UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 9, 2015 at 10:00 a.m.

No written opposition has been filed to the following motions set for argument on this calendar:

2, 5, 6, 8, 12, 13, 15

When Judge McManus convenes court, he will ask whether anyone wishes to oppose one of these motions. If you wish to oppose a motion, tell Judge McManus there is opposition. Please do not identify yourself or explain the nature of your opposition. If there is opposition, the motion will remain on calendar and Judge McManus will hear from you when he calls the motion for argument.

If there is no opposition, the moving party should inform Judge McManus if it declines to accept the tentative ruling. Do not make your appearance or explain why you do not accept the ruling. If you do not accept the ruling, Judge McManus will hear from you when he calls the motion for argument.

If no one indicates they oppose the motion and if the moving party does not reject the tentative ruling, that ruling will become the final ruling. The motion will not be called for argument and the parties are free to leave (unless they have other matters on the calendar).

MOTIONS ARE ARRANGED ON THIS CALENDAR IN TWO SEPARATE SECTIONS. A CASE MAY HAVE A MOTION IN EITHER OR BOTH SECTIONS. **THE FIRST SECTION INCLUDES ALL MOTIONS THAT WILL BE RESOLVED WITH A HEARING. A TENTATIVE RULING IS GIVEN FOR EACH MOTION. THE SECOND SECTION INCLUDES ALL MOTIONS THAT HAVE BEEN RESOLVED BY THE COURT WITHOUT A HEARING. A FINAL RULING IS GIVEN FOR EACH MOTION. WITHIN EACH SECTION, CASES ARE ORGANIZED BY THE LAST TWO DIGITS OF THE CASE NUMBER.**

ITEMS WITH TENTATIVE RULINGS: IF A CALENDAR ITEM HAS BEEN SET FOR HEARING BY THE COURT PURSUANT TO AN ORDER TO SHOW CAUSE OR AN ORDER SHORTENING TIME, OR BY A PARTY PURSUANT TO LOCAL BANKRUPTCY RULE 3007-1(c)(1) OR LOCAL BANKRUPTCY RULE 9014-1(f)(1), AND IF ALL PARTIES AGREE WITH THE TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS AND CONCLUSIONS.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING BY A PARTY PURSUANT TO LOCAL BANKRUPTCY RULE 3007-1(c)(2) OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED

TO DEVELOP THE WRITTEN RECORD FURTHER.

IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE ON APRIL 6, 2015 AT 10:00 A.M. OPPOSITION MUST BE FILED AND SERVED BY MARCH 23, 2015, AND ANY REPLY MUST BE FILED AND SERVED BY MARCH 29, 2015. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THESE DATES.

ITEMS WITH FINAL RULINGS: THERE WILL BE NO HEARING ON THE ITEMS WITH FINAL RULINGS. INSTEAD, EACH OF THESE ITEMS HAS BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING ALSO WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

ORDERS: UNLESS THE COURT ANNOUNCES THAT IT WILL PREPARE AN ORDER, THE PREVAILING PARTY SHALL LODGE A PROPOSED ORDER WITHIN 14 DAYS OF THE HEARING.

MATTERS FOR ARGUMENT

1. 15-20405-A-7 TONYA SANFORD — ORDER TO SHOW CAUSE 2-9-15 [15]

Tentative Ruling: The petition will be dismissed.

The debtor did not pay its petition filing fee and the court denied the debtor's motion for waiver of the filing fee on January 23, 2015 (Docket 8). The filing fee of $335 was due on January 26, 2015 and has not been paid. See Docket 8.

2. 15-20605-A-7 JUAN/OFELIA GARCIA — MOTION FOR RELIEF FROM AUTOMATIC STAY 2-18-15 [19]
MRG-1
RTED IRVINE, L.L.C. VS.

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The movant, RTED Irvine, LLC, seeks relief from the automatic stay as to real property in Elk Grove, California. The movant purchased the property at a pre-petition foreclosure sale, on January 7, 2015. The movant's deed was recorded on January 8, 2015. On January 13, 2015, the movant served the debtors with a three-day notice to quit. On January 20, 2015, the movant commenced an unlawful detainer proceeding. The debtors were served with the eviction complaint on January 24, 2015. The debtors filed the instant petition on January 28, 2015.

This is a liquidation proceeding and the debtor has no interest in the property as the movant purchased it pre-petition. This is cause for the granting of relief from stay. Accordingly, the motion will be granted for cause pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to proceed with its unlawful detainer action against the debtor in state court. The parties are to return to state court in order to determine who is entitled to possession of the property. If the movant prevails, no monetary claim may be collected from the debtors. The movant is limited to recovering possession of the property if such is permitted by the state court.

No fees and costs are awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived.

3. 09-43509-A-7 RENOLFO/SOCORRO NAVARRO — MOTION TO AVOID JUDICIAL LIEN
BMV-1 — 2-5-15 [23]
VS. LYON FINANCIAL SERVICES, INC.

Tentative Ruling: The motion will be granted in part and denied in part.

The debtors request the court to reopen the case so they can do three things: list an omitted creditor in their schedules, Lyon Financial Services, Inc.; claim an exemption in their residence in Vallejo, California; and seek avoidance of Lyon's judicial lien against the property.

The debtor seeks to avoid Lyon's judicial lien.

The court can reopen a case to "accord relief to the debtor." 11 U.S.C. § 350(b). Motions for the reopening of cases should be "routinely granted because the case is necessarily reopened to consider the underlying request for relief." In re Dodge, 138 B.R. 602, 605 (Bankr. E.D. Cal. 1992) (citing In re Corgiat, 123 B.R. 388, 392, 393 (Bankr. E.D. Cal. 1991)).

The case will be reopened for the limited purpose of allowing the debtors to add Lyon to the schedules, add an exemption on their residence, and seek avoidance of Lyon's judicial lien.

The court however will not avoid Lyon's lien in connection with this motion. The debtors have not yet filed their Amended Schedule C asserting an exemption in the property. An intent to exempt property is not sufficient to permit the avoidance of a lien under 11 U.S.C. § 522(f). The exemption claim itself is required.

More, when amending schedules, including Schedule C, the debtor must serve them on the creditors. This is especially true when the debtors are about to notify for the first time of the bankruptcy the very creditor whose lien they are seeking to avoid.

And, parties in interest have 30 days from an exemption amendment to object to any added or altered exemptions. Fed. R. Bankr. P. 4003(b)(1). Because the debtors have not afforded parties in interest such an opportunity, the motion to avoid the lien will be denied without prejudice.

To the extent the motion also seeks permission for the debtors to amend their schedules, such permission by the court is unnecessary. Fed. R. Bankr. P. 1009 provides that "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time." No court permission is required.

4. 13-30013-A-7 JON/FAITH PARMER — MOTION FOR COMPENSATION OF CHAPTER 7 TRUSTEE
JWR-1 — 2-11-15 [95]

Tentative Ruling: The motion will be denied without prejudice.

The chapter 7 trustee, John Reger, has filed his first and final motion for approval of compensation. The requested compensation consists of $13,310 in fees and $163.03 in expenses, for a total of $13,473.03. The services for the sought compensation were provided from August 2, 2013 through February 11, 2015. The sought compensation represents 41 hours of services.

The motion will be denied as it makes no effort to establish that the proposed compensation does not exceed the cap of 11 U.S.C. § 326(a). The movant's final report is not even part of the record on the motion. And, the motion does not calculate the trustee's cap in this case. It simply cites legal authority that he is entitled to the statutory cap. Accordingly, the motion will be denied without prejudice.

5. 10-49228-A-7 MARIO/NITZE JAIMEZ — MOTION TO EMPLOY
DNL-3 — 2-18-15 [50]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the trustee on behalf of Kershaw, Cutter & Ratinoff, LLP, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The trustee seeks retroactive approval to employ Leonard Carder, LLP and Altshuler Berzon, L.L.P., collectively, as special counsel for the estate, effective January 9, 2013, to prosecute labor law claims for the estate and Debtor Mario Jaimez, pursuant to a stipulation entered into between the trustee and the debtors. The stipulation splits the net recovery from the litigation, after the payment of attorney's fees and costs, as follows: 60% to the estate and 40% to the debtors. The claims cover a period of services provided by Mr. Jaimez from October 2001 through October 2011.

The debtors received their discharge in February 2011 and the case was closed in March 2011. It was not until approximately September 2014 that the trustee received a letter from Leonard Carder disclosing the pending labor law claims in state court. This case was reopened on December 22, 2014.

The debtors were not aware of the claims until after their bankruptcy case had closed. The proposed special counsel discovered the bankruptcy case by doing its own due diligence in the litigation.

The trustee seeks to employ the proposed special counsel under the same compensation arrangement entered into between the debtors and special counsel:

"(A) a fee calculated by the greater of: (i) an hourly fee per "lodestar," (ii) a 33 1/3 contingent fee if the parties reach settlement prior to trial or arbitration, or (iii) a 40% contingent fee if the parties reach a settlement after trial or arbitration commences or of any monetary award obtained as a result of trial or arbitration; and (B) expenses, individual and common benefit, to be paid from the client's share of any recovery. Any contingent fee will be calculated prior to the deduction of costs."

Docket 50 at 3.

The retainer agreement also authorizes special counsel to employ associate counsel at no additional cost to the client.

The special counsel is representing another approximately 120 plaintiffs in similar claims against the same defendants.

Subject to court approval, 11 U.S.C. § 327(a) permits a trustee to employ a professional to assist the trustee in the administration of the estate. Such professional must "not hold or represent an interest adverse to the estate, and [must be a] disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a) allows for such employment "on any reasonable terms and conditions . . . including on a contingent fee basis."

The Ninth Circuit has a two-prong standard for the retroactive approval of employment for estate professionals. Courts require: (1) satisfactory explanation for the failure of the estate to obtain prior court approval; and (2) a showing that the professional has benefitted the estate. In re THC Financial Corp., 837 F.2d 389, 392 (9th Cir. 1988). In deciding whether satisfactory explanation for the failure of the estate to obtain prior court approval exists, the court may consider not just the reason for the delay but also prejudice, or the lack thereof, to the estate resulting from the delay. In re Gutterman, 239 B.R. 828, 831 (Bankr. N.D. Cal. 1999); see also Atkins v. Wain, Samuel & Co. (In re Atkins), 69 F.3d 970, 974 (9th Cir. 1995) (listing permissive factors for nunc pro tunc approval of employment). And, the decision to grant nunc pro tunc approval of employment of a professional is committed to the discretion of the bankruptcy court. Gutterman at 831.

The debtors did not disclose their interest in the litigation when this case was filed on November 4, 2010 because they apparently did not become aware of that interest until after this bankruptcy case was closed. After the case was closed on March 2, 2011, the special counsel was retained and commenced work on the subject claims. The case was reopened on December 22, 2014 pursuant to a motion brought by the U.S. Trustee.

The special counsel began working on the labor law claims on or about January 9, 2013 and did not learn of the instant bankruptcy case until approximately September 2014, after it had started working on the claims.

In other words, the special counsel has benefitted the estate already by analyzing and litigating the claims since January 2013. The court is also satisfied with the trustee's explanation about why the estate failed to obtain prior court approval of the special counsel's employment.

The court concludes that the terms of employment and compensation are reasonable. The special counsel is a disinterested person within the meaning of 11 U.S.C. § 327(a) and does not hold an interest adverse to the estate. The employment of the special counsel will be approved, effective January 9, 2013. The motion will be granted.

6. 11-26832-A-7 GREGORY/CATHY SANDERS — MOTION FOR AUTHORITY TO COMPROMISE O.S.T. 2-23-15 [80]
DNL-6

Tentative Ruling: The motion will be granted in part.

The trustee requests authority to make an offer of compromise under Cal. Civ. Proc. Code § 998 to Sacramento County, which is a defendant in a pending

wrongful death action, pending in state court, brought by the debtors due to the passing of their daughter. While there are other defendants in the action, including Brian Matthews and the State of California, the County is apparently responsible for maintaining the road intersection where the debtors' daughter was involved in an accident.

In the event the offer is accepted, the trustee asks the court to approve the compromise without the necessity for further court order.

The trustee is seeking authority to make a Cal. Civ. Proc. Code § 998(d) offer to the County in the amount of $275,000.

Cal. Civ. Proc. Code § 998(d) provides that "(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs."

The trustee is convinced that the offer is in the best interest of the estate and the creditors, given that the County just reneged on a $275,000 settlement the parties had reached at a mandatory settlement conference. More, the estate is about to incur substantial expert witness fees and costs in the litigation against the County.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of 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 with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise, assuming the County accepts it. The court will authorize the trustee to make the offer.

Given the obvious tactical advantage of presenting an offer to compromise for the amount the parties had tentatively agreed to settle for, given that the claims are factually complex and will require substantial expert evidence, given that the estate has not yet incurred the substantial expert fees and costs it anticipates incurring, given that the biological mother of the debtors' daughter - who also has interest in the litigation - supports the section 998 offer, and given the inherent costs, risks, delay and inconvenience of further litigation, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id.

The motion will be granted but only to the extent the final compromise with the County does not include any other terms that are not considered "boiler plate" terms in a typical settlement agreement. In the event the final compromise with the County includes non-boiler plate terms not mentioned in this motion, the trustee shall be required to obtain separate court approval of that compromise. The court is not approving such compromise in this ruling.

7. 14-27937-A-7 BETTY SMITH — MOTION TO SELL
DMB-3 — 2-10-15 [62]

Tentative Ruling: The motion will be granted.

The chapter 7 trustee requests authority to sell as is for $18,000 the estate's unencumbered interest in real property in Rough and Ready, California to Ryan Ellmas. The property has a scheduled value of $40,000. Docket 1, Schedule A.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business. The sale will generate some proceeds for distribution to creditors of the estate. Hence, the sale will be approved pursuant to 11 U.S.C. § 363(b), as it is in the best interests of the creditors and the estate. The court is not authorizing the payment of any realtor compensation, as such relief was not requested in the motion. Docket 62.

8. 14-31337-A-7 PRESENTACION HAW — MOTION FOR RELIEF FROM AUTOMATIC STAY
PPR-1 — 1-15-15 [34]
THE BANK OF NEW YORK MELLON VS.

Tentative Ruling: The motion will be granted.

The movant, The Bank of New York Mellon, seeks relief from the automatic stay as to real property in Roseville, California. The property has a value of $500,000 and it is encumbered by claims totaling approximately $1,152,294. The movant's deed is in first priority position and secures a claim of approximately $1,002,294.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that the trustee can administer it for the benefit of creditors.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

9. 15-21439-A-7 DARA PETROLEUM, INC.
BHR-2
HSBC BANK USA, N.A. VS.

MOTION TO DISMISS CASE WITH A BAR TO REFILING OR, IN THE ALTERNATIVE, EXCUSE RECEIVER'S TURNOVER AND FOR RELIEF FROM AUTOMATIC STAY O.S.T. 3-3-15 [15]

Tentative Ruling: The motion will be granted in part and denied in part.

The movant, HSBC Bank U.S.A., N.A., seeks dismissal of the case with a one-year bar to refiling or, in the alternative, to have the federal district court post-judgment receiver excused from turning over the property, and relief from the automatic stay.

This is the debtor's third bankruptcy case since May 9, 2014. The prior two cases were dismissed soon after filing. The first case, Case No. 14-24935-B-7, a chapter 7 case, was filed on May 9, 2014 and dismissed on May 29, 2014, upon the movant's motion to dismiss, alleging bad faith. Case No. 14-24935, Docket 8. The second case, Case No. 14-26608-B-11, a chapter 11 case, was filed on June 9, 2014 and dismissed on September 5, 2014, based on a conclusion that the case was filed in bad faith, given that:

- the debtor has "few, if any, assets or income,"
- it "owns no real property,"
- it owns "no personal property,"
- it its assets pre-petition (including a sole gas station real property in Sacramento, California, a lease agreement pertaining to that property, the underground fuel tanks, etc.),
- the debtor's business is "nothing," and
- the debtor's "filing of the bankruptcy case is clearly an attempt to circumvent the Receivership Order and forestall Singer's efforts to sell the Property to satisfy the Judgment."

Case No. 14-26608, Docket 110 at 4-5.

The court incorporates the dismissal ruling of Case No. 14-26608 here. That ruling follows below.

"*Disposition After Oral Argument: This matter came on for final hearing on August 26, 2014, at 9:32 a.m. Appearances are noted on the record. The court deemed the matter submitted following additional oral argument. The following constitutes the court's findings of fact and conclusions of law, pursuant to Federal Rule of Bankruptcy Procedure 7052.*

"*Debtor Dara Petroleum, Inc. ('Dara')'s opposition is overruled. Creditor HSBC Bank USA, N.A., as Indenture Trustee for the benefit of the Noteholders and the Certficateholders of Business Loan Express Business Trust 2005-A ('HSBC')'s motion to dismiss (the 'Motion') is granted, and the above-captioned bankruptcy case is dismissed pursuant to 11 U.S.C. § 1112(b). HSBC's request for a one-year bar for Dara to re-file a case under Title 11 is denied. HSBC's requests for a finding under 11 U.S.C. § 362(d)(4) and for in rem relief as to*

its collateral is denied. The court retains jurisdiction to consider a separate, properly filed and noticed motion by HSBC for the imposition of sanctions, including attorneys' fees and costs. Any such motion shall comply in all respects with the requirements of Local Bankruptcy Rule ('LBR') 9014-1, including without limitation LBR 9014-1(d)(5) and (6). HSBC's remaining requests for relief are dismissed. Except as so order, the motion is denied.

"*Factual Background*

"*The following facts are alleged in the Motion and supporting exhibits. On or about July 29, 2004, Dara entered into a loan agreement with HSBC's predecessor-in-interest, BLX Capital, LLC ('BLX'), which agreed to loan Dara the principal sum of $800,000.00 (Dkt. 50, pp.20-31). To secure the indebtedness, Dara executed a first deed of trust (Dkt. 50, pp.33-58) in favor of BLX against the real property located at 3449 El Camino Avenue, Sacramento, California 95821 (the 'Property'). Dara also granted to BLX a security interest in 'other property' to secure the debt, including '[a]ll leases, rents, issues, deposits and profits accruing and to accrue from the Real Property and the avails thereof.' The debt was guaranteed by Sarbjit S. Kang ('Kang') and Narges Eghtesadi ('Eghtesadi'), each in their individual capacities (Dkt. 50, pp.67-74). Based on a separate loan transaction, the United States Small Business Administration (the 'SBA') obtained a second position lien against the Property.*

"*On July 7, 2009, after Dara had ceased making payments on the debt, BLX filed a complaint in the Sacramento County Superior Court, case number 34-2009-00053262, against 'Dara Petroleum, Inc. dba Watt Avenue Exxon, a California corporation; Sarbjit S. Kang, an individual; Narges Eghtesadi, an individual; Exxon Mobil Corporation f/k/a Exxon Corporation, a New Jersey corporation; U.S. Small Business Administration, a United States government agency; and DOES 1 through 20, inclusive' (Dkt. 50, pp.9-18) (the 'State Court Complaint'). The State Court Complaint alleged causes of action for judicial foreclosure of trust deed against all defendants, and breach of written guarantee against Kang, Eghtesadi, and DOES 11-20. On August 24, 2009, the SBA filed a notice of removal (Dkt. 50, pp.6-7) of the State Court Complaint to the United States District Court for the Eastern District of California, commencing case number 2:09-2356-WBS-EFB (the 'District Court Action').*

"*After extensive litigation, on or about January 13, 2012, the District Court entered a judgment of foreclosure and order of sale, amended on January 29, 2013, in favor of HSBC against the named defendants, jointly and severally, in the total amount of $985,776.75, with interest accruing at the daily rate of $263.64 from and after January 10, 2012, through the date of entry of the judgment (Dkt. 50, pp.76-79) (the 'Judgment'). The Judgment further ordered that the Property be sold at a foreclosure sale and that the proceeds of the sale be used to satisfy the Judgment. The total current balance on the Judgment is no less than $1,109,947.50.*

"*After entry of the Judgment, Dara informed HSBC that: (1) all of Dara's stock had been transferred within days of the closing of the loan between Dara and BLX; (2) on February 8, 2010, Dara entered into a lease agreement with Parjmit Singh ('Singh') to operate the Valero gas station and convenience store located on the Property (Dkt. 50, pp.86-115); (3) Dara sold the underground storage tanks, pipes, and fuel dispensers to Singh on August 19, 2010 (Dkt. 50, pp.120-121); and (4) on January 25, 2012, Dara transferred ownership of the Property to Stars Holding Company ('Stars') (Dkt. 50, pp.123-125), which*

included an assignment of the lease with Singh. All of the foregoing transactions allegedly occurred without HSBC's prior knowledge or consent.

"Having been informed that Singh now operated the Property, on May 6, 2013, HSBC made demand upon Singh to make monthly rent payments to HSBC (Dkt. 50, pp.127-129). However, Singh has allegedly only periodically turned over approximately half of the $6,000.00 monthly rental payments to HSBC. Additionally, property taxes are allegedly not current. Delinquent property taxes total no less than $29,412.99, which could be as high as $49,371.14 when including penalties (Dkt. 50, pp.135).

"Based on the foregoing, HSBC sought the appointment of a post-judgment receiver in the District Court Action. On May 2, 2014, the District Court entered a 'Memorandum and Order re: Motion to Appoint Receiver; Motion for Preliminary Injunction in aid of Receiver' (Dkt. 50, pp.138-152) (the 'Receivership Order'). Pursuant to the Receivership Order, Kevin Singer ('Singer') was appointed as post-judgment receiver 'to take possession, custody and control of the property for the purposes of maintaining, managing and operating the property pending the foreclosure sale, paying property taxes/insurance to the extent that income is adequate and selling the property' (Dkt. 50, pp.145-146). The Receivership Order further restrained and enjoined the "Defendants and their respective agents, servants, employees, assignees, successors, representatives, attorneys, and all persons acting under their direction or on their behalf" from violating the terms of the Receivership Order without prior authorization from the District Court (Dkt. 50, p.152).

"On May 9, 2014, Dara commenced case number 14-24935 in this court by filing a voluntary 'skeleton' petition under Chapter 7, listing its street address as '3449 El Camino Avenue, Sacramento, California 95821' and its county of residence as "Sacramento" (Dkt. 50, p.154-156) (the 'Chapter 7 Case'). Kang is listed on the petition in the Chapter 7 Case as the president and authorized individual of Dara. On May 13, 2014, HSBC filed a motion to dismiss case, etc. on shortened time, raising several of the arguments which have been made in the instant motion. The hearing on that motion was held on May 20, 2014, at 9:32 a.m. Although Dara filed opposition to the motion, neither its attorney, Noel Knight ('Knight'), nor its representative appeared at the hearing. The Chapter 7 Case was dismissed by order entered May 29, 2014 (Dkt. 50, p.158).

"On June 9, 2014, shortly after the dismissal of the Chapter 7 Case, Dara commenced the instant case by filing a voluntary petition under Chapter 11 in the United States Bankruptcy Court for the Northern District of California (Dkt. 50, pp.164-166). Kang is again listed as the president and authorized individual of Dara, but this time Dara's street address is listed as '55 Oak Court, Suite 100, Danville, California 94526' and its county of residence is listed as 'Contra Costa.' The location of Dara's principal assets is listed as '3449 El Camino Avenue, Sacramento, California 95821,' which is the same as what is stated on the petition in the Chapter 7 Case. According to the California Secretary of State's website, as of the petition date of the instant case, Dara's address was '8994 Greenback Lane, Orangevale, California 95662.'

"On June 11, 2014, HSBC filed an emergency motion to transfer venue from the Northern District back to this court or, in the alternative, to dismiss the case with a one-year bar to refiling (Dkt. 6). After extensive oral argument on the matter, the Northern District entered an order on June 24, 2014, transferring venue to this court (Dkt. 33) (the 'Transfer Order'). In the Transfer Order, Judge Hammond specifically found that the filing of this case

indicates 'forum shopping following contrary rulings in both the United States District Court for the Eastern District of California and United States Bankruptcy Court for the Eastern District of California.' She went on to state that, although she found that cause exists to dismiss the instant case pursuant to 11 U.S.C. § 1112(b), it would be more appropriate to transfer venue back to this court make that determination as well as a determination as to whether there should be a bar to refiling and/or imposition of monetary sanctions.

"*Discussion*

"*HSBC now asks this court to dismiss this case pursuant to 11 U.S.C. § 1112(b) on the grounds that it was filed in bad faith and that neither the principals of Dara nor Stars have authority to file a bankruptcy case. HSBC further seeks an order pursuant to 11 U.S.C. § 105(a) barring Dara from refiling a case under Title 11 for a period of one-year, as well as in rem relief with respect to the Property pursuant to 11 U.S.C. § 362(d)(4).*

"*In the alternative, if the court declines to dismiss the case, HSBC requests an order (1) excusing Singer from his turnover obligations under 11 U.S.C. § 543(b) on the grounds that the property that is the subject of the receivership is not property of the estate; and (2) granting HSBC relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to allow Singer to remain in place to manage, operate and sell the receivership property, and then distribute the sale proceeds, in accordance with the Receivership Order.*

"*In the alternative, if the court declines to dismiss the case and finds that the property that is subject to the receivership constitutes property of the estate, HSBC still requests that Singer be relieved of his turnover obligations under the discretionary power granted to this court under 11 U.S.C. § 543(d).*

"*The court will begin by addressing HSBC's motion to dismiss and related requests for relief.*

"*The Motion to Dismiss and Related Requests for Relief*

"*Pursuant to 11 U.S.C. § 1112(b)(1), the court, after notice and a hearing, shall convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause. 11 U.S.C. § 1112(b) limits the foregoing directive in several ways:*

"*First, under section 1112(b)(1), the court shall not convert or dismiss the case if the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. Section 1104(a)(2) states that 'at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.' 11 U.S.C. § 1104(a)(2).*

"*Second, under section 1112(b)(2), the court may not convert or dismiss the case, even if the movant establishes cause, if the court finds and specifically identifies 'unusual circumstances' establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes the requirements of sections*

1112(b)(2)(A) and (B). Specifically, the debtor or any other opposing party in interest must establish that:

"*(A) There is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and*

"*(B) The grounds for converting or dismissing the case include an act or omission of the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation - (i) for which there exists a reasonable justification for the act or omission; and (ii) that will be cured within a reasonable period of time fixed by the court.*

"*11 U.S.C. § 1112(b)(2)(A)-(B).*

"*11 U.S.C. § 1112(b)(4) sets forth a non-exhaustive list of examples of 'cause.' If one of the enumerated examples of cause set forth in 11 U.S.C. § 1112(b)(4) is proven by the movant by a preponderance of the evidence, the court must find that the movant has established cause. 7-1112 Collier on Bankruptcy § 1112.04 (16th ed. 2013). The court may dismiss a chapter 11 case for cause under section 1112(b). In re Wood, 2011 WL 7145617, slip op. at 7 (9th Cir. BAP 2011); Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir. 1994). Although bad faith is not among the examples of cause specifically enumerated in 11 U.S.C. § 1112(b)(4), courts have found that a lack of good faith in filing a chapter 11 petition constitutes cause for dismissal. In re Marsch, 36 F.3d at 829. 'The existence of good faith depends on an amalgam of factors and not upon a specific fact.' In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986). The following circumstantial factors are considered in determining whether a chapter 11 case was not filed in good faith:*

"*(1) the debtor has only one asset;*

"*(2) the secured creditors' lien encumbers that asset;*

"*(3) there are generally no employees except for the principals;*

"*(4) there is little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments;*

"*(5) there are few, if any, unsecured creditors whose claims are relatively small;*

"*(6) there are allegations of wrongdoing by the debtor or its principals;*

"*(7) the debtor is afflicted with the 'new debtor syndrome' in which a one-asset equity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors; and*

"*(8) bankruptcy offers the only possibility of forestalling loss of the property.*

"*Stolrow v. Stolrow's Inc. (In re Stolrow's Inc.), 84 B.R. 167, 171 (9th Cir. BAP 1988) (citing In re Hulse, 66 B.R. 681, 682-83 (Bankr. M.D.Fla. 1986)).*

"*Based on the foregoing, the court finds that this case was filed in bad faith.*

"*The most glaring issue is that Dara had few, if any, assets or income when it filed its Chapter 11 petition. According to the schedules filed under penalty of perjury on June 9, 2014 (Dkt. 1) (none of which, aside from Schedule F, have been amended to date), Dara owns no real property (Dkt. 1, p.8) and no personal property (Dkt. 1, pp.9-11). Two executory contracts/settlement agreements with HSBC are disclosed on Schedule G (Dkt. 1, p.16). Additionally, the Statement of Financial Affairs (Dkt. 1, pp.19-26) discloses no income from employment or operation of business at Item 1, no income other than from employment or operation of business at Item 2, and no payments to creditors at Item 3. Furthermore, nothing is listed at Item 18 for the nature, location and name of business. It appears based on the evidence presented that Dara's interest in the Property, the lease with Singh, and the underground tanks, etc. on the Property were transferred or sold pre-petition.*

"*The above information was corroborated by the testimony at the section 341 meeting of creditors held July 21, 2014, a transcript of which was attached as Exhibit 'B' to HSBC's opposition to Dara's motion pursuant to 11 U.S.C. § 365 to assume stipulation for entry of satisfaction of judgment with HSBC (Dkt. 79, pp.7-41). Specifically, Azad Amiri ('Amiri'), who represented Dara as its secretary and treasurer, testified in response to the United States Trustee's questioning that Dara owns no bank accounts or cash, has no employees, holds no interest in any other corporations, LLCs, or partnerships, and does not owe any entity any money. Furthermore, when asked what Dara's business is or what it does, Amiri responded with 'nothing.' This is consistent with comments made by Knight before Judge Hammond at the hearing on HSBC's motion to transfer venue back to this court (Dkt. 49, pp.5-19), in which he was unable to answer basic questions about the nature of Dara's business, whom it employs, and with whom it does business.*

"*The fact that Dara has reported no income or income from business, no bank accounts, no cash on hand, and has stated that it is not currently doing business with any entity leads to the conclusion that Dara has no cash flow or source of income. According to Dara's opposition, its source of income to fund a viable Chapter 11 plan will come from a transfer of the Property from Stars, a loan from Stars and payments by Singh under the lease (which Dara assigned to Stars in January 2012). However, no transfer of the Property has occurred, and Dara has provided no explanation of how a transfer of the Property could be made without violating the Receivership Order (p. 14, paragraph 6(a)). Although Dara has filed a motion to incur new debt, the matter has not yet come on for hearing and no court approval has been granted.*

"*Dara claims in its opposition that the filing of this bankruptcy case 'is a legitimate response to a receivership order that was improperly entered and Movant's subsequent bad faith declaration of default under that certain Stipulation for Entry and Satisfaction of Judgment, dated May 6, 2014, by and between Debtor and Movant' (Dkt. 82, p.2). However, Dara has not appealed the Receivership Order. Rather, the filing of the bankruptcy case is clearly an attempt to circumvent the Receivership Order and forestall Singer's efforts to sell the Property to satisfy the Judgment, all for the benefit of a non-debtor party, Stars.*

"*The court also agrees with the findings of the Northern District that there is evidence of forum shopping on the part of Dara for the reasons stated in both the Motion and the Transfer Order.*

"*The court notes that it is not making a finding of bad faith based on HSBC's*

argument that the principals of Dara did not have authority to file the bankruptcy. As the court noted at the last hearing on this matter held August 26, 2014, at 9:32 a.m., the cases cited by HSBC in support of this argument actually do not support it. The cases cited involved situations where a corporation was placed into a receivership proceeding. The corporation was the subject of the receivership. Here, on the other hand, the subject of the Receivership Order is real property, defined in the Receivership Order as the 'Receivership Estate.' While it is true that the Receivership Order enjoins certain parties from taking certain actions, this does not disqualify Dara from filing a bankruptcy case, and HSBC cites to no authority in support of such an argument.

"*The court notes that, even if it had not made the bad faith finding above, other grounds for dismissal are present in this case. First, Dara has failed to timely file monthly operating reports. On August 19, 2014, it filed operating reports for the periods ending June 30, 2014 (Dkt. 99) and July 31, 2014 (Dkt. 98), both of which were untimely. An unexcused failure to timely file monthly operating reports constitutes cause to dismiss the case pursuant to 11 U.S.C. § 1112(b)(4)(F).*

"*Additionally, Knight filed an ex parte employment application on July 16, 2014 (Dkt. 66). The court rejected Knight's proposed order approving employment and instructed him to set the matter for a hearing after it was discovered that the United States Trustee filed opposition to the application (Dkt. 68). The court specifically raised this defect at the status conference held August 19, 2014, at 1:30 p.m. and was reassured by Knight that the issue would be resolved. The court explained the importance of this procedure on the record, stating that Knight would not be allowed to continue to appear in court and represent Dara if he did not obtain employment under 11 U.S.C. § 327 and Fed. R. Bankr. P. 2014. However, to date the matter has not been set for hearing. This constitutes cause to dismiss the case pursuant to 11 U.S.C. § 1112(b)(4)(E).*

"*HSBC's request for a one-year bar for Dara to re-file a case under Title 11 is denied. The court may not use its 'inherent' powers under 11 U.S.C. § 105(a) to impose such an extraordinary sanction. The authorities cited by HSBC all predate the recent United States Supreme Court decision of Law v. Siegel, 134 S.Ct. 1188, 188 L.Ed.2d 146, 82 USLW 4140 (March 4, 2014), which held in part that federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Bankruptcy Code. In so holding, the Court specifically stated that '[C]ourts' inherent sanctioning powers are likewise subordinate to valid statutory directive and prohibitions...whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.' Law v. Siegel, 134 S.Ct. at 1194. Similarly, Ninth Circuit authorities have stated that in the exercise of its § 105(a) authority, a bankruptcy court has broad discretion to shape equitable remedies which further Congressional intent. Pacific Shores Dev., LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064, 1070 (9th Cir. 2004) ('[A] bankruptcy court must locate its equitable authority in the Bankruptcy Code.'). '[S]tatutory silence alone does not invest a bankruptcy court with equitable powers. Those powers are limited and do not amount to a roving commission to do equity.' Id. (citation omitted). The reference to a 'roving commission to do equity' is derived from In re Yadidi, 274 B.R. 843, 848 (9th Cir. B.A.P. 2002) ('§ 105 is not a roving commission to do equity or to do anything inconsistent with the Bankruptcy Code'). Aside from 11 U.S.C. § 105(a), HSBC cites to no specific provision of the Bankruptcy Code which gives this court the statutory authority to bar Dara from re-filing a case under Title 11 for a period of*

one-year. Accordingly, this request is denied.

"*HSBC's requests for a finding under 11 U.S.C. § 362(d)(4) and for in rem relief as to the Property are denied. First, a finding under 11 U.S.C. § 362(d)(4) is made as part of a ruling granting relief from the automatic stay. Section 362(d) begins with the language '[O]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section,' and it then continues with four numbered subparagraphs, the last of which deals with relief from a stay of an act against real property if the court makes certain findings. However, those findings are only made as a basis for granting relief from the stay imposed by 11 U.S.C. § 362(a). Here, because the court is dismissing the case based on bad faith, no automatic stay exists from which relief may be granted.*

"*Second, HSBC cites to no authority which specifically allows this court to grant in rem relief as to the Property, which is grounds to deny the request under the Local Bankruptcy Rules. LBR 9014-1(d)(5). However, even if the court were to construe this as a request made under 11 U.S.C. § 105(a), it would be denied under the same authorities and for the same reasons HSBC's request for a one-year bar for Dara to re-file a case under Title 11 was denied. Simply put, the court concludes that purporting to use 11 U.S.C. § 105(a) to grant in rem relief from the automatic stay would conflict with the plain language of 11 U.S.C. § 362(a) ('Except as provided in subsection (b)...a petition filed under section 301, 302, or 303...operates as a stay....'). The conflict between such purported use of 11 U.S.C. § 105(a) and 11 U.S.C. § 362 is highlighted by the multiple filing provisions of 11 U.S.C. §§ 362(c)(3), (c)(4) and (d)(4), which were added to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA'). While sections 362(c)(3) and (c)(4) only deal with individual filings, Congress clearly contemplated appropriate consequences for multiple filings, and it did not specify in rem relief as a general power; rather, it limited that form of relief to the confines of 11 U.S.C. § 362(d)(4).*

"*HSBC's Request for Sanctions Against Dara and Knight*

"*Regarding HSBC's request for sanctions against Dara and Knight in the form of an award of attorneys' fees and costs incurred in prosecuting both the motion to transfer venue and the instant motion, the court retains jurisdiction consider [sic] a separate, properly filed and noticed motion by HSBC.*

"*HSBC's Alternative Requests for Relief*

"*Because the court has granted HSBC's motion dismiss the case and fully addressed the related requests for relief, all of HSBC's alternative requests for relief are dismissed as moot.*

"*The court will issue a minute order.*"

Case No. 14-26608, Docket 110 at 1-6.

While this case will be dismissed, the court will deny the request for dismissal with a one-year bar to refiling, as such injunctive relief requires an adversary proceeding. Fed. R. Bankr. P. 7001(7); see also Johnson v. TRE Holdings LLC (In re Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006) (discussing in rem relief under section 105 and the necessity for an adversary proceeding when determining an interest in property).

It also is unnecessary to excuse the receiver from turning the subject property over to the trustee. 11 U.S.C. § 543, provides:

"*(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.*

"*(b) A custodian shall—*

"*(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and*

"*(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.*

"*(c) The court, after notice and a hearing, shall—*

"*(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;*

"*(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and*

"*(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.*

"*(d) After notice and hearing, the bankruptcy court—*

"*(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and*

"*(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.*"

The property that is at the heart of this motion is not "property of the debtor" or "property of the estate," within the meaning of section 543(a) and (b), meaning that the turnover provisions of section 543 do not apply.

The property subject to the receiver's control is a the gas station real property, the lease to Singh, the underground tanks and other personal property collateral of the movant. This is not property of the debtor or the estate. See 11 U.S.C. § 541(a) (making property of the debtor as of the petition date, property of the estate). It is not property of the estate because the debtor transferred that property pre-petition. It transferred the real property to Star Holding Company, along with an assignment of the lease of the property to Singh, pre-petition, on or about January 25, 2012. This case was filed on February 25, 2015.

Thus, the request that turnover be excused will be denied as unnecessary.

Given the debtor's history of bankruptcy filings and dismissals, given its admission in the prior bankruptcy case that it owns no assets, and given the federal district court judgment of foreclosure and order for sale of the movant's collateral property, there is cause under section 362(d)(1) to lift the stay to allow the movant to conduct the foreclosure sale, as ordered by the district court, and recover the property in accordance with applicable non-bankruptcy law.

Although such property is no longer property of this bankruptcy estate, as it was transferred by the debtor pre-petition, the court will lift the stay to allow the movant to proceed against the debtor to the extent necessary to recover the property in accordance with the district court's judgment.

No fees and costs will be awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506. The creditor is not secured by property of the debtor or the estate. The court also does not have sufficient evidence about whether there is equity in the property subject to the foreclosure judgment.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

The motion will be granted in part and denied in part.

10.	14-24839-A-7 SSA-3	KENNETH/ALICIA UNG	MOTION TO SELL 2-14-15 [62]

Tentative Ruling: The motion will be denied without prejudice.

The chapter 7 trustee requests authority to sell for $525,000 the estate's interest in real property in Stockton, California to Kirkpatric and Helen Chua. The trustee also asks for approval of the payment of the real estate commission.

The property is encumbered by the following liens: a first deed of trust held by Bank of America, securing a claim for $208,733; a second deed of trust held by Bank of America, securing a claim for $82,428; and a third deed of trust held by Wells Fargo Bank, securing a claim for $100,075, altogether totaling approximately $391,236. After accounting for the debtor's exemption and the 6% realtor commission of $31,500, the trustee expects the estate to realize approximately $52,196, before payment of the sales and escrow.

11 U.S.C. § 363(b) allows the trustee to sell property of the estate, other than in the ordinary course of business.

Although the trustee expects a gross recovery for the estate of $83,696, before

payment of the sales, escrow and commission costs, the motion says nothing about whether and to what extent the estate will incur a tax liability from the sale. Accordingly, the court cannot determine if the sale is in the best interest of the estate and the creditors. The motion will be denied.

11.	10-25463-A-7 DNL-6	MICHAEL GIBSON AND JUDY MAYNE	MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY 2-5-15 [70]

Tentative Ruling: The motion will be granted in part and denied in part.

Desmond, Nolan, Livaich & Cunningham, attorney for the trustee, has filed its first and final motion for approval of compensation. The requested compensation consists of $11,845.50 in fees and $58.26 in expenses, for a total of $11,903.76. This motion covers the period from August 7, 2014 through the January 29, 2015. The court approved the movant's employment as the trustee's attorney on September 10, 2014. In performing its services, the movant charged hourly rates of $150, $175, $195, $275, and $400.

The debtors oppose the compensation arguing that:

(1) they were never told that the trustee's counsel would be allowed to recover fees and costs beyond the $5,000 cap on the trustee's commission, under the stipulation between the estate and the debtors, resolving their exemption in the personal injury claims;

(2) specific time entries for work performed by Gabriel Herrera, Luke Hendrix, Nabeel Zuberi, and J. Russell Cunningham are redundant, duplicative, unnecessary, and/or excessive; the debtors are contending that the movant's fees should be reduced from $11,745.50 to $5,999.26; and

(3) the requested compensation by the movant is disproportionate to the results obtained in the case.

First, the court rejects the objection that the debtors were not told that the trustee's counsel is bound by the agreed $5,000 cap on the trustee's compensation. Trustees are entitled to employ professionals for the estate, including attorneys to assist the estate in resolving legal issues. And, such professionals are entitled to compensation. See 11 U.S.C. §§ 327, 328, 330. Obviously, the cap on the trustee's compensation did not bind the estate's professionals.

The stipulation between the estate and the debtors, compromising the debtors' amended exemption claims, prescribes: "Provided that the amount of unsecured debt identified in the Debtors' Schedules E and F is accurate, the Trustee shall cap his compensation in the amount of $5,000." Docket 37 at 4.

Nothing in that language binds the trustee's professionals. The movant then is not bound to receiving no compensation for its work just because the trustee capped his fees, "[p]rovided the amount of unsecured debt identified in the [d]ebtors' Schedules E and F is accurate."

Second, the debtors have not explained what they mean by the time entries in their opposition being redundant, duplicative, unnecessary, and/or excessive. For instance, the court does not know what is the difference between "redundant" and "duplicative." Also, are not all "redundant" and "duplicative"

time entries also "excessive?" The court is puzzled then what "excessive" means.

More, the debtors have not explained why each of the time entries identified by them is redundant, duplicative, unnecessary, and/or excessive. The court cannot speculate about why each time entry identified by the debtors is improper. The debtors have not explained their rejection of each time entry listed in the opposition.

Stated differently, just because the debtors have placed labels on some of the movant's time entries, does not mean the court will attach the same labels to those time entries and disallow the fees associated with them.

Third, attorney's fees and costs must be reasonable and necessary. 11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses."

The debtors are essentially arguing that the requested fees are not reasonable or necessary because they are not proportionate to the results achieved or "benefit realized" by the movant, "to shock the conscience."

The court disagrees, given that the creditors are receiving a 100% dividend.

Moreover, necessity is measured by whether the professional did what was required by the standard of care of similar professionals, in the same area of practice, with the limited knowledge of the case the professional had when it did the work.

In this case, when the movant began analyzing the personal injury claims, it did not know whether the debtors had intentionally omitted the claims from the schedules; did not know whether there are any other assets to be discovered; did not know the debtors' intentions about claiming an exemption; did not know the stage of the personal injury litigation; did not know the level of competency of the personal injury attorney retained by the debtors; did not know whether the personal injury attorney had obtained the best possible settlement result, for both the creditors of the estate, as well as the debtors; did not know of the willingness of the personal injury attorney to be employed as counsel for the estate and its compensation to be subject to court approval; did not know of the terms of the settlement and whether they would be favorable to the estate; etc.

In other words, while the personal injury attorneys, Kershaw, Cutter & Ratinoff, did all the work on the claims, the estate was not privy to reviewing and analyzing the personal injury claims, was not privy to deciding who to retain as personal injury attorney, was not privy to making decisions every step of the litigation, and was not privy to making decisions on the settlement, as it had been reached already. This placed the trustee in the difficult position of having to second-guess every step of the personal injury litigation, given that the personal injury claims were not disclosed in the schedules and he did not have the opportunity to participate in every decision at the time it was made.

And, as representative of the estate, the trustee "owes a fiduciary duty to debtor and creditors *alike* to act fairly and protect their interests." Martin-Trigona v. Ferrari (In re Whet, Inc.), 750 F.2d 149 (1st Cir. 1984); see also In re Haugen, No. 04-00034, 2008 WL 1995359, at *5 (Bankr. D. Hawaii May 6,

2008) & In re Suntastic U.S.A., Inc., 269 B.R. 846, 849 (Bankr. D. Ariz 2001) (both cases citing Whet favorably).

Because of the failure to disclose the personal injury claims in the schedules when the petition was filed, the trustee also had the added burden of having to obtain retroactive approval of Kershaw's employment as special counsel for the estate. He also had the added burden of convincing this court to approve the settlement, when and although he did not participate in the settlement discussions.

While gathering the above information and analyzing the personal injury litigation may not seem like much of a benefit to the debtors, it is a tremendous benefit to the estate in that the personal injury claims have been administered in accordance with the requirements prescribed by the Bankruptcy Code, the Bankruptcy Rules, the ethical rules governing conduct within the legal profession, and the fiduciary duties the estate owes to the creditors and the debtors.

Once necessity for services has been established, the reasonableness of the fees incurred measures whether the time spent and fees and expenses incurred are proportionate to the actual necessary services performed. As with the necessity of the movant's services, the debtors have not been helpful in identifying unreasonable fees or expenses.

Nevertheless, the court's own review of the movant's time entries reveals several entries for which the movant should not be compensated.

One, there are three time entries by Gabriel Herrera, dated 8/18/14 and 8/19/14 (1.8, 0.4, 0.4 hrs.), involving the preparation of, discussions pertaining to, and revisions of a motion to reopen the case. Docket 74 at 4.

The court will disallow the fees for those time entries because it was the United States Trustee who prepared, filed and prosecuted the motion to reopen the case. See Docket 17-21.

Although the supporting declaration to the United States Trustee's motion to reopen is by the chapter 7 trustee, the above time entries do not reflect that Mr. Herrera was preparing a declaration in support of the motion to reopen. The time entries reflect the preparation of a motion to reopen. Docket 74 at 4.

Also, a motion to reopen is a pro forma document that is considered ex parte and is almost always granted. It is difficult to believe an experienced bankruptcy attorney was required to expend significant time to prepare it.

The court will partially disallow the compensation for another time entry by Nabeel Zuberi, dated 9/25/14 (3.5 hrs.), involving what appears to be two tasks lumped into one time entry. The first task is the research on the nunc pro tunc standard for approval of employment. The court cannot discern the second task because it is partially obscured by the "Exhibit B" label at the bottom of Docket 74 at 4.

Even though the court cannot tell how much of the entry time was devoted to the research, the court will limit the time to one hour, given the well-established state of the law in this area. See In re THC Financial Corp., 837 F.2d 389, 392 (9th Cir. 1988). The court will disallow the compensation for the other task in the time entry because it cannot tell what is the task and, as a

result, cannot determine the reasonableness of the compensation allocated to that task. Also, the record on this motion has closed and the motion can no longer be supplemented. In short, the 3.5 hour task will be reduced to 1.0 hour and the compensation will be reduced from $612.50 to $175.

The movant's other services included, without limitation:

- the preparation of motion to employ the movant;

- negotiating stipulation that resolves the debtors' exemption in the personal injury claims;

- preparing the stipulation and obtaining court approval of it;

- preparing, filing and prosecuting a motion to employ Kershaw retroactively;

- preparing, filing and prosecuting a motion to compensate Kershaw;

- preparing, filing and prosecuting a motion to approve the personal injury settlement;

- preparing, filing and prosecuting the instant motion.

As the debtors' opposition has been unhelpful in identifying unnecessary services and/or unreasonable fees or expenses, warranting the trustee's reply to the debtors' opposition, the court will award the movant its $1,995 in fees for having to prepare and file the reply, along with any additional fees for the movant's appearance at the March 9, 2015 hearing on the motion.

Except as specifically disallowed above, the court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved as modified in this ruling.

12. 15-20475-A-7 GENE SHAWN GROUP L.L.C. MOTION FOR
HSM-1 RELIEF FROM AUTOMATIC STAY
DAVID FLEMMER VS. 2-23-15 [7]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted in part.

The movant, David Flemmer, seeks relief from the automatic stay with respect to all real property of the debtor in Sacramento, San Joaquin and Los Angeles Counties, as well as all personal property of the debtor, scheduled and valued by the debtor in the aggregate amount of $64,819. Docket 1, Schedule B. The

movant is the holder of a pre-petition state court judgment against the debtor for $72,581.10.

The movant has filed a notice of judgment lien with the California Secretary of State, has recorded abstracts of judgment in Sacramento, San Joaquin and Los Angeles Counties, and has obtained an order of examination lien against the debtor under Cal. Civ. Proc. Code § 708.110(d).

The trustee has filed non-opposition. This is cause for the granting of the motion as to the estate.

As to the debtor, the analysis is different. With respect to the real property, the motion will be denied because the court has no evidence that the debtor owns any real property in any of the respective counties where the movant recorded judgment abstracts.

With respect to the personal property, the court concludes that there is no equity in that property and no evidence exists that it is necessary to a reorganization.

Accordingly, with respect to the personal property, the motion will be granted as to the debtor under 11 U.S.C. § 362(d)(2) to permit the movant to repossess its collateral, dispose of it pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived.

13. 14-29986-A-7 ELIZABETH CHAN — MOTION TO AVOID JUDICIAL LIEN
MET-2
VS. AMERICAN EXPRESS CENTURION BANK — 12-7-14 [19]

Tentative Ruling: The motion will be granted.

A judgment was entered against Matthew Mayette in favor of American Express Centurion Bank for the sum of $24,244.19 on March 8, 2011. The abstract of judgment was recorded with Solano County on May 30, 2012. That lien attached to the debtor's residential real property in Fairfield, California.

The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property has an approximate value of $350,000 as of the date of the petition. The unavoidable liens total $445,154 on that same date, consisting of a single mortgage in favor of Bank of America Home Loans in the amount of $443,567 and an HOA lien in favor of Turnstone Homeowners Association in the amount of $1,587. The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 in Amended Schedule C. Docket 12.

The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its

fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

14. 14-30697-A-7 CAROLE PETERSEN — OBJECTION TO EXEMPTIONS
SSA-3 — 1-21-15 [30]

Tentative Ruling: The objection will be sustained.

The trustee objects to the debtor's $73,427 exemption claim under Cal. Civ. Proc. Code § 704.100(c) in an annuity with a scheduled value of $73,427. Dockets 24 & 39.

Fed. R. Bankr. P. 4003(b)(1) provides that:

"[A] party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension."

The objection is timely as it was filed within 30 days of the last amendment of Schedule C on January 26, 2015. Docket 39. See also Docket 47 & 48 (reflecting a stipulation and order approving it and providing that this objection pertains to the debtor's last amendment of Schedule C). This objection was filed on January 21, 2015.

Fed. R. Bankr. P. 4003(c) provides that:

"In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections."

A claim of exemption is presumptively valid. Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999); Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 630 (B.A.P. 9th Cir. 2010); Hopkins v. Cerchione (In re Cerchione), 414 B.R. 540, 548-49 (B.A.P. 9th Cir. 2009); Kelley v. Locke (In re Kelley), 300 B.R. 11, 16-17 (B.A.P. 9th Cir. 2003).

Under Rule 4003(c), once an exemption has been claimed, the objecting party has the burden to prove that the exemption is improper. Carter at 1029 n.3; Cerchione at 548; Gonzales v. Davis (In re Davis), 323 B.R. 732, 736 (B.A.P. 9th Cir. 2005).

"Once the debtor claims an exemption on her bankruptcy schedules, 'the objecting party has the burden of proving that the exemptions are not properly claimed.' Fed. R. Bankr.P. 4003(c). Thus, in this case, the trustee had the burden to show that debtor had not properly claimed the exemption."

Davis at 736.

This means that the objecting party has both the burden of production, *i.e.*, to produce evidence in support of the objection (also known as the burden of going forward) and the burden of persuasion. Carter at 1029 n.3; Cerchione at 548.

Even if the presumption is rebutted with evidence from the objecting party, forcing the debtor to come forward with unequivocal evidence to support the

exemption, "[t]he burden of persuasion remains with the objecting party." Carter at 1029 n.3.

But, when the objecting party produces sufficient evidence to rebut the presumptive validity of the exemption claim, the burden of production shifts to the debtors to establish the validity of the exemption. Even though the burden of persuasion always remains with the objecting party, when the objecting party overcomes the presumptive validity of the exemption claim, the debtors have the burden "to come forward with unequivocal evidence to demonstrate that the exemption is proper." Carter at 1029 n.3; see also Cerchione at 549.

The standard for the objecting party's burden of persuasion is preponderance of the evidence. Nicholson at 631-33, 634 (holding that the applicable standard to exemption objections is preponderance of the evidence and citing Grogan v. Garner, 498 U.S. 279, 286 (1991), and resolving the issue of what is the standard for establishing bad faith in the context of exemption objections). "Proof by the preponderance of the evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not." Id. at 631 (quoting United States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994)).

The exemption here has been claimed pursuant to Cal. Civ. Proc. Code § 704.100(c), which provides that "Benefits from matured life insurance policies (including endowment and annuity policies) are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor."

"Because the statute mentions endowment policies and annuity policies only parenthetically, after the word 'including,' the logical construction is that the endowment policies and annuity policies referenced are only those that come within the general category of 'life insurance policies.' Had the California legislature intended to create an exemption for all endowment policies and annuity policies, whether or not they are life insurance policies, it presumably would have enacted a statute that exempted 'matured life insurance, endowment and annuity policies.'"

Kennedy v. Pikush (In re Pikush), 157 B.R. 155, 156 (B.A.P. 9th Cir. 1993), aff'd, 27 F.3d 386 (9th Cir. 1994).

Cal. Civ. Proc. Code § 704.100(c) does not apply to annuity contracts that do not involve risks, contingencies, or unknown events. "Here, the annuity contracts involve no risks, contingencies or unknown events, and are thus not life insurance policies." Pikush at 159.

"*In California, life insurance is defined as '"a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event"' where 'the contingent or the unknown event is mortality.' Pikush, 157 B.R. at 156, quoting California Insurance Code ("Cal.Ins.Code") § 22.*"

"*The basic purpose of life insurance is to address the risks associated with human mortality. Life insurance serves not only a protective function, but also, with certain types of policies, a savings function. In its protective function, life insurance provides funds for estate purposes, income for family members after the death of the insured, and special needs such as the payment of a mortgage.[ ] In its savings function, certain types of life insurance products allow individuals to accumulate savings[ ] and provide the*

policyholder with the ability to borrow against those savings or to obtain the cash surrender value of the policy. The various types of life insurance products emphasize different aspects of the protective and savings functions in varying degrees to serve individual needs. Cal. Ins. Law & Prac., supra, § 20.01[1] (footnotes omitted)."

"'*An annuity, by contrast, is a right to receive fixed, periodic payments, either perpetually or for life or a stated period of time.... Thus, annuities are more in the nature of investments rather than insurance.*' Pikush, *157 B.R. at 156–57 (citation omitted).*

. . .

"*With an annuity, the person designated as the recipient (the annuitant) is usually the person paying the money. The annuitant pays a fixed sum, in return for which the company must then perform a series of obligations over a period of years, at designated times. The hazard of loss is no longer upon the company, but upon the recipient, who may die before any benefits are received. Instead of creating an immediate estate for benefit of others, the annuitant has reduced the annuitant's immediate estate in favor of future contingent income. Annuity contracts must, therefore, be recognized as investments rather than as insurance. Cal. Ins. Law & Prac., supra, § 20.20[2][a].*"

Short v. Payne (In re Payne), 323 B.R. 723, 728 (B.A.P. 9th Cir. 2005).

"*The Bernards first claim the annuity is exempt under Cal.Civ.Proc.Code § 704.100(a) as an unmatured life insurance policy. Relying on our decision in In re Moffat, 959 F.2d 740 (9th Cir.1992), the trustee counters that the annuity at issue here is fully mature and thus governed not by section 704.100(a), but by section 704.100(c). This dispute over the applicable provision doesn't matter, however, because the relevant language of the two subsections is identical and has been conclusively construed by our recent decision in In re Pikush, 157 B.R. 155 (9th Cir. BAP 1993), aff'd, 27 F.3d 386 (9th Cir.1994). There, we held that 'the exemption provided by section 704.100(c) is limited to life insurance policies,' and thus that annuity contracts which do not involve any 'risks, contingencies or unknown events' are not covered by section 704.100(c) at all. See 157 B.R. at 159.*"

"*Applying this reasoning to the identical language in section 704.100(a), we conclude that the Bernards' annuity is not exempt. Like the annuity contracts in Pikush, the Bernards' annuity provides a guaranteed stream of income over the term of the contract. There are no contingencies that can divest the Bernards of their right to receive payment; should Mr. Bernard die during the life of the contract, all remaining payments will be made to his designated beneficiaries. As noted in Pikush, an annuity of this nature is an investment, not a life insurance policy. See id. Because section 704.100 only applies to life insurance policies, the Bernards' annuity is not exempt under this provision.*"

Bernard v. Coyne (In re Bernard), 40 F.3d 1028, 1032 (9th Cir. 1994); see also In re Pipkins, Case. No. 13-30087DM, WL 2756552, at *3-4 (Bankr. N.D. Cal. June 16, 2014) (Judge Montali holding that Cal. Civ. Proc. Code § 704.100(c) does not permit an exemption of an unqualified annuity, similar to the one here).

"*A single-premium annuity that provides a guaranteed stream of income and has no contingencies that can divest the debtor or his beneficiaries of their right*

to payment is an investment, not a life insurance policy. Bernard, 40 F.3d at 1032; Pikush, 157 B.R. at 159. To analyze whether a particular annuity falls within this rule, we examine the non-exclusive factors identified by the BAP in Turner v. Marshack (In re Turner), 186 B.R. 108, 117 (9th Cir.BAP 1995), namely:

(1) whether the annuity is truly contingent;

(2) whether the debtor can accelerate the maturity date;

(3) whether the debtor can borrow against the policy;

(4) who owns the policy;

(5) whether payment of the premium is consistent with an investment or payment;

(6) whether the seller was licensed to sell life insurance in the debtor's state;

(7) what, if any, is the opinion of testifying experts;

(8) what provisions of the application are also part of the policy; and

(9) whether a life insurance policy in the debtor's state must contain a death benefit."

Simpson v. Burkart (In re Simpson), 557 F.3d 1010, 1015-16 (9th Cir. 2009).

The subject annuity is a single-premium annuity with a guaranteed stream of income and without contingencies to divest the debtor or her beneficiaries of their right to payment. The debtor purchased the annuity with $150,000 in March 2006 from Cuna Mutual Insurance. She received the funds for the annuity from her sister, who in turn received them from their father, who inherited or received them, for the debtor, from the debtor's mother's estate.

In exchange, the debtor is given 180 monthly payments, over a 15-year period, at $1,030.60 a month. The debtor has been receiving the $1,030.60 monthly payments for last approximately nine years. Docket 34 at 18.

The debtor has named beneficiaries in the annuity, to receive "death proceeds," in the event she passes away. The beneficiaries include Veterans of Foreign Wars and National Humane Society. Docket 34 at 12.

First, the payments under the annuity are not contingent on anything, including the debtor's life. It entails no risks, contingencies or unknown events. Docket 32; Docket 34 at 14, 18. The annuity is marked as "Non Qualified." Docket 34 at 14.

Although the debtor's response states that the annuity involves a contingency "in case of her death," there is nothing in the other supporting papers identifying the annuity in such a way. Docket 52 at 4. The record does not support this. There is no mention of this anywhere else in the record, including the inadmissible evidence proffered by the debtor.

The naming of a beneficiary does not make the annuity an equivalent to life insurance, especially for purposes of section 704.100(c).

"As with life insurance, the uncertainty facing the annuitant is the length of his or her life. However, the risks are typically different. 'With an annuity, the risk insured is that death will be postponed; with life insurance, the risk insured is that death will be premature.'"

Estate of Dean Short v. Payne (In re Payne), 323 B.R. 723, 729 (B.A.P. 9th Cir. 2005) (quoting and citing Cal. Ins. Law & Prac. § 20.20[2][b]).

The risk of the debtor's passing does not make the annuity "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event, where the contingent or unknown event is mortality." See Pikush at 156, 159; Cal. Ins. Code § 22. There is no indemnity associated with the passing of the debtor. No one will be indemnified for anything if the debtor passes away. The naming of a beneficiary ensures only who will continue to receive the annuity payments in the event the debtor passes away before the annuity's maturity date.

Stated differently, while the annuity provides for the eventuality that the debtor passes away, her passing does not alter the annuity payment stream. The annuity then does not insure or indemnify against the premature passing of the debtor. Rather, it insures or indemnifies against the postponement of her passing.

The annuity is not the equivalent to life insurance, for purposes of section 704.100(c).

Second, as admitted by the debtor, she is not allowed to accelerate the maturity date of the annuity. The debtor has admitted that she is not allowed to cash the annuity before its 15-year term matures. "It is a policy that she was told could not be sold, redeemed, nor could it be cashed out, nor did she own it." Docket 52 at 4.

The debtor's inability to accelerate the annuity makes it more like an investment vehicle rather than life insurance. Many investment vehicles - such as certificates of deposit, for instance - will fix a period during which the investor cannot cash the invested principal, while he is receiving interest on the investment.

The court fails to see how the debtor's inability to cash the annuity makes it exempt. The debtor's future right to payments is as much of an estate asset as any other estate asset, meaning that the right to future payments can be liquidated as any other estate asset.

Third, the court has not seen evidence in the record allowing the debtor to borrow against the annuity. See Docket 34. Nor has the debtor argued or given evidence that she is entitled to borrow against the annuity. See Docket 52 at 4-6.

Fourth, while the debtor claims that she does not own the annuity, the court has seen no admissible evidence of this. The debtor's declaration, where she makes this claim, is not executed under the penalty of perjury, making it inadmissible. See 28 U.S.C. § 1746(2) (setting forth the standard for the form of declarations).

Conversely, the "Specification Page" for the annuity, as submitted by the trustee, identifies the debtor as the owner of the annuity. The debtor's name appears next to the heading "OWNER DATA." Docket 34 at 18. Thus, the debtor

owns the annuity.

In any event, even if she did not own the annuity, she received the funds to purchase the annuity as an inheritance from her mother's probate estate, via her father and her sister. The inheritance funds were used to purchase the annuity.

Nevertheless, the debtor claims that she was forced to purchase the annuity by her father, sister and the agent who sold the annuity. Docket 52 at 4-6.

However, the court fails to see the relevance of this argument. How does the debtor being forced to purchase the annuity make it the equivalent to a life insurance policy for purposes of section 704.100(c)? The debtor does not elaborate on this.

More, while the argument may be relevant to the debtor seeking to contest the validity of the annuity, she should have done this before filing this case. Nothing in her motion papers or schedules indicates that the debtor has been contesting the validity of the annuity.

After filing for bankruptcy and after receiving payments from the annuity for nine years, the debtor is only now contending that the annuity is somehow invalid because she was forced to enter into it.

This makes no sense and is disingenuous on the part of the debtor. She did not contest the annuity while receiving payments every month for the last approximately nine years. Yet, now, that she has filed for bankruptcy and the trustee is objecting to her exemption, the debtor is contending that the annuity is somehow improper because she was compelled to have it.

Moreover, even if relevant, the assertion that she was forced to buy the annuity is unsupported by admissible and probative evidence.

The statement that Frank Feng told her to "sign or receive nothing" are inadmissible hearsay. Docket 53 at 2; Fed. R. Evid. 802. The letter from the debtor's sister, even if the court were to consider it as admissible evidence, does not say anything about the debtor's sister or her father "forcing the debtor" to enter into the annuity. Docket 55. Nothing in the letter states that the debtor did not want to have the annuity and her sister and father forced her to have it. The letter merely states that the debtor's father "did not consult with [the debtor]" about his intentions of how the funds were to be placed. Docket 55. It does not say that the debtor did not want to have the annuity.

On the other hand, the debtor's statements that her sister and father forced her to have the annuity are hearsay and inadmissible on that basis. Fed. R. Evid. 802.

The characterization by the debtor of being "forced" is also only her opinion of what happened, which is not supported by the record in the debtor's declaration. She has not given any foundation for this opinion. Fed. R. Evid. 602. For instance, she does not say what she told her father and sister and what they told her in response, when they discussed her receiving the funds from her mother's estate.

Fifth, the payment of the premium for the annuity is more consistent with an investment rather than simply a payment for insurance. The instant annuity is

in the nature of an investment because, instead of creating an immediate estate for the benefit of others, it reduced the debtor's immediate estate - the funds received from her mother's estate - in favor of future income, under the terms of the annuity.

More, there is no death benefit associated with the annuity. The court has seen no evidence and the debtor has proffered none, that the annuity contains a death benefit. If the debtor passes away, the annuity payments appear to continue under the same terms as prior to her passing, except the payments are now directed to the beneficiaries.

Moreover, even if it had contained a death benefit, the annuity would still not have been the equivalent to a life insurance policy, because its fundamental purpose is still to give the debtor fixed, periodic payments (of $1,030.60 a month) for an identified time period (15 years), without making the debtor's passing a condition for the obligation to make the payments.

Sixth, the court has no admissible evidence in the record from qualified experts on the issue. The court rejects the contention that the annuity is exemptible under section 704.100(c) because the operations compliance consultant with Cuna Mutual, Debra Sauerbrei, told the trustee in a letter that the annuity is exemptible under section 704.100(c). Docket 51.

The letter is inadmissible because it is irrelevant, it is not authenticated, and it is hearsay. See Fed. R. Evid. 401, 901(a), 802. The letter contains out-of court statements proffered for the truth of the matter asserted therein. Fed. R. Evid. 801(a)-(c). Ms. Sauerbrei's opinion of whether the annuity is exemptible is also inadmissible because it requires specialized knowledge and she is not qualified as an expert witness on such specialized knowledge. Fed. R. Evid. 701(c). Also, the opinion does not contain the grounds upon which it is based. Fed. R. Evid. 702(a)-(d).

And, it is the court and not Ms. Sauerbrei that answers the question of whether the annuity is exemptible. Hence, Ms. Sauerbrei's opinion is not binding or even persuasive on this court and, as such, it is not relevant to the court's adjudication of this objection.

Seventh, the court has no evidence about whether the seller of the annuity to the debtor was licensed to sell life insurance.

Eight, the annuity application contains virtually all the terms of the annuity policy contract. At the end of the annuity application, it refers to the application as "this contract," meaning that the terms set forth in the application are the terms of the annuity policy contract. The signature page of the application also refers to the allocation of "purchase payment(s) are to be allocated as indicated in Section 10 of this application." Therefore, the terms of the annuity policy are largely, if not wholly, in the annuity application. This is consistent with an investment and not life insurance, as life insurance would require a separate insurance declaration, outlining the terms of the coverage.

Finally, the debtor has produced no admissible evidence with the response to the objection. None of the exhibits have been properly authenticated by a declaration. The two documents titled "declaration," one by the debtor and the other by her sister, are not declarations. Dockets 53 & 54. They have not been executed under the penalty of perjury, in violation of 28 U.S.C. § 1746(2), which sets forth the standard for the format of declarations proffered

to the court. Thus, in addition to sustaining the objection on the merits, as discussed above, the court will sustain the objection also due to the lack of admissible evidence from the debtor. In other words, while the trustee has met her burden of production and rebutted the presumptive validity of the exemption claim, the debtor has not produced any proof to refute such evidence. The objection will be sustained.

15. 14-31999-A-7 ANGELO/LYNDA NEGRETE — MOTION FOR RELIEF FROM AUTOMATIC STAY
CJO-1 — 2-11-15 [16]
HSBC BANK USA, N.A. VS.

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The movant, HSBC Bank U.S.A., N.A., seeks relief from the automatic stay as to real property in Fair Oaks, California. The property has a value of $393,368 and it is encumbered by claims totaling approximately $470,865. The movant's deed is in first priority position and secures a claim of approximately $363,758.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that the trustee can administer it for the benefit of creditors. The court also notes that the trustee filed a report of no distribution on February 4, 2015.

Thus, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9th Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed $750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of $750.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

FINAL RULINGS BEGIN HERE

16. 09-39713-A-7 SCOTT DINSDALE — MOTION TO AVOID JUDICIAL LIEN
TJW-5 — 2-3-15 [43]
VS. THOMAS/KATHLEEN HALASZYNSKI

Final Ruling: The motion will be dismissed without prejudice.

The notice of hearing is not accurate. It states that written opposition need not be filed by the respondent. Instead, the notice advises the respondent to oppose the motion by appearing at the hearing and raising any opposition orally at the hearing. This is appropriate only for a motion set for hearing on less than 28 days of notice. See Local Bankruptcy Rule 9014-1(f)(2). However, because 28 days or more of notice of the hearing was given in this instance, Local Bankruptcy Rule 9014-1(f)(1) is applicable. It specifies that written opposition must be filed and served at least 14 days prior to the hearing. Local Bankruptcy Rule 9014-1(f)(1)(ii). The respondent was told not to file and serve written opposition even though this was necessary. Therefore, notice was materially deficient.

In short, if the movant gives 28 days or more of notice of the hearing, it does not have the option of pretending the motion has been set for hearing on less than 28 days of notice and dispensing with the court's requirement that written opposition be filed.

17. 12-28413-A-7 F. RODGERS CORPORATION — MOTION FOR RELIEF FROM AUTOMATIC STAY
KRM-1 — 2-10-15 [788]
UNITED AUBURN INDIAN COMMUNITY VS.

Final Ruling: The motion will be dismissed without prejudice.

The notice of hearing is not accurate. It states that written opposition need not be filed by the respondent. Instead, the notice advises the respondent to oppose the motion by appearing at the hearing and raising any opposition orally at the hearing. This is appropriate only for a motion set for hearing on less than 28 days of notice. See Local Bankruptcy Rule 9014-1(f)(2). However, because 28 days or more of notice of the hearing was given in this instance, Local Bankruptcy Rule 9014-1(f)(1) is applicable. It specifies that written opposition must be filed and served at least 14 days prior to the hearing. Local Bankruptcy Rule 9014-1(f)(1)(ii). The respondent was told not to file and serve written opposition even though this was necessary. Therefore, notice was materially deficient.

In short, if the movant gives 28 days or more of notice of the hearing, it does not have the option of pretending the motion has been set for hearing on less than 28 days of notice and dispensing with the court's requirement that written opposition be filed.

18. 14-30118-A-7 VIRGINIA CHAMBERLAIN — MOTION TO AVOID JUDICIAL LIEN
TMP-1 — 1-20-15 [15]
VS. UNIFUND CCR PARTNERS

Final Ruling: The motion will be dismissed without prejudice because service of the motion did not comply with Fed. R. Bankr. P. 7004(b)(3), which requires service "Upon a domestic or foreign corporation or upon a partnership or other unincorporated association . . . to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to

receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

The debtor served the motion on Unifund without addressing it "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."

The debtor served the motion on an individual named Kenneth Miele, without identifying who is that person in relation to the respondent. Docket 18.

And, to the extent Mr. Miele is the respondent's attorney, unless the attorney agreed to accept service, service was improper. See, e.g., Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (B.A.P. 9th Cir. 2004).

Finally, the motion and supporting declaration refer to a recorded abstract of judgment, evidencing the subject lien. But, all such references are inadmissible hearsay because the recorded abstract of judgment is not part of the record on the motion. Fed. R. Evid. 802. In other words, even if the court were to somehow overlook the service deficiency, it does not have admissible evidence of the subject lien and the motion would have been denied.

19. 14-32118-A-7 MARIETTA REYES — MOTION TO AVOID JUDICIAL LIEN
AJJ-1
VS. KELKRIS ASSOCIATES, INC. — 1-27-15 [20]

Final Ruling: The motion will be dismissed without prejudice because the notice of hearing is confusing and internally contradictory. While it states that written response is required "no less than 14 days before the date of the hearing on this motion," it also states that "If you mail a response to the Court for filing, you must mail it early enough so the Court will receive it before the date of the hearing on this motion." Docket 21 at 1-2.

In other words, while on one hand the notice tells the respondent that written opposition is due 14 days before the hearing, it also says, on the other hand, that the opposition must be mailed only in time for the court to receive it before the hearing. This makes no sense, it is confusing and it is not what Local Bankruptcy Rule 9014-1(f)(1) requires. The rule requires that written opposition be filed and served at least 14 days before the hearing. The notice does not comply with that requirement. Accordingly, the motion will be dismissed.

20. 14-29519-A-7 CHARLES BORNCAMP — MOTION TO AVOID JUDICIAL LIEN
RM-1
VS. UNIFUND CCR, L.L.C. — 1-16-15 [33]

Final Ruling: The motion will be dismissed without prejudice because it is not accompanied by a *separate* notice of hearing as required by Local Bankruptcy Rule 9014-1(d)(2). The motion and notice of motion are one document. Docket 33.

Further, the motion does not comply with Fed. R. Bankr. P. 7004(b)(3), which requires service "[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association . . . to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one

authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

The debtor served the motion on Unifund without addressing it "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process."

And, while the debtor served Unifund's attorney, unless the attorney agreed to accept service, service was improper. See, e.g., Beneficial California, Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (B.A.P. 9th Cir. 2004).

21. 14-30420-A-7 SHER/ZAKIA BACHA — ORDER TO SHOW CAUSE 2-9-15 [22]

Final Ruling: The order to show cause will be discharged and the petition will remain pending.

This order to show cause was issued because the debtor filed an Amended Master Address List on January 26, 2015, but did not pay the $30 filing fee. However, the debtor paid the fee on February 11, 2015. No prejudice has resulted from the delay.

22. 10-49228-A-7 MARIO/NITZE JAIMEZ — MOTION TO APPROVE STIPULATION 2-9-15 [43]
DNL-2

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The trustee requests approval of a stipulation between the estate and the debtors, resolving the respective parties' interests in labor law claims against an employer of Debtor Mario Jaimez. The claims pertain to the mis-classification of the debtor as an independent contractor for a period of approximately 10 years.

Under the terms of the stipulation, the trustee will prosecute the claims for pre and post-petition services provided by the debtor; the recovery will pay first the attorney's fees and costs incurred in prosecuting the claims and the remaining amount divided 60% to the estate and 40% to the debtors. The debtors waive any claims, including exemption claims they could assert, against the estate's 60% portion of the net recovery. Settlement of the labor claims shall be subject to bankruptcy court approval. The debtors may object to any motion for approval of a settlement of the labor claims, in the event they do not agree that the settlement is fair and equitable.

On a motion by the trustee and after notice and a hearing, the court may

approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of 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 with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the stipulation. That is, given that the debtors appear not to have omitted scheduling the claims intentionally, given the anticipated high cost of litigating the division of recovery between pre and post-petition services provided by the debtor, given that the debtor will cooperate in the prosecution of the claims, and given the other inherent costs, risks, delay and inconvenience of further litigation, the stipulation is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

23.	11-24633-A-7 BHS-6	ANDREW/KIMBERLEY BROCCHINI	MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY 2-6-15 [81]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtor, the trustee, the U.S. Trustee, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The Law Office of Barry Spitzer, attorney for the trustee, has filed its first and final motion for approval of compensation. The requested compensation consists of $7,027.50 in fees and $165.14 in expenses, for a total of $7,192.64. This motion covers the period from February 14, 2013 through February 6, 2015. The court approved the movant's employment as the trustee's attorney on April 3, 2013. In performing its services, the movant charged hourly rates of $325 and $350.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services included, without limitation: (1) analyzing petition documents and assets, (2) analyzing the estate's interest in personal injury claims, (3) communicating with special counsel and the trustee about the claims, (4) evaluating issues

pertaining to a worker's compensation matter, (5) obtaining court approval of a settlement of the personal injury claims, (6) advising the trustee about the general administration of the estate, and (7) preparing and filing employment and compensation motions.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved.

To the extent applicable, the movant shall deduct from the allowed compensation any fees or costs that have been estimated but not incurred.

24. 10-49334-A-7 SALEN LOR AND XONG THAO — MOTION TO AVOID JUDICIAL LIEN
DBJ-2 — 2-23-15 [38]
VS. DISCOVER BANK

Final Ruling: The motion will be dismissed without prejudice because it was not served on the respondent creditor, Discover Bank, in accordance with Fed. R. Bankr. P. 7004(h), which requires service on insured depository institutions (as defined by section 3 of the Federal Deposit Insurance Act) to be made by *certified mail* and addressed to an *officer* of the institution.

Discover Bank is an insured depository institutions.

The proof of service accompanying the motion indicates that the notice was not served by certified mail and it was not addressed to an officer of the creditor. Docket 43. It was addressed to Discover Bank's agent for service of process, CT Corporation System. Docket 43 at 2. This does not satisfy Rule 7004(h).

25. 10-47342-A-7 JOANNE PILLAY — MOTION TO AVOID JUDICIAL LIEN
SLE-1 — 2-23-15 [26]
VS. CAPITAL ONE BANK

Final Ruling: The motion will be dismissed without prejudice because it was not served on the respondent creditor, Capital One Bank, in accordance with Fed. R. Bankr. P. 7004(h), which requires service on insured depository institutions (as defined by section 3 of the Federal Deposit Insurance Act) to be made by *certified mail* and addressed to an *officer* of the institution.

Capital One Bank is an insured depository institutions.

The proof of service accompanying the motion indicates that the notice was not served by certified mail and it was not addressed to an officer of the creditor. Docket 30. It was not addressed to anyone. Docket 30 at 2. This does not satisfy Rule 7004(h).

26. 10-47342-A-7 JOANNE PILLAY — MOTION TO AVOID JUDICIAL LIEN
SLE-2 — 2-23-15 [31]
VS. VION HOLDINGS L.L.C.

Final Ruling: The motion will be dismissed without prejudice because the motion was not served on the respondent creditor, Vion Holdings, L.L.C. Docket 35.

And, while the motion was served on Vion's attorney, Mark Walsh, unless the attorney agreed to accept service, service was improper. See, e.g., Beneficial

California, Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (B.A.P. 9th Cir. 2004).

Finally, the motion was not served on the chapter 7 trustee. Although the proof of service contains the name of the trustee, there is no address associated with the name. Docket 35 at 2.

27. 14-30147-A-7 ERIK/SYLVIA PATTEN — MOTION TO DISMISS CASE 2-2-15 [16]
UST-1

Final Ruling: This motion to dismiss the casenhas been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(b) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the debtor, the trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted and the case will be dismissed.

The U.S. Trustee moves for dismissal of this case pursuant to 11 U.S.C. § 707(b)(3)(B). In the alternative, the U.S. Trustee asks for conversion to chapter 13, assuming the debtors consent to such conversion.

11 U.S.C. § 707(b)(3) provides: "In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."

This motion is based solely on 11 U.S.C. § 707(b)(3)(B).

11 U.S.C. § 707(b)(1) provides for dismissal of a Chapter 7 case upon a finding of "abuse" by an individual debtor with "primarily consumer debts."

Consumer debts are defined as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). "[A] debtor is considered to have "primarily consumer debts" under § 707(b) when consumer debts constitute more than half of the total debt." Price v. United States Trustee (In re Price), 353 F.3d 1135, 1139 (9th Cir. 2004).

The debtors have admitted in their petition that their debts are primarily consumer debts for purposes of 11 U.S.C. § 101(8). The debtors checked the "primarily consumer debts" box in their petition. Docket 1 at 1.

Further, the totality of the circumstances of the debtors' financial situation

demonstrates abuse. The debtors' own Schedules I and J reflect that their household income exceeds their household expenses by $1,271.60. Docket 1, Schedule J. With such disposable monthly income, the debtors could repay their $30,192.69 in unsecured debtor, both priority and general, in approximately 24 months.

The debtors have not filed any response to this motion, disputing their statements in Schedules I and J. Also, the time for responding to the motion has expired. Responses to the motion were due 14 days prior to the hearing.

More, the debtors' actual take home net pay reflects a higher figure than what reported on Schedule I. The debtors' actual net take home pay is $6,974.45, meaning that their actual disposable income is even greater; it is $1,617.45 ($6,974.45 minus $5,357).

A debtor's "ability to pay" creditors is itself a sufficient basis for concluding that the "totality of the circumstances" demonstrates abuse. See United States v. Kelly (In re Kelly), 841 F.2d 908, 914 (9th Cir. 1988) ("the debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse") (emphasis added); In re Lamug, 403 B.R. 47, 55 (Bankr. N.D. Cal. 2009) ("ability to pay, standing by itself, remains a sufficient ground to support a finding of abuse under post-BAPCPA § 707(b)(3)") (emphasis added); In re Baeza, 398 B.R. 692, 696-97 (Bankr. E.D. Cal. 2008) ("totality of circumstances" under Section 707(b)(3) includes the debtor's ability to pay his debts).

Given the foregoing, the totality of the circumstances of the debtors' financial situation demonstrates abuse. The motion will be granted and the case will be dismissed.

28. 14-30053-A-7 WALTER FLETSCHER — MOTION FOR RELIEF FROM AUTOMATIC STAY
TJS-1
JPMORGAN CHASE BANK, N.A. VS. — 1-28-15 [33]

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be dismissed as moot.

The movant, JPMorgan Chase Bank, seeks relief from the automatic stay with respect to a 2009 Porsche Cayenne vehicle.

11 U.S.C. § 521(a)(2)(A) requires an individual chapter 7 debtor to file a statement of intention with reference to property that secures a debt. The statement must be filed within 30 days of the filing of the petition (or within 30 days of a conversion order, when applicable) or by the date of the meeting of creditors, whichever is earlier. The debtor must disclose in the statement whether he or she intends to retain or surrender the property, whether the

property is claimed as exempt, and whether the debtor intends to redeem such property or reaffirm the debt it secures. See 11 U.S.C. § 521(a)(2)(A); Fed. R. Bankr. P. 1019(1)(B).

The petition here was filed on October 8, 2014 and a meeting of creditors was first convened on December 3, 2014. Therefore, a statement of intention that refers to the movant's property and debt was due no later than November 7, 2014. The debtor filed a statement of intention on the petition date, indicating an intent to retain the vehicle and reaffirm the debt secured by the vehicle.

11 U.S.C. § 521(a)(2)(B) requires that a chapter 7 individual debtor, within 30 days after the first date set for the meeting of creditors, perform his or her intention with respect to such property.

If the property securing the debt is personal property and an individual chapter 7 debtor fails to file a statement of intention, or fails to indicate in the statement that he or she either will redeem the property or enter into a reaffirmation agreement, or fails to timely surrender, redeem, or reaffirm, the automatic stay is automatically terminated and the property is no longer property of the bankruptcy estate. See 11 U.S.C. § 362(h).

Here, although the debtor indicated an intent to retain the vehicle and reaffirm the debt secured by the vehicle, the debtor has not done so. And, no motion to redeem has been filed, nor has the debtor requested an extension of the 30-day period. As a result, the automatic stay automatically terminated on January 2, 2015, 30 days after the petition date.

The trustee may avoid automatic termination of the automatic stay by filing a motion within whichever of the two 30-day periods set by section 521(a)(2) is applicable, and proving that such property is of consequential value or benefit to the estate. If proven, the court must order appropriate adequate protection of the creditor's interest in its collateral and order the debtor to deliver possession of the property to the trustee. If not proven, the automatic stay terminates upon the conclusion of the hearing on the trustee's motion. See 11 U.S.C. § 362(h)(2).

The trustee in this case has filed no such motion and the time to do so has expired.

Therefore, without this motion being filed, the automatic stay terminated on January 2, 2015.

Nothing in section 362(h)(1), however, permits the court to issue an order confirming the automatic stay's termination. 11 U.S.C. § 362(j) authorizes the court to issue an order confirming that the automatic stay has terminated under 11 U.S.C. § 362(c). See also 11 U.S.C. § 362(c)(4)(A)(ii). But, this case does not implicate section 362(c). Section 362(h) is applicable and it does not provide for the issuance of an order confirming the termination of the automatic stay. Therefore, if the movant needs a declaration of rights under section 362(h), an adversary proceeding seeking such declaration is necessary. See Fed. R. Bankr. P. 7001.

29. 14-32353-A-7 JAMES/EMILY ANDERSON — MOTION FOR RELIEF FROM AUTOMATIC STAY
JM-1 — 2-5-15 [17]
COMMERCE BANK, N.A. VS.

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The movant, Commerce Bank, seeks relief from the automatic stay with respect to a 2008 FS2500 Weekend Warrior RV vehicle. The movant has produced evidence that the vehicle has a value of $9,900 and its secured claim is approximately $12,655. Docket 19 at 2-3.

The court concludes that there is no equity in the vehicle and no evidence exists that it is necessary to a reorganization or that the trustee can administer it for the benefit of the creditors. And, in the statement of intention, the debtor has indicated an intent to surrender the vehicle. Docket 14.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(2) to permit the movant to repossess its collateral, dispose of it pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived due to the fact that the movant's vehicle is being used by the debtor without compensation and it is depreciating in value.

30. 14-32354-A-7 JESSICA CANADA — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1 — 1-30-15 [11]
FORD MOTOR CREDIT COMPANY, L.L.C. VS.

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be dismissed as moot.

The movant, Ford Motor Credit Company, seeks relief from the automatic stay with respect to a 2013 Ford Mustang vehicle.

11 U.S.C. § 521(a)(2)(A) requires an individual chapter 7 debtor to file a statement of intention with reference to property that secures a debt. The statement must be filed within 30 days of the filing of the petition (or within 30 days of a conversion order, when applicable) or by the date of the meeting of creditors, whichever is earlier. The debtor must disclose in the statement whether he or she intends to retain or surrender the property, whether the property is claimed as exempt, and whether the debtor intends to redeem such property or reaffirm the debt it secures. See 11 U.S.C. § 521(a)(2)(A); Fed. R. Bankr. P. 1019(1)(B).

The petition here was filed on December 24, 2014 and a meeting of creditors was first convened on February 17, 2015. Therefore, a statement of intention that refers to the movant's property and debt was due no later than January 23, 2015. The debtor filed a statement of intention on the petition date but without listing the vehicle in the statement.

If the property securing the debt is personal property and an individual chapter 7 debtor fails to file a statement of intention, or fails to indicate in the statement that he or she either will redeem the property or enter into a reaffirmation agreement, or fails to timely surrender, redeem, or reaffirm, the automatic stay is automatically terminated and the property is no longer property of the bankruptcy estate. See 11 U.S.C. § 362(h).

Here, although the debtor filed a statement of intention on the petition date, the vehicle is not listed in the statement. And, no reaffirmation agreement or motion to redeem has been filed, nor has the debtor requested an extension of the 30-day period. As a result, the automatic stay automatically terminated on January 23, 2015, 30 days after the petition date.

The trustee may avoid automatic termination of the automatic stay by filing a motion within whichever of the two 30-day periods set by section 521(a)(2) is applicable, and proving that such property is of consequential value or benefit to the estate. If proven, the court must order appropriate adequate protection of the creditor's interest in its collateral and order the debtor to deliver possession of the property to the trustee. If not proven, the automatic stay terminates upon the conclusion of the hearing on the trustee's motion. See 11 U.S.C. § 362(h)(2).

The trustee in this case has filed no such motion and the time to do so has expired. The court also notes that the trustee filed a "no-asset" report on February 17, 2015, indicating an intent not to administer the vehicle or any other assets.

Therefore, without this motion being filed, the automatic stay terminated on January 23, 2015.

Nothing in section 362(h)(1), however, permits the court to issue an order confirming the automatic stay's termination. 11 U.S.C. § 362(j) authorizes the court to issue an order confirming that the automatic stay has terminated under 11 U.S.C. § 362(c). See also 11 U.S.C. § 362(c)(4)(A)(ii). But, this case does not implicate section 362(c). Section 362(h) is applicable and it does not provide for the issuance of an order confirming the termination of the

automatic stay. Therefore, if the movant needs a declaration of rights under section 362(h), an adversary proceeding seeking such declaration is necessary. See Fed. R. Bankr. P. 7001.

31. 12-33565-A-7 MARK KOLODZIEJ — MOTION TO AVOID JUDICIAL LIEN
TJW-2
VS. JPMORGAN CHASE BANK — 2-23-15 [80]

Final Ruling: The motion will be dismissed without prejudice.

The motion does not comply with Local Bankruptcy Rule 9014-1 because when it was filed it was not accompanied by a separate proof of service. See Local Bankruptcy Rule 9014-1(e)(3). Appending a proof of service to one of the supporting documents (assuming such was done) does not satisfy the local rule. The proof of service must be a separate document so that it will be docketed on the electronic record. This permits anyone examining the docket to determine if service has been accomplished without examining every document filed in support of the matter on calendar.

32. 12-33565-A-7 MARK KOLODZIEJ — MOTION TO AVOID JUDICIAL LIEN
TJW-3
VS. AMERICAN BUILDERS & CONTRACTORS SUPPLY CO. INC. — 2-23-15 [84]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be denied without prejudice.

A judgment was entered against the debtor in favor of American Builders and Contractors Supply Co., Inc. for the sum of $28,270.94. The abstract of judgment was recorded with Solano County on December 30, 2010. Docket 87 at 9. That lien attached to the debtor's residential real property in Vallejo, California on Legend Circle. The debtor asks the court to avoid the lien as to the Legend Circle property under section 522(f)(1).

The subject real property had an approximate value of $200,000 as of the petition date. Dockets 86 & 1. The unavoidable liens totaled $387,799.03 on that same date, consisting of a single mortgage in favor of Bank of America. Dockets 86 & 1.

However, the motion will be denied because the only exemption claimed in Schedule C (Docket 1) is as to the debtor's one-half interest in another real property in Vallejo, California, on Thomas Avenue. And, there is no Amended Schedule C on the docket. Accordingly, there is no exemption impairment by the subject lien. The motion will be denied.

33. 12-33565-A-7 MARK KOLODZIEJ — MOTION TO AVOID JUDICIAL LIEN
TJW-4
VS. CAPITAL ONE BANK (USA) N.A. — 2-23-15 [89]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be denied without prejudice.

A judgment was entered against the debtor in favor of Capital One Bank for the sum of $10,589.11. The abstract of judgment was recorded with Solano County on March 23, 2011. Docket 92 at 9. That lien attached to the debtor's residential real property in Vallejo, California on Legend Circle. The debtor asks the court to avoid the lien as to the Legend Circle property under section 522(f)(1).

The subject real property had an approximate value of $200,000 as of the petition date. Dockets 91 & 1. The unavoidable liens totaled $387,799.03 on that same date, consisting of a single mortgage in favor of Bank of America. Dockets 91 & 1.

However, the motion will be denied because the only exemption claimed in Schedule C (Docket 1) is as to the debtor's one-half interest in another real property in Vallejo, California, on Thomas Avenue. And, there is no Amended Schedule C on the docket. Accordingly, there is no exemption impairment by the subject lien. The motion will be denied.

34. 12-33565-A-7 MARK KOLODZIEJ — MOTION TO AVOID JUDICIAL LIEN
TJW-5
VS. NAPA BUILDERS SUPPLY CO. INC. — 2-23-15 [94]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be denied without prejudice.

A judgment was entered against the debtor in favor of Napa Builders Supply Co., Inc. for the sum of $81,842.05. The abstract of judgment was recorded with Solano County on April 6, 2012. Docket 97 at 9. That lien attached to the debtor's residential real property in Vallejo, California on Legend Circle. The debtor asks the court to avoid the lien as to the Legend Circle property under section 522(f)(1).

The subject real property had an approximate value of $200,000 as of the petition date. Dockets 96 & 1. The unavoidable liens totaled $387,799.03 on that same date, consisting of a single mortgage in favor of Bank of America. Dockets 96 & 1.

However, the motion will be denied because the only exemption claimed in Schedule C (Docket 1) is as to the debtor's one-half interest in another real property in Vallejo, California, on Thomas Avenue. And, there is no Amended Schedule C on the docket. Accordingly, there is no exemption impairment by the subject lien. The motion will be denied.

35. 12-30566-A-7 PEGGY OSBORNE — MOTION TO AVOID JUDICIAL LIEN
LRR-2
VS. COVENANT CARE CALIFORNIA, LLC — 12-9-14 [23]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted.

A judgment was entered against the debtor in favor of Covenant Care California,

LLC for the sum of $117,148.80 on December 7, 2011. The abstract of judgment was recorded with San Joaquin County on January 3, 2012. That lien attached to the debtor's residential real property in Stockton, California (730, 732, 734 Hemlock Street). As the debtor passed away post-petition, on August 1, 2012, after this case was filed on June 1, 2012, this motion to avoid the subject lien is brought by the administrator of the debtor's probate estate.

The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property had an approximate value of $73,900 as of the petition date. Docket 1. The unavoidable liens totaled $0.00 on that same date. Docket 1. The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(3) in the amount of $73,900 in Schedule C. Docket 1. The court takes judicial notice of the debtor's Schedules A, C and D. Fed. R. Evid. 201.

The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

36. 14-30467-A-7 DONALD/JILL POLGLASE — MOTION FOR RELIEF FROM AUTOMATIC STAY
PD-1 — 1-30-15 [23]
HSBC BANK USA, N.A. VS.

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee, to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted in part and dismissed as moot in part.

The movant, HSBC Bank U.S.A., N.A., seeks relief from the automatic stay as to real property in Granite Bay, California.

Given the entry of the debtor's discharge on February 10, 2015, the automatic stay has expired as to the debtor and any interest the debtor may have in the property. See 11 U.S.C. § 362(c). Hence, as to the debtor, the motion will be dismissed as moot.

As to the estate, the analysis is different. The property has a value of $465,166 and it is encumbered by claims totaling approximately $625,752. The movant's deed is in first priority position and secures a claim of approximately $503,531.

The court concludes that there is no equity in the property and there is no evidence that it is necessary to a reorganization or that the trustee can administer it for the benefit of creditors. The court also notes that the trustee filed a report of no distribution on December 22, 2014.

Thus, the motion will be granted as to the estate pursuant to 11 U.S.C. §

362(d)(2) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

The court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

Because the movant has not established that the value of its collateral exceeds the amount of its secured claim, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will not be waived. That period, however, shall run concurrently with the 7-day period specified in Cal. Civ. Code § 2924g(d) to the extent section 2924g(d) is applicable to orders terminating the automatic stay.

37. 14-23576-A-7 GSO ENTERPRICES, INC. MOTION TO APPROVE COMPROMISE
PGM-1 1-29-15 [20]

Final Ruling: The motion will be dismissed without prejudice because the motion violates Fed. R. Bankr. P. 2002(a)(3), which requires that motions to compromise be served on all creditors. The subject motion has not been served on all creditors. It has not been served on any creditors. Docket 23.

The court also notes that the motion does not describe the dispute leading to the compromise, does not sufficiently describe the terms of the compromise, and does not brief and analyze the merits of the compromise. Docket 20.

Finally, the notice of hearing for the motion refers to the chapter 13 trustee. Docket 21 at 1. This, however, is a chapter 7 case.