the obligors must agree and sign a mortgage modification. The agreement discharges the debt as to Debtors because Debtors did not agree to, or sign the modification.

The "Motion" consists substantially of the copy of a treatise which has been cut and pasted into the document. In substance, Debtors' counsel has assigned to the court the work of a junior attorney of reading a third-party treatise, research the authorities, and assemble for the senior partner a draft pleading. Such is not the duties or responsibility of the court. Counsel's failure to do these minimum activities of an attorney representing a party puts into doubt the validity and credibility of the Objection.

That Counsel for Debtors cut and pasted the same treatise into a pleading titled "Points and Authorities" does not give them any greater

significance. Nor "ordering" the court to read Counsel's raw research and draft pleading a second time does not compel the court to do Counsel's work.

TRUSTEE'S RESPONSE

Eric Nims, the Chapter 7 Trustee, filed a response to the Debtor's Objection on January 23, 2015. Dckt. 105.

Background

As amended, Proof of Claim No.1 is an unsecured claim in the amount of $99,810.87. The Claim was filed by Real Time Resolutions, Inc., as agent for JP Morgan Chase bank, National Association, as successor to Washington Mutual Bank. See Dckt. 106 at 2.

The Claim is based on money loaned under an account bearing the last four digits 3380. Attached to the Claim is a copy of an Agreement and Disclosure dated April 20, 2007 (the "Agreement"). Dckt. 106 at 5, 13. Additionally, attached to the Claim is a copy of a Deed of Trust, which includes a signature page signed by Jimmy Cloninger, as trustor, over two months later, on July 5, 2007. Id. At 22. The property subject to the Deed of Trust is described as 2289 Autumn Moon Way, Turlock, Stanislaus County, California (the "Autumn Moon Property"). Id. At 25.

Debtors acknowledge that the Autumn Moon Property is not an asset of the bankruptcy estate. Dckt. 82 at 3. Debtor states that he and Jimmy Cloninger "signed a note and second mortgage in favor of Washington Mutual, secured by property at 2289 Autumn Moon Way, Turlock, CA." Id. At 1,2. Debtor does not specify the dates on which these acts would have occurred.

Debtors submit his declaration as Exhibit "A" thereto a copy of a Grant Deed from the Debtors to Jimmy Cloninger that includes a legal description substantially similar to the one set fourth in the Deed of Trust attached to the claim. This Grant Deed was signed on February 28, 2007 and bears recording stamp dated March 1, 2007, fifty days before the date of Ramon Lomeli's signature on the Deed of Trust to JP Morgan Chase Bank National Association. This indicates that Ramon Lomeli would have already conveyed title to Jimmy Cloninger when he purported to convey a security interest in the Autumn Moon Property to JP Morgan Chase Bank National Association's predecessor.

In Debtor's Schedule F, for unsecured clams, Debtors identify "Chase/WAMU" as holding a number of claims on several accounts, including one with a number ending in 3380, in an unidentifiable amount. Dckt. 1 at 20. Trustee states that it is a fair conclusion that the unsecured debt admitted by the Debtors on Account 3380 is the unsecured debt asserted by JP Morgan Chase Bank National Association in the Claim.

The record of this proceeding indicates that the Claim is based on a loan made by JP Morgan Chase Bank National Association's predecessor, to Mr. Lomeli only, on Account 3380; that was ostensibly secured by a Deed of Trust against the Autumn Moon Property. Debtors admit that the Autumn Moon Property is not property of the bankruptcy estate, supporting allowing the Claim as an unsecured claim in favor of JP Morgan Chase Bank National Association.

Although the Trustee would typically object to an improper claim, the Trustee believes that the Objection is without merit.

Trustee states that the Objection suffers from the following defects:

1. The written evidence submitted by the Debtors is faulty and inadmissible. No party with personal knowledge has attested to the authenticity of the "Loan Modification Agreement" or the redacted "Settlement Agreement" that are submitted with the Lomeli Declaration. Mr. Lomeli is a party to neither document and his Declaration lacks any statement that he has personal knowledge of either document that would permit him to authenticate them.

2. Even if the "Loan Modification Agreement" had been admissible, it is not signed by JP Morgan Chase bank National Association or a predecessor in interest, which would be the party who is sought to be charged. Thus, under California Code of Civil Procedure § 1624(a)(1)it is not evidence of an enforceable agreement between the parties.

3. Debtors assert that "modification of the document [i.e., the loan modification] discharges the debt as to [the] Debtors because they did not agree to, or sign the modification." Dckt. 80 at 8. On its face, the "Loan Modification Agreement" refers to loan No. 730047586 between Jimmy Cloninger and JPMorgan Chase Bank, N.A. It does not refer to any loan agreement with either of the Debtors, nor any modification of Account 3380, which is described both in the Claim and in the Debtors' schedules. Therefore, there is no evidence of any modification of the loan on which the Claim is based, making the claimed grounds for disallowance inapplicable.

4. Debtors cite no authority for the assertion that the act of filing the Claim is an "action" under applicable law. See Dckt.80 at 3-8. The filing of a proof of claim in a Chapter 7 case is simply the assertion of a right to a distribution from the bankruptcy estate, not a "proceeding in a court of justice by which one party prosecutes another," the definition pf "action" California Code of Civil Procedure § 22.

5. Debtors request "sanctions" against the claimant, however, the "sanction" under California Code of Civil Procedure § 726(a) that Debtor describes applies specifically to a loss of security when the "one-action rule" is successfully asserted after a creditor obtains judgment on the underlying note. To the extent that Debtors may seek monetary relief against the claimant, an adversary proceeding is necessary. See Federal Rules of Bankruptcy P. 3007(b). Debtors have not shown that any claim for sanctions is not property of the bankruptcy estate, as it is apparently would have accrued before the date they filed their Chapter 7 petition.

6. There is no evidence that Mr. Lomeli has been released from personal liability to JPMorgan Chase Bank, N.A. under Account 3380. This determination is necessary for the claimant's unsecured claim to be disallowed. In order to qualify for relief under California Code of Civil Procedure § 726(a), Debtors would need to show a declaration that JPMorgan Chase Bank, N.A. waived its security. However, JPMorgan Chase Bank, N.A. does not assert a secured claim and instead asserts that it is entitled to a distribution from the bankruptcy estate, based on Mr. Lomeli's (now discharged) liability on Account 3380.

7. There is no evidence that the loan under Account 3380 was a purchase-money transaction or that the transaction otherwise qualifies the Debtor for relief under anti-deficiency legislation. The "one action rule" cited by Debtors is not anti-deficiency legislation. If Debtors lived in the Autumn Moon Property and Account 3380 had been used for purchase of same, then anti-deficiency legislation such as California Code of Civil Procedure § 580(b) might be applicable so as to eliminate Mr. Lomeli's personal liability and provide a basis to object to allowanced of the Claim. However, debtors submitted no clear evidence of any facts that would make anti-deficiency legislation apply.

JPMORGAN CHASE BANK, N.A.'S RESPONSE

JPMorgan Chase Bank, N.A. ("Chase") filed a response to the instant Objection on January 29, 2015. Dckt. 108.

Background

On or about October 3, 2001, Debtors obtained title to real property commonly known as 2289 Autumn Moon Way, Turlock, CA ("Property"). On March 1, 2007, Debtors record a grant deed ("Cloninger Deed") wherein title of the Property was purportedly transferred to Jimmy Cloninger. Cloninger's spouse, Carolyn Cloninger, caused to be recorded on March 1, 2007, an interspousal transfer deed transferring any interests she may have in the property to Jimmy Cloninger.

On or about February 27, 2007, Cloninger borrowed $393,300 from Washington Mutual ("Cloninger loan"). Repayment of the Cloninger Loan is secured by a deed of trust recorded on March 1, 2007, as to the Property ("Cloninger DOT"). The Cloninger deed of trust clearly states that it is dated February 27, 2007. The numbers "0730047586" are clearly visible on the bottom right corner on each page of the document. On September 8, 2009, Chase recorded an assignment of deed of trust with respect to the Cloninger DOT in order to provide record notice of the assignment interests to CitiBank N.A., as Trustee for WaMu Series 2007-HE3 Trust. Chase remains the servicer with respect to the Cloninger Loan and DOT.

On March 20, 2007, Cloninger recorded a grant deed where title of the Property was transferred to himself and Debtor Ramon Lomeli as join tenants. Thereafter, Debtor Ramon Lomeli obtained a home equity line of credit from Washington Mutual in the maximum amount of $105,000.00 ("Subject Loan"). Repayment of this loan is secured by a deed of trust executed by both Debtor Ramon Lomeli and Colninger, recorded on July 16, 2007. Dckt. 110, Exhibit 8.

On September 25, 2008, the Office of Thrift Supervision closed Washington Mutual and appointed the FDIC as receiver. Dckt. 110, Exhibit 9. Chase acquired certain assets liabilities, including the Subject Loan and deed of trust and the servicing rights of Washington Mutual with respect to the Cloninger DOT.

In the Debtor's first bankruptcy (Case No. 09-93568), the Debtors listed the Property on their Schedule A and listed it as encumbered by a secured claim. Debtors' Schedule D also lists Chase with respect to the Property, and noted there was a superior lien as to the Property. Dckt. 110, Exhibit 11. The Debtors did not list the Subject Loan as disputed, contingent

or unliquidated. Id. The Debtors filed a motion to dismiss the bankruptcy case which was granted on August 16, 2012. Dckt. 110, Dckt. 10.

In the instant bankruptcy case, the Debtors do not list the Property in their Schedule A. The Debtors list the Property as foreclosed upon in 2012 on question 5 of the Statement of Financial Affairs even though the Property has not been foreclosed upon. The Subject Loan and DOT are not listed on Schedule D, but it appears that the Debtors may have listed it on Schedule F. The Debtors amended their Schedules but did not include any interest in the Property or the Subject Loan and DOT. Dckt. 51. However, the Debtors amended Question 5 of the Statement of Financial Affairs to omit any reference to the Property. Dckt. 51.

Argument

JPMorgan Chase Bank, N.A. makes the following arguments:

1. Chase's claim constitutes prima facie evidence of its validity and amount. Chase has fully complied with the Rule requirements and official forms.

2. Debtors fail to overcome the *prima facie* validity of the claim. Based on the title records, the Property is property of the estate. Dckt. 110, Exhibit 7. Thus, the Subject DOT is valid and secured the Subject Loan. The title records further reflect that Debtor Ramon Lomeli still holds title in the Property as a joint tenant, along with Cloninger. Moreover, the Debtors listed the Property in the Schedules of their first bankruptcy, and have admitted in this bankruptcy that the Property was not foreclosed upon in 2012.

3. Debtors should be judicially estopped from now objecting to the claim. The positions taken in the Debtors first bankruptcy should be estopped the Debtors from now asserting no interest in the Property.

4. Filing the claim does not invoke or violate the One Action Rule of California Code of Civil Procedure § 726. Furthermore, even if the filing of the proof of claim did violate the rule, Chase would have a valid unsecured claim.

5. The Loan Modification modified the Cloninger Loan and not the Subject Loan. The exhibits submitted by the Debtors show that the loan is not for the Subject Loan but instead for the Cloninger Loan as evidenced by the different effective dates and loan account numbers.

CREDITOR'S RESPONSE

Creditor filed a response to the instant Objection on February 9, 2015. Dckt. 124. FN.1.

FN.1. The court notes that Creditor improperly titles their response as a "Joinder." As this is incorrect as a party cannot join a response as such, the

court will *sua sponte* classify the filing as a response. Creditor is the agent of JPMorgan Chase Bank, N.A., the actual "creditor," as that term is defined by 11 U.S.C. § 101(10) and (5).

Creditor makes the following arguments:

Chase holds a secured interest in the Property and at minimum an unsecured claim against the Debtor. The Creditor originally filed a secured claim based on the lien that is perfected against the Property. However, the Chapter 7 Trustee contacted Creditor and convince them to change their claim to unsecured. If the Debtors do not hold an interest in the Property, there is, at minimum, a claim against the Debtors due to the liability on the Note. However, if the Debtors do hold an interest in the Property, then Creditor reserves the right to re-amend the Proof of Claim, if needed, to assert the secured interest.

The Debtors' Objection to Claim must be denied as no violation of the One-Action Rule or the Security-First Rule occurred and the Loan Modification is with the first lien holder. There is no proof that the filing of a Chapter 7 proof of claim is an action with respect to California Code of Civil Procedure § 726(a). Further, the Debtor has admitted that the Property has not yet been foreclosed. The filing of the Proof of Claim was simply an assertion of a right to payment from the estate.

There is no basis for sanctions because neither the one-action rule nor the security first principal was violated.

The loan modification is not signed by Chase. A cursory review of the document evidences that the loan modification is inapplicable to the claim. The loan modification evidences a loan number of xxx7586 while Proof of Claim No. 1 evidences a loan number of xxx3380. Further, the loan modification specifically states that the "new principal balance of my Note is $545,512.33," while Chase's original Note evidences an original principal balance of only $105,000.00.

DISCUSSION

This Claim and the Objection are not the hallmark of federal court judicial practice. JPMorgan Chase Bank, N.A. is correct, most of the Debtors objection is ill founded and unsupported. Debtor's collapsing of the two loans into one "modification" is at best inaccurate and at worst intentionally deceiving.

However, JPMorgan Chase Bank, N.A. makes its own "have our cake and eat it to" argument. If the court accepts as truthful JPMorgan Chase Bank, N.A.'s argument – admission – that the Autumn Moon Property is property of the bankruptcy estate, then JPMorgan Chase Bank, N.A. has a secured claim in this case.

> "The title records reflect that, prior to the recording of the Subject DOT, debtor Ramon Lomeli held title to the Property as a joint tenant along with Cloninger. RJN Ex. 7. Thus, the Subject DOT is valid and secures the Subject Loan. The title records further reflect that debtor Ramon Lomeli still holds

> title in the Property as a joint tenant, along with Cloninger. Moreover, the Debtors listed the Property in the Schedules of their First Bankruptcy, and have admitted in this bankruptcy that, contrary to their statements submitted under penalty of perjury, the Property was not foreclosed upon in 2012.
>
> Thus, the Property is property of the Debtors' bankruptcy estate. See 11 U.S.C. § 541(a)(1) and (2)."

Opposition, pg. 7:2-10. As property of the estate, then JPMorgan Chase Bank, N.A. has a "secured claim." See 11 U.S.C. § 506(a).

Based on the Admission that there is a secured claim in this case, the Objection is sustained. This is without prejudice to JPMorgan Chase Bank, N.A., filing an amended proof of claim on or before March 1, 2015 which identifies the secured portion of its claim, the unsecured portion of its claim, and its right to payment from Debtors on an unsecured claim while it is holding real property security for the claim.

Buried in the cut and paste treatise and work assigned to the court, is a reference to California Code of Civil Procedure § 726(a) – as if its mere mention causes the heavens to part and all deliberation to cease. That is not the case, though it nibbles around the edges of a substantial issue. The actual code section is never actually stated by Debtors in their Objection or Points and Authorities. The actual statute states,

> "§ 726. Foreclosure of mortgage or deed of trust; Proceedings; Action based on fraud
>
> (a) There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, the sum for attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage."

This states that there is only "one action," which is the prosecution of a judicial proceeding to recover the debt personally from the obligor. This section is closely tied to which California Civil Code § 580(d), which precludes any deficiency owing after a non-judicial foreclosure sale. While creditor is not required to conduct a non-judicial foreclosure sale, absent other statutory provisions, if it so conducts a non-judicial foreclosure sale it cannot collect a deficiency from principal co-obligors. *Union Bank v. Dorn*, 254 Ca. App. 2d 157 (1967).

The court is presented with, and Debtors and JPMorgan Chase Bank have not clearly elucidated, how the court addresses a claim to which the provisions of California Code of Civil Procedure § 580(d) may apply, and the rights of the

estate if it has to make a payment on an unsecured claim for which the co-obligor has provided collateral (if JPMorgan Chase Bank, N.A.'s admission that the Autumn Moon Property is property of the bankruptcy estate and it has a secured claim in this case is not the court's final ruling).

For the court to allow or disallow an unsecured claim and then JPMorgan Chase Bank, N.A. to obtain through this judicial action a payment on a claim before the collateral has been exhausted can have significant consequences for the JPMorgan Chase Bank, N.A., the Debtors, the Estate, and the co-obligor. FN.1.

FN.1. The California Supreme Court has defined the term "action" for purposes of California Code of Civil Procedure § 726, " An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Italics added.)" *Security Pacific National Bank v. Wozab*, 51 Cal. 3d 991 (1990), citing Cal. C.C.P. § 22. The filing of a proof of claim takes the place of filing a complaint and has the force of a judgment in the bankruptcy case, unless objected to by a party in interest. 11 U.S.C. §§ 502(a), 726, 901, 925, 1111, 1129, 1222, 1225, 1322, and 1325.

Additionally, the Trustee has not addressed what position he takes with respect to the rights of the estate if it is called on (1) to make an unsecured payment on a claim secured by property of the estate (as admitted by JPMorgan Chase Bank, N.A.) or (2) the rights of the estate if it has to pay on a claim which is secured by property owned by a co-obligor (such as, subrogation to debt and lien or contribution). Rather, there appears to be a rush to get in an unsecured claim, sell the Debtors' house, pay the unsecured claim, and be done. While the Debtors' and Debtors' counsel's approach to this case justifiably may well have led to frustration by the Trustee, the court cannot and will not blindly sign off on this process. To the extent that the Estate has incurred expenses of the Trustee, Broker, and Attorney due to Debtors failure to comply with the court's prior orders, proper compensatory sanctions can be ordered by this court.

The Debtors' request for sanctions is denied. Much of the problems with respect to this claim relate directly to the conduct of and strategy implemented by the Debtors and Debtors' Counsel. All parties have been "sanctioned" sufficiently through the pleadings filed in this Contested Matter.

Further, Federal Rule of Civil Procedure 18 allowing a party to bundle multiple claims in one complaint is not part of the contested matter practice provided for by Federal Rule of Bankruptcy Procedure 9014. Further, merely "pleading" "C.C.P 726(a) provides for sanctions against a creditor who violates the Security First Rule." and then tell the court to read "Munoz, Demystifying the One Action Goblin" does not state grounds for such relief. Again, it is not for the court to, serving as the junior associate attorney, to read the treatise identified by the senior partner, draft a pleading, and then take the pleading to the senior partner for his or her use.

All other requests for relief are denied.

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 of Real Time Resolutions, Creditor filed in this case by Ramon Lomeli and Maria Lomeli, Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim Number 1 of Real Time Resolutions is sustained, without prejudice to JPMOrgan Chase Bank, N.A. (the actual creditor for that claim) filing an amended proof of claim on or before March 1, 2015, which identifies the secured portion of its claim, the unsecured portion of its claim, and its right to payment from Debtors on an unsecured claim while it is holding real property security for the claim
>
> All other requests for relief in the Objection are denied.

11. 13-91459-E-11 KDG-15 LIMA BROTHERS DAIRY Jacob L. Eaton

MOTION FOR FINAL DECREE AND ORDER CLOSING CASE 1-29-15 [404]

Tentative Ruling: The Motion for Final Decree and Order Closing Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 29, 2015. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Final Decree and Order Closing Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Final Decree and Order Closing Case is granted.

Federal Rules of Bankruptcy Procedure Rule 3022 provides that, after an estate is fully administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case. 11 U.S.C. § 350(a) additionally states that the court is required to close a case after an estate is "fully administered and the court has discharged the trustee." The fact that the estate has been fully administered merely means that all available property has been collected and all required payments made. *In re Menk,* 241 B.R. 896, 911 (9th Cir. B.A.P. 1999).

To determine whether a Chapter 11 case has been "fully administered," the court considers whether:

• the plan confirmation order is final;

• deposits required by the plan have been distributed;

• property to be transferred under the plan has been transferred;

• the debtor (or the debtor's successor under the plan) has taken control of the business or of the property dealt with by the plan;

• plan payments have commenced; and

• all motions, contested matters and adversary proceedings have been finally resolved.

Federal Rule of Bankruptcy Procedure 3022, Adv. Comm. Note (1991). Additionally, unless the Chapter 11 plan or confirmation order provides otherwise, a Chapter 11 case should not remain open solely because plan payments have not been completed. *See id.*; *In re John G. Berg Assocs., Inc*., 138 B.R. 782, 786 (Bankr. E.D. Pa. 1992).

Here, the Chapter 11 Plan was confirmed on November 12, 2014. Dckt. 373. The Plan provided that Debtor is responsible for operating its business and making distributions in accordance with the terms of the plan. Debtors state that all distributions to be made under the plan are current and that all the post-confirmation operating reports have been filed.

As indicated by the Advisory Committee Notes accompanying Fed. R. Bankr. P. 3022, entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Rather, the above-listed factors should be considered in determining whether the estate has been fully administered. As stated by Debtors, there are no outstanding deposits that require distribution under the plan and that all disputed claims have been resolved.

Upon confirmation of the Plan, the relevant property became fully vested in Debtors, who are currently managing the estate. Debtors appear to be current on all distribution under the plan and filed post-confirmation operating reports.

Thus, the court finds that Debtors have satisfactorily met the above-listed factors, determining whether the Chapter 11 bankruptcy estate has been fully administered within the meaning of 11 U.S.C. § 350(a). The court will enter a final decree closing Debtors' case.

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 Final Decree and Order Closing Case filed by the Debtors-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and

Debtors' Chapter 11 Bankruptcy Case is closed pursuant to 11 U.S.C. § 350(a) and Federal Rule of Bankruptcy Procedure 3022, without limitation or restriction of this court's post-confirmation jurisdiction in this case.

12. 14-91459-E-7 JONHENRI/SAMANTHA MADRU — MOTION TO COMPEL ABANDONMENT
BSH-1 Brian S. Haddix — 1-11-15 [12]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on January 11, 2015. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion to Abandon Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Motion to Abandon Property is granted.

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

The Motion filed by Jonhenri Louis Madru and Samantha Carolee Madru ("Debtor") requests the court to order the Trustee to abandon property commonly known as:

Asset	Value	Encumbrance	Equity	Exemptions

5301 Whitestone Dr., Salida, California	$270,000.00	$214,497.09	$55,502.91	CCP § 704.730 - $55,502.91
Cash in Wallet	$17.00	None	$17.00	CCP § 704.070- $12.75
BBVA Compass Checking (5919)	$0.00	None	$0.00	CCP § 704.070 - N/A
Golden Valley FCU (5895-001)	$20.00	None	$20.00	CCP § 704.070 - $20.00
BBVA Compass Checking (8339)	$20.00	None	$20.00	CCP § 704.070 - $20.00
Household goods and furnishings including audio, video and computer equipment	$3,050.00	None	$3,050.00	CCP § 704.020 - $3,050.00
Personal Clothing	$500.00	None	$500.00	CCP § 704.020 - $500.00
Engagement and Wedding Rings	$900.00	$387.00	$513.00	CCP § 704.040 - $513.00
Silver Ring	$25.00	None	$25.00	CCP § 704.070 - $25.00
2005 Saturn Vue 2WD V6 with 168,000 miles in good condition	$2,150.00	None	$2,150.00	CCP § 704.010 - $2,150.00
2005 GMC 1500 Sierra Crew Cab SLE 4WD with 178,000 miles in good condition	$8,175.00	$8,023	$152.00	CCP § 704.070 - $152.00
2 dogs and 2 cats	$1.00	None	$1.00	None- N/A

(the "Property"). The Declaration of Debtors has been filed in support of the motion and values the Property as stated above.

No opposition has been filed in connection with this instant Motion.

The court finds that the debt secured by the Property exceeds the value of the Property, and that there are negative financial consequences to the Estate retaining the Property. The court determines that the Property is of

inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Abandon Property filed by Jonhenri Louis Madru and Samantha Carolee Madru ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted and that the Property identified as:

Asset
5301 Whitestone Dr., Salida, California
Cash in Wallet
BBVA Compass Checking (5919)
Golden Valley FCU (5895-001)
BBVA Compass Checking (8339)
Household goods and furnishings including audio, video and computer equipment
Personal Clothing
Engagement and Wedding Rings
Silver Ring
2005 Saturn Vue 2WD V6 with 168,000 miles in good condition
2005 GMC 1500 Sierra Crew Cab SLE 4WD with 178,000 miles in good condition
2 dogs and 2 cats

> and listed on Schedule A and B by Debtor is abandoned to Jonhenri Louis Madru and Samantha Carolee Madru by this order, with no further act of the Trustee required.

13. 14-91360-E-7 LUTHER WARDA — MOTION TO AVOID LIEN OF STAN BOYETT AND SONS, INC.
SSA-1 Steven S. Altman — 1-9-15 [17]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Stan Boyett and Sons, Inc., and Office of the United States Trustee on January 9, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Stan Boyett and Sons, Inc. ("Creditor") against property of Luther M. Warda ("Debtor") commonly known as 2028 Waterfall Court, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $1,871.89. An abstract of judgment was recorded with Stanislaus County on December 23, 2009, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $336,000.00 as of the date of the petition. The unavoidable consensual liens total $295,657.04 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $100.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Stan Boyett and Sons, Inc., California Superior Court for Stanislaus County Case No. SC397986, recorded on December 23, 2009, Document No. 2009-0122395-00 with the Stanislaus County Recorder, against the real property commonly known as 2028 Waterfall Court, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

14. 14-91360-E-7 LUTHER WARDA — MOTION TO AVOID LIEN OF CACH, LLC
SSA-2 Steven S. Altman — 1-9-15 [23]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Cach, LLC, and Office of the United States Trustee on January 9, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of CACH, LLC ("Creditor") against property of Luther M. Warda ("Debtor") commonly known as 2028 Waterfall Court, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $3,216.42. An abstract of judgment was recorded with **Stanislaus** County on September 5, 2014, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $336,000.00 as of the date of the petition. The unavoidable consensual liens total $395,657.04 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.140(b)(1) in the amount of $100.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of CACH, LLC, California Superior Court for Stanislaus County Case No. 2000954, recorded on September 5, 2014, Document No. 2014-0058556-00 with the Stanislaus County Recorder, against the real property commonly known as 2028 Waterfall Court, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

15. 14-91360-E-7 LUTHER WARDA
SSA-3 Steven S. Altman

MOTION TO AVOID LIEN OF WASHINGTON INTERNATIONAL INSURANCE COMPANY
1-9-15 [29]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter Trustee, Washington International Insurance Company, and Office of the United States Trustee on January 9, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Washington International Insurance Company ("Creditor") against property of Luther M. Warda ("Debtor") commonly known as 2028 Waterfall Court, Modesto, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $55,480.45. An abstract of judgment was recorded with San Joaquin County on October 2, 2013, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $336,000.00 as of the date of the petition. The unavoidable consensual liens total $395,657.04 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $100.00 on Schedule C.

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

ISSUANCE OF A COURT DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the judgment lien of Washington International Insurance Company, California Superior Court for San Joaquin County Case No. 39-2012-00281590-CU-CL-STK, recorded on October 2, 2013, Document No. 2013-0083387-00 with the San Joaquin County Recorder, against the real property commonly known as 2028 Waterfall Court, Modesto, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

16. 10-94467-E-7 TINA BROWN CONTINUED MOTION FOR CONTEMPT
CWC-4 Michael R. Germain 7-11-13 [63]

The hearing is xxxxx.

In connection with Adversary Proceeding 12-9003 entered a judgment; which is final, no appeal taken; determining that the bankruptcy estate owned three vehicles which were in the possession of Timothy Brown. Mr. Brown was ordered to turn over the vehicles. When he failed to do so, corrective sanctions were ordered. When he repeatedly violated the court's order to turn over the vehicles, the Trustee obtained a monetary judgment for the value of the vehicles, in addition to the corrective sanctions previously ordered by the court.

CHAPTER 7 TRUSTEE'S DECEMBER 11, 2014 STATUS REPORT

The Chapter 7 Trustee filed a status report on December 11, 2014. Dckt. 157.

In the status report, the Trustee states that as of December 10, 2014, the Debtor has failed to comply with the court's order. No vehicles or required documents or information has been turned over to the Trustee. No monetary sanctions have been paid to the Trustee.

On August 6, 2014, the court entered a supplemental Order for Election of Monetary Damages under Judgment (Dckt. 41) and Authorized Enforcement of Monetary Sanctions (10-49477, DCN: CWC-4) and Judgment Through Combined Writ of Execution and Other Judgment Enforcement ("Supplemental Order"). This Supplemental Order was forwarded to the Trustee's Special Counsel, David Cook, on August 11, 2014. On November 10, 2014, the court entered an Order Granting Motion for Assignment of Rights, Restraining Order and Turnover (12-09003; DCN: CCA-1).

On November 18, 2014, the court entered an Order Authorizing Process Server to Levy Execution (12-09003; Dckt. 72). On December 2, 2014, Bank of America advised David Cook of a safe deposit box in the name of Debtor, Tim Brown, which they had frozen pursuant to the Temporary Restraining Order.

On December 4, 2014, Defendant Timothy Brown filed a Chapter 13 case, Case No. 14-91596, in the Eastern District of California, Modesto Division, assigned to Judge Bardwil.

Special counsel, David Cook and Defendant's counsel, David Foyil, have entered into a Stipulation to Modify Automatic Stay to Continue Freeze Upon Safety Deposit Box Pending Further Order of the Court.

DECEMBER 18, 2015 HEARING

The court continued the hearing to February 12, 2015. Dckt. 159.

FEBRUARY 6, 2015 HEARING

Since the December 18, 2015 hearing, no supplemental pleadings have been filed.

At the hearing, ----

17. 09-91977-E-7 SONIA LOPEZ
BSH-12

MOTION BY BRIAN S. HADDIX TO WITHDRAW AS ATTORNEY
1-8-15 [244]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

The court having previously granted the Motion to Withdraw as Attorney on February 6, 2015, **the matter is removed from the calendar.**

18. 14-91284-E-7 LARRY/MELISSA SMITH CONTINUED MOTION TO REDEEM
PGM-1 Peter G. Macaluso 11-11-14 [16]

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.
Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Wilshire Commercial Capital and Office of the United States Trustee on November 11, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Redemption of Personal Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Redeem 2001 GMC Yukon is denied without prejudice

Larry Blain Smith and Melissa Ann Smith ("Debtor") seeks to redeem 2001 GMC Yukon ("Property") from the claim of Wilshire Commercial Capital ("Creditor") pursuant to 11 U.S.C. § 722.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

A. The Debtor hereby moves to redeem personal property pursuant to 11 U.S.C. § 722.

B. The secured creditor is Wilshire Commercial Capital.

C. The property to be redeemed is a 2001 GMC Yukon.

D. The creditor has not filed a proof of claim with the court.

E. The principal balance on this claim is approximately $3,349.00.

F. The property to be redeemed is personal property intended primarily for personal, family, or household use.

G. The property is exempt under 11 U.S.C. § 522.

CREDITOR'S OBJECTION

Creditor filed an objection to the instant Motion on December 9, 2014. Dckt. 32.

The Creditor first argues that the Debtor failed to claim the Property as exempt in Schedule C.

Creditor further opposes the Motion based on the Debtors have failed to propose a proper redemption value for the Property. Creditor argues that § 506 requires that the Debtor pay Creditor's secured value at the "price a retail merchant would charge." Creditor argues that the price is not accurately measured by the "retail" value of the vehicle. Creditor attached a NADA Guide report valuation of the Property.

Creditor requests that the Motion be denied, or in the alternative, and after the Debtors amend their Schedule C, the court should set the redemption value at the NADA Guide suggested valuation.

DEBTORS' REPLY

Debtors filed a reply to the Creditor's objection on December 11, 2014. Dckt. 35. The Debtors assert that they will amend Schedule C on or before the hearing. The Debtors request that the Motion be continued approximately 30 days.

The Debtors further assert that the Creditor's opposition does not provide admissible evidence as to this Property. The Debtors argue that the creditor did not request further briefings, did not authenticate the NADA Guide Report.

DECEMBER 18, 2014 HEARING

At the hearing, the court continued the hearing to February 12, 2015 at 10:30 a.m. to allow the Debtors the opportunity to amend Schedule C. Dckt. 37. Prior to the court continuing the Motion, the court expressed concern over the fact that the Motion fails to plead with particularity as required by Fed. R. Bankr. P. 9013, the failure of the Debtors to claim an exemption in the Property, and the failure to provide evidence as to the value of the Vehicle.

DEBTORS' AMENDED SCHEDULE C

On December 24, 2014, the Debtors filed an amended Schedule C. Dckt. 49. The only amendment made was for the "2001 GMC Yukon, 154k miles, fair condition" which the Debtors claim an exemption in the amount of $1,900.00, pursuant to California Code of Civil Procedure § 703.140(b)(2). The Debtors state that the current value of the vehicle is $1,500.00.

DISCUSSION

While the Debtors have amended their Schedule C to include an exemption in the Property, the Debtors fail to amend the Motion to plead with particularity as required by Fed. R. Bankr. P. 9013 and failed to address the court's concerns over the proper valuation.

The Debtors have provided their opinion of the "retail value" of the vehicle, stating that it is $1,500.00. Debtors state that the vehicle has 154,000 miles on it, and is in need of substantial repairs – ABS Brake System, Front/Rear Brakes and Rotors need replacing, Power Steering Pump, and Air Conditioning. Declaration, Dckt. 18. While providing their layperson opinion of value, they do not provide a basis for the court taking these various repairs and any amounts for such repairs, into account.

What real life teaches is that such a beat up, damaged, high mileage vehicle will in the very near future cost the Debtors much more than $1,500 they want to pay, and even the "clean retail" value on the unauthenticated N.A.D.A. used car value summary.

While the court does not consider the unauthenticated N.A.D.A. Report to have credible evidentiary value, even at best case for creditor, if the required repairs need to be made, it will never recover $1,500.00 in selling the vehicle. More likely, it will lose money with the costs of repossession and disposal.

All the Debtors have done since the requested continued hearing is amended Schedule C, without addressing the other failures of the Motion. The court will not continue to allow the Debtors the opportunity to piece-meal correct the Motion.

Here, the Debtors failed to reach 11 U.S.C. § 722 because the evidence of value they have provided does not allow the court to make a determination of retail value. Without meeting the qualifying factors for redemption, the court cannot grant the Motion.

The Motion to Redeem pursuant to 11 U.S.C. § 722 and Federal Rule of Bankruptcy Procedure 6008 is denied without prejudice.

The court will issue a minute order holding that the Motion to Redeem is granted.

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

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

The Motion to Redeem Personal Property filed by Larry Blain Smith and Melissa Ann Smith ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

19. 09-92998-E-7 PEQ-1 — LEON H. BARTLETT, INC. — Steven S. Altman — MOTION FOR COMPENSATION FOR PAUL E. QUINN, ACCOUNTANT — 1-9-15 [1012]

Final Ruling: No appearance at the February 12, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter7 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 9, 2015. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

Paul E. Quinn, the Accountant ("Applicant") for Eric J. Nims the Chapter 7 Trustee ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

The period for which the fees are requested is for the period May 14, 2012 through December 3, 2014. The order of the court approving employment of Applicant was entered on June 21, 2012, Dckt. 971. Applicant requests fees in the amount of $4,405.00.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by professional are "actual," meaning that the fee application reflects time entries properly charged for services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional must exercise good billing judgment with regard to the services provided as the court's authorization to employ a professional to work in a bankruptcy case does not give that professional "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including tax preparation, correspondence with tax authorities, and correspondences concerning administration. The court finds the services were beneficial to the Client and bankruptcy estate and reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

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

General Case Administration: Applicant spent 4.4 hours in this category. Applicant assisted Client with communicating with Client to prepare the instant fee application.

Tax Preparation and Tax-Related Matters: Applicant spent 16.0 hours in this category. Applicant assisted in tax preparation and tax related matters, including the review of the Debtor's 2010 federal and state corporate tax returns, and the preparation of the 2011, 2012, and 2013 federal and state corporate tax returns.

Correspondence: Applicant spent 1.3 hours in this category. Applicant drafted letters to the respective tax authority's insolvency groups for tax years 2011, 2012, and 2013.

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

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Paul E. Quinn, CPA, CFF	8.8	$250.00	$2,200.00

Deborah Monis	12.6	$175.00	$2,205.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
	0	$0.00	$0.00
Total Fees For Period of Application			$4,405.00

FEES ALLOWED

Fees

The court finds that the hourly rates reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of $4,405.00 are approved pursuant to 11 U.S.C. § 330 as final fees and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

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

Fees $4,405.00

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

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Allowance of Fees and Expenses filed by Paul E. Quinn ("Applicant"), Accountant for the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Paul E. Quinn is allowed the following fees and expenses as a professional of the Estate:
>
> Paul E. Quinn, Professional Employed by Trustee
>
> Fees in the amount of $4,405.00,
>
> The Fees and Costs pursuant to this Applicant, and Fees in the amount of $4,405.00 are approved as final fees and costs pursuant to 11 U.S.C. § 330.

IT IS FURTHER ORDERED that the Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.