UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

February 15, 2018, at 10:30 a.m.

1.	**16-90500-E-11** **HSM-19**	**ELENA DELGADILLO** **Len ReidReynoso**	**MOTION FOR APPROVAL OF SECOND AND FINAL DISTRIBUTION TO CREDITORS** **1-17-18 [302]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 17, 2018. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Motion for Approval of Distribution was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, **----------**.

The Motion for Approval of Distribution is granted.

Irma Edmonds ("the Chapter 11 Trustee") moves for approval of a final distribution to Sacramento Lopez and holders of general unsecured claims ("Creditors") pursuant to 11 U.S.C. § 363(b).

The Chapter 11 Trustee notes that the court approved an interim distribution to Creditors on June 12, 2017, in the amount of $322,000.00 to Sacramento Lopez and $7,775.21 to general unsecured claims. *See* Dckt. 190. The Chapter 11 Trustee reports that Sacramento Lopez has also received distributions from two sales of property: one of $362,988.04 on August 9, 2017, and another of $302,295.74 in the first week of January 2018. The Chapter 11 Trustee asserts that Sacramento Lopez's remaining claim is $131,418.24.

The Chapter 11 Trustee has requested that Sacramento Lopez release any and all liens held against Elena Delgadillo ("Debtor") within sixty days of receiving the final $131,418.24. The Chapter 11 Trustee requests permission to make a final distribution as follows:

Creditor	Amount
Sacramento Lopez (Claim No. 5-1)	$131,418.24
Internal Revenue Service (Claim No. 2-1)	$2,754.91
Portfolio Recovery Associates, LLC (Claim No. 3-1)	$12,744.36
Portfolio Recovery Associates, LLC (Claim No. 4-1)	$4,811.06
Internal Revenue Service (Claim No. 6-1)	$3,011.73
Eden Medical Center	$550.00
Sears Credit Card	$4,230.00
Total	$159,520.30

The Chapter 11 Trustee asserts that sufficient assets have been administered in this case to pay all creditors in full with interest, with the balance of funds to be returned to Debtor. A sufficient amount of funds will be retained to cover projected administrative expenses.

DEBTOR'S NON-OPPOSITION

Debtor filed a Non-Opposition on February 1, 2018. Dckt. 309. Debtor states that there is no opposition to the proposed distribution.

RULING

Based upon the Chapter 11 Trustee demonstrating to the court that there are sufficient proceeds to make a final distribution and retain funds for administrative expenses, the court determines that a final distribution is in the best interest of the Estate. The Chapter 11 Trustee and Debtor have structured a disbursement that mimics the distribution that would be done in a Chapter 7 case, not improperly favoring any creditor or class of claims over another. As discussed in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983-984, 197 L. Ed. 2d 398, 2017 U.S. LEXIS 2024 (2017):

"We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent? Our simple answer to this complicated question is "no."

The Code's priority system constitutes a basic underpinning of business bankruptcy law. Distributions of estate assets at the termination of a business bankruptcy normally take place through a Chapter 7 liquidation or a Chapter 11 plan, and both are governed by priority. In Chapter 7 liquidations, priority is an absolute command—lower priority creditors cannot receive anything until higher priority creditors have been paid in full. See 11 U.S.C. §§725, 726. Chapter 11 plans provide somewhat more flexibility, but a priority-violating plan still cannot be confirmed over the objection of an impaired class of creditors. See §1129(b).

The priority system applicable to those distributions has long been considered fundamental to the Bankruptcy Code's operation. See H. R. Rep. No. 103-835, p. 33 (1994) (explaining that the Code is "designed to enforce a distribution of the debtor's assets in an orderly manner . . . in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor"); Roe & Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends The Creditors' Bargain, 99 Va. L. Rev. 1235, 1243, 1236 (2013) (arguing that the first principle of bankruptcy is that "distribution conforms to predetermined statutory and contractual priorities," and that priority is, "quite appropriately, bankruptcy's most important and famous rule"); Markell, Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 123 (1991) (stating that a fixed priority scheme is recognized as "the cornerstone of reorganization practice and theory").

. . .

Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. See §349(b)(1) (dismissal ordinarily reinstates a variety of avoided transfers and voided liens); §349(b)(2) (dismissal ordinarily vacates certain types of bankruptcy orders); §349(b)(3) (dismissal ordinarily "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"); see also H. R. Rep. No. 95-595, p. 338 (1977) (dismissal's "basic purpose . . . is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case").

Here, the Chapter 11 Trustee, Debtor, and their counsel have worked diligently to present the present Motion that is structured not to violate the rights of any creditors and disburse the monies of the estate generated from the administration of those assets in the same priority as a Chapter 7. This decision has been made, with Debtor forgoing her discharge, to avoid further administrative costs and expenses if this case were converted.

The requested dismissal is consistent with the direction of the Supreme Court in *Jevic*, properly provides for the interests of creditors, and allows Debtor and her family move on to a "fresh start"outside of bankruptcy.

The Motion is granted, and the Chapter 11 Trustee is authorized to make a final distribution of $131,418.24 to Sacramento Lopez and $28,102.06 to priority general unsecured claims.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Approval of Distribution filed by Irma Edmonds ("the Chapter 11 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 Motion for Approval of Distribution is granted, and the Chapter 11 Trustee is authorized to distribute $131,418.24 to Sacramento Lopez and $28,102.06 to priority and general unsecured claims in this case, as specified below (subject to amendments that may reduce the amount requested and any prior distributions authorized by this court):

Creditor	Amount
Sacramento Lopez (Claim No. 5-1)	$131,418.24
Internal Revenue Service (Claim No. 2-1)	$2,754.91
Portfolio Recovery Associates, LLC (Claim No. 3-1)	$12,744.36
Portfolio Recovery Associates, LLC (Claim No. 4-1)	$4,811.06
Internal Revenue Service (Claim No. 6-1)	$3,011.73
Eden Medical Center	$550.00
Sears Credit Card	$4,230.00
Total	$159,520.30

2. **16-90603-E-7** **MARK ONE CORPORATION** **MOTION FOR REMAND**
17-9021 **DB-1** **1-18-18 [13]**
BURGER PHYSICAL THERAPY SERVICES, INC. V. SIMS

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney and Chapter 7 Trustee's Attorney on January 18, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Office of the United States Trustee has not been served. The latest United States Trustee guidelines request service of all pleadings and orders in Chapter 7 adversary proceedings. Given the court's decision in this matter, the court waives the service defect.

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

The Motion for Remand is xxxxxxxxxxxxxxx.

Burger Physical Therapy Services, Inc. ("Plaintiff") moves the court for an order remanding this Adversary Proceeding to the Stanislaus Superior Court pursuant to 28 U.S.C. § 1452(b). Alternatively, Plaintiff moves for the court to abstain under 28 U.S.C. § 1334(c)(1) from hearing this Adversary Proceeding.

Plaintiff asserts that remand is appropriate because all of the causes of action stated in the Complaint are based upon state law and do not commonly arise in bankruptcy. Additionally, Plaintiff states that the Complaint does not assert any cause of action against the debtor in the underlying proceeding, Mark One Corporation ("Debtor"). Instead, the Complaint alleges two causes of action against two non-debtors.

Plaintiff argues that its claims are not asserted against Debtor, and any recovery will go to Plaintiff directly, not to the bankruptcy estate.

DEFENDANT'S OPPOSITION

John Sims, individually and as Trustee of the G&M Baker 1994 Trust ("Defendant") filed an Opposition on February 1, 2018. Dckt. 30. Defendant argues that Plaintiff's Complaint is a fraudulent conveyance action, disguised in other terms.

Defendant illustrates that Paragraphs 8 and 28 of the Complaint reference a scheme or plan to strip away and fraudulently transfer assets from Debtor. Debtor argues that as a fraudulent transfer action, this matter is authorized to be prosecuted by a trustee under 11 U.S.C. § 548.

Additionally, Defendant argues that he and Irma Edmonds ("the Chapter 7 Trustee") agree that Debtor's Bankruptcy Estate owns the claims alleged by Plaintiff, putting them exclusively within the Chapter 7 Trustee's control.

Defendant argues that he and the Chapter 7 Trustee have been negotiating a settlement to resolve the preference action that the Chapter 7 Trustee filed against Defendant, Adversary Proceeding No. 17-09007. A settlement and motion to approve the settlement have been presented to the court in Debtor's bankruptcy case, and the hearing is set for March 8, 2018. Case No. 16-90603, Dckt. 76.

Finally, Defendant argues that abstention is not applicable to cases that have been removed from state to federal court, and it is not applicable when there is no parallel state court proceeding. Dckt. 30 at 3:8–14 (citing *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997) (stating that abstention is not applicable when a case has been removed from state to federal court); *Schulman v. California. (In re Lazar)*, 237 F.3d 967, 981–82 (9th Cir. 2001) (citation omitted) ("[A]bstention can exist only where there is a parallel proceeding in state court.")).

PLAINTIFF'S REPLY

Plaintiff filed a Reply on February 8, 2018. Dckt. 34. Plaintiff argues that Defendant has failed to address the legal standard set forth by Plaintiff. Now, Plaintiff asserts that the matter should be remanded because Defendant has not opposed remand.

Plaintiff argues that even if the Chapter 7 Trustee has standing to bring Plaintiff's claims, that does not mean that the bankruptcy court has jurisdiction. Plaintiff argues that the claims may be brought in state court.

Nevertheless, Plaintiff argues that the claims are his and not the Chapter 7 Trustee's to enforce because they are being asserted against Defendant personally. For most of the Reply, Plaintiff uses the same language that it has already asserted in the Motion, which the court addresses below.

APPLICABLE LAW

28 U.S.C. § 1452(b) states: "The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." Defendant cites the court to *Security Farms v. Int'l Bhd. of Teamsters* for a proposition that abstention is not proper in a case removed from state court

to federal. The Ninth Circuit's explanation contains more information than that simple rule. The Ninth Circuit held that requiring "a pendent state action as a condition of abstention eliminates any confusion with 28 U.S.C. § 1452(b), which provides district courts with the authority to remand civil actions properly removed to federal court, in situations where there is no parallel proceeding." 124 F.3d at 1010.

The grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334 is very broad, bringing into federal court many non-federal law matters into federal court to allow parties to assert and have their rights and interests timely adjudicated in and through the bankruptcy laws enacted by Congress as provided in Article I of the U.S. Constitution. Because the grant of jurisdiction is so broad, Congress has also provided the statutory structure for bankruptcy judges and district court judges determining to abstain from determining issues, electing or being required to allow such matters to be adjudicated pursuant to non-bankruptcy jurisdiction. The abstention provisions created by Congress are:

> § 1334. Bankruptcy cases and proceedings
>
> (c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c).

The decision to abstain is discretionary, except when the issues in the proceeding are only "related to" the bankruptcy case (not arising under the Bankruptcy Code or in the bankruptcy case), no federal jurisdiction would otherwise exist but for 28 U.S.C. § 1334, and if there is an action that has been commenced and could be timely adjudicated in a state court forum.

When evaluating whether to abstain, the Ninth Circuit Court of Appeals has established that the court considers twelve factors:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
>
> (2) the extent to which state law issues predominate over bankruptcy issues,
>
> (3) the difficulty or unsettled nature of the applicable law,

(4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

(7) the substance rather than form of an asserted "core" proceeding,

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

(9) the burden on the bankruptcy court's docket,

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, 912 F.2d 1162, 1167 (9th Cir. 1990).

RULING

The court begins with reading the actual Complaint and what is alleged therein. The claims and causes of action stated in the Complaint (Dckt. 1) are summarized by the court. Defendant asserts that they are thinly disguised fraudulent conveyance actions in which Plaintiff seeks to strip the bankruptcy estate of the assets (or their monetary value) that were conveyed by Defendant and those assisting him.

However, the Complaint can be read as one in which various personal tort claims against Defendant are being asserted that arise from his conduct in participating in the now-avoidable conveyances. These can be read as Defendant's personal obligations that may have caused damage to Plaintiff for which Defendant is personally responsible, not merely to strip away from him the assets of Debtor alleged to have been improperly transferred from Debtor.

Unfortunately, Plaintiff creates some confusion in generally asking for relief in the prayer as including "For any and all relief available under the Uniform Fraudulent Transfer Act (Civil Code section 3439 et seq.) for conspiracy to commit a fraudulent transfer." Where conspiracy ends and recovery of the fraudulent conveyance can begin is now a line being left for this court to draw and structure so that Plaintiff's prosecution of the claims in this Adversary Proceeding (whether here or after remand) does not usurp the power so the Chapter 7 Trustee as established by Congress (such as allowing Plaintiff to prosecute the claim, which in substance diverts monies for the recovery of the conveyances by the Chapter 7 Trustee for the benefit of all creditors to this one Plaintiff).

Review of Proposed Settlement

In the Mark One Corporation Bankruptcy Case, 16-90603, the Chapter 7 Trustee has set for hearing on March 8, 2018, a hearing for approval of a compromise with John Sims (Defendant in this Adversary Proceeding) and John Sims, Trustee of the G & M Baker 1994 Trust (Co-Defendant in this Adversary Proceeding). 16-90603, Dckt. 76. The grounds and relief requested in the Motion to Approve Compromise stated with particularity (FED. R. BANKR. P. 9013) include the following:

A. In April 2015, the Baker Trust made a $100,000 loan to Debtor.

B. In July 17, 2105, the Debtor transferred $100,000 to the Baker Trust.

C. The Chapter 7 Trustee, pursuant to the preference avoiding powers pursuant to 11 U.S.C. § 547(b), asserts the right to avoid the transfer and recover the $100,000 for the benefit of the bankruptcy estate and all creditors in this Chapter 7 case, which was filed on July 8, 2016.

D. Plaintiff is asserting a $379,099.48 claim in the Chapter 7 Bankruptcy Case.

E. The Chapter 7 Trustee asserts that the Bankruptcy Estate owns all of the claims asserted in this Adversary Proceeding. Further, the Chapter 7 Trustee, Sims, and Sims as Trustee, contend that Plaintiff asserting the claims in this Adversary Proceeding is improperly asserting claims of the Bankruptcy Estate against Sims and Sims as Trustee.

F. The terms of the proposed settlement include:

1. Sims and Sims as Trustee will pay the Bankruptcy Estate $75,000.00.

2. The above payment:

i. Is in settlement of the Chapter 7 Trustee's Preference Claim against Sims and Sims as Trustee.

ii. The Chapter 7 Trustee shall assign any and all claims of the Bankruptcy Estate , whatever they may be, which exist or may exist against Sims and Sims as Trustee, including, but not limited to, all of the claims asserted by Plaintiff in this Adversary Proceeding.

iii. The Chapter 7 Trustee will dismiss this Adversary Proceeding.

The Motion does not address the nature of the claims in this Adversary Proceeding, and there is no points and authorities addressing the nature of these legal rights asserted by Plaintiff against Sims and Sims as Trustee being property of the bankruptcy estate. In 11 U.S.C. § 544 Congress provided for certain

prepetition rights against a debtor to be transferred by operation of law to the bankruptcy trustee for the benefit of all creditors:

> (a) **The trustee shall have**, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, **the rights and powers of**, **or may avoid any transfer of property of the debtor** or any obligation incurred by the debtor **that is voidable** by—
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
> >
> > (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
> >
> > (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
> >
> > (b) (1) Except as provided in paragraph (2), the **trustee may avoid any transfer of an interest of the debtor in property** or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.
> >
> > (2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."

Defendant Sims and Sims as Trustee have filed this Motion to Dismiss this Adversary Proceeding that states with particularity (FED. R. CIV. P. 7(b) and FED. R. BANKR. P. 7007) that this Adversary Proceeding must be dismissed because:

> "BURGER PHYSICAL THERAPY SERVICES, INC. lacks standing to bring and/or prosecute the alleged claims set forth, inasmuch as such causes of action/or claims became property of the bankruptcy estate pursuant to 11 U.S.C. §541(a)(l). Only the

Chapter 7 Trustee as representative of the bankruptcy estate is empowered to bring such causes of action/claims. 11 U.S.C. §323."

Motion to Dismiss, Dckt. 9. While a conclusion of law drawn by Defendant Sims and Sims as Trustee, such a conclusion does not provide the court with grounds for the court to make such a conclusion of law. Defendants Sims and Sims as Trustee provide a one-page points and authorities (the first page being the caption page) stating that Defendant concludes that Plaintiff is the "poster child" example for the fraudulent conveyance rights of a bankruptcy trustee. That legal conclusion may satisfy Defendant's personal conclusions of law, but Defendant fails to provide legal authorities for the court to conclude that the various claims asserted in this Adversary Proceeding are "fraudulent conveyance claims" that belong to the Chapter 7 Trustee.

As discussed in Collier on Bankruptcy, 16th Edition, ¶ 544.01 a general overview of the Chapter 7 Trustee's obtaining rights of individual creditors to be prosecuted for the benefit of the bankruptcy estate and all creditors includes:

> "**Subsection (a) empowers the trustee to avoid certain prebankruptcy transfers that could have been avoided by certain types of creditors or a bona fide purchaser**, whether or not such creditors or a bona fide purchaser actually exist. To that end, **the trustee is vested with the rights and powers (including to power to avoid any transfer of the debtor's property or any obligation incurred by the debtor**) that could have been exercised by (1) a hypothetical creditor (a) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, a judicial lien on all property of the debtor that could have been obtained by a creditor on a simple contract; or (b) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, an execution against the debtor that is returned unsatisfied; or (2) a hypothetical bona fide purchaser of real property (other than fixtures) from the debtor against whom applicable nonbankruptcy law permits such transfer to be perfected and that has, as of the commencement of the title 11 case, perfected such transfer.
>
> **Subsection (b)(1), on the other hand, arms the trustee with the powers of an actual creditor with an allowable unsecured claim that could have avoided a transfer of the debtor's property** or any obligation of the debtor under applicable (generally nonbankruptcy) law.
>
> As noted, the trustee's avoiding powers under section 544 come into existence as of the commencement of the title 11 case, whether the petition is voluntary or involuntary.
>
> As is the case with other avoidance powers, the trustee's quantum of recovery is determined by section 550 and the transferee-defendant may have an unsecured claim under section 502(h).

> These rights and powers are often referred to as the trustee's "strong arm powers."
>
> **Section 544 is limited to avoidance actions and does not give the trustee standing to pursue tort claims that were not the property of the estate at the commencement of the case.** This section "vests the trustee with the ability of a judgment lien creditor to attach or seize both tangible and intangible property transferred by the debtor to a third party prior to filing for bankruptcy, but it does not transform the trustee into a 'super creditor' with the ability to raise causes of actions separate from those possessed by the estate."
>
> The section 544(a) powers and section 544(b) powers are limited by their terms and may not be used by the trustee to avoid postpetition transfers. Avoidance of postpetition transfers is governed by section 549.

This discussion by Collier does not quite square with Defendant's conclusions of law summary set forward in the Motion to Dismiss.

FEBRUARY 15, 2018 HEARING

It appears that the court cannot determine the present Motion to Dismiss or the Related Motion to Remand this Adversary Proceeding until the court has ruled on the Motion to Approve Compromise in the Chapter 7 case (and determines what rights and claims the Chapter 7 Trustee is seeking to assign to Defendant Sims and Sims as Trustee).

At the hearing, xxxxxxxxxxxxxxx.

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 Remand filed by Burger Physical Therapy Services, Inc. ("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 xxxxxxxxxxxxxxx.

3. **16-90603-E-7** **MARK ONE CORPORATION** **MOTION TO DISMISS ADVERSARY PROCEEDING**
17-9021 **WJS-1**
BURGER PHYSICAL THERAPY SERVICES, INC. V. SIMS **1-9-18 [9]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 9, 2018. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is xxxxxxxxxxxxxxx.

John Sims, individually and as Trustee of the G&M Baker 1994 Trust, ("Defendant") moves for the court to dismiss all claims against it in Burger Physical Therapy Services, Inc.'s ("Plaintiff-Debtor") Complaint for lack of standing.

Defendant asserts that Plaintiff's Causes of Action became property of the estate under 11 U.S.C. § 541(a)(1), and only Irma Edmonds ("the Chapter 7 Trustee") may prosecute the claims, pursuant to 11 U.S.C. § 323.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on February 1, 2018. Dckt. 28. Plaintiff argues that once this case is remanded back to state court, then the case will be back in its "rightful" location. Plaintiff also argues that Defendant is wrong to assert that this Adversary Proceeding is a fraudulent conveyance action solely within the Chapter 7 Trustee's authority.

Plaintiff argues that Defendant has noted only one section of the Complaint that references a fraudulent conveyance and insists that looking at the Complaint more broadly shows that the causes of action are for a scheme to frustrate the payments to Plaintiff.

Plaintiff asserts that for a cause of action based on conspiracy and aiding and abetting a fraudulent transfer, a creditor is the proper party to prosecute such claims. *Id.* at 5 (citing *In re Hamilton Taft & Co.*, 176 B.R. 895, 902 (Bankr. N.D. Cal. 1995)).

APPLICABLE LAW

A motion to dismiss based on lack of standing is properly brought under Federal Rule of Civil Procedure 12(b)(1). *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Calhoun v. United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958).

REVIEW OF COMPLAINT

Plaintiff's Complaint sets forth six causes of action: (1) intentional interference with prospective economic advantage, (2) negligent interference with prospective economic advantage, (3) conspiracy to intentionally interfere with prospective economic advantage, (4) civil conspiracy to commit a fraudulent transfer, (5) aiding and abetting a fraudulent transfer, and (6) Unfair Competition Law (Bus. & Prof. Code §§ 17200, et. seq.).

Paragraph 33 of the First Cause of Action states: "Defendant conspired to and did cause **a transfer** of [Debtor's] assets . . . for unreasonably low, if any, consideration and/or with the intent to hinder, delay or defraud Plaintiff." Dckt. 5, Exhibit C, at 11 (emphasis added).

Paragraph 42 in the Second Cause of Action states more explicitly that "Defendant conspired to and did carry out **a fraudulent transfer** by causing a transfer of [Debtor's] assets . . . ." *Id.*, Exhibit C, at 12 (emphasis added). The Third Cause of Action sets forth allegations based upon the same underlying transfer of assets. *See id.*, Exhibit C, at 12–13.

Paragraph 55 of the Fourth Cause of Action alleges that "Defendant agreed and knowingly and willfully conspired with others . . . to carry out, commit, or cause **a fraudulent transfer** and to defraud Plaintiff, among other creditors." *Id.*, Exhibit C, at 14. Paragraph 63 of the Fifth Cause of Action is identical to Paragraph 55. *See id.*, Exhibit C, at 15.

DISCUSSION

The court begins with reading the actual Complaint and what is alleged therein. The claims and causes of action stated in the Complaint (Dckt. 1) are summarized by the court. Defendant asserts that they are thinly disguised fraudulent conveyance actions in which Plaintiff seeks to strip the bankruptcy estate of the assets (or their monetary value) that were conveyed by Defendant and those assisting him.

However, the Complaint can be read as one in which various personal tort claims against Defendant are being asserted that arise from his conduct in participating in the now-avoidable conveyances. These can be read as Defendant's personal obligations that may have caused damage to Plaintiff for which Defendant is personally responsible, not merely to strip away from him the assets of the Debtor alleged to have been improperly transferred from Debtor.

Unfortunately, Plaintiff creates some confusion in generally asking for relief in the prayer as including "For any and all relief available under the Uniform Fraudulent Transfer Act (Civil Code section 3439 et seq.) for conspiracy to commit a fraudulent transfer." Where conspiracy ends and recovery of the fraudulent conveyance can begin is now a line being left for this court to draw and structure so that Plaintiff's prosecution of the claims in this Adversary Proceeding (whether here or after remand) does not usurp the powers of the Chapter 7 Trustee as established by Congress (such as allowing Plaintiff to prosecute the claim, which in substance diverts monies for the recovery of the conveyances by the Chapter 7 Trustee for the benefit of all creditors to this one Plaintiff).

Review of Proposed Settlement

In the Mark One Corporation Bankruptcy Case, 16-90603, the Chapter 7 Trustee has set for hearing on March 8, 2018, a hearing for approval of a compromise with John Sims (Defendant in this Adversary Proceeding) and John Sims, Trustee of the G & M Baker 1994 Trust (Co-Defendant in this Adversary Proceeding). 16-90603, Dckt. 76. The grounds and relief requested in the Motion to Approve Compromise stated with particularity (FED. R. BANKR. P. 9013) include the following:

A. In April 2015, the Baker Trust made a $100,000 loan to Debtor.

B. In July 17, 2105, the Debtor transferred $100,000 to the Baker Trust.

C. The Chapter 7 Trustee, pursuant to the preference avoiding powers pursuant to 11 U.S.C. § 547(b), asserts the right to avoid the transfer and recover the $100,000 for the benefit of the bankruptcy estate and all creditors in this Chapter 7 case, which was filed on July 8, 2016.

D. Plaintiff is asserting a $379,099.48 claim in the Chapter 7 Bankruptcy Case.

E. The Chapter 7 Trustee asserts that the Bankruptcy Estate owns all of the claim asserted in this Adversary Proceeding. Further, the Chapter 7 Trustee, Sims, and Sims as Trustee, contend that Plaintiff asserting the claims in this Adversary Proceeding is improperly asserting claims of the Bankruptcy Estate against Sims and Sims as Trustee.

F. The terms of the proposed settlement include:

1. Sims and Sims as Trustee will pay the Bankruptcy Estate $75,000.00.

2. The above payment:

i. Is in settlement of the Chapter 7 Trustee's Preference Claim against Sims and Sims as Trustee.

ii. The Chapter 7 Trustee shall assign any and all claims of the Bankruptcy Estate , whatever they may be, which exist or may exist against Sims and Sims as Trustee, including, but not limited to, all of the claims asserted by Plaintiff in this Adversary Proceeding.

iii. The Chapter 7 Trustee will dismiss this Adversary Proceeding.

The Motion does not address the nature of the claims in this Adversary Proceeding, and there is no points and authorities addressing the nature of these legal rights asserted by Plaintiff against Sims and Sims as Trustee being property of the bankruptcy estate. In 11 U.S.C. § 544 Congress provided for certain prepetition rights against a debtor to be transferred by operation of law to the bankruptcy trustee for the benefit of all creditors:

> (a) **The trustee shall have**, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, **the rights and powers of**, **or may avoid any transfer of property of the debtor** or any obligation incurred by the debtor **that is voidable** by—
>
> > (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
> >
> > (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
> >
> > (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected,

> that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
>
> (b) (1) Except as provided in paragraph (2), the **trustee may avoid any transfer of an interest of the debtor in property** or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.
>
> (2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

Defendant Sims and Sims as Trustee have filed a Motion to Dismiss this Adversary Proceeding that states with particularity (FED. R. CIV. P. 7(b) and FED. R. BANKR. P. 7007) that this Adversary Proceeding must be dismissed because:

> "BURGER PHYSICAL THERAPY SERVICES, INC. lacks standing to bring and/or prosecute the alleged claims set forth, inasmuch as such causes of action/or claims became property of the bankruptcy estate pursuant to 11 U.S.C. §541(a)(l). Only the Chapter 7 Trustee as representative of the bankruptcy estate is empowered to bring such causes of action/claims. 11 U.S.C. §323."

Motion to Dismiss, Dckt. 9. While a conclusion of law drawn by Defendant Sims and Sims as Trustee, such a conclusion does not provide the court with grounds for the court to make such a conclusion of law. Defendants Sims and Sims as Trustee provide a one-page points and authorities (the first page being the caption page) stating that Defendant concludes that Plaintiff is the "poster child" example for the fraudulent conveyance rights of a bankruptcy trustee. That legal conclusion may satisfy Defendant's personal conclusions of law, but Defendant fails to provide legal authorities for the court to conclude that the various claims asserted in this Adversary Proceeding are "fraudulent conveyance claims" that belong to the Chapter 7 Trustee.

As discussed in Collier on Bankruptcy, 16th Edition, ¶ 544.01 a general overview of the Chapter 7 Trustee's obtaining rights of individual creditors to be prosecuted for the benefit of the bankruptcy estate and all creditors:

> "**Subsection (a) empowers the trustee to avoid certain prebankruptcy transfers that could have been avoided by certain types of creditors or a bona fide purchaser**, whether or not such creditors or a bona fide purchaser actually exist. To that end, **the trustee is vested with the rights and powers (including to power to avoid any transfer of the debtor's property or any obligation incurred by the**

debtor) that could have been exercised by (1) a hypothetical creditor (a) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, a judicial lien on all property of the debtor that could have been obtained by a creditor on a simple contract; or (b) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, an execution against the debtor that is returned unsatisfied; or (2) a hypothetical bona fide purchaser of real property (other than fixtures) from the debtor against whom applicable nonbankruptcy law permits such transfer to be perfected and that has, as of the commencement of the title 11 case, perfected such transfer.

Subsection (b)(1), on the other hand, arms the trustee with the powers of an actual creditor with an allowable unsecured claim that could have avoided a transfer of the debtor's property or any obligation of the debtor under applicable (generally nonbankruptcy) law.

As noted, the trustee's avoiding powers under section 544 come into existence as of the commencement of the title 11 case, whether the petition is voluntary or involuntary.

As is the case with other avoidance powers, the trustee's quantum of recovery is determined by section 550 and the transferee-defendant may have an unsecured claim under section 502(h).

These rights and powers are often referred to as the trustee's "strong arm powers."

Section 544 is limited to avoidance actions and does not give the trustee standing to pursue tort claims that were not the property of the estate at the commencement of the case. This section "vests the trustee with the ability of a judgment lien creditor to attach or seize both tangible and intangible property transferred by the debtor to a third party prior to filing for bankruptcy, but it does not transform the trustee into a 'super creditor' with the ability to raise causes of actions separate from those possessed by the estate."

The section 544(a) powers and section 544(b) powers are limited by their terms and may not be used by the trustee to avoid postpetition transfers. Avoidance of postpetition transfers is governed by section 549.

This discussion by Collier does not quite square with Defendant's conclusions of law summary set forward in the Motion to Dismiss.

FEBRUARY 15, 2018 HEARING

It appears that the court cannot determine the present Motion to Dismiss this Adversary or the related Motion to Remand until the court has ruled on the Motion to Approve Compromise in the Chapter 7 case (and determines what rights and claims the Chapter 7 Trustee is seeking to assign to Defendants Sims and Sims as Trustee).

At the hearing, xxxxxxxxxxxxxxx.

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 Adversary Proceeding filed by John Sims, individually and as Trustee of the G&M Baker 1994 Trust, ("Defendant") 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 **xxxxxxxxxxxxxx**.

4. **17-90906-E-7** **JUANITA DOWNS** **CONTINUED TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING AND MOTION TO EXTEND THE DEADLINES FOR FILING OBJECTIONS TO DISCHARGE AND MOTIONS TO DISMISS**
MDM-1 **Pro Se** **12-6-17 [14]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), the Chapter 7 Trustee, creditors, and parties requesting special notice on December 8, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss is xxxxxxxxxxxx.

Michael McGranahan ("the Chapter 7 Trustee") alleges that Juanita Downs ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case.

Alternatively, if Debtor's case is not dismissed, the Chapter 7 Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 10:30 a.m. on January 23, 2018. If Debtor fails to appear at the continued Meeting of Creditors, the Chapter 7 Trustee requests that the case be dismissed without further hearing.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on December 28, 2017. Dckt. 17. The Opposition is blank, however, and Debtor has not expressed any grounds why this case should not be dismissed.

JANUARY 11, 2018 HEARING

At the hearing, the court continued the hearing to 10:30 a.m. on February 15, 2018, to allow Debtor to attend and complete the continued meeting. Dckt. 18.

RULING

The Chapter 7 Trustee's Report from the Continued Meeting of Creditors on January 24, 2018, shows that Debtor did not appear.

Unfortunately, Debtor has not filed any further response to the Motion to Dismiss. The filings in this case do not reflect Debtor taking any action to prosecute this case.

Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss the Chapter 13 case filed by Michael McGranahan ("the Chapter 7 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is xxxxxxxxxxxxxxx.

5. **13-91315-E-7** **APPLEGATE JOHNSTON, INC.** **MOTION FOR COMPENSATION FOR**
MDM-12 **George Hollister** **MICHAEL D. MCGRANAHAN, CHAPTER 7 TRUSTEE**
1-24-18 [863]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 24, 2018. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

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

The Motion for Allowance of Professional Fees is granted.

Michael McGranahan, the Chapter 7 Trustee, ("Applicant") for the Estate of Applegate Johnston, Inc. ("Client"), makes a Second Interim Request for the Allowance of Fees and Expenses in this case. Fees are requested for the period January 1, 2016, through December 31, 2017.

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). A professional must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). 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 a trustee are "actual," meaning that the fee application reflects time entries properly charged for services, the trustee must demonstrate still that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A trustee must exercise good billing judgment with regard to the services provided because the court's authorization to employ a trustee to work

in a bankruptcy case does not give that trustee "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

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

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

A review of the application shows that Applicant's services for the Estate include objecting to claims and preparing the case to close. The Estate has $804,324.19 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES REQUESTED

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 14.30 hours in this category. Applicant reviewed settlement offers, prepared fee applications, sent and reviewed e-mails, conducted conference calls, and reviewed time records.

Claims Administration: Applicant spent 17.10 hours in this category. Applicant reviewed filed claims, filed objections to priority and late claims, and attended hearings on objections.

Employee Benefit Pension: Applicant spent 1.10 hours in this category. Applicant worked on drafts and revisions to application for an employee.

Fee Employment Application: Applicant spent 5.30 hours in this category. Applicant reviewed fee applications, time records, submitted interim fee requests, reviewed the court's rulings, and discussed the applications with employees.

Litigation: Applicant spent 69.80 hours in this category. Applicant reviewed the court's rulings, discussed settlement offers, litigated preference actions, sent e-mails and made telephone calls about preference actions, attended hearings, conducted BDRP, prepared mediation briefs, conducted trial, and discussed future options with parties.

Retirement Plan Administration: Applicant spent 13.70 hours in this category. Applicant reviewed various pension claims, audited payroll records, and made payments.

Tax Matters: Applicant spent 0.70 hours in this category. Applicant commented on an application to employ, helped finalize the application, and e-mailed the application to the U.S. Trustee.

Applicant requests the following fees:

25% of the first $5,000.00	$1,250.00
10% of the next $45,000.00	$4,500.00
5% of the next $950,000.00	$47,500.00
3% of the balance of $1,171,237.44	$35,137.12
Calculated Total Compensation	**$88,387.12**
Plus Adjustment	$0.00
Total Maximum Allowable Compensation	$88,387.12
Less Previously Paid	$25,000.00
Total Second Interim Fees Requested	$25,000.00 of the $63,287.12 maximum

FEES ALLOWED

The court finds that the requested fees are reasonable pursuant to 11 U.S.C. § 326(a) and that Applicant effectively used appropriate rates for the services provided. Second Interim Fees in the amount of $25,000.00 pursuant to 11 U.S.C. § 331 and subject to final review pursuant to 11 U.S.C. § 330 are authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

In this case, the Chapter 7 Trustee currently has $804,324.19 of unencumbered monies to be administered. The Chapter 7 Trustee has litigated various preference actions and has moved this case toward completion. Applicant's efforts have resulted in a realized gross of $1,067,301.95 during the Second Interim period recovered for the Estate, with a total of $2,171,237.44 in gross proceeds in this case. Dckt. 863 at 4:10–11.

This case required significant work by the Chapter 7 Trustee, with full amounts permitted under 11 U.S.C. § 326(a), to represent the reasonable and necessary fees allowable as a commission to the Chapter 7 Trustee.

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

Fees $25,000.00

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 Michael McGranahan, the Chapter 7 Trustee, ("Applicant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Michael McGranahan is allowed the following fees and expenses as a professional of the Estate:
>
> Michael McGranahan, the Chapter 7 Trustee
>
> Fees in the amount of $25,000.00,
>
> The fees and costs are allowed pursuant to 11 U.S.C. § 331 as interim fees and costs, subject to final review and allowance pursuant to 11 U.S.C. § 330.
>
> **IT IS FURTHER ORDERED** that the Chapter 7 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.

6.	**13-91315-E-7** **MJB-1**	**APPLEGATE JOHNSTON, INC.** **George Hollister**	**MOTION FOR ADMINISTRATIVE EXPENSES** **1-12-18 [856]**

Final Ruling: No appearance at the February 15, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 12, 2018. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Allowance of Administrative Expenses is granted.

Stephen Ciari Plumbing & Heating, Inc. ("Movant") requests payment of administrative expenses in the amount of $4,377.48 as the prevailing party in a preference action brought by Michael McGranahan ("the Chapter 7 Trustee").

CHAPTER 7 TRUSTEE'S NON-OPPOSITION

The Chapter 7 Trustee filed a Non-Opposition on January 18, 2018. Dckt. 861. He states that the does not oppose the expenses being paid as an administrative claim.

DISCUSSION

Movant argues it is the prevailing party in Adversary Proceeding 15-09026 and that a Bill of Costs submitted in that Adversary Proceeding for $4,377.48 is properly payable as an administrative claim pursuant to 11 U.S.C. § 503(b)(1)(A).

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Here, Movant argues through persuasive caselaw that a defendant's litigation costs from overcoming a Chapter 7 trustee's preference action are recoverable as an administrative expense of the estate. Dckt. 856 at 3–4 (citing *Brandt v. Lazard Freres & Co. (In re Healthco Int'l, Inc.)*, 310 F.3d 9 (1st Cir. 2002); *In re G.I.C. Gov't Secs., Inc.*, 121 B.R. 647 (Bankr. M.D. Fla. 1990)).

Movant having demonstrated entitlement to its litigation costs, and the Chapter 7 Trustee not opposing the Motion, the court finds that Movant is entitled to reimbursement for its litigation costs as an administrative expense of the Estate. The Motion is granted, and the Chapter 7 Trustee is authorized to pay Movant its administrative expenses in the amount of $4,377.48.

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 Administrative Expense filed by Stephen Ciari Plumbing & Heating, Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Chapter 7 Trustee is authorized to pay Stephen Ciari Plumbing & Heating, Inc. $4,377.48 as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).

7. **11-92235-E-11** **JAMES/LORI SARAS** **ORDER TO SHOW CAUSE**
RHS-1 **Mikalah Liviakis** **1-8-18 [805]**

APPEARANCE OF JAMES SARAS, DAVID STERNBERG, AND MIKALAH LIVIAKIS REQUIRED FOR THE HEARING

NO TELEPHONIC APPEARANCES PERMITTED

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Office of the United States Trustee as stated on the Certificate of Service on January 11, 2018. The court computes that 35 days' notice has been provided.

The Order to Show Cause is xxxxx.

On November 16, 2012, the court entered its order confirming the Chapter 11 Plan in this case. Order, Dckt. 665. Under the terms of the Plan, James Saras and Lori Saras, the two Debtors, served as the Plan Administrators and are responsible for performance of the Chapter 11 Plan. Plan, attached as Exhibit A to Order Confirming Plan, *Id.*

On November 20, 2013, James Saras and Lori Saras, the Plan Administrator Debtors, filed a Motion for Entry of Discharge ("Motion") (Dckt. 765), representing to the court that the Chapter 11 Plan had been completed, with one exception. That exception was payment to the Class 10 ranching crew workers, with the Motion stating:

> 5. The only creditors we have not yet paid are a group of ranching crew workers that are part of Class 10 of the Plan and U.S. Bank, National Association. However, we are current on the payments to U.S. Bank, National Association (Class Six and Class Six Arrearages) [with the non-arrearage payments extending beyond the Plan]. We are attempting to locate and inform all of the ranching crew workers that are part of Class 10 so that we can issue payment to them pursuant to he confirmed chapter 11 plan.

Motion ¶ 5, *Id.* The court, in granting the Motion, stated in the Minutes from the Hearing on the Motion for Entry of Discharge:

While the U.S. Bank, N.A. claim does not cause the court concern with respect to entry of the discharge (based on completion of the Plan), the inability or failure to pay the Ranching Crew Workers is another story. These Class 10 creditors are listed as having $40,000.00 of claims. This is a significant amount of money. The Declaration of James Saras does not state how many of these claims have been paid and what amount remains for creditors "to be found." The Plan Administrators have not addressed the requirements of 11 U.S.C. § 347(b) with respect to the Class 10 distributions which have not been made at this time.

Additional Information, December 19, 2013 Hearing

At the hearing on December 19, 2013, the Plan Administrators reported that there remains $38,220.00 in monies for payment of the "Worker Creditor Claims" to be disbursed. Because some of the workers are in the region only for the agricultural season, the Plan Administrators are attempting to locate them.

The Plan Administrators have the funds to disburse, but are unable to due to the nature of the creditors. Rather than hold up the discharge to Debtors who have otherwise successfully completed a plan, the better solution is to order the Plan Administrators to deposit the $38,220.00 with the Clerk of the Bankruptcy Court, and then when they have located the creditors to have the Plan Administrators seek a release of the monies so that it may be distributed to these creditors.

Therefore, conditioned on the deposit of the $38,220.00 with the Clerk of the Bankruptcy Court, which monies shall be held pending further order of this court, the court grants the Debtors, and each of them, their discharges in this case. The Clerk shall not issue the discharges until after the $38,220.00. Further, the court waives the reopening fee in this case for the Plan Administrators seeking an order for the Clerk of the Court to release the deposited funds, due to the unique challenges facing the Debtors in Possession is locating and distributing the claim payments to these creditors.

Civil Minutes, Dckt. 793. The court, relied on the Plan Administrator Debtors and their counsel to diligently complete the plan and make the disbursements to the Ranching Crew Workers.

UNDISBURSED MONIES

In mid-December 2017, the Clerk's Office contacted David Sternberg, Special Counsel for the Plan Administrator Debtors in the bankruptcy case. The Clerk's Office notified Mr. Sternberg that the $38,220.00 deposited with the court had not been disbursed. This was four years after the Plan Administrator Debtors and their counsel represented to the court that the disbursement of such monies would be diligently prosecuted.

By letter dated January 5, 2018, Mr. Sternberg replied, providing information concerning the monies on deposit with the court, which includes:

> "In the process of drafting the Subject Motion [motion to disburse monies to the Ranch workers], I was unable to obtain valid addresses for the day workers and, as such, the Subject Motion was never filed."
>
> "Thereafter, Lori Elsie Saras passed away, and James John Saras has become non-functional."
>
> "There were funds in my trust account with which to pay for the motion to distribute the funds to the day workers ("Subject Motion"). . . The funds held in my trust account to fund the Subject Motion were subsequently levied upon by the State of California, and no monies remain to pay for the Subject Motion."

Letter, Dckt. 802.

As to the latter point, it appears that Mr. Sternberg incorrectly identifies the monies that were the subject to a State of California Levy. First, the court ordered the monies to pay the Ranch Worker claims to be deposited with the court—the very monies that were the subject of the Clerk's inquiry. Second, the court is unsure how monies that are the subject of a Confirmed Chapter 11 Plan, which are held by the fiduciary Plan Administrators or in the attorney trust account for the fiduciary Plan Administrators, and not monies of the Debtors personally, could be the subject of a state law levy of some debt other than as provided for in the Confirmed Chapter 11 Plan.

The letter also discloses that at some unspecified time in the past Plan Administrator Debtor Lori Elsie Saras passed away. The court's initial search of the personal records data base indicates that Lori Saras passed away December 1, 2014—which was approximately a year after the entry of her discharge.

Mr. Sternberg further states that at some time during the past four years James Saras has become "non-functional." No time reference is made as to the fiduciary Plan Administrator Debtor James Saras becoming unable to fulfill his fiduciary duties under the Confirmed Chapter 11 Plan.

ISSUANCE OF ORDER TO APPEAR AND SHOW CAUSE

The fiduciary Plan Administrator Debtors in this case have been represented by two attorneys, David Sternberg as Special Counsel and Mikalah Liviakis as general bankruptcy counsel. There remains unperformed a substantial distribution under the Confirmed Chapter 11 Plan. No action has been taken by the fiduciary Plan Administrators or their counsel to address this default. Further, though one fiduciary Plan Administrator has died and the other is "non-functional," the attorneys for those fiduciaries have not acted to address these failures or protect their clients' interests with respect to the fiduciary duties to be performed.

Upon review of the files in this case, the letter from Special Counsel David Sternberg, the belated reported death of Lori Saras, one of the two fiduciary Plan Administrator Debtors, the belated reported "non-functional" state of James Saras, the other fiduciary Plan Administrator Debtor, and good cause appearing, the court issued an Order to Appear and Show Cause on January 8, 2018. Dckt. 805.

The court ordered David Sternberg and Mikalah Liviakis to appear personally at the hearing, and required each of them to file and serve status reports by January 26, 2018, regarding the actions taken to proceed with the performance of the Confirmed Chapter 11 Plan to pay the Ranch Workers Claims, including:

> (1) the dates of communications with the fiduciary Plan Administrator Debtors since the December 19, 2013 hearing on the Motion for Entry of Discharge;
>
> (2) the efforts made and actions taken by the reporting attorney to disburse the monies for the Ranch Workers Claims;
>
> (3) the Ranch Worker Claim creditors for which the reporting attorney had an address or believed that the fiduciary Plan Administrator Debtors had an address; and
>
> (4) the dates which the reporting attorney learned of the death of Lori Saras and the "nonfunctionality" of James Saras.

The court also ordered that a death certificate for Lori Saras be filed by January 26, 2018. For James Saras, the court ordered him to appear personally to address issues concerning the defaults under the Confirmed Chapter 11 Plan regarding payment of the monies for the Ranch Worker claims.

If the parties believed that Mr. Saras is physically or mentally unable to appear at the Status Conference and Order to Show Cause, then on or before January 26, 2018, they were to file with the court and serve on the U.S. Trustee properly authenticated testimony of Mr. Saras' doctor(s) providing expert testimony to the court concerning his physical or mental "nonfunctionality."

Finally, the court ordered that James Saras, as the surviving Plan Administrator Debtor, David Sternberg, and Mikalah Liviakis, and each of them, shall show cause why the court does not immediately appoint an independent third-party to serve as a replacement plan administrator in light of the reported death of one Plan Administrator Debtor and the "Nonfunctionality" of the other Plan Administrator Debtor.

DAVID STERNBERG'S STATUS REPORT

David Sternberg filed a Status Report on January 26, 2018. Dckt. 808. He states that the $38,220 is still on file with the court until disbursement instructions become available.

Mr. Sternberg reports that upon receiving the court's order, he immediately contacted James Saras, but he was unable to reach him, and he has not heard from him since.

Regarding performance of the plan to pay the claims of the Class 10 ranching crew workers, Mr. Sternberg reports the following dates and events:

A. December 19, 2013: Mr. Sternberg met with Mr. Saras and discussed Class 10 ranching crew workers, learning that because of winter, Mr. Saras would not be able to provide information until spring.

B. December 20, 2013: Mr. Sternberg reviewed and executed a check for $38,220.00 and forwarded it to the court.

C. Mr. Sternberg assisted Mr. Saras and Andrea Saras (his daughter) relocate to another location because of pending divorce proceedings and ensured that taxes were paid.

D. February 7, 2014: Mr. Sternberg spoke with Armand and learned that Armand would obtain addresses for the Class 10 ranching crew workers.

E. February 20, 2014: Mr. Sternberg received a list of Class 10 ranching crew workers with missing information and instructed his assistant to contact Armand about the missing information.

F. February 21, 2014: Mr. Sternberg spoke with Mr. Saras about Class 10.

G. February 25, 2014: Mr. Sternberg spoke with Mr. Saras about providing addresses for the Class 10 ranching crew workers.

H. February 2, 2015: Mr. Sternberg instructed an associate to prepare a motion to reopen and a motion to disburse so that a full draft could be sent to Mr. Saras to obtain necessary information about the ranching crew workers.

I. February 3, 2015: Mr. Sternberg's associate left a message with Mr. Saras about providing addresses, and a proposed declaration was sent to Mr. Saras regarding those addresses.

J. February 6, 2015: Mr. Sternberg's associate spoke with Mr. Saras about obtaining the addresses.

K. February 9, 2015: A message was left with Mr. Saras about obtaining the addresses.

L. February 12, 2015: Another message was left with Mr. Saras, and correspondence was sent to him.

M. February 23, 2015: Another letter was sent to Mr. Saras.

N. March 26, 2015: At a meeting, Mr. Saras stated that he would get the addresses.

O. March 30, 2015: Mr. Sternberg spoke with Mr. Saras about acquiring the addresses.

P. June 26, 2015: Mr. Sternberg drafted a letter to Mr. Saras about the missing addresses.

Q. February 19, 2016: Mr. Sternberg spoke with Andrea Saras and instructed her to have her father obtain the addresses.

R. April 27, 2016: Mr. Sternberg spoke with Mr. Saras about whether there was any money for Mr. Saras, and Mr. Sternberg told him that there was not.

S. September 13, 2017: Mr. Sternberg received a notice from the EDD that the remaining client funds in his trust account had been levied upon.

T. December 21, 2017: Mr. Sternberg received an e-mail from Linda Payne, Financial Specialist at the United States Bankruptcy Court.

U. January 5, 2018: Mr. Sternberg prepared a response to Ms. Payne's e-mail.

Mr. Sternberg suggests that the court appoint an investigator to ascertain whether the addresses of the Class 10 ranching crew workers while leaving the case open so that a motion may be brought to disburse funds. Alternatively, he suggests that the court appoint an independent fiduciary to have the funds disbursed to Class 10. He argues that any remaining funds should be disbursed to unsecured claims.

Mr. Sternberg reports that Lori Saras died on December 1, 2014, and the last time Mr. Sternberg spoke with Mr. Saras was April 27, 2016, although Mr. Sternberg argues that Mr. Saras was unclear and incoherent during that conversation.

MIKALAH LIVIAKIS'S STATUS REPORT

Mikalah Liviakis filed a Status Report on January 26, 2018. Dckt. 812. Mr. Liviakis states that Mr. Sternberg is filing a redacted copy of the death certificate with the court.

Mr. Liviakis does not have first-hand knowledge of Mr. Saras's health because he has not had direct contact with him in several years. He states that Mr. Saras has not contacted him.

Mr. Liviakis believes that his last contact with the Sarases was around the beginning of 2014 because they preferred to communicate with Mr. Sternberg. Mr. Sternberg, in turn, provided information to Mr. Liviakis.

Mr. Liviakis does not know when he learned of Mrs. Saras's death, but he estimates that it was in the middle or latter portion of 2015.

Prior to discharge, Mr. Liviakis states that there was difficulty getting Mr. Saras to comply, usually taking repeated efforts. He states that Mr. Saras eventually complied in most instances, but not without significant prodding. Mr. Liviakis does not attribute that performance to functionality, though.

Mr. Liviakis believes that Mr. Saras has compiled a list that provides names for the ranching crew workers, with many of them sharing the same address. Mr. Liviakis does not know why so many have been listed at the same address, and Mr. Saras has not explained why. Mr. Liviakis suggests that making disbursements without further information would cause a significant risk of error.

Mr. Liviakis summarizes the information Mr. Saras provided to Mr. Sternberg as follows:

Name	Address	Amount Owed
Robert Pizeno	2554 Dobbins Lane, Riverbank, California 95367	$101.58
Dolores Piceno		$754.57
Luis Muchica		$242
Leonardo Navarro		$35
Jorge Hernandez		$99
Alejandro Luna		$693
Antonio Calderon		$1074
Guadalupe Calderon		$1728
Ross Arauza		$2534
Davis Arauza		$1221
Monica Arauza		$1217
Wizer Arauza		$1231
Ross Arauza		$1283
Klamt Arauza		$896
Hlford Arauza		$1475
Carson Arauza		$1357

Jose G. Torrez	No Address Provided by Mr. Saras	$656.38
Hadan Hernandez		$441.31
Arnolfo Torrez		$1120
Esteban Lazo		$357
Jose Sanchez		$901
Alecan Valdez		$90
Rosa G. Oreiel		$415
Luis Hernandez		$455.87
Pedro Garibay		$347
Javier Madina		$72
Oriel Mateo		$1407
Irma Salseda	PO Box 269, Winton, California 95388	$550.72
Victor Calderon		$349
Abal Barrientos		$336
Jose Luis Medina		$722
Heriberto Medina		$244
Oscar Rosales		$694
Jose Torrez	PO Box 1123, Salida, California 95368	$644.38
Jouquin Yepez		$1008
Ramira Manzo		$134
Ricardo Machuna	3766 Patterson Road, Riverbank, California 95367	$240
Jose Luis Machuna	3660 Iowa Avenue, Riverbank, California 95367	$1040
Leonardo Navarro	2621 Santafee Street, #3, Riverbank, California 95367	$35

Mr. Liviakis suggests mailing declarations that include a requirement for each worker to confirm whether: (1) he or she has ever worked for Mr. Saras, (2) when he or she worked for him, and (3) how much money is believed to be owed.

Additionally, Mr. Liviakis suggests that the court could require Mr. Saras to offer testimony explaining the status of information concerning the ranching crew workers.

RULING

At the hearing, xxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is xxxxxxxx.

8. **11-92235-E-11** **JAMES/LORI SARAS** **POST-CONFIRMATION STATUS CONFERENCE RE: VOLUNTARY PETITION**
RHS-1 **Mikalah Liviakis** **6-22-11 [1]**

Debtors' Atty: Mikalah R. Liviakis

Notes:
Set by court order dated 1/8/18 [Dckt 805]. To be heard in conjunction with Order to Show Cause. Status reports due on or before 1/26/18.

Status Report by David M. Sternberg filed 1/26/18 [Dckt 808]; Exhibits to Status Report filed 1/26/18 [Dckt 809]

Status Report [Debtors] filed 1/26/18 [Dckt 812]

9. **02-94454-E-7** **LUANN SELECKY** **CONTINUED MOTION FOR INSPECTION, TURNOVER OF PROPERTY OF THE ESTATE, AND REIMBURSEMENT OF FEES AND COSTS**
SSA-2 **Greg Smith** **10-3-17 [20]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 3, 2017. By the court's calculation, 37 days' notice was provided. 14 days' notice is required.

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

The Motion for Turnover is removed from calendar, an amended motion having been filed.

Michael McGranahan, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1037 Westmont Terrace, Modesto, California ("Property") and for turnover of a demand note in favor of Luann Selecky ("Debtor") executed by her former husband Stephen Goudreau in the principal amount of $500,000.00 ("Note").

The grounds for relief as stated with particularity in the Motion (Federal Rule of Bankruptcy Procedure 9013) include the following:

A. Based upon information provided to Movant and working with the Office of the United States Trustee, Movant has requested this bankruptcy case be reopened so that he may pursue the recovery of assets of the estate that are alleged not to have been previously disclosed by Debtor.

B. Based upon the information provided by Debtor in the Schedules, the First Meeting of Creditors, and in the bankruptcy case, there appeared to be no assets to be administered by Movant, and the case was noticed as a "No Asset" case. Motion, FN. 1; Dckt. 20.

C. It is alleged that the Debtor owned real property commonly known as 1037 Westmont Terrace, Modesto, California, when this bankruptcy case was commenced, but such "Real Property" was not disclosed in Debtor's bankruptcy case. *Id.*, ¶ 3, Dckt. 20.

D. It is alleged that Debtor held a demand note, with Debtor as payee, in the principal amount of $500,000.00 that was executed by her former husband. *Id.*, ¶ 4.

E. Debtor has not turned over the Property and the Note to Movant.

In his Declaration, Movant provides a discussion of the investigation undertaken and what he and his agents have discovered. Movant testifies that he is asserting an interest of the bankruptcy estate in the Property pursuant to an Interfamily Transfer and Dissolution on or about September 6, 2001. Declaration ¶ 4, Dckt. 22. (It is not clear whether that is referencing a court order, contract, marital settlement agreement, or other type of document transferring legal, equitable, or other rights in the Property to Debtor. However, this appears to be language used in connection with a deed issued by one spouse to the other in connection with the dissolution of a marriage.) Movant reports that the deed for the Property was not recorded until July 6, 2015. *Id.*

Copies of the deed or other documents are not provided. Movant has filed a copy of a LexisNexis Property Deed/Mortgage Report as Exhibit 1 in support of the Motion. Dckt. 24. That third-party information does not constitute personal knowledge testimony by Movant, nor does it appear to be a certified county real property record. While the information in Exhibit 1 may be several steps removed from personal knowledge testimony or an authenticated document (Federal Rule of Evidence 601, 602, 901 et seq.), it does provide some general information, which if true, can be easily and properly documented for the court.

The LexisNexis Property Deed/Mortgage Report includes the following information relating to the Property and to Debtor:

A. Debtor acquired the Property by a "Contract" dated September 6, 2001. Exhibit 1, p. 2 of 4; Dckt. 24.

B. The "Contract" was recorded on July 6, 2015. *Id.*

C. The "Seller" of the Real Property was Stephen Goudreau, whom Movant identifies as Debtor's ex-husband. *Id.*

D. There is a non-purchase money mortgage for a $45,000.00 obligation of Debtor as "Borrower" based on a "Contract" dated February 21, 2016, and recorded on April 5, 2017, naming "Stephen Goudreau," for which Debtor is listed as the owner of the Property. *Id.*, p. 1 of 4.

Movant notes in his Declaration that in the Original Chapter 7 Schedules filed, Debtor lists her residence as the Property, but on Schedule A she states under penalty of perjury that she has no interests in any real property. Declaration ¶ 6, Dckt. 22.

The court's review of the Petition discloses that Debtor stated her address to be the Property. Dckt. 1 at 1. On Schedule A, Debtor stated under penalty of perjury in response to the required disclosure of any interests in real property that she had "None." *Id.* at 5.

On Schedule I, Debtor stated that she is single and has income of $750.00 per month. *Id.* at 14. On Schedule J, Debtor stated that she had no rent or mortgage expense, no utilities expense, and no home maintenance expense. *Id.* at 15. Debtor did state that for her income of $750.00 per month, she had an expense of $150.00 per month identified as "Set aside for taxes." *Id.*

On the Statement of Financial Affairs, Debtor affirmatively stated that she has not been a party of any suits or proceedings in the one year prior to the November 26, 2002 commencement of her bankruptcy case. *Id.* at 17. In response to Question 15 on the Statement of Financial Affairs, Debtor stated that she has not lived at any address other than the Property during the two years prior to the commencement of the bankruptcy case. *Id.* at 19.

On Schedule B, Debtor did not list any interest in any promissory notes ($500,000.00 or other amount) or any right to payment of monies ($500,000.00 or other amount) from any other person. *Id.* at 6–7.

NOVEMBER 9, 2017 HEARING

At the hearing, the court stated that it did not believe that Movant would knowingly present inaccurate information but would have to present clear evidence if the court is to issue an order from which contempt sanctions could be issued. Dckt. 35.

The court issued a scheduling order (Dckt. 43) setting deadlines for additional pleadings and for a further hearing.

SUPPLEMENTAL PLEADINGS

Movant filed supplemental pleadings on November 9, 2017. Dckts. 36–39. In the Supplemental Declaration of Michael McGranahan, he states that he contacted Pam Shaw, an escrow officer for Chicago Title, in October 2017 and requested a preliminary title report for the Property. Dckt. 36. He received the title report and also procured certified records from the Stanislaus County Recorders Office showing that an Interspousal Transfer Deed was executed from Stephen Goudreau to Debtor for the Property on September 6, 2001, but it was not recorded until July 6, 2015. *See* Exhibits 2 & 5, Dckt. 39.

Movant has also described and attached a Case Index for a divorce proceeding between Debtor and Stephen Goudreau that appears final as of July 13, 2001. Exhibit 4, Dckt. 39. Movant has provided the Declaration of Pam Shaw, who confirms that she prepared and delivered a title report for the Property. Dckt. 37.

The Declaration of Steven Altman reaffirms the above statements relating to how the evidence was gathered. Dckt. 38.

NOVEMBER 30, 2017 HEARING

At the hearing, the court granted the Motion; ordered Debtor to turn over the Property and Note by 12:00 p.m. on December 15, 2017; and continued the hearing on this Motion to 10:30 a.m. on January 11, 2018, for a status report on Debtor's compliance and whether any corrective sanctions should be ordered.

JANUARY 11, 2018 HEARING

At the hearing, Movant's counsel reported that Debtor delivered a box of documents, about half of what was requested, for the document production. Movant reported that Debtor did not appear at the January 10, 2018 examination ordered by the court. When Movant's counsel attempted to contact her by phone, only a message machine recording was reached.

Debtor was not present at the January 11, 2018 hearing.

The court continued the matter to 10:30 a.m. on February 15, 2018, and ordered that on or before January 25, 2018, Movant shall file an amended motion for the relief requested. Opposition, if any, was to be filed and serve on or before February 8, 2018, and replies, if any, could be presented orally at the hearing.

DISCUSSION

On January 18, 2018, Movant filed another Motion for Inspection, Turnover, and Reimbursement. Dckt. 85. The filing of that motion, with a new Docket Control Number of SSA-5, renders this one moot. This Motion is removed from the calendar.

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 Michael McGranahan, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is removed from calendar, an amended motion having been filed with Docket Control Number SSA-5.

10. **02-94454-E-7** **LUANN SELECKY**
SSA-5 **Greg Smith**

MOTION FOR INSPECTION, MOTION FOR TURNOVER OF PROPERTY AND/OR MOTION FOR REIMBURSEMENT OF FEES AND COSTS
1-18-18 [85]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 3, 2017. By the court's calculation, 37 days' notice was provided. 14 days' notice is required.

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

The Motion for Turnover is xxxxxxxxxxx.

Michael McGranahan, the Chapter 7 Trustee, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the real property commonly known as 1037 Westmont Terrace, Modesto, California ("Property") and for turnover of a demand note in favor of Luann Selecky ("Debtor") executed by her former husband Stephen Goudreau in the principal amount of $500,000.00 ("Note").

The grounds for relief as stated with particularity in the original Motion (DCN: SSA-2) (Federal Rule of Bankruptcy Procedure 9013) include the following:

A. Based upon information provided to Movant and working with the Office of the United States Trustee, Movant has requested this bankruptcy case be reopened so that he may pursue the recovery of assets of the estate that are alleged not to have been previously disclosed by Debtor.

B. Based upon the information provided by Debtor in the Schedules, the First Meeting of Creditors, and in the bankruptcy case, there appeared to be no assets to be administered by Movant, and the case was noticed as a "No Asset" case. Motion, FN. 1; Dckt. 20.

C. It is alleged that the Debtor owned real property commonly known as 1037 Westmont Terrace, Modesto, California, when this bankruptcy case was commenced, but such "Real Property" was not disclosed in Debtor's bankruptcy case. *Id.*, ¶ 3, Dckt. 20.

D. It is alleged that Debtor held a demand note, with Debtor as payee, in the principal amount of $500,000.00 that was executed by her former husband. *Id.*, ¶ 4.

E. Debtor has not turned over the Property and the Note to Movant.

In his Declaration to the original Motion, Movant provides a discussion of the investigation undertaken and what he and his agents have discovered. Movant testifies that he is asserting an interest of the bankruptcy estate in the Property pursuant to an Interfamily Transfer and Dissolution on or about September 6, 2001. Declaration ¶ 4, Dckt. 22. (It is not clear whether that is referencing a court order, contract, marital settlement agreement, or other type of document transferring legal, equitable, or other rights in the Property to Debtor. However, this appears to be language used in connection with a deed issued by one spouse to the other in connection with the dissolution of a marriage.) Movant reports that the deed for the Property was not recorded until July 6, 2015. *Id.*

Copies of the deed or other documents are not provided. Movant has filed a copy of a LexisNexis Property Deed/Mortgage Report as Exhibit 1 in support of the Motion. Dckt. 24. That third-party information does not constitute personal knowledge testimony by Movant, nor does it appear to be a certified county real property record. While the information in Exhibit 1 may be several steps removed from personal knowledge testimony or an authenticated document (Federal Rule of Evidence 601, 602, 901 et seq.), it does provide some general information, which if true, can be easily and properly documented for the court.

The LexisNexis Property Deed/Mortgage Report includes the following information relating to the Property and to Debtor:

A. Debtor acquired the Property by a "Contract" dated September 6, 2001. Exhibit 1, p. 2 of 4; Dckt. 24.

B. The "Contract" was recorded on July 6, 2015. *Id.*

C. The "Seller" of the Real Property was Stephen Goudreau, whom Movant identifies as Debtor's ex-husband. *Id.*

D. There is a non-purchase money mortgage for a $45,000.00 obligation of Debtor as "Borrower" based on a "Contract" dated February 21, 2016, and recorded on April 5, 2017, naming "Stephen Goudreau," for which Debtor is listed as the owner of the Property. *Id.*, p. 1 of 4.

Movant notes in his Declaration that in the Original Chapter 7 Schedules filed, Debtor lists her residence as the Property, but on Schedule A she states under penalty of perjury that she has no interests in any real property. Declaration ¶ 6, Dckt. 22.

The court's review of the Petition discloses that Debtor stated her address to be the Property. Dckt. 1 at 1. On Schedule A, Debtor stated under penalty of perjury in response to the required disclosure of any interests in real property that she had "None." *Id.* at 5.

On Schedule I, Debtor stated that she is single and has income of $750.00 per month. *Id.* at 14. On Schedule J, Debtor stated that she had no rent or mortgage expense, no utilities expense, and no home maintenance expense. *Id.* at 15. Debtor did state that for her income of $750.00 per month, she had an expense of $150.00 per month identified as "Set aside for taxes." *Id.*

On the Statement of Financial Affairs, Debtor affirmatively stated that she has not been a party of any suits or proceedings in the one year prior to the November 26, 2002 commencement of her bankruptcy case. *Id.* at 17. In response to Question 15 on the Statement of Financial Affairs, Debtor stated that she has not lived at any address other than the Property during the two years prior to the commencement of the bankruptcy case. *Id.* at 19.

On Schedule B, Debtor did not list any interest in any promissory notes ($500,000.00 or other amount) or any right to payment of monies ($500,000.00 or other amount) from any other person. *Id.* at 6–7.

NOVEMBER 9, 2017 HEARING

At the hearing on the original Motion, the court stated that it did not believe that Movant would knowingly present inaccurate information but would have to present clear evidence if the court is to issue an order from which contempt sanctions could be issued. Dckt. 35.

The court issued a scheduling order (Dckt. 43) setting deadlines for additional pleadings and for a further hearing.

SUPPLEMENTAL PLEADINGS

Movant filed supplemental pleadings to the original Motion on November 9, 2017. Dckts. 36–39. In the Supplemental Declaration of Michael McGranahan, he states that he contacted Pam Shaw, an escrow officer for Chicago Title, in October 2017 and requested a preliminary title report for the Property. Dckt. 36. He received the title report and also procured certified records from the Stanislaus County Recorders Office showing that an Interspousal Transfer Deed was executed from Stephen Goudreau to Debtor for the Property on September 6, 2001, but it was not recorded until July 6, 2015. *See* Exhibits 2 & 5, Dckt. 39.

Movant has also described and attached a Case Index for a divorce proceeding between Debtor and Stephen Goudreau that appears final as of July 13, 2001. Exhibit 4, Dckt. 39. Movant has provided the Declaration of Pam Shaw, who confirms that she prepared and delivered a title report for the Property. Dckt. 37.

The Declaration of Steven Altman reaffirms the above statements relating to how the evidence was gathered. Dckt. 38.

NOVEMBER 30, 2017 HEARING

At the hearing on the original Motion, the court granted the Motion; ordered Debtor to turn over the Property and Note by 12:00 p.m. on December 15, 2017; and continued the hearing on this Motion to 10:30 a.m. on January 11, 2018, for a status report on Debtor's compliance and whether any corrective sanctions should be ordered.

JANUARY 11, 2018 HEARING

At the hearing on the original Motion, Movant's counsel reported that Debtor delivered a box of documents, about half of what was requested, for the document production. Movant reported that Debtor did not appear at the January 10, 2018 examination ordered by the court. When Movant's counsel attempted to contact her by phone, only a message machine recording was reached.

Debtor was not present at the January 11, 2018 hearing.

The court continued the matter to 10:30 a.m. on February 15, 2018, and ordered that on or before January 25, 2018, Movant shall file an amended motion for the relief requested. Opposition, if any, was to be filed and serve on or before February 8, 2018, and replies, if any, could be presented orally at the hearing.

FILING OF AMENDED MOTION

Movant filed an Amended Motion on January 18, 2018. Dckt. 85. The Motion asserts the same statutory basis for relief as in the original Motion and clarifies what is requested in current relief. Movant requests:

A. A further order directing Debtor both to testify at a duly continued scheduled 2004 examination at Movant's counsel's office and also to produce the following previously unprovided materials for inspection and copying, or offer just cause why the materials cannot be provided—

1. Copies of Debtor's income taxes for 2001, 2002, 2015, and 2016;

2. Copies of any and all insurance policies currently in effect for the purpose of insuring the Property;

3. Copies of any and all documents in Debtor's custody, control, or possession concerning the listing for sale of the Property;

4. Copies of any and all documents in Debtor's custody, control, or possession evidencing demand for payment of money by Debtor

to Stephen Joseph Goudreau since the close of Debtor's Chapter 7 bankruptcy case on March 11, 2003, to the present;

5. Copies of any and all documents in Debtor's custody, control, or possession concerning the payment of the secured debt on the Property within one year preceding the filing of this bankruptcy case;

6. Copies of any and all documents in Debtor's custody, control, or possession concerning the payment of the secured debt on the Property following the bankruptcy case on November 26, 2002, to the present;

B. Monetary sanctions against Debtor of $5,000.00, payable to Movant for noncompliance with the court's prior order, with a deadline to pay the sanction. If Debtor fails or refuses to pay the sanction, then Movant requests a further order that Movant may recoup sanctions from proceeds of the Bankruptcy Estate and any surplus funds that would otherwise be available to Debtor;

C. Further monetary sanctions to compel Debtor's compliance;

D. Further fees and costs to be paid to Movant's counsel for legal work incurred to enforce compliance with turnover, discovery, 2004 exam orders, with a deadline to pay those fees and costs. If Debtor fails or refuses to pay those fees and costs, then Movant requests a further order that Movant may recoup the fees and costs from proceeds of the Bankruptcy Estate and any surplus funds that would otherwise be available to Debtor;

E. An order requiring Debtor to vacate the Property; and

F. Inspection and turnover by Debtor of the original demand note in favor of Debtor, executed by Stephen Goudreau in the principal amount of $500,000.00.

DISCUSSION

Debtor has not responded to the latest motion to compel her to turnover the Property and the requested documents by Movant.

As part of the court's order compelling Debtor to appear at the prior examination and to produce documents, the court issued a conditional order that Debtor would face a $5,000.00 sanction for not complying with the court's order. Movant now alleges that Debtor failed to comply, which triggers the court's prior $5,000.00 sanction. *See* Dckt. 66.

Additionally, Movant argues that only about half of the requested documents have been provided, and he argues that Debtor has not appeared at the 2004 examination proceeding still. The Amended Motion is an extension of the prior motions to compel Debtor to take certain actions in compliance with law and court orders. *See* Dckt. 65, 78.

Debtor has not complied still. Dckt. 92. The court will enter a further order compelling Debtor to appear at the 2004 examination, to turn over the requested documents, to vacate the Property, to turnover the Note, and to pay further sanctions if she does not comply.

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 filed by Michael McGranahan ("the Chapter 7 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 is granted and that Luann Selecky ("Debtor") shall appear at **xxxxx a.m. on xxxxx, 2018**, for her examination pursuant to Federal Rule of Bankruptcy Procedure 2004, which shall continue thereafter until completed, but which shall continue no later than 5:00 p.m. on a day and not past 5:00 p.m. on **xxxxxxxxxxx, 2018**.
>
> **IT IS FURTHER ORDERED** that Luann Selecky shall produce and deliver at **xxxx on xxxx, 2018**, the following documents to Steven Altman, counsel for the Chapter 7 Trustee, as part of the 2004 Examination:
>
> 1. Copies of Luann Selecky's income taxes for 2001, 2002, 2015, and 2016;
>
> 2. Copies of any and all insurance policies currently in effect for the purpose of insuring 1037 Westmont Terrace, Modesto, California ("Property");
>
> 3. Copies of any and all documents in Luann Selecky's custody, control, or possession concerning the listing for sale of the Property;
>
> 4. Copies of any and all documents in Luann Selecky's custody, control, or possession evidencing demand for payment of money by Luann Selecky to Stephen Joseph Goudreau since the close of Luann Selecky's Chapter 7 bankruptcy case on March 11, 2003, to the present;
>
> 5. Copies of any and all documents in Luann Selecky's custody, control, or possession concerning the payment of the secured debt on the Property within one year preceding the filing of this bankruptcy case;

6. Copies of any and all documents in Luann Selecky's custody, control, or possession concerning the payment of the secured debt on the Property following the bankruptcy case on November 26, 2002, to the present

IT IS FURTHER ORDERED that if Luann Selecky fails to deliver the documents specified above in paragraphs 1 through 6 by **xxxx, on 2018**, or fails to appear at **xxxx on xxxx, 2018** for the 2004 Examination and continue to appear at that examination to its conclusion, the court shall issue an order for Luann Selecky to pay a $5,000.00 corrective sanction to the Chapter 7 Trustee for the Bankruptcy Estate in this case. This corrective sanction will be ordered only if Luann Selecky fails to timely comply with this Order. The $5,000.00 amount of corrective sanction has been determined reasonable in light of the promissory note at issue being for $500,000.00 and the real property worth hundreds of thousands of dollars. The corrective sanction is less than 1% of the value of the assets that are to be turned over as property of this Bankruptcy Estate.

IT IS FURTHER ORDERED that Luann Selecky shall deliver on or before **xxxx, 2018**, possession of the real property commonly known as 1037 Westmont Terrace, Modesto, California.

IT IS FURTHER ORDERED that Luann Selecky shall deliver on or before **xxxx, 2018**, the demand note in favor of Luann Selecky executed by Stephen Goudreau in the principal amount of $500,000.00 ("Note").

IT IS FURTHER ORDERED that the order to produce the above documents to attend the 2004 Examination, to turnover the Property, and to turnover the Note is without prejudice to all rights of privilege or other objections to such production or questions at the Examination as may properly and timely be raised by Luann Selecky.

Further, the $5,000.00 corrective sanction, which will be imposed only if Luann Selecky fails to comply with this Order, does not limit further sanctions, corrective and punitive, which may be ordered by this court and the U.S. District Court for violations of this order, including awarding attorney's fees and costs to the Chapter 7 Trustee, and corrective and punitive incarceration.

11. 12-92479-E-12 DAVID/ESPERANZA AGUILAR MOTION FOR ENTRY OF DISCHARGE
NFG-3 Nelson Gomez 12-15-17 [96]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, creditors, and Office of the United States Trustee on December 15, 2017. By the court's calculation, 62 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Discharge is granted.

The Motion for Entry of Discharge has been filed by David Aguilar and Esperanza Aguilar ("Debtor"). With some exceptions, 11 U.S.C. § 1228 permits the discharge of debts provided for in a plan or disallowed under 11 U.S.C. § 502 after the completion of plan payments. Jan Johnson's ("the Chapter 12 Trustee") final report was filed on November 15, 2017, and no objection was filed within the specified thirty-day period. *See* FED. R. BANKR. P. 5009. The order approving final report and discharging the Chapter 12 Trustee was entered on December 21, 2017. Dckt. 103. The entry of an order approving the final report is evidence that the estate has been fully administered. *See In re Avery*, 272 B.R. 718, 729 (Bankr. E.D. Cal. 2002).

Debtor's Declaration (Dckt. 98, 99) certifies that Debtor:

A. has completed the plan payments;

B. does not have any delinquent domestic support obligations;

C. has not received a discharge in a case under Chapter 7, 11, or 12 during the four-year period prior to filing of this case or a discharge under a Chapter 13 case during the two-year period prior to filing of this case;

D. is not subject to the provisions of 11 U.S.C. § 522(q)(1); and

E. is not a party to a pending proceeding which implicates 11 U.S.C. § 522(q)(1).

The Chapter 12 Trustee entered a statement of non-opposition on December 26, 2017. Debtor appears entitled to a discharge, but Debtor has not provided all of the required certifications yet. At the hearing, Debtor certified xxxxxxxxxx.

There being no objection, Debtor is entitled to a discharge.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Discharge filed by David Aguilar and Esperanza Aguilar ("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 granted, and the court shall enter the discharge for David Aguilar and Esperanza Aguilar in this case.

12. **12-92979-E-7** **RUDY/JULISSA GARCIA** **MOTION TO AVOID LIEN OF**
TPH-2 **Thomas Hogan** **CITIBANK N.A.**
1-25-18 [27]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on January 25, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

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

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Citibank N.A. ("Creditor") against property of Rudy Garcia and Julissa Garcia ("Debtor") commonly known as 2805 Boardwalk Court, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $15,306.53. An abstract of judgment was recorded with Stanislaus County on September 21, 2012, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $65,104.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $175,671.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 23. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00 on Amended Schedule C. Dckt. 24.

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

ISSUANCE OF A COURT-DRAFTED ORDER

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Rudy Garcia and Julissa Garcia ("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 judgment lien of Citibank N.A, California Superior Court for Stanislaus County Case No. 676124, recorded on September 21, 2012, Document No. 2012-0084158-00, with the Stanislaus County Recorder, against the real property commonly known as 2805 Boardwalk 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.

13. 08-92594-E-7 **ROBERT/STEPHANIE** **MOTION TO COMPEL**
15-9054 **ACHTERBERG** **1-9-18 [77]**
MDG-3
ACHTERBERG, JR. ET AL V.
CREDITORS TRADE ASSOCIATION,
CASE CLOSED: 02/21/2017

Final Ruling: No appearance at the February 15, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's Attorney on January 10, 2018. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Office of the United States Trustee has not been served. The latest United States Trustee guidelines request service of all pleadings and orders in Chapter 7 adversary proceedings.

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

The Motion to Compel is granted.

Robert Achterberg, Jr., and Stephanie Achterberg ("Plaintiff") requests that the court order Gary Looney, president and owner of Creditors Trade Association, Inc., dba Great Western Collection Bureau ("Defendant") to produce documents related to payment of a judgment against Defendant. Plaintiff also asks for reimbursement of fees and costs associated with Defendant failing to comply with discovery. Additionally, Plaintiff seeks imposition of monetary sanctions against Defendant for any future failures and to prohibit Defendant from introducing contrary evidence to the Motion.

APPLICABLE LAW

The Federal Rules of Civil Procedure are incorporated into bankruptcy proceedings in large part. This is true with respect to the discovery provisions (whether in an adversary proceeding or contested

matter). Here, Federal Rule of Civil Procedure 37 and incorporating Federal Rule of Bankruptcy Procedure 7037 are cited in the motion as the basis for the relief requested.

Federal Rule of Civil Procedure 37(a) establishes the procedure for obtaining an order from the court to compel a party to respond to discovery. When requested and the court issues such an order, the requesting party is entitled to recover the costs and expenses in prosecution of such a motion. FED. R. CIV. P. 37(a)(5).

"Meet and Confer" Requirement

Federal Rule of Civil Procedure 37(a)(1) requires that the motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." FN.1.

FN.1. Both the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are mentioned several times in the court's ruling. A Federal Rule of Civil Procedure will be referred to as "Rule," and a Federal Rule of Bankruptcy Procedure will be referred to as "Bankruptcy Rule."

The certification requirement of Rule 37(a)(1) was described in *Shuffle Master, Inc. v. Progressive Games, Inc.* as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual *certification* document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the *performance*, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

170 F.R.D. 166, 170 (D. Nev. 1996); *see also Triad Commer. Captive Co. v. Carmel (In re GTI Capital Holdings, LLC)*, No. AZ-09-1053-JuMKD, 2009 Bankr. LEXIS 4539, at *26–27 (B.A.P. 9th Cir. Aug. 20, 2009); *Sanchez v. Wash. Mutual Bank (In re Sanchez)*, No. 06-2251-D, 2008 Bankr. LEXIS 4239, at *2–3 (Bankr. E.D. Cal. Sept. 8, 2008). The court went further, stating that "a moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" *Shuffle Master, Inc.*, 170 F.R.D. at 171; *see also Triad Commer. Captive Co.*, 2009 Bankr. LEXIS 4539, at *27; *Sanchez*, 2008 Bankr. LEXIS 4239, at *3.

Rule 37 also requires that the moving party must have conferred in good faith or attempted to confer with the opposing party regarding the discovery dispute. *Shuffle Master, Inc.*, 170 F.R.D. at 171. The court in *Shuffle Master* noted that good faith "cannot be shown merely through the perfunctory parroting of statutory language . . . to secure court intervention; rather it mandates a genuine attempt to resolve the discovery dispute through non-judicial means." *Id.*; *see also Sanchez*, 2008 Bankr. LEXIS 4239, at *3–4.

The movant must show good faith and the party need actually attempt a meeting or conference. *Shuffle Master, Inc.*, 170 F.R.D. at 171. Courts have found that "conferment" requirement entails "two-way communication, communication which is necessary to genuinely discuss any discovery issues and to avoid judicial recourse." *Compass Bank v. Shamgochian*, 287 F.R.D. 397, 398–99 (S.D. Tex. 2012).

The "meet and confer" requirement is not satisfied by mailing a letter from one party's counsel to another party's counsel. *See Leimbach v. Lane (In re Lane)*, 302 B.R. 75, 78–79 (Bankr. D. Idaho 2003). The requirement of filing "a certificate cannot be satisfied by including with the motion copies of correspondence that discuss the discovery at issue. . . . The Court is unwilling to decipher letters between counsel to conclude that the requirement has been met." *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001).

DISCUSSION

The court first considers whether Plaintiff has satisfied the "meet and confer" requirement of Rule 37(a). After trial, the court granted a motion compelling defendant to appear and be examined. *See* Dckt. 75, 76. Defendant was examined on September 28, 2017, after the court's hearing on the motion to compel. Dckt. 76. Mr. Gross states that at that examination, Defendant failed to supply all requested documents, including bank statements for any accounts utilized by Defendant along with a list of all accounts receivable or accounts in which Defendant is a judgment creditor. Dckt. 79 at 2:16–21.

Mr. Gross states that he attempted to meet and confer on October 10, 2017, by e-mailing a letter to Defendant advising of the default. *Id.* at 2:22–23. Mr. Gross states that he received a response from Defendant's counsel on October 16, 2017, stating that Defendant's house had been lost to fire and that he would not be able to respond for another week. *Id.* at 2:23–3:1.

Mr. Gross states that he sent a second e-mail attempting to meet and confer on November 16, 2017, advising that he would bring this Motion otherwise. *Id.* at 3:2–5.

The court has reviewed the October 10, 2017 "meet and confer" letter. In it, counsel for Plaintiff communicates to Defendant:

> In a follow up to the Order for Exam and to constitute a meet and confer effort, I would ask that you provide my office with details as well [as] bank statements for any accounts utilized by Creditors' Trade Association, Inc. In addition. A [*sic*] list of all accounts receivables or accounts in which Creditors' Trade Association, Inc, is a judgment creditor.
>
> As for a possible settlement, we would like to see a payment of $1,500.00 per month by your client.

Exhibit C, Letter, Dckt. 80.

That correspondence is considered in light of the prior proceedings in this case. On September 28, 2017, the court conducted a hearing on Plaintiff's motion to compel Defendant to appear and be examined. Dckt. 76. Debtor appeared and was examined.

It is clear that though Plaintiff has attempted to engage Defendant in communication, Defendant has not reciprocated. That is not a situation when there is merely a perfunctory letter sent. Rather, there have been two face-to-face hearings at which Defendant attended.

Defendant's unwillingness to meet and confer does not defeat Plaintiff's ability to request for the court to order that Defendant produce financial documents.

Attorney's Fees and Costs Requested

The Motion requests that the court award Plaintiff reasonable attorney's fees and costs arising from Defendant's failure to comply with discovery.

Federal Rule of Civil Procedure 45(g) provides that the court may hold in contempt a person who fails to obey the subpoena or an order relating to it. As stated in Federal Rule of Civil Procedure 45(a), the subpoena is also used to compel attendance at a deposition or document production. Commonly the first step in treating the non-responding party as being in "contempt" and imposing sanctions is for the court to issue an order compelling compliance with the subpoena. Though this may seem like the court issuing an order stating that the prior order is "really an order that must be complied with," because the subpoena is issued by an attorney, the full effect of it may not be appreciated by the other person. MOORE'S FEDERAL PRACTICE, CIVIL § 45.62[3]. However, as noted by the Seventh Circuit, no such order compelling is actually required under the Federal Rules of Civil Procedure. *United States SEC. v. Hyatt*, 621 F.3d 687, 693 (7th Cir. 2010).

That is similar to the process used for general discovery and the failure to comply. Federal Rule of Civil Procedure 37 and Federal Rule of Bankruptcy Procedure 7037 require that a party first move to compel discovery after non-compliance. Then, if the other party fails to comply with the order to compel discovery, the sanctions are appropriate for failing to comply with the order.

The court will apply that procedure here and issue the order compelling Defendant to produce the financial documents. Further, in light of Defendant's failure to engage in this case since judgment has been entered, the court will issue a corrective sanction as part of the order.

The corrective sanction will be in the amount of $1,000.00, to be paid by Defendant, to Plaintiff in this case, if Defendant fails to produce documents as ordered by the court.

More importantly, Defendant will only be obligated to pay the $1,000.00 if Defendant fails to comply with the order of this court to produce documents.

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 Compel filed by Robert Achterberg, Jr., and Stephanie Achterberg ("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 to Compel is granted and that Gary Looney, president and owner of Creditors Trade Association, Inc., dba Great Western Collection Bureau ("Defendant"), shall produce and deliver at **xxxx on xxxx, 2018**, the following documents to Malcolm Gross, counsel for Plaintiff:

A. Bank statements for accounts utilized by Creditors' Trade Association, Inc., and

B. A list of all accounts receivables or accounts in which Creditors' Trade Association, Inc., is a judgment creditor.

IT IS FURTHER ORDERED that if Defendant fails to deliver the documents specified above in paragraphs A & B by **xxxx, on 2018**, the court shall issue an order for Defendant to pay a $1,000.00 corrective sanction to Plaintiff in this case. This corrective sanction will be ordered only if Defendant fails to timely comply with this Order.

IT IS FURTHER ORDERED that the order to produce the above documents is without prejudice to all rights of privilege or other objections to such production or questions at the Examination as may properly and timely be raised by Defendant.

Further, the $1,000.00 corrective sanction, which will be imposed only if Defendant fails to comply with this Order, does not limit further sanctions, corrective and punitive, which may be ordered by this court and the U.S. District Court for violations of this order, including awarding attorney's fees and costs to Plaintiff, and corrective and punitive incarceration.