UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

February 23, 2017, at 10:30 a.m.

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1. **16-90002-E-11** **1263 INVESTORS LLC** **MOTION TO SELL FREE AND CLEAR OF LIENS**
RLC-11 **Stephen Reynolds** **2-8-17 [105]**

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.

Correct Notice Not 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 February 3, 2017. By the court's calculation, 20 days' notice was provided. 21 days' notice is required. Fed. R. Bankr. P. 2002(a)(2) (requiring twenty-one days' notice).

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

The Motion to Sell Property is denied without prejudice.

The Bankruptcy Code permits 1263 Investors, LLC, the Debtor in Possession, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell the real property commonly known as 7318 Crane Road, Oakdale, California ("Property").

INSUFFICIENT NOTICE AND SERVICE PROVIDED

Movant filed this Motion to Sell Property according to Local Bankruptcy Rule 9014-1(f)(2). That Rule requires a total of twenty-one days' notice to be provided for the Motion to Sell Property. Movant provided twenty days' notice, which is insufficient.

Additionally, Local Bankruptcy Rule 9014-1(e)(1) & (2) require service of all pleadings and documents filed in support of a Motion be made on or before the date they are filed with the Court. A proof of service shall be filled concurrently with the pleadings or documents served or not more than three days after they are filed. Movant filed the proof of service on February 3, 2017, five days before the filing of the Motion to Sell Property on February 8, 2017. Notice and service of this Motion is deficient, and the Motion to Sell Property is denied without prejudice.

Unfortunately, this is not the Movants first, or even second, foray into presenting pleadings to the court without providing adequate notice. Movant creates the appearance that the federal judicial process is a game - don't follow the rules, try to slip it by the court, and if you get caught, just feign ignorance or a mistake. The "mistakes" of Movant have been exhausted.

Movant has failed to comply with the minium notice requirements specified in Federal Rule of Bankruptcy Procedure 2002(a)(2). As was recently pointed out to the court by another Sacramento based attorney, Federal Rule of Bankruptcy Procedure 9006(b) prohibits the court from extending or reducing time period specified in the Federal Rules of Bankruptcy Procedure unless "cause" is shown.

The court does not see the proper "cause" for Movant self-shortening the time period required by the Supreme Court in Federal Rule of Bankruptcy Procedure 2002(a)(2).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Sell Property filed by 1263 Investors, LLC, the Debtor in Possession, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF MOVANT REQUESTS THAT THE COURT SHORTEN NOTICE.

The proposed purchaser of the Property is John Marquez, and the terms of the sale are:

A. Purchase price of $410,000.00, all cash;

B. Initial deposit of $10,000.00;

C. Property sold in “As Is Condition;”

D. Escrow company is Old Republic Title Company;

E. Escrow is to close fourteen days after approval of short sale from both existing lenders;

F. Buyer pays the following:

1. Home inspection fee,

2. Pest report fee,

3. Roof report fee,

4. Half of the escrow fee,

5. Home warranty, and

6. C.L.V.E.;

G. Seller pays the following:

1. Natural hazard report fee including tax,

2. Environmental fees,

3. Smoke alarm and carbon monoxide device installation and water heater bracing (if required),

4. Half of the escrow fee,

5. Owner’s title insurance,

6. County transfer tax or fee, and

7. City transfer tax or fee (if applicable);

H. Buyer does not intend to occupy the Property as a primary residence;

I. Liquidated damages are equal to no more than 3% of the purchase price.

The Motion seeks to sell the Property free and clear of the liens of Nationstar Mortgage and Bank of New York Mellon (“Creditors”). The Bankruptcy Code provides for the sale of estate property free and clear of liens in the following specified circumstances,

> "(f) The trustee[, debtor in possession, or Chapter 13 debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."

11 U.S.C. § 363(f)(1)–(5).

For this Motion, Movant has established that the property is encumbered by secured claims in the amount of $717,221.12, which includes first and second priority secured claims held by Creditor in the amount of $597,221.12 by Nationstar Mortgage and $120,000.00 by Bank of New York Mellon. Movant alleges it will be able to acquire the consent of the senior secured claim prior to the hearing on the proposed sale. Movant had previously obtained the consent of the senior creditor to a "Short sale," but various clouds on title created by the prior owner of the Property required a quiet title action in Stanislaus County Superior Court, which was successfully concluded just prior to the filing of the current case. Pursuant to the court's order valuing secured claim, the second deed of trust holder is completely unsecured. *See* Dckt. 56.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it provides for the complete payoff of the secured claims of creditors Nationstar Mortgage and Bank of New York Mellon and will reduce Movant's liabilities in this bankruptcy case.

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

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

The Motion to Sell Property filed by 1263 Investors, LLC, the Debtor in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that 1263 Investors, LLC, the Debtor in Possession, is authorized to sell pursuant to 11 U.S.C. § 363(b) and (f)(2) to John Marquez or nominee ("Buyer"), the Property commonly known as 7318 Crane Road, Oakdale, California ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $410,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit 1, Dckt. 108, and as further provided in this Order.

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

C. The Property is sold free and clear of the lien of Nationstar Mortgage and Bank of New York Mellon, Creditors asserting secured claims, pursuant to 11 U.S.C. § 363(f)(2), with the lien of such creditor attaching to the proceeds. Debtor in Possession shall hold the sale proceeds; after payment of the closing costs, other secured claims, and amount provided in this order; pending further order of the court.

D. Debtor in Possession is authorized to execute any and all documents reasonably necessary to effectuate the sale.

2.	**10-94405-E-7** **JAD-2**	**STEPHEN HURST** **Jessica Dorn**	**CONTINUED MOTION TO AVOID LIEN OF DISCOVER BANK** **1-9-17 [24]**

APPEARANCE OF COUNSEL FOR STEPHEN HURST REQUIRED AT THE HEARING

TELEPHONIC APPEARANCE PERMITTED

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on January 9, 2017. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Discover Bank ("Creditor") against property of Stephen Hurst ("Debtor") commonly known as 12076 Combine Drive, Waterford, California ("Property").

FEBRUARY 9, 2017 HEARING

At the hearing, no appearance was made for Debtor to address the conflicting information in the Schedules and the Motion. Dckt. 33 The court continued the matter to 10:30 a.m. on February 23, 2017.

MOTION TO AVOID LIEN

A judgment was entered against Debtor in favor of Creditor in the amount of $3,619.39. An abstract of judgment was recorded with Stanislaus County on October 7, 2010, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $120,000.00 as of the date of the petition. The unavoidable consensual liens that total $281,852.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1.00 on Amended Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of 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).

Review of Amended Schedule A/B

On January 9, 2017, Debtor filed an Amended Schedule A/B. Dckt. 30. On it Debtor states under penalty of perjury with respect to the above property:

A. The Property is a single family home;

B. Only Debtor has an interest in the Property;

C. Debtor is the Fee Owner of the Property;

D. The entire Property has a value of $120,000.00; and

E. Debtor's interest in the Property has a value of $120,000.00.

If the court accepts this as true, then Debtor is stating that no one else in the world has any interest in this Property. However, in the related case of Carol Juarez, Ms. Juarez states that she is the only owner of the property. No. 09-93844; Amended Schedule A/B filed January 9, 2017, Dckt. 24. Ms. Juarez states under penalty of perjury on Amended Schedule A/B:

A. The Property is a single family home;

B. Only the Ms. Juarez has an interest in the Property;

C. Debtor is the Joint Tenant of the Property (which is inconsistent with stating above that only Ms. Juarez has an interest in the Property);

D. The entire Property has a value of $140,000.00; and

E. Debtor's interest in the Property has a value of $70,000.00.

Both Debtor and Ms. Juarez are represented by the same attorney (who is new counsel in representing each of them in reopening the bankruptcy case and filing this Motion to Avoid Lien) in their respective bankruptcy cases. At the hearing, counsel for Debtor explained **xxxxxxxxxxxxxxxxxxxxxxxxx**.

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 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 Discover Bank, California Superior Court for Stanislaus County Case No. 643898, recorded on October 7, 2010, Document No. 2010-0090421-00, with the Stanislaus County Recorder, against the real property commonly known as 12076 Combine Drive, Waterford, 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.

3.	**09-93844-E-7** **JAD-2**	**CAROL JUAREZ** **Jessica Dorn**	**CONTINUED MOTION TO AVOID LIEN OF CHASE BANK USA, N.A.** **1-9-17 [26]**

APPEARANCE OF COUNSEL FOR CAROL JUAREZ REQUIRED AT THE HEARING

TELEPHONIC APPEARANCE PERMITTED

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, parties requesting special notice, and Office of the United States Trustee on January 9, 2017. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Chase Bank USA, N.A. ("Creditor") against property of Carol Juarez ("Debtor") commonly known as 12076 Combine Drive, Waterford, California ("Property").

FEBRUARY 9, 2017 HEARING

At the hearing, no appearance was made for Debtor to address the conflicting information in the Schedules and the Motion. Dckt. 32 The court continued the matter to 10:30 a.m. on February 23, 2017.

MOTION TO AVOID LIEN

A judgment was entered against Debtor in favor of Creditor in the amount of $51,811.68. An abstract of judgment was recorded with Stanislaus County on August 26, 2009, that encumbers the Property.

Pursuant to Debtor's Amended Schedule A, the subject real property has an approximate value of $140,000.00 as of the date of the petition. The unavoidable consensual liens that total $270,000.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 703.140(b)(5) in the amount of $1.00 on Amended Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of 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).

Review of Amended Schedule A/B

On January 9, 2017, Debtor Juarez filed an Amended Schedule A/B. Dckt. 24. On it Debtor states under penalty of perjury with respect to the above property:

A. The Property is a single family home;

B. Only Debtor Juarez has an interest in the Property;

C. Debtor Juarez is the Joint Tenant of the Property (which is inconsistent with stating above that only Debtor Juarez has an interest in the Property);

D. The entire Property has a value of $140,000.00; and

E. Debtor Juarez's interest in the Property has a value of $70,000.00.

If the court accepts this as true, then Debtor Juarez is stating that she has only a one-half interest in the Property. On Original Schedules A and D, Debtor Juarez states that:

A. That the deed of trust recorded against the Property is for debt only of the joint co-owner of the Property, not Debtor Juarez. Schedule A, Dckt. 1 at 18.

B. On Schedule D, Debtor Juarez states that she has no secured debt. Schedule D, Dckt. 1 at 23.

However, on Amended Schedule D, Debtor Juarez now stats that she owes the $270,000.00 debt to "EMC 'A'" that is secured by the Property. Dckt. 24 at 12. Further, that she is the only person who owes this debt. *Id.* (Debtor checking the "Debtor 1 only" box for who owes the debt and not the "At least one of the debtors and another" box.)

This conflicts not only with Debtor Juarez's prior Schedules stated under penalty of perjury, but with Debtor Stephen Hurst who also states under penalty of perjury that he owns the Property in his bankruptcy case. No. 10-94405. On his Amended Schedule A/B filed January 9, 2017, (No. 10-94405, Dckt. 30) Debtor Hurst states under penalty of perjury:

A. The Property is a single family home;

B. Only Debtor has an interest in the Property;

C. Debtor is the Fee Owner of the Property;

D. The entire Property has a value of $120,000.00; and

E. Debtor's interest in the Property has a value of $120,000.00.

On Amended Schedule D, Debtor Hurst states under penalty of perjury that only he is obligated to pay the debt to "EMC 'A.'" *Id.*, Dckt. 30 at 12.

Both Debtor Juarez and Debtor Hurst are represented by the same attorney (who is new counsel in representing each of them in reopening the bankruptcy case and filing this Motion to Avoid Lien) in their respective bankruptcy cases. At the hearing, counsel for Debtor explained **xxxxxxxxxxxxxxxxxxxxxxxxx**.

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 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 Chase Bank USA, N.A., California Superior Court for Stanislaus County Case No. 631990, recorded on August 26, 2009, Document No. 2009-0084200-00, with the Stanislaus County Recorder, against the real property commonly known as 12076 Combine Drive, Waterford, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

4. **16-90913-E-7** **BEATRICE FLORES** **MOTION TO SELL**
MDM-2 **Pro Se** **1-19-17 [31]**

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 19, 2017. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits Michael McGranahan, the Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here, Movant proposes to sell the non-exempt equity in a 2010 Nissan Sentra, VIN ending in 4707 ("Vehicle"), for $2,500.00.

The proposed purchaser of the Vehicle is Beatrice Flores, the Debtor, and the Trustee reports that she has paid the requested $2,500.00 for the non-exempt equity in the Vehicle.

DISCUSSION

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because Debtor has paid fair value for the non-exempt equity in the Vehicle.

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

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

The Motion to Sell Property filed by Michael McGranahan, the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Michael McGranahan, the Trustee is authorized to sell pursuant to 11 U.S.C. § 363(b) to Beatrice Flores or nominee ("Buyer"), a 2010 Nissan Sentra, VIN ending in 4707 ("Vehicle"), on the following terms:

A. The Vehicle shall be sold to Buyer for $2,500.00, on the terms and conditions set forth in this Order.

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

5. **16-90736-E-11** **RONALD/SUSAN SUNDBURG** **AMENDED MOTION TO EMPLOY COOK CPA GROUP AS ACCOUNTANT(S)**
TBG-3 **Stephan Brown** **2-5-17 [66]**

Final Ruling: No appearance at the February 23, 2017 hearing is required.

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on January 12, 2017, with an amended motion and notice given changing the hearing date to February 23, 2017. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Employ has not been properly 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 Employ is denied without prejudice.

Ronald Sundburg and Susan Sundburg, Debtor in Possession, seek to employ Cook CPA Group ("Accountant"), pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor in Possession seeks the employment of an accountant to assist with tax-related accounting, as well as income tax preparation in compliance with federal and state authorities.

DISCUSSION

Debtor in Possession argues that Accountant's appointment and retention is necessary in performing the accounting services that will be required.

Evelyn Cook, a certified public accountant and owner of Cook CPA Group, testifies that she and the firm do not represent or hold any interest adverse to Debtor in Possession or to the Estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys and accountants. Evelyn Cook testifies that Accountant has agreed to provide tax-related accounting services at the following hourly rates:

A.	Evelyn Cook	$225.00
B.	Annamaria Dugan	$135.00
C.	Tax staff	$85.00
D.	Administrative staff	$75.00

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including accountants, to represent or assist the debtor in possession in carrying out the duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration of Evelyn Cook demonstrating that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Cook CPA Group as an accountant for the Chapter 11 estate on the terms and conditions stated in this ruling. The approval of hourly fees is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

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 Employ filed by the Chapter 11 Debtors in Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and the Chapter 11 Debtor in Possession is authorized to employ Cook CPA Group as an accountant for the Chapter 11 Debtor in Possession on the terms and conditions as set forth in this ruling, at the following hourly rates:
>
> | | | |
> |---|---|---|
> | A. | Evelyn Cook | $225.00 |
> | B. | Annamaria Dugan | $135.00 |
> | C. | Tax staff | $85.00 |
> | D. | Administrative staff | $75.00 |
>
> **IT IS FURTHER ORDERED** that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject

to the provisions of 11 U.S.C. § 328. Additionally, while hourly rates have been approved, the court's review of the services provided includes consideration of whether the services provided warranted the fees charged (an example of such would be if the CPA with a rate of $225 elected to do clerical work, but sought to be paid at the CPA rate).

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by Accountant in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.

6. **12-93049-E-11** **MARK/ANGELA GARCIA**
Mark Hannon

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
11-30-12 [1]

Debtors' Atty: Mark J. Hannon

Notes:
Continued from 1/16/17 to allow the U.S. Trustee time to file a motion for appointment of replacement plan administrators or conversion of this case.

The Status Conference is xxxxxxxxxxxxxxxxxxxxxx.

7. **12-93049-E-11** **MARK/ANGELA GARCIA** **CONTINUED MOTION FOR REPLACEMENT OF PLAN ADMINISTRATORS**
MJH-19 **Mark Hannon** **1-12-17 [903]**

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

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

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

Correct 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 12, 2017. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion for Replacement of Plan Administrators is xxxxxxxxxxxxx.

Mark Garcia and Angela Garcia ("Plan Administrators/Debtors") seek an order for replacement of themselves as plan administrators in this case. At a prior hearing, the court determined that the Plan Administrators/Debtors have breached their duties and must be replaced or the case converted to one under Chapter 7. Dckt. 896.

Plan Administrators/Debtors argue that conversion of the case would result in a dividend to unsecured claims of less than 8%, whereas the confirmed Chapter 11 plan of reorganization provides for a 50% dividend.

Continuance of Hearing to February 23, 2017

A review of the docket shows that the United States Trustee has filed a Motion for Order Converting or Dismissing this case pursuant to the court's prior determination that it should be converted or plan administrators replaced. Dckt. 907. The U.S. Trustee's motion is set for hearing on February 23, 2017. In the Motion, the U.S. Trustee does not expressly address the alternative of appointing a replacement plan administrator, reasons for why such may not be practical, and whether persons approached on taking such position rejected the opportunity.

The U.S. Trustee having filed a Motion to Convert or Dismiss this case, the court continues this matter to 10:30 a.m. on February 23, 2017, for the matters and arguments from each party in interest to be heard concurrently.

The court further requires the Debtors to submit the names of several (at least three) independent, third-party fiduciaries who are experienced in serving as receivers, trustees in bankruptcy, or other court (state or federal) appointed representatives who they propose to fulfill the role of plan administrator under the confirmed Chapter 11 plan rather than having the case converted to one under Chapter 7.

The court has made it clear, based upon the conduct of Debtor and the filing of declarations under penalty of perjury that contained false information, the court does not trust the Debtor, or persons working with Debtor, to serve in the fiduciary capacity of a Chapter 11 Plan Administrator.

For the court to have confidence in such a fiduciary, it has to be someone independent from Debtor. While the court prefers to allow Debtor the opportunity to perform the plan, the perjury committed precludes them doing it on their own.

The court has requested that the U.S. Trustee weigh-in on the potential selection of replacement Plan Administrator. While a Plan Administrator is not chosen by the U.S. Trustee, the participation of such independent third-party who has no financial stake in the outcome brings significant credibility to the proffered replacement Plan Administrators, even those advanced by the Debtor.

FEBRUARY 23, 2017 HEARING

Debtor has now filed a new Motion to Employ Kevin Lagorio as the Plan Administrator. Dckt. 916. That Motion conflicts with the present Motion filed by Debtor with this court. Such filing of conflicting motions only further demonstrates the lack of good faith by Debtor, and Debtor's counsel, in the prosecution of this case. (This is the same counsel who prepared the declaration in which Debtor Mark Garcia, servicing in his fiduciary capacity as the Plan Administrator, committed perjury in attempting to purchase property from the Plan Estate.)

The perjury committed by Mark Garcia is addressed in the Civil Minutes from the hearing on the Motion to Sell Property filed by the two Debtor Plan Administrators. That motion, the declaration in which the perjury was committed, and the active prosecution of the motion to try and have property of the Plan Estate sold to a limited liability company in which Mark Garcia is the managing member were all done with the assistance of Debtor's counsel. Civil Minutes, Dckt. 896.

The questionable conduct of Debtor and Debtor's counsel in connection with the prior proposed sale, in addition to the perjury, included Debtor waiving the right of the Plan Estate to receive a $30,000.00 carve out from the short sale. Rather, Debtor's and counsel's conduct created the appearance of having cut a side deal in which money was to be shuffled to the creditor rather than properly paid to the Plan Estate. Then, the prior motion sought to have most of what would have been the carve out paid to Debtor's counsel, bypassing the proper payment of his fees through the Chapter 11 Plan, to the detriment of all of the other persons holding allowed administrative expenses in this bankruptcy case.

The court will address the second conflicting motion separately. The court will not treat the second motion as mooting out this one, but concludes that the second motion is merely a redundant pleading that is part of this Motion.

Review of Sale of Property

The court has approved the sale of property as requested by Debtor, serving in their capacities as fiduciaries of the Plan Estate. November 17, 2016 Filed Order, Dckt. 894. The sale was approved, it having been (involuntarily) disclosed that the limited liability company buyer was one in which he was a managing member and a friend was the other member and putting up the money to purchase the property. The creditor agreeing to the short sale and the Debtor Plan Administrators agreed that from the sales proceeds the Plan Estate would receive a $25,000.00 carve-out, with such provision included in the order approving the sale.

Though the order approving the sale was entered in November 2016, no Report of Sale has been filed by the Debtor Plan Administrators. The court cannot identify a sale being reported in the post-confirmation monthly operating reports filed by the Debtor Plan Administrators.

Review of Motion

The court begins its consideration of the Motion for Replacement of Plan Administrators with the motion itself and the grounds stated with particularity (Fed. R. Bank. P. 9013) for such relief. The Motion states that the court has determined that the debtors need to be replaced as plan administrators or the case converted to one under Chapter 7. That is true, but neglects to state the grounds for the change – perjury having been committed by Debtor.

The Motion advises the parties in interest that through the continued operation of the Debtor's bail bond business, the Chapter 11 Plan is projected to return significantly more in payments to creditors than a liquidation of that business and the other assets of Debtor and the Plan Estate. This appears to be an accurate projection and consistent with the court's belief to date that it is better for both Debtor (notwithstanding their dalliances with perjury) and creditors of a good faith performance of the Plan rather than conversion. But that requires a good faith prosecution of the Plan and not double dealing and shady, unethical practices.

The court continued this hearing, instructing the Debtor Plan Administrators:

> "The court further requires the Debtors to submit the names of several (at least three) independent, third-party fiduciaries who are experienced in serving as receivers,

> trustees in bankruptcy, or other court (state or federal) appointed representatives who they propose to fulfill the role of plan administrator under the confirmed Chapter 11 plan rather than having the case converted to one under Chapter 7."

Civil Minutes, Dckt. 922 at 2.

On February 10, 2017, Debtor Plan Administrators and their counsel proposed three possible replacement Plan Administrators:

A. Kevin V. Lagorio, C.P.A.
B. Michael McGranahan, Chapter 7 Trustee
C. Gary Farrar, Chapter 7 Trustee

While the court recognizes the two Chapter 7 Trustee as having experience servicing a fiduciary, the court is not familiar with Kevin Lagorio. No background information is provided by Debtor Plan Administrators with this recommendation.

As the court has noted, Debtor Plan Administrator has filed a redundant motion in which they seek to have Kevin V. Lagorio, C.P.A. appointed as the replacement Plan Administrator. In substance, the second "motion" is merely a series of supplemental pleadings to this Motion, with the Debtor Plan Administrators and their counsel making their case for having Mr. Lagorio appointed. The court now considers the promotion of Mr. Lagorio by the Debtor Plan Administrators.

In the supplemental pleading titled motion (Dckt. 916) Debtor Plan Administrators assert the following:

> 2. The Replacement Plan Administrator will verify that plan payments according to the Plan are made, that accurate monthly and or quarterly reports are timely filed with the court and will appear at court hearings as needed. **Mr. Lagorio has the accounting and other capabilities to perform these services.**
>
> 3. Mr. Lagorio is qualified to perform these tasks and has had substantial experience in similar cases. **Plan Administrators have retained Mr. Lagorio to be Replacement Plan Administrator subject to Court approval.**
>
> 4. **Mr. Lagorio was retained by the Plan Administrators to prepare and file income tax returns**.
>
> 6. **Mr. Lagorio has a professional connection with the Plan Administrators** in preparing income tax returns **and has a 30 year professional relationship with the Attorney for the Plan Administrators**. Mr. Lagorio has no other connection with the Plan Administrators, or any other party in interest with their respective attorneys or accountants, or the United States Trustee or any person employed in the office of the United States Trustee, nor does he hold or represent any interest adverse to the Debtors' estate in connection with the matters for which Lagorio's employment is sought.

. . .

7. In the event that **the Court determines a conflict exists** with preparing the income tax returns of the current Plan Administrators and estate duties as Replacement Plan Administrator **then Mr. Lagorio would refrain from preparing future tax returns**.

Paragraphs 2, 3, 4, 5, and 7 of supplemental pleading. (Emphasis added)

The court has previously addressed with Debtor Plan Administrator and their counsel the inappropriateness of someone who has worked for Debtors in the past and is looking to have further work from them in the future of being presented as a purported independent fiduciary to serve as the replacement Plan Administrator. Additionally, in light of Debtor Plan Administrator's counsel's conduct and participation in the motion in which Debtor committed perjury, having a purported "independent" fiduciary who has 30 years of "professional" dealings, and apparently future "professional"dealings, Mr. Lagorio cannot be an independent fiduciary.

Additionally, Debtor Plan Administrators and their counsel continue to bend the concepts of "fiduciary" and say that should the court determines conflict exists, then "Mr. Lagorio would **refrain** from preparing tax returns." The declaration is pregnant with Mr. Lagorio's fiduciary incapacity based on his past and ongoing business dealings with Debtor Plan Administrator. Determination of a fiduciary is not a bargaining of determining how much of a breach of fiduciary duty will be tolerated. Further, the court is unsure what Mr. Logorio agreeing to "refrain" from preparing tax returns means. Will he continue to do all of the work and have a bookkeeper prepare the "tax returns." Does "refrain" mean he will not do it, or merely that he intends to try not to do it. In the Merriam-Webster dictionary, the word "refrain" is defined as follows:

> "to keep oneself from doing, feeling, or indulging in something and especially from following a passing impulse <refrained from having dessert>"

https://www.merriam-webster.com/dictionary/refrain. Fulfilling a fiduciary obligation is more than merely trying to not give in to an impulse or indulgence.

The court is convinced that Mr. Lagorio, even if an honest, upright person, has been disqualified from serving as the replacement Plan Administrator due to his past business dealings with the Debtor Plan Administrators, his (undefined) professional dealings with Debtor Plan Administrator's counsel, the equivocal "refrain" from possibly preparing the tax returns (and only if the court steps in to tell him not to), and his perfunctory declaration and the supplemental pleading by Debtor Plan Administrator. The declaration does not inspire the confidence of the court that Mr. Lagorio appreciates the obligations of a Plan Administrator as a fiduciary. Further, neither he, the Plan Administrator Debtors, nor counsel provide the court with any information that Mr. Lagorio is within the category of "third-party fiduciaries who are experienced in serving as receivers, trustees in bankruptcy, or other court (state or federal) appointed representatives" as required by the court.

At this juncture, Debtor Plan Administrators and their counsel further demonstrate that they do not intend to prosecute the Plan in good faith, and if given the chance, will take every opportunity to breach their duties in this case.

Comments of U.S. Fire Insurance Company

U.S. First Insurance Company ("USFI") has filed a response to the U.S. Trustee's motion to convert this case to one under Chapter 7. Response, Dckt. 927. USFI's comments are relevant to the court's inquiry into the present Motion. The Reply indicates that the sale of the property approved by the court in November 2016 has not been concluded by the fiduciary Debtor Plan Administrators. USFI expresses concern over what it describes as the "extraordinary delay in consummating that sale." *Id.*, p. 2:16-17.

The Reply continues that USFI continues to support the appointment of an independent (emphasis in reply) replacement plan administrator, but if not, believes the case should be converted rather than merely dismissed (which would then just turn the assets back over to Debtor). *Id.*, p. 2.

Comments of Ian MacDonald

Ian MacDonald, a judgment creditor (and former attorney for Debtor) states that he concurs with USFI for the appointment of an independent replacement Plan Administrator rather than conversion or dismissal of this case.

RULING

It is clear that Mr. Lagorio does not qualify as an independent person who can serves in the fiduciary capacity as the replacement Plan Administrator. Even accepting Mr. Lagorio as an honest, hardworking professional, Debtor Plan Administrator and their counsel have demonstrated conduct which causes the court to conclude that they would actively work to "bend" Mr. Lagorio to serve their own interests, even if it would result in Mr. Lagorio breaching his duties as Plan Administrator.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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 Order of Replacement of Plan Administrators 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 Order of Replacement of Plan Administrators is xxxxxxxxxxxxxxxxxx.

8. **12-93049-E-11** **MARK/ANGELA GARCIA** **MOTION TO EMPLOY KEVIN V. LAGORIO AS REPLACEMENT PLAN ADMINISTRATOR**
MJH-20 **Mark Hannon** **1-20-17 [916]**

Final Ruling: No appearance at the February 23, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 20, 2017. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion to Employ is denied without prejudice, the pleadings being supplemental pleadings to the pending Motion filed by the Debtor Plan Administrators (MJH-19).

Plan Administrators, Mark Anthony Garcia and Angela Marie Garcia, have filed a pleading seeking to have Kevin L. Lagorio, C.P.A. appointed as the replacement Plan Administrator, the court having determined that the Debtor Plan Administrators have breached their fiduciary duties and are no longer able to serve as plan administrators. This is not a separate motion, but constitute supplemental pleadings to the Debtor Plan Administrators' Motion to appoint a replacement plan administrators. DCN: MJH-19; Dckt. 903. If treated as a separate motion, this would be an attempt by Debtor Plan Administrator and their counsel to commence multiple contested matters on the same claim, which would have the effect of fostering confusion and possibly lead to conflicting orders from this court.

Giving the Debtor Plan Administrators and their counsel the benefit of the doubt, the court will construe the pleadings filed in connection with this purported separate "motion" as supplemental pleadings in support of their earlier motion, MJH-19, which they are actively prosecuting in this court. The court considers these supplemental pleadings in connection with the prior motion.

This pleading, to the extent it is a motion, is denied.

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

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

The Motion to Employ filed by the Plan Administrators 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 Employ is denied, without prejudice to the prior filed motion, DCN: MJH-19. The court considers the document titled "motion" (Dckt. 916) and the pleadings filed in support thereof, as supplemental pleadings to MJH-19, which supplemental pleadings.

9. **12-93049-E-11** **MARK/ANGELA GARCIA** **MOTION TO CONVERT CASE FROM CHAPTER 11 TO CHAPTER 7, MOTION TO DISMISS CASE**
UST-4 **Mark Hannon** **1-13-17 [907]**

No Tentative Ruling: The Motion to Convert the Bankruptcy Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on January 13, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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

The Motion to Convert the Chapter 11 Bankruptcy Case to one under Chapter 7 is ~~[granted/denied] [and the case is converted to one under Chapter 7]~~.

This Motion to Dismiss the Chapter 11 bankruptcy case of Mark Anthony Garcia and Angela Marie Garcia, "Debtor" has been filed by Tracey Hope Davis, "Movant," the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds.

A. Debtor Plan Administrator Mark Garcia falsely testified under penalty of perjury in this bankruptcy case that the sale of property proposed by the Debtor Plan Administrators was to an entity that the Plan Administrators did not have any interest.

B. The statement under penalty of perjury was false in light of the records of the California Secretary of State showing that Debtor Plan Administrator was a member/owner of the proposed purchaser.

C. The conduct of Debtor Plan Administrator constitutes cause to convert this case to one under Chapter 7.

D. Conversion, rather than dismissal, is in the best interests of the bankruptcy estate and creditors because the estate has a right to a $25,000.00 carve out from the sale of property that the Debtor Plan Administrators (the fiduciaries) obtained authorization to sell in November 2016.

Motion, Dckt. 907.

The U.S. Trustee provides the declarations of Tina Spyksma (paralegal specialist in the Office of the U.S. Trustee), Dckt. 911, and Jason Blumberg, an attorney in the Office of the U.S. Trustee, Dckt. 912.

Ms. Spyksma testifies as to obtaining documents from the California Secretary of State which document that Mark Garcia is a member and manager of Interface Investment Capital, LLC, the proposed purchaser of real property from the Plan Estate. Mark Garcia, one of the Debtor Plan Administrator testified under penalty of perjury in his declaration in support of the sale that neither he nor his Co-Debtor Plan Administrator had any interest in Interface Investment Capital, LLC. See Exhibit 1 and 2, Dckt. 910.

Based on the false testimony and self dealing in his fiduciary capacity as Debtor Plan Administrator, the U.S. Trustee seeks conversion of this case to one under Chapter 7.

Alternative of Replacement Plan Administrator

Subsequent to the filing of the Motion to Convert this case, the court conducted a hearing on a motion by Debtor Plan Administrator to have a replacement plan administrator appointment. While the court did not find the proposed representative, the Debtor Plan Administrators' past and current CPA, the court continued the hearing instructing the Debtor Plan Administrators to proposed three experienced, independent persons who could serve as a plan administrator fiduciary.

The court continued the hearing on the motion to appoint a replacement plan administrator to February 23, 2017, to be heard in conjunction with this Motion.

Response From Debtor Plan Administrator

Debtor Plan Administrator has not filed an opposition to this Motion to Convert the case. However, Debtor Plan Administrator has continued in the prosecution of the motion to appoint a replacement plan administrator. While not opposing this Motion directly, the court infers that Debtor Plan Administrator contends that continuing under the Plan with an independent fiduciary serving as the plan administrator is preferable to conversion of this case.

Responses from Creditors

United States Fire Insurance ("USFI") and Ian MacDonald, both creditors, have filed Responses to the U.S. Trustee's Motion. Dckts. 927 and 931, respectively. These two creditor concur that the appointment of an independent (emphasis in original Response filed by USFI) fiduciary to serve as the replacement plan administrator is preferable to conversion of this case. Additionally, that conversion of this case is preferable to dismissal of the case.

FEBRUARY 23, 2017 HEARING
AND RULING

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

> At the February 23, 2017 hearing, xxxxxxxxxxxxxxxxxxxxxxxxx.

Cause ~~exists/does not exist~~ to ~~convert/dismiss~~ this case pursuant to 11 U.S.C. § 1112(b).

The motion is ~~granted/denied and the case is dismissed/converted to a case under Chapter 7~~].

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 11 case filed by the United States 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 ~~[granted/denied] [and the case is dismissed/converted to a under Chapter 7 of Title 11, United States Code]~~.

10. **17-90063-E-7** **JAMES FRITZ** **MOTION TO COMPEL ABANDONMENT**
SSA-1 **Steven Altman** **2-8-17 [11]**

Final Ruling: No appearance at the February 23, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 8, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Compel Abandonment was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, Creditors, the 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.

The hearing on the Motion to Compel Abandonment is continued to 10:30 a.m. on April 13, 2017.

The Motion filed by James Fritz ("Debtor") requests the court to order the Trustee to abandon property commonly known as 2321 Brockway Drive, Modesto, California ("Property"). The Property is encumbered by the lien of Di-Tech, securing a first deed of trust of $73,046.00, and Wells Fargo Bank, securing a second deed of trust of $46,528.00. Debtor also claimed a homestead exemption of $175,000.00, which combined with the deeds of trust totals an amount of $294,574.00. The Declaration of James Fritz has been filed in support of the Motion and values the Property at $240,000.00.

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

STIPULATION

Debtor and the Chapter 7 Trustee filed a Stipulation on February 14, 2017, which was granted on the same day. Dckts. 17 & 22. The parties have stipulated that the deadline to object to the Motion is March 30, 2017. Accordingly, the court continues the hearing on the Motion until after the objection deadline.

11. **14-91565-E-7** **RICHARD SINCLAIR** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH DEUTSCHE BANK NATIONAL TRUST COMPANY, OCWEN LOAN SERVICING, LLC, WESTERN PROGRESSIVE TRUSTEE, LLC**
HSM-11 **Pro Se** **2-1-17 [545]**

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 1, 2017. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(3), 21 day notice.)

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

The Motion For Approval of Compromise is granted.

Gary Farrar, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2003-NC5, Mortgage Pass-Through Certificates 2003-NC5 (a.k.a. Deutsche Bank National Trust Company, as Trustee for the Pooling and Servicing Agreement Dated as of May 1, 2003 Morgan Stanley ABS Capital I Inc. Trust 2003-NC5) (the "Investor"), Ocwen Loan Servicing,

LLC ("Ocwen"), and Western Progressive Trustee, LLC dba Western Progressive, LLC ("Western Progressive") (collectively "Defendants")("Settlor").

This settlement arises out of claims that are property of the bankruptcy estate which have been asserted by Richard Sinclair, the Debtor, and his wife, Deborah Sinclair. (Debtor represents to the court that he and his wife have a legal separation which included the pre-petition division of assets, but no evidence of a final dissolution decree has been provided to this court).

Debtor and Mrs. Sinclair commenced suit against Defendants in California Superior Court, County of Stanislaus, Case No. 683081. Judgment was entered for Defendants and Debtor and Mrs. Sinclair filed an appeal of that adverse judgment. Fifth District Court of Appeal, No. F070301.

Debtor listed the lawsuit in his Statement of Financial Affairs (Dckt. 45 at 5) and listed Deutsche Bank National Association as a creditor on Schedule D (Dckt. 42 at 7, not identifying any collateral), the underlying claims against Defendant were not listed on Schedule B (*Id.* at 2-4). The Superior Court for the County of Stanislaus reports that the state court complaint was filed on February 7, 2013, which was twenty-one months prior to the November 24, 2014 commencement of this bankruptcy case by Debtor. http://appsd.caeb.circ9.dcn/ecfcasequery/MainContent.aspx?caseID=559643.

Judgment was entered for Defendants in the trial court based on the demurrer to the second amended complaint filed by Debtor and Mrs. Sinclair being sustained and the state court complaint being dismissed with prejudice. The dismissal with prejudice was the appeal taken by Debtor and Mrs. Sinclair to the California Fifth District Court of Appeal.

A copy of the Opening Appeal Brief filed by Debtor is filed as Exhibit C in support of the Motion. Dckt. 550 at 43. This Opening Brief identifies only Richard Sinclair, the Debtor, as the Appellant. It is signed only by Richard Sinclair, the Debtor, as the Appellant. The Opening Brief is dated November 21, 2015 by Debtor.

Deutsche Bank National Trust Company, as Trustee, has filed a proof of claim for $682,308.59, of which it asserts $273,633.28 would be unsecured. Proof of Claim No. 25, Exhibit 1; Dckt. 550.

Under the Terms of the proposed Settlement:

A. Defendants shall pay $13,500.00 to the bankruptcy estate within five days of the entry of the order approving the settlement;

B. Upon approval of the settlement, the Chapter 7 Trustee shall dismiss the appeal with prejudice;

C. The Trustee and the Bankruptcy Estate shall not contest, oppose, or become involved in any actions relating to the claims of Mrs. Sinclair asserted in the trial and appellate court actions;

D. Each party to the settlement shall bear their own costs and attorneys' fees;

E. The Chapter 7 Trustee, on behalf of the Bankruptcy Estate, shall grant the Defendant, and each of them, and their respective identified representatives and agents of claims (defined term in Settlement Agreement)

1. "which were or could have been raised in, arise out of, relate to, or in any way, directly or indirectly, involve the Actions, the Property, the Note, the Deed of Trust, or the Loan, including the Estate's interests in any right of rescission under the federal Truth in Lending Act ("TILA") and any other claims it may have, whether known or unknown, fixed or contingent, under TILA, the Home Ownership and Equity Protection Act ("HOEPA"), the Real Estate Settlement and Procedures Act ("RESPA"), the Fair Debt Collection Practices Act ("FDCPA"), the Equal Credit Opportunity Act ("ECOA"), the Fair Credit Reporting Act ("FCRA"), or their implementing regulations, or any corresponding state law statute or provision concerning the Note, the Deed of Trust, the Loan, and/or the Actions. It is the intention and effect of this release to discharge all Claims the Estate may have, known and unknown, in the Actions."

F. The release by the Bankruptcy Estate includes claims known and unknown, with a waiver of California Civil Code § 1542 rights.

The Trustee's analysis of the *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988), and *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986) factors for consideration of approval of a proposed settlement includes the following:

1. The probability of success in the litigation.

The Trustee asserts that, for the Bankruptcy Estate, the probability of success in prosecuting the Appeal taken by Debtor is low. The Trustee's analysis is that Debtor's arguments are grounded in a "minor" typographic error which Debtor purports abrogated Defendant's rights to conduct a non-judicial foreclosure sale. In reviewing the Proof of Claim filed by Deutsche Bank National Trust Company, as Trustee, the bankruptcy Trustee notes that the defaults on the loan are in excess of $200,000.00 and even Debtor on his Schedules states that there is no equity in the property that secures the debt for the estate or Debtor. The Trustee's conclusion is that the "value" of the Appeal existed in frustrating and delaying the Defendants in foreclosing on the property.

2. Any difficulties expected in collection.

The real property that secures the obligation is not property of the bankruptcy estate (Debtor not identifying the collateral on Schedule D). For the Estate, there is little, if any, economic value to continuing the litigation and little likelihood of any economic recovery. However, under the proposed Settlement the Bankruptcy Estate obtains a modest monetary recovery and stops the financial losses and expenses of continuing with the appellate litigation.

3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it.

The Trustee concludes that the estate's rights and interests are the subject of complex, highly contested litigation for which there is little advantage. While Debtor had "value" in pursuing the litigation in property in which he no longer asserted an interest to delay the foreclosure, there is no corresponding "delay value" for the Bankruptcy Estate. The conduct of Defendants and the further investigation by the Trustee yields his conclusion that Defendants will continue in their active defense, not withdrawing merely because the Trustee is now in charge.

4. The paramount interest of the creditors and a proper deference to their reasonable views.

For creditors, the settlement allows for the administration of this asset, a modest recovery for the estate, stop further cost and expense relating to property which is not property of the bankruptcy estate, and bring to an end this litigation.

Settlement as a Sale of Rights

To the extent that the Settlement is viewed as a sale of rights by the Bankruptcy Estate, the Trustee asserts that for the factors stated above, obtaining payment of $13,500.00 is a fair and proper sales price for such assets.

The claims and disputes to be resolved by the proposed settlement are

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates the four factors reviewed above.

The court concurs with the analysis of the Trustee. After having battled through three iterations of the trial court complaints, Debtor and Mrs. Sinclair finally were held to lose. For the granting of a demurrer (similar to a Fed. R. Civ. P. 12(b) motion) and entering judgment for Defendants, the trial court had to conclude not only that the complaint as amended failed to state a claim for which relief could be granted, but also that Debtor and Mrs. Sinclair were not able to further amend the complaint to state a claim. Discussion of when dismissal without leave to amend is proper is found in the Witkin California Procedure, Fifth Edition, in the following sections (quoted in pertinent part):

[§ 991] No Good Cause of Action

> Leave to amend should be denied where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result. . . .

> The same is true where it is clear that the plaintiff cannot state a cause of action within the subject matter jurisdiction of the court. . . .
>
> The burden of proving that there is a reasonable possibility the defect can be cured by amendment is on the plaintiff. . .
>
> [multiple internal citations omitted]

The general standards for when a trial court sustains a demurrer without leave to amend is discussed in *Buller v. Sutter Health*, 160 Cal. App. 4th 981, 992 (1st DCA 2008), cited in § 991 above:

> "The demurrer should be sustained and leave to amend denied only "where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 946, p. 403; accord, *Kilgore v. Younger* (1982) 30 Cal.3d 770, 781.)
>
> To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1388; accord, *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) This showing may be made either in the trial court or on appeal. (*Careau & Co., supra*, at p. 1386.)"

[§ 992] Unsuccessful Attempts To State Cause.

> A general demurrer may be sustained without leave to amend where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action. . . .
>
> The judicial task is described in *Hills Trans. Co. v. Southwest Forest Industries* (1968) 266 C.A.2d 702, 72 C.R. 441: 'How does a court, confronted with a defective pleading of nondescript appearance and uncertain ancestry, determine whether the pleading is susceptible of future domestication into the recognizable flock of justiciable causes of action? In final analysis, the court is required to look at the existing pleading and hazard its best judgment whether behind the words of the pleading anything of legal substance lies, whether on further revision the pleading can honestly state a cause of action.' (266 C.A.2d 709.) The court found its answer on an examination of the superseded pleading containing destructive facts suppressed in the amended version. (266 C.A.2d 709; see infra, § 1190.)
>
> Another technique was approved in *Mobaldi v. Regents of Univ. of Calif.* (1976) 55 C.A.3d 573, 127 C.R. 720. Plaintiffs filed a complaint against defendant doctor and others for damages for emotional distress, under the doctrine of *Dillon v. Legg* (1968) 68 C.2d 728, 441 P.2d 912, 6Summary

> (10th), Torts, § 1008. The trial judge sustained a demurrer, but then, to determine whether the complaint could be amended to state a cause of action, he allowed the parties to file declarations of fact. He then sustained the demurrer without leave to amend. On appeal from the judgment of dismissal, the appellate court approved this practice, set forth the facts stated in plaintiffs' declaration to determine whether refusal to allow amendment was an abuse of discretion, and reversed the judgment. (55 C.A.3d 577, 585.)
>
> [multiple internal citations omitted]

[§ 993] Unsuccessful Attempts To Correct Defects of Form.

> Where the plaintiff has had ample opportunity to overcome defects of form, raised by special demurrer, and has failed to do so, no clear rule can be discerned.
>
> Some cases take the position that after a third or fourth time even a defect of form might justify the exercise of discretion to refuse further leave to amend. *Billesbach v. Larkey* (1911) 161 C. 649, 120 P. 31, is an example. Conceding that the complaint was sufficient to withstand a general demurrer, and that the defect was one of form alone, the court nevertheless held it uncertain in failing to inform defendant of the particular act of negligence charged against him. (See *supra*, § 600, for criticism of holding on this point.) Accordingly, the trial judge's order sustaining the demurrer to the third amended complaint was upheld, with the remark: "The plaintiff does not have a positive right to amend his pleading after a demurrer has been sustained to it. His leave to amend afterward is always of grace, not of right." (161 C. 653.) . . .
>
> However, in *Wennerholm v. Stanford University School of Medicine* (1942) 20 C.2d 713, 718, 128 P.2d 522, judgment on demurrer, after denial of leave to amend a fifth amended complaint, was reversed. Under this holding, there is no fixed limit on the number of tries a plaintiff may have to correct defects of form
>
> [multiple internal citations omitted]

Debtor had multiple opportunities to format and reformat the state court complaint. After three opportunities, the state trial court concluded that the second amended complaint was dismissed without leave to amend and judgment was to be entered for the Defendants.

From the Motion and supporting pleadings, the Trustee has presented the court with proper grounds for approving the proposed Settlement.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to the Movant to purchase or prosecute the property, claims, or interests of the estate to present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Gary Farrar, the 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 to Approve Compromise between Movant and Deutsche Bank National Trust Company, Ocwen Loan Servicing, LLC, and Western Progressive Trustee, LLC ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit B in support of the Motion(Docket Number 550).

12. **16-90966-E-7** **RICKY/SHARON SEVERE** **MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.**
MLP-1 **Martha Lynn Passalaqua** **2-7-17 [14]**

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, Creditor, creditors, and Office of the United States Trustee on February 7, 2017. By the court's calculation, 16 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 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 Capital One Bank (USA), N.A. ("Creditor") against property of Ricky Severe and Sharon Severe ("Debtor") commonly known as 3408 Creek Bed Court, Modesto, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $4,368.25. An abstract of judgment was recorded with Stanislaus County on May 13, 2013, that encumbers the Property.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $315,073.00 as of the date of the petition. The unavoidable consensual lien that totals $199,217.79 as of the commencement of this case is stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $115,855.21 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of 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 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 Capital One Bank (USA), N.A., California Superior Court for Stanislaus County Case No. 678277, recorded on May 13, 2013, Document No. 2013-0041171-00, with the Stanislaus County Recorder, against the real property commonly known as 3408 Creek Bed 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. **16-90867-E-7** **JOHNNY/ROSITA ROSA** **MOTION TO COMPEL ABANDONMENT**
BSH-1 **Brian Haddix** **1-23-17 [29]**

Final Ruling: No appearance at the February 23, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and parties requesting special notice on January 21, 2017. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Compel Abandonment 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 Abandonment is granted.

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

The Motion filed by Johnny Rosa and Rosita Rosa ("Debtor") requests the court to order the Trustee to abandon the following, collectively defined as Assets:

A. Real property commonly known as 5112 Passalaqua Lane, Salida, California;

B. 2013 Toyota Prius;

C. 1972 Chevrolet Cheyenne;

D. 1971 Chevrolet C-10;

E. 1963 Chevrolet Nova II;

F. 2000 Volvo V70XC;

G. 2001 Volkswagen Jetta;

H. 2012 Harley Davidson Road Glide;

I. 1983 Chevrolet Winnebago;

J. 1993 Kawasaki 75SX Jet Ski;

K. Household Goods and Furnishings;

L. Electronics: TV Set, DVRs, DVD/Blu-Ray Players, Consoles & Games, Computers, Tablets/Smart Phones, Home Phone, Printers & Scanners, iPod & Music Collection, Camera & Camcorders;

M. Sport & Hobby Equipment;

N. Clothes;

O. Jewelry;

P. Cash;

Q. Checking Account: Bank of America (9491);

R. Savings Account: Bank of America (0363);

S. Credit Union: County Credit Union (59-00);

T. Checking Account: Bank of the West (5044);

U. Savings Account: Bank of the West (4930);

V. Checking Account: Bank of the West (5967);

W. Savings Account: Bank of the West (6295);

X. ITF: Bank of America ITF Minor Child (5536);

Y. Retirement: Capital One Investing IRA (1408);

Z. Retirement: 401(k) (through ICMA-RC);

AA. Retirement: 401(k) (through ICMA-RC); and

BB. Family Support.

The 2013 Toyota Prius and the 2012 Harley Davidson Road Glide are encumbered by liens that exceed the values of the vehicles, and the remaining assets are claimed as exempt on Schedule C. The Declaration of Johnny Rosa and Rosita Rosa has been filed in support of the Motion and states that the Assets "scheduled in Schedules A and B that [Debtor] seek[s] to have abandoned are exempt, of inconsequential value, or burdensome to the estate to administer."

The court finds that the $21, 746.00 encumbrance on the 2013 Toyota Prius exceeds its scheduled value of $11,569.00, and the $14,989.00 encumbrance on the 2012 Harley Davidson Road Glide exceeds its $13,275.00 scheduled value. All the other assets are claimed as exempt under Schedule C. There are negative financial consequences to the Estate caused by retaining the Assets. The court determines that the assets are of inconsequential value and benefit to the Estate and orders the Trustee to abandon the property.

CHAMBERS PREPARED ORDER

The court shall issue an Order (not a minute order) substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Compel Abandonment filed by Johnny Rosa and Rosita Rosa ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Compel Abandonment is granted, and the following assets that are listed on Schedule A and B by Debtor are abandoned by Michael McGranahan, the Chapter 7 Trustee, to Johnny Rosa and Rosita Rosa by this order, with no further act of the Trustee required:
>
> A. Real property commonly known as 5112 Passalaqua Lane, Salida, California;
>
> B. 2013 Toyota Prius;
>
> C. 1972 Chevrolet Cheyenne;
>
> D. 1971 Chevrolet C-10;
>
> E. 1963 Chevrolet Nova II;
>
> F. 2000 Volvo V70XC;
>
> G. 2001 Volkswagen Jetta;
>
> H. 2012 Harley Davidson Road Glide;

I. 1983 Chevrolet Winnebago;

J. 1993 Kawasaki 75SX Jet Ski;

K. Household Goods and Furnishings;

L. Electronics: TV Set, DVRs, DVD/Blu-Ray Players, Consoles & Games, Computers, Tablets/Smart Phones, Home Phone, Printers & Scanners, iPod & Music Collection, Camera & Camcorders;

M. Sport & Hobby Equipment;

N. Clothes;

O. Jewelry;

P. Cash of $25.00;

Q. Checking Account: Bank of America (9491);

R. Savings Account: Bank of America (0363);

S. Credit Union: County Credit Union (59-00);

T. Checking Account: Bank of the West (5044);

U. Savings Account: Bank of the West (4930);

V. Checking Account: Bank of the West (5967);

W. Savings Account: Bank of the West (6295);

X. ITF: Bank of America ITF Minor Child (5536);

Y. Retirement: Capital One Investing IRA (1408);

Z. Retirement: 401(k) (through ICMA-RC);

AA. Retirement: 401(k) (through ICMA-RC); and

BB. Family Support.

14. **16-90969-E-7** **JEREMY PANNELL** **CONTINUED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS**
RDG-2 **Pro Se** **12-19-16 [14]**

Final Ruling: No appearance at the February 23, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on December 19, 2016. By the court's calculation, 66 days' notice was provided. 28 days' notice is required.

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

The Objection to Claimed Exemptions is overruled as moot, Debtor having amended Schedule C in apparent recognition of this Objection.

The former Chapter 13 Trustee objects to Jeremy Pannell's ("Debtor") claimed exemption for household goods under California Code of Civil Procedure 703.140(b)(3) because Debtor has claimed the full amount of fair market value without specifying actual dollar amounts. Without the amounts, the Trustee is not able to determine whether the exemption falls within statutory limits.

CONVERSION FROM CHAPTER 13 TO CHAPTER 7

On January 23, 2017, Debtor voluntarily converted his Chapter 13 case to one under Chapter 7. Dckt. 23.

FEBRUARY 7, 2017 HEARING

At the hearing, the court noted that the case had been converted and transferred to Department E. Dckt. 39. The court continued the hearing on the matter to 10:30 a.m. on February 23, 2017, to be heard on the Department E calendar.

DISCUSSION

While the case has been converted from Chapter 13 to Chapter 7, and a new trustee is involved in this case, the court does not dismiss this Objection as moot because the prior Chapter 13 Trustee has properly raised the issue.

However, in apparent recognition of (or education by) the Objection, Debtor has amended Schedule C to state specific items and specific exemption amounts. Amended Schedule C, Dckt. 24.

The court overrules without prejudice the Objection as having been rendered moot by the Amended Schedule C.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claimed Exemptions filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Objection is overruled without prejudice, Debtor having filed an Amended Schedule C (Dckt. 24) and not claiming the exemptions in the manner upon which the Trustee objected.

15. 16-90386-E-7 RUBEN/SOFIA AMAYA
HCS-3 Patrick Greenwell

MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH RUBEN RODRIGUEZ AMAYA AND SOFIA AMAYA
2-1-17 [70]

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.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on February 1, 2017. By the court's calculation, 22 days' notice was provided. 21 days' notice is required. Fed. R. Bankr. P. 2002(a)(3) (twenty-one-day notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and 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 Compromise is granted.

Gary Farrar, the Chapter 7 Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Ruben Amaya and Sofia Amaya ("Settlor"). The claims and disputes to be resolved by the proposed settlement are related to the real property listed on Settlor's Schedule C about a second home on that property that Settlor failed to disclose.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 74):

A. Settlor agrees not to seek review, by appeal or otherwise, of the order.

B. Settlor agrees to deliver payment to the Trustee of $45,000.00 (the "Settlement Funds") so that the Trustee receives the Settlement Funds on or before March 31, 2017.

C. Settlor agrees not to amend the exemptions.

D. Settlor agrees to sign and deliver to the Trustee's counsel a Stipulation for Turnover.

E. In exchange, the Trustee agrees not to administer the Real Property. However, if the Settlor fails to timely comply with the Settlement terms, Settlor must vacate the property and deliver the keys to the Trustee.

F. The Settlor will also cooperate with the Trustee's efforts to sell the property.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Probability of Success

Movant has not really addressed this factor. Movant argues that if there were no settlement, then Settlor could try to convert this case to Chapter 13 again, even though such motion has been denied before by the court. The Trustee states that there is no certainty that such a conversion request would be granted.

Difficulties in Collection

Movant states that the settlement resolves disputed issues with minimal expense and should allow the Trustee to move towards distribution to creditors. If Settlor breaches the Settlement, the Trustee should be able to obtain possession of the Real Property and sell it with less resistance than otherwise might

be the case. However, it would take time to sell the Real Property and there is no guaranty it would sell for a given price, or at all.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that litigation would result in significant costs. Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a greater recovery for the Estate than if the case proceeds to trial, but without the costs of litigation.

Paramount Interest of Creditors

Movant argues that settlement is in the paramount interests of creditors because the compromise provides prompt payment to creditors that could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the Settlement allows the estate to recover $45,000.00 quickly and without further litigation or expense. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Gary Farrar, the Chapter 7 Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Ruben Amaya and Sofia Amaya ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 74).