

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

March 24, 2016 at 10:30 a.m.

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1. [14-29361](#)-E-7      WALTER SCHAEFER      CONTINUED MOTION FOR CONTEMPT  
DNL-15              Douglas Jacobs              11-4-15 [[238](#)]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on November 4, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Contempt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

**The Motion for Contempt is ~~XXXXX~~**

Kimberly J. Husted ("Trustee") moves for an order holding Walter H. Schaefer ("Debtor") in contempt for violating court orders, Dckt. 101 and 135. Trustee seeks (1) compulsory sanctions in an amount no less than \$5,000.00 per day; or (2) ordering that the Debtor be imprisoned until such time as the

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Debtor complies with the court's orders.

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FN.1. The court notes that the Motion contains a typographical error, misidentifying the trustee as J. Michael Hopper moving for an order of contempt. The court recognizes Kimberly J. Husted as the duly-appointed Trustee of the above-captioned bankruptcy estate.  
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**ALLEGED CONDUCT OF DEBTOR IN VIOLATION OF PRIOR COURT ORDERS**

Trustee alleges that Debtor violated court orders directing the Debtor to turn over certain real properties located in Costa Rica, corporations organized under the laws of Costa Rica which hold interests in the real properties, and ordering the Debtor to direct the Debtor's agents, attorneys, and brokers to comply with the Trustee's and her attorneys' instructions. Trustee provides the court with an exhaustive factual background, to contextualize the issue at hand, urging the court to grant the instant Motion. Trustee alleges the following:

Among the assets of the Debtor's bankruptcy estates is the Debtor's interest in:

- A. Certain real property commonly known as Los Delfines, Bayside, Unit #2, Tambor, Costa Rica ("First Condominium");
- B. Certain real property commonly known as 184 Los Delfines, Tambor, Costa Rica ("Undisclosed Condominium");
- C. Certain unimproved lots in Costa Rica identified as Guanacaste Nos. 37920-000 and 37922-000 ("Lots"); and
- D. Corporations organized under the laws of Costa Rica which hold title to the aforementioned real properties and identified as Morena Velar S.A. ("Velar"), Free Solutions Imperial S.A. ("Free Solutions"), Bayside Tambor JVM Dos S.A. ("Bayside"), and 3101495080 S.A. ("Lot Corporations").

The court has conducted multiple prior hearings on this Motion and the prior Civil Minutes address in detail the issues.

The parties have proceeded to resolve many of these matters, using this process to reasonable solve issues rather than merely battle.

**JANUARY 7, 2015 HEARING**

At the hearing, Trustee's counsel acknowledged that significant process has been made. The shares of stock have been signed over, \$4,100 of the rental income, and copies of some of the rental agreements.

The parties requested that the hearing be continued as they address the remaining information items. The hearing on the Motion for Contempt was continued to 10:30 a.m. on March 24, 2016

**DEBTOR'S STATUS REPORT - Filed March 8, 2016**

The Debtor filed a Status Statement on March 8, 2016. Dckt. 309. The Debtor states that he has directed his attorneys and agents to sign over any and all interest in the properties or corporations immediately to the Trustee's Costa Rican Attorney, which has allegedly been done. The Debtor states that all papers necessary to effect the transfers have been signed and delivered.

The Debtor states he had all keys to the various properties delivered to the Trustee's attorney. The Debtor has provided the accounting of all monies spent. Neither the Debtor nor hi attorney know of any act requested of the Debtor or his attorney hat has not bee completed.

**TRUSTEE'S ADDITIONAL STATUS REPORT - Filed March 17, 2016**

The Trustee filed a status report on March 17, 2016. Dckt. 311. The Trustee states that following the December hearing, the Debtor turned over \$4,100.00 to the Trustee and represented that the sum was all the money left over in the Costa Rican accounts in which rental monies were deposited.

On January 5, 2016, the Debtor executed a declaration that provided an accounting of the rental monies received on the properties. The Debtor explained that all rents collected were place in and all the expenses were taken out of two account in Costa Rica - a Free Solutions Account and a Morena Velar Account. The Debtor further explained that he received \$21,300.00 in rents and incurred \$17,077.00 in expenses, of which approximately \$153.00 per month was being automatically withdrawn for utilities.

Following the January hearing, the Trustee states that account statements for the two bank accounts through November 2015 were turned over. The account reflects that there were beginning balances (as of the petition date) of approximately \$5,342.76 and approximately \$11,964.56 when the case was converted. The statements also reflect:

1. The Debtor collected approximately \$21,300.00 in rents
2. \$7,858.01 of the funds were clearly used for personal expenses;
3. Approximately \$10,016.46 of the funds were used for expenses related to the condos;
4. There were no automatic withdrawals approximating \$153.00 per month for utilities; and
5. There were ending balances that aggregated \$5,738.81, of which \$4,100.00 was turned over.

The Trustee further states that additional account statements for December 2015 and January 2016 were turned over on March 16, 2016. The account statements reflect that nearly all of the ending balances were consumed for personal expenses. In addition, despite the Debtor's statements regarding the \$4,100 that was turned over to the Trustee, there were additional sums remaining and the Debtor had withdrawn \$4,500.00 at or near the time the funds were turnover.

The Debtor has agreed to stipulate to turnover the funds consumed for

his personal benefit. In addition, the Trustee anticipates transferring the real properties in Costa Rica to new entities to assist her in their marketing sale.

**MARCH 24, 2016 HEARING**

At the hearing, **xxxxxx**

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 23, 2015. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

**The hearing for the Motion for Contempt is ~~XXXXXXXXXXXXXXXXXXXX~~.**

J. Michael Hopper, the Chapter 7 Trustee, filed the instant Motion for Contempt on December 23, 2015. Dckt. 129. The Trustee seeks an order holding Janet Robinson ("Debtor") in contempt for failing to comply with the court's order directing the Debtor to turn over, among other things, certain real property located at 725 Acacia Avenue, Richmond, California and the post-petition rents for the Acacia Property, and certain real property generally located at 681 8<sup>th</sup> Street, Richmond, California.

The Trustee requests compulsory sanctions in an amount no less than \$2,500.00 per day or the Debtor be incarcerated until such time as the Debtor complies with the court's order.

Trustee alleges that Debtor's Amended Schedule B, filed April 8, 2015, disclosed for the first time the Debtor's one-sixth interest in the probate estate of her father. At that time, Debtor represented the 8<sup>th</sup> Street Property as the sole asset of the probate estate, and never disclosed the Debtor's interest in the Acacia Property.

At the second meeting of creditors, the Debtor confirmed that she had an interest in the 8<sup>th</sup> Street Property, and stated that the Subject Property was generating \$1,275.00 in rental income, and monthly mortgage payments approximated in the amount of \$268.00. At the fourth, and final, meeting of Creditors, the Debtor failed to provide any of the requested documentation and information related to the other purported owners of the 8<sup>th</sup> Street Property.

Trustee asserts that as part of its investigation, a public record search was caused to be performed. The public record reflected that, on the petition date, the 8th Street Property was solely in the Debtor's name. The same day the Grant Deed for the 8th Street Property was recorded, a Grand Deed was recorded that reflects that Julietta C. Robinson conveyed to Debtor and five other individuals the Acacia Property. Public records reflect that the title to this property remains in the Debtor's name.

Trustee notes that on September 3, 2015, this court entered an order granting the Trustee's motion to sell the 8th Street Property. Dckt. 90.

Trustee alleges that to date, Debtor has not provided any documentation or information related to the 8th Street Property, the post-petition rents collected, the Acacia Property, and the owners of the Acacia Property from the Debtor's counsel.

**OCTOBER 29, 2015 TURNOVER ORDER**

On October 29, 2015, the court granted the Trustee's Motion for Turnover and ordered the following:

**IT IS ORDERED** that the Motion for Turnover of Property is granted.

**IT IS FURTHER ORDERED** that Janet L. Robinson ("Debtor"), shall deliver on or before noon on November 20, 2015, possession of the property, including:

1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8<sup>th</sup> Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8<sup>th</sup> Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

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(the "Property") with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

**IT IS FURTHER ORDERED** that the monies turned over shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15<sup>th</sup> Street, Sacramento, California 95811.

Dckt. 114.

#### **APPLICABLE LAW**

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384,395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see *Price v. Lehitine*, 564 F. 3d at 1058.

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

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Once an alleged contemtor's noncompliance with a court order is established, the burden shifts to the alleged contemtor to produce sufficient evidence of its inability to comply to raise a question of fact. *In re Icenhower*, 755 F.3d 1130, 1139 (9th Circuit 2014)(internal citations and quotations omitted).

## **DISCUSSION**

From the information provided for by the Trustee and a review of the instant case, the Debtor failed to comply with the court's order and turnover:

1. All post-petition rents collected by the Debtor on account of certain real property located at 681 8th Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8<sup>th</sup> Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

Pursuant to the court's order, the Debtor had until noon on November 20, 2015 to turnover the properties, rents, and accounting to the Trustee. As testified by the Trustee in his declaration, the Debtor failed to comply. The Trustee testifies that on November 25, 2015, the Debtor's counsel provided a narrative response explaining that expenses the Debtor incurred related to the 8<sup>th</sup> Street Property apparently offset any rents collected. Dckt. 131. However, the Trustee states that no documentation was provided in support and no information or documentation was provided relating to the Acacia Property.

The Trustee states that through his counsel, on November 29, 2015 and December 7, 2015, attempted to obtain a substantiative response and compliance with the court's order. The Debtor's counsel responded on December 8, 2015 stating that the Debtor was not "tech savvy" and that the Debtor required an additional week. The Trustee allowed for an extension until December 14, 2015. However, the Debtor has still failed to comply.

It is apparent from the facts around this case that the Debtor has wilfully failed to comply with the court order to turnover the property. The Trustee offered the Debtor an additional 24 days to comply with the court's specific order. To date the Debtor was failed to take advantage of this extension. Rather, the Debtor and Debtor's counsel provided a "narrative" of how the rent monies were used and claim the Debtor's lack of computer knowledge as reasons for failing to comply. This is unacceptable.

## **JANUARY 7, 2016 HEARING**

At the hearing counsel for Ms. Robinson appeared and consented to the entry of the Order. Counsel for Ms. Robinson and the Trustee stated that they were working on providing the information and the granting of the motion and the continued hearing was consistent with their efforts.

The court issued the following order:

**IT IS ORDERED** that the Motion for Contempt is granted.

**IT IS FURTHER ORDERED** that Janet L. Robinson ("Debtor"), shall deliver on or before noon on January 21, 2016, possession of the property, including:

1. All post-petition rents, and accounting thereof, collected by the Debtor on account of certain real property located at 681 8<sup>th</sup> Street, Richmond, California;
2. Rent in the sum of \$8,925.00 collected from February 2015 to August 2015, on account of the 8<sup>th</sup> Street Property;
3. Certain real property located at 725 Acacia Avenue, Richmond, California; and
4. Any post-petition rents collected on account of the Acacia Property.

(the "Property") with all of their personal property, personal property of any other persons which Debtors, and each of them, allowed access to the Property; and any other person or persons that Debtors, and each of them, allowed access to the Property removed from the Property.

**IT IS FURTHER ORDERED** that if the Debtor fails to turnover the Property by noon on January 21, 2016, the Debtor shall be sanctioned \$250.00 per day until the Debtor has turned over the Property.

**IT IS FURTHER ORDERED** that the sanctions shall be in the form of a cashier's check or other certified funds issued by a bank or credit union with physical branches in California or a money order issued by an entity with has physical locations in California. The cashier's check, certified funds, or money order, and any documents relating to the possession or control of other property to be turned over, shall be delivered to the Trustee at the following address: J. Michael Hopper, Trustee, c/o of Desmond, Nolan, Livaich & Cunningham, Attn: J. Luke Hendrix, 1830 15<sup>th</sup> Street, Sacramento, California 95811.

**IT IS FURTHER ORDERED** that further hearing on the Motion shall be conducted at 10:30 a.m. on February 25, 2016, for the court to consider:

- A. The effectiveness of the \$250.00 a day corrective sanctions;
- B. Issuance of an order computing the amount of the corrective \$250.00 sanction to the date of the

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hearing if the Debtor failed to comply with the turnover order;

- C. Whether the court should order incarceration as a corrective sanctions;
- D. Whether the court should order the corrective sanction of the dismissal with prejudice of this bankruptcy case if the Debtor does not comply with the prior turnover over by a future specified date; and
- E. Such other sanctions as proper.

Dckt. 138.

#### **FEBRUARY 23, 2016 HEARING**

Prior to the February 23, 2016 Hearing, no supplemental papers have been filed in connection with the instant Motion.

At the hearing, the Trustee reported that there remains the issue of the turnover of the rents from the Eight Street Property. The Debtor has asserted that a portion of the rent monies were used to make mortgage payments and expenses. The Trustee's investigation shows that no mortgage payments were made by Debtor.

For the asserted expenses, the Trustee has not found evidence of payments made by the Debtor. The Trustee is now going to investigate with the providers of the services to determine if they were actually made by the Debtor. The Trustee believes that the receipts for the "work done" have been fabricated.

The Debtor's counsel responded, stating counsel may be filing a motion to withdraw, but desired additional time to clearly communicate the ramifications if Debtor does not comply with the turnover order relating to the rents.

At the hearing, the court continued the Motion to 10:30 a.m. on March 24, 2016.

#### **MARCH 24, 2016 HEARING**

No supplemental papers were filed in connection with the instant Motion since the continuance.

At the hearing, xxxxxx

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

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

The Motion for Contempt filed by Trustee having been

presented to the court, and upon review of the pleadings,  
evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Contempt is **xxxxxx**

3. 15-20081-E-7 JANET ROBINSON  
HLG-2 Kristy Hernandez

MOTION BY KRISTY A. HERNANDEZ  
TO WITHDRAW AS ATTORNEY  
3-9-16 [154]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 9, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

**The Motion to Withdraw as Attorney is granted**

Kristy Hernandez, attorney of record for Janet Lee Robinson ("Debtor"), filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case. Dckt. 154. FN. 1. Movant states the following:

1. The Debtor has, for the past five months, repeatedly failed to cooperate in the prosecution of this case and in particular has repeatedly failed to communicate with the Movant, and has not answered or responded to letters, e-mails, or phone calls.
2. The Debtor and counsel cannot agree on a course of proceeding in this case.

3. Revealing specific facts upon which this motion is based would involve disclosure of client confidences, the undersigned represents that good grounds for withdrawal exist under the Rules of Professional Conduct of the State Bar of California.

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FN.1. The Motion states that it is a withdrawal request "solely within above-captioned adversary proceeding." However, the only case listed is the Debtor's bankruptcy case.  
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**APPLICABLE LAW**

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

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FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.  
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It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 915.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l. Conduct 3-700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows

or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. Cal. R. Prof'l. Conduct 3-700(B).

Permissive Withdrawal is limited to when to situations where:

(1) Client:

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(5) The client knowingly and freely assents to termination of the employment; or

Cal. R. Prof'l. Conduct 3-700(C).

#### **DISCUSSION**

Movant provides various reasons for the Motion to Withdraw as Attorney such as her inability to work and communicate with Debtor for over five months to move the case forward. Movant states in her declaration:

Unfortunately, the attorney-client relationship between Janet Robinson and myself has broken down to the point where I can no longer properly represent her in this matter.

Dckt. 156.

Movant does not discuss any prejudice his withdrawal as a counsel will or will not cause to the other litigants or harm it might or might not have on administration justice. However, neither the Trustee, Debtor, nor any other relevant party has filed an opposition to this Local Bankruptcy Rule 9014-1(f)(2) motion.

Furthermore, under the California Rules of Professional Conduct 3-700(C)(1)(d), Debtor's conduct, such as the lack of response to correspondence from the Movant is hindering Movant's ability to carry out her employment and duties effectively. These are sufficient reasons for permissive withdrawal.

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

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

The Motion to Withdraw as Attorney filed by Debtor's Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Withdraw as Attorney is granted and Kristy Hernandez is permitted to withdraw as counsel for Debtor Janet Lee Robinson.

4. [14-29284-E-7](#) CHARLES MILLS CONTINUED OBJECTION TO DEBTOR'S  
DNL-14 Lucas Garcia CLAIM OF EXEMPTIONS  
11-30-15 [[314](#)]

**No Tentative Ruling:** The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on November 30, 2016. By the court's calculation, 59 days' notice was provided. 28 days' notice is required.

The Objection to Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The hearing on the Objection to Claim of Exemptions is  
XXXXXXXXXXXXXXXXXXXXX.**

The Chapter 7 Trustee, Kimberly Husted ("Trustee"), opposes Charles Mills' ("Debtor") claim of exemption against: (1) real property identified as

9285 Pinehurst Drive, Roseville, California 95747 ( the "Pinehurst Property") claimed as exempt pursuant to California Code of Civil Procedure § 704.730; (2) sports items, including jerseys, football helmets, autographed sports equipment, and similar items identified in Debtor's Amended Schedule B ( the "Sports Items") claimed as exempt pursuant to California Code of Civil Procedure § 704.020; (3) an antique slot machine, claimed as exempt pursuant to California Code of Civil Procedure § 704.020; (4) a Wurlitzer juke box, claimed as exempt pursuant to California Code of Civil Procedure § 704.020; and (5) a Go-Kart, claimed as exempt pursuant to California Code of Civil Procedure § 704.020.

As discussed infra, Debtor does not oppose Trustee's objection as to the Wurlitzer juke box or the antique slot machine, and argues that the Go-Kart is not property of the estate, and therefore not entitled to an exemption.

Trustee's remaining objections are as follows:

1. The Pinehurst Property was not Debtor's principal dwelling at the time of the petition date, and therefore is not entitled to the exemption under California Code of Civil Procedure § 704.730. Debtor's original and amended petitions identify Debtor's street address as 201 Rua Esperanza, Lincoln, California 95648 (the "Rua Esperanza Property"), and do not identify prior addresses. Debtor's 2012 tax return similarly identifies the Rua Esperanza Property as Debtor's home address, and claims rental income from the Pinehurst Property. Debtor's Amended Schedule B further identifies the Rua Esperanza Property as the location for all of Debtor's personal property.

On July 7, 2014, Yvonne Rego ("Rego") started working with Debtor, and moved into the Rua Esperanza Property, where she resided until October 10, 2014. Rego states that during this period, she observed Debtor and his family coming and going, and that Debtor's vehicles and substantial personal belonging were at the Rua Esperanza Property. Rego states further that she would come over for coffee with Debtor and his wife, and that she observed large social gatherings at the Rua Esperanza Property. Rego's friend, Leanne Hammond, was also present at the Rua Esperanza Property on several occasions and states that it was apparent Debtor and his family were living there. See Rego Declaration, Dckt. 316; Leanne Hammond Declaration, Dckt. 317.

During the period of September 2014 and October 2014, Joey Alexander, Caleb Scribner and his family, and Jessie Morgan resided at the Pinehurst Property. During this time, neither Debtor nor his family resided at the Pinehurst Property. See Joey Alexander Declaration, Dckt. 319. On October 6, 2014, Rego was forced to pay Debtor's cable bill to reactivate service at the Rua Esperanza Property though Debtor and his family were still residing there.

While this case was pending in Chapter 11, Debtor attempted to sell the Rua Esperanza Property. In his declaration supporting

the motion for sale, Debtor identifies the Pinehurst Property as a former rental property, stating that "Debtor in Possession intends to vacate [the Rua Esperanza Property] upon closing and move to [the Pinehurst Property.]" The Debtor stated further that \$50,000.00 of the sale proceeds would be needed in order to make the Pinehurst property livable after former tenants, evicted by Debtor, left the property in a state of disrepair.

After Debtor's proposed sale fell through, Debtor's case was converted to a Chapter 7, and the court subsequently entered an order granting Trustee's motion to sell the Rua Esperanza Property for \$1,855,000.00, providing \$10,000.00 to Debtor for exempt household items included in the sale.

2. The Sports Items are more akin to memorabilia or display items than household goods, and are not ordinarily found in households. Therefore, the Sports Items are not exempt under California Code of Civil Procedure § 704.020.

Along with the Trustee's Motion, the Trustee filed the following declarations in support: (1) Declaration of Yvonne Rego; (2) Declaration of Leanne Hammond; (2) Declaration of Trustee; and (4) Declaration of Joey Alexander.

The Rego Declaration states that Ms. Rego, during July 7, 2014 through October 10, 2014, Ms. Rego lived at Rua Esperanza with the Debtor and his family. Dckt. 316. Ms. Rego asserts that she would see the Debtor and his family, as well as she would see the Debtor's Maserati inside the garage. Ms. Rego states that she visited Pinehurst property with the Debtor in late August 2014 or early September 2014. Furthermore, Ms. Rego states that on October 6, 2014, prior to moving out, she made a payment to Direct TV after the service was shut off due to unpaid bills.

The Hammond Declaration states that Ms. Hammond visited Ms. Rego at Rua Esperanza. Dckt. 317. Ms. Hammond testifies that she saw the Debtor and his family at Rua Esperanza and that she believed the Debtor was living there.

The Alexander Declaration states that during the period of September 2014 and October 2014, Mr. Alexander lived at Pinehurst. Dckt. 319. Mr. Alexander asserts that he lived at the Pinehurst property with Caleb Scribner and his wife and two children and Jessie Morgan. Mr. Alexander testifies that the Debtor and his family were not living there during the time period, including September 17, 2014. Mr. Alexander states "[t]he Debtor rented the Pinehurst Property to us."

#### **DEBTOR'S OPPOSITION**

Debtor filed an opposition to Trustee's Objection on January 18, 2016. Dckt. 331. Debtor's arguments are as follows:

1. Trustee is seeking to cover up her lack of vigorous opposition to a relief of stay motion resulting in the sale of the Rua Esperanza Property, as well as her lack of vigorous pursuit of higher offers for that same sale. In selling the Rua Esperanza Property, Trustee "merely carved out an amount sufficient for

her needs, the needs of her counsel and professionals, and the secured creditor."

2. Debtor's principal dwelling at the time of filing was the Pinehurst Property. Debtor's address listed as the Rua Esperanza Property was a duplication error due to the expedited nature of this filing. Debtor's personal belongings were at the Rua Esperanza Property because that property was being marketed as fully furnished. Furthermore, there were no personal belongings or furnishings at the Pinehurst Property because Debtor wished to add his furnishings to the Rua Esperanza Property sale in order to buy new furnishings for the Pinehurst Property.

While Rego did reside at the Rua Esperanza Property, neither house can look into the other except by walking up and looking through windows. Rego's living space was equivalent to living next door to Debtor's at the Rua Esperanza Property. Furthermore, the last time Debtors had coffee with Rego was on September 1, 2014, following Rego's termination from Debtor's employment. On October 6, 2014, the cable service had turned off because Debtor's had stopped living at the Rua Esperanza Property and no longer needed television service there. While Debtor and his wife still maintained appearances in the neighborhood of Rua Esperanza that they lived and intended to live there, they had disclosed to close friends and family their intent to move.

Debtor consulted with Caleb Scribner ("Scribner") as early as May 2014 regarding his intention to move into the Pinehurst Property. After evicting former tenants, Debtor allowed Scribner and his family to reside at the Pinehurst Property as guests, while Debtor maintained a room there so he could rehabilitate the property. See Scribner Declaration, Dckt. 333. In August 2014, Debtor contracted with a landscape company to bring fresh beauty bark to the Pinehurst Property as part of the rehabilitation process. Debtor was physically present through the filing of his petition to work on the interior and exterior of the Pinehurst Property. See Mills Declaration, Dckt. 332.

3. Debtor's Sports Items are a random collection for Debtor's personal enjoyment and decoration, and are not memorabilia. Fewer than 50% of the items have certificates of authenticity, the display stands and frames for each item are separate, none of the items are original game wear, and there is no theme behind the Sports Items. Because the Sports Items are general decoration, they should be considered household goods, like art.
4. Debtor does not oppose Trustee's objection as to the Wurlitzer juke box or the antique slot machine, and argues that the Go-Kart is not property of the estate, and therefore not entitled to an exemption.

Along with the Debtor's opposition, the Debtor provides the declarations of: (1) Debtor; (2) Caleb Scribner; and (3) Tamara Mills.

The Scribner Declaration declares that Mr. Scribner moved into the Pinehurst property while he was relocating himself and his family to California. Dckt. 333. Mr. Scribner states that he was instructed to keep a room available to him at all times and that Mr. Scribner assist in repairing and rehabilitating the property. On September 16, 2014, Mr. Scribner states that he was informed that the Debtor "was going to be moving his family to Pinehurst shortly and that in addition to his current room he was going to need all of [them] to vacate the Pinehurst home." Additionally, of note, Mr. Scribner states:

I continued to live in Pinehurst into the month of October all the while maintaining a room for Mills and assisting him in getting the property ready for his wife and children to move in.

Tamara Mills' declaration states that it was her and the Debtor's intention to move to Pinehurst. Dckt. 334. Mrs. Mills discusses that she "had not physically moved to Pinehurst on September 17, 2014," and that she held events at Rua Esperanza to lead "neighbors to believe that we were still doing well financially and to believe that I was residing and intending to reside at Rua Esperanza." Mrs. Mills then restates essentially the same bases as those in the opposition.

#### **TRUSTEE'S REPLY**

On January 21, 2016, Trustee filed a reply stating the following:

1. The Debtor's focus on the sale of the Rua Esperanza Property is irrelevant to the current Objections.
2. The Debtor has not met his burden of showing that the Pinehurst Property was intended to be his principal dwelling at filing. Debtor's current claims are inconsistent with his petition and schedules. Furthermore, during the Summer of 2014, at a time when Debtor claims he was already discussing moving into the Pinehurst Property, Debtor was actively marketing the property.

While Debtor claims that he maintained a room beginning August 2014 at the Pinehurst Property, he only recalls staying there overnight on September 16 and 18, 2014. Joey Alexander, a tenant there, further states that he had access to each room, and that neither Debtor nor his family resided there. Moreover, Rego was never an employee of Debtor, and was not terminated by him.

3. The Debtor's current characterization of the Sports Items is inconsistent with past representations. Furthermore, items that are not ordinarily found in households, and which are used as purely ornamental display are not household goods.
4. Lastly, the Debtor misunderstands the Trustee's avoidance rights, namely concerning the priming rights of the Trustee.

**March 24, 2016 at 10:30 a.m.**

The Trustee provided the declarations of Yvonne Rego, Tony Manning, and Joseph Alexander.

Ms. Rego's declaration states that she was never employed nor terminated by Debtor and instead worked alongside Debtor. Dckt. 341. Ms. Rego declares that she was terminated from Elevate, which is a solar power business, and not by Debtor. Additionally, Ms. Rego asserts that her relationship was not strained, as asserted by Debtor. Ms. Rego also asserts that she did in fact see the Debtor's family at Rua Esperanza and that the television payments was due to unpaid bills and that Debtor's wife thanked her for making the payment.

Tony Manning declares that he filed Proof of Claim No. 17-1, asserting a secured claim in the amount of \$115,000.00 on account of a promissory note and deed of trust against the Pinehurst Property. Dckt. 342. Mr. Manning states that the security interest arose as part of a settlement of a lawsuit filed against Debtor. The Settlement provided that the Debtor would pay Mr. Manning \$115,00.00 from the sale proceeds of the sale of the Pinehurst property, directly from escrow. The Settlement provided Placer Title Company would handle the escrow.

The Trustee also attached Joseph Alexander's supplemental declaration. Dckt. 343. This declaration states that Mr. Alexander has access to each room at the Pinehurst property during the period of September 2014 and October 2014. Mr. Alexanders testifies that:

[The Debtor] did not have a room at the Pinehurst Property while I was living at the property. The Debtor did not stay overnight at the Pinehurst Property while I was living at the property. I did see him at the Pinehurst Property working on projects.

Additionally, Mr. Alexander testifies that he did not have a written lease agreement but did pay rent to the Debtor.

#### **SUPPLEMENTAL DECLARATION OF JOSEPH ALEXANDER**

The Debtor filed a "supplemental Corrective Declaration of Joseph Alexander Opposing Trustee's Objection to Exemptions" on February 11, 2016. Dckt. 351. Mr. Alexander states, still under the penalty of perjury, that the purpose of the supplemental declaration is to correct the information in his prior declarations filed by the Trustee. Mr. Alexander alleges that for both declarations, Rego approached him to sign the declarations. Mr. Alexander argues that he did not understand the purpose of the document, the importance of perjury, nor if any of the information was correct. Mr. Alexander argues that for both declarations, Mr. Alexander felt pressure to sign the documents without correcting information due to the alleged pressure from Rego.

Mr. Alexander states that he would correct the following statements:

1. "I did live at the Pinehurst property on the dates in question, I can assert that Freddie did stay nights there while preparing the property for his family to move in as their permanent residence." Dckt. 351, ¶ 28a.

2. "I did not pay rent at all to Freddie. I paid my portion of the expenses to Caleb Scribner but never to Freddie. And although I considered it my 'rent' in a loose fashion, I did know that it was not the market value of rent for such a nice property and that I was merely a guest in Freddie's house." Dckt. 351, ¶ 28b.
3. "Although I did not think of him as a roommate (because I did not think he would be leaving the property and staying with us when we left) I knew that he had full access to and use of the Pinehurst property and that he was staying some nights as well as preparing it for his family to occupy." Dckt. 351, ¶ 28c.

#### **TRUSTEE'S RESPONSE**

The Trustee filed a response to the Debtor's request for judicial notice on February 18, 2016. Dckt. 355. The Trustee asserts that while she questions the circumstances surrounding Mr. Alexander's change of testimony, the Trustee notes that the only substantive changes in the testimony is that Mr. Alexander now asserts that the Debtor spent some nights at the Pinehurst property and that Mr. Alexander paid what he considered his rent to Caleb Scribner and not to the Debtor directly.

The Trustee concludes by stating that the Debtor has repeatedly testified and made representations that Rua Esperanza was his residence and the location for his personal property; that the Pinehurst property was a rental property and had not been occupied by the Debtor; and that the Pinehurst property would be marketed and sold in furtherance of the Debtor's settlement agreement with Tony Manning. The Trustee argues that the Debtor has not sufficiently shown that the Debtor is entitled to an exemption.

#### **APPLICABLE LAW**

##### Homestead

For purposes of the instant Objection, California law provides the following homestead exemption:

(a) The amount of the homestead exemption is one of the following:

(1) Seventy-five thousand dollars (\$75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).

(2) One hundred thousand dollars (\$100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

(3) One hundred seventy-five thousand dollars (\$175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead any one of the following:

(A) A person 65 years of age or older.

(B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.

(C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars (\$25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars (\$35,000) and the sale is an involuntary sale.

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

California Code of Civil Procedure § 704.730.

Under California law, the factors a court should consider in determining residency, for homestead purposes, are physical occupancy of the property and the intention with which the property is occupied. *In re Kelley*, 300 B.R. 11 (B.A.P. 9th Cir. 2003). California Government Code specifies what should be considered when determining the place of residence:

In determining the place of residence the following rules shall be observed:

(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.

(b) There can only be one residence.

(c) A residence cannot be lost until another is gained.

(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such unmarried minor child.

(e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.

(f) The residence can be changed only by the union of act and intent.

(g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse.

Cal. Govt Code § 244 (West).

Under California law, debtor or debtor's spouse must reside in dwelling when bankruptcy petition is filed in order to be entitled to homestead exemption, whether homestead is claimed under article on homestead exemption or under article on declared homesteads. Cal. C.C.P. §§ 697.710, 704.710 et seq., 704.910 et seq; see, e.g. *In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992) (under California law, debtors' claim of homestead exemption was valid, even though debtors did not physically occupy house all the time, where debtors were only temporarily absent for a few days at a time for employment away from home).

California courts have discussed the requirements in order to claim a homestead exemption:

In *Tromans v. Mahlman*, 92 Cal. 1, 8 [27 P. 1094, 28 P. 579], it is said: "To effect its purpose, the [homestead] statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended. ... Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their home in San Francisco. ..."

*Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, (Dist. Ct. App. 1961).

Bankruptcy courts in the Eastern District have grappled with the proper burden of proof as to proving that applicability of an exemption. Specifically,

Because California law mandates the use of state exemptions, prohibits the use of federal exemptions, and allocates the burden of proof to the exemption claimant, the court further concludes that California Code of Civil Procedure § 703.580(b) is a substantive element of a California exemption and

California exemption law that must be applied inside bankruptcy the same as it would outside bankruptcy.

*In re Pashenee*, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015).

### Memorabilia

California has defined "collectible" as:

an autographed sports item, including, but not limited to, a photograph, book, ticket, plaque, sports program, trading card, item of sports equipment or clothing, or other sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more.

Cal. Civ. Code § 1739.7 (West).

In comparison, California states that "household furnishings, appliances, provisions, wearing apparel and other personal effects" are exempt under California if the following are met:

(a) Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt in the following cases:

(1) If ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence.

(2) Where the judgment debtor and the judgment debtor's spouse live separate and apart, if ordinarily and reasonably necessary to, and personally used or procured for use by, the spouse and members of the spouse's family at the spouse's principal place of residence.

(b) In determining whether an item of property is "ordinarily and reasonably necessary" under subdivision (a), the court shall take into account both of the following:

(1) The extent to which the particular type of item is ordinarily found in a household.

(2) Whether the particular item has extraordinary value as compared to the value of items of the same type found in other households.

Cal. Civ. Proc. Code § 704.020 (West).

### **DISCUSSION**

First, to narrow the issues at bar, the court sustains the objection to exemption as to the Wurlitzer juke box and the antique slot machine. The Trustee and the Debtor concur that the exemptions claimed in each of these

items are not proper and should be sustained. Therefore, the Trustee's objection to exemptions as to the Wurlitzer juke box or the antique slot machine and the claimed exemptions are disallowed in their entirety.

The crux of the remaining objection deals with the final three items: (1) Homestead exemption; (2) Spots Memorabilia; and (3) Go-Kart.

#### Homestead Exemption

The court does not find that the Debtor has met his burden to justify the use of a homestead exemption on the Pinehurst Property.

The burden of proof is on the Debtor to show that the Debtor is entitled to an exemption. *In re Pashenee*, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015). In order for the Debtor to claim a homestead exemption on the Pinehurst Property, the Debtor must have resided at Pinehurst when bankruptcy petition was filed.

Before discussing why the Debtor has failed to prove that he is entitled to claim a homestead exemption on the Pinehurst Property, the court reviews the prior pleadings in the instant case to determine where the Debtor has purported to "reside" during the bankruptcy case.

1. Petition, Dckt. 1.
  - a. Filed September 17, 2014.
  - b. Lists Street Address of Debtor as: "201 Rue Espinosa, Lincoln, CA."
2. 2012 Tax Return, Dckt. 20.
  - a. Filed September 25, 2014.
  - b. The home address is listed as: "201 Rue Esperanza."
3. Status Report, Dckt. 34.
  - a. Filed October 7, 2014.
  - b. "POST PETITION ACTIVITIES: The debtor has hired (subject to future court approval) an independent real estate agent named Mimi Nassif, to market, list and show the residence on Rua Esperanza, Lincoln CA 95648. Agent has received an offer for purchase, debtors attorney is gathering this offer as part of the necessary documents for a motion to approve the proposed sale. The sale price will exceed all secured claims on the property."
4. Motion to Authorize the Debtor to Employ Realtor Mimi Nassif, Dckt. 36.
  - a. Filed October 9, 2014.
  - b. "Luke Garcia, attorney for and on behalf of Charles Fredell Mills, Jr, the Debtor herein, hereby moves this Court for an

**March 24, 2016 at 10:30 a.m.**

Order Authorizing the Debtor to Employ Realtor Mimi Nassif to market, list, acquire all necessary escrow and the title contractors necessary to sell the real estate property located at 201 Rua Esperanza in Lincoln California, 95648."

- c. The Rua Esperanza Property is called the "real estate" in the Motion.
5. Motion to Authorize the Debtor in Possession to Sell Real Property and Contents, Dckt. 41.
  - a. Filed October 9, 2014.
  - b. The Motion sought authorization to sell the Rua Esperanza Property.
  - c. "Further, the Debtor In Possession hereby moves this court to allow this sale to be conducted in such a way as to include all furnishings, contents, decorations, and accouterments of the **home** except the personal belonging of the Debtor In Possession and to keep a portion of the remaining funds for repair and furnishing of the **home to which they will move.**" Dckt. 41, lines 21-24.
  - d. "Debtor In Possession **intends to vacate the [Rua Esperanza Property] upon closing and move to 9285 Pinehurst Drive, Roseville California 95747.** This address was formerly used as a rental by the Debtor in Possession but is currently vacant as of the date of this motion and the date of filing." Dckt. 41, ¶ 9.
  - e. "Wherefore Debtor in Possession also requests in the this motion permission to use \$50,000.00 of the net proceeds after distribution for renovating and furnishing the home on 9285 Pinehurst Drive, Roseville California 95747. That home has been left dilapidated and unfurnished by the recent removal of a nonpaying renter. **In order for the Debtor in possession to move into and live in that home furniture and repairs will be necessary.**" Dckt. 41, ¶ 16.
6. Declaration of Debtor in Support of Motion to Authorize the Debtor in Possession to Sell Real Property and Contents, Dckt. 43.
  - a. Filed October 9, 2014.
  - b. "The buyer intends to occupy [Rua Esperanza] and therefore I will be moving myself and my family (Wife and two sons) to a house that we formerly used as a rental property located at 9285 Pinehurst Drive, Roseville, California 95747 hereinafter 'Pinehurst'." Dckt. 43, ¶ 14.
  - c. "I recently evicted the former tenants who had not paid their rent for many months. This however has left the home in a state

of disrepair and dilapidation. This coupled with the proposed sale of all furnishings, contents, decorations, and accouterments will leave the Pinehurst home empty and in poor living condition." Dckt. 43, ¶ 16.

7. Schedules, Dckt. 50.
  - a. Filed October 15, 2015.
  - b. Schedule B, pg. 7.
    - i. All household goods and furnishings, including audio, video, and computer equipment, cash on hand, books, pictures, and other art objects antiques, stamp, coin, record, tape, compact disc, and other collections or collectible, wearing apparel, furs and jewelry, automobiles, and office equipment are **listed as being located at Rua Esperanza Property**.
    - ii. No personal property listed is reported to be located at the Pinehurst Property.
  - c. Schedule C, pg. 11.
    - i. Claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the Pinehurst Property in the amount of \$100,000.00.
  - d. Schedule I, pg. 22.
    - i. Debtor's employment is listed as "Self Employed Energy Broker" with Energy Master Agents. **The address is the Rua Esperanza Property**.
  - e. Schedule J, pg. 24.
    - i. Debtor states that his two sons and his wife live with him.
    - ii. The "rental or home ownership expenses for your residence" is listed at \$3,300.00.
    - iii. The Debtor lists "Other real property expenses" for "Mortgages on other property" as \$1,200.00.
  - f. Statement of Financial Affairs, pg. 27.
    - i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."
      - ii. Debtor indicated that there are **no** previous addresses.

8. Amendment Petition, Dckt. 52.
  - a. Filed October 15, 2014.
  - b. "Amendment(s) to the following petition, list(s), schedule(s) or statement(s) are transmitted herewith: Voluntary Petition for address spelling correction."
  - c. The amended petition states that the street address of the Debtor is "201 **Rua Esperanza** Lincoln, CA"
9. Motion to Dismiss, Dckt. 81.
  - a. Filed November 17, 2014.
  - b. "The financial situation of the Debtor has unexpectedly changed and the Debtor now desires to dismiss this case. Most notably the impending foreclosure that was threatening to debtors form [sic] **primary residence** [Rua Esperanza] has been resolved through the sale approved by this court."
10. Declaration of Debtor in Support of Ex Parte Motion to Dismiss Case, Dckt. 83.
  - a. Filed November 17, 2014.
  - b. "My financial and legal situation has unexpectedly changed and now wish to dismiss this case. Namely, the funds from the sale of my former home and furnishings will allow full payment of all my personal debts." Dckt. 83, ¶ 3.
11. Emergency Application for Order Authorizing the Debtor in Possession to Receive Early Disbursement of Estimated Remaining Funds from Sale, Dckt. 85.
  - a. Filed November 19, 2014.
  - b. "Upon consummation of [the sale of Rua Esperanza Property] on **November 18, 2014** the debtor gave up all furnishings of the home and **moved to a former rental unit of the debtor [Pinehurst Property], which was presently unfurnished.**" Dckt. 85, ¶ 2.
  - c. "The debtor brought personal belongings (like clothes and kids toys) but only mattresses for sleeping on. The debtor did not even get to keep the second refrigerator located at the **former primary residence** nor the second washer or dryer." Dckt. 85, ¶ 3.
  - d. "Therefore, the debtor is now essentially living in a wholly unfurnished house with no ability to keep cold foods or store the clothing they retained upon departure of the former primary residence." Dckt. 85, ¶ 4.
12. Amended Schedules, Dckt. 118.

- a. Filed December 10, 2014.
- b. Schedule B
  - i. All household goods and furnishings, including audio, video, and computer equipment, cash on hand, books, pictures, and other art objects antiques, stamp, coin, record, tape, compact disc, and other collections or collectible, wearing apparel, furs and jewelry, automobiles, and office equipment are **listed as being located at Rua Esperanza Property.**
  - ii. All personal property listed is reported to be located at the Pinehurst Property.
- c. Schedule C, pg. 11.
  - i. Claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the Pinehurst Property in the amount of \$100,000.00.
- d. Statement of Financial Affairs, pg. 27.
  - i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."
  - ii. Debtor indicated that there are **no** previous addresses.
- 13. Amended Petition and Schedule
  - a. Filed January 18, 2016.
  - b. Petition, pg. 2.
    - i. **Debtor's Street Address is listed as "9285 Pinehurst Drive, Roseville CA 95747" for the first time in the case.**
    - ii. **Mailing Address of Debtor is listed as "201 Rua Esperanza, Lincoln, CA 95648.**
  - c. Statement of Financial Affairs, pg. 27.
    - i. Question 15: Prior address of the debtor. If the debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case."
    - ii. Debtor indicated that there are **no** previous addresses.

As shown supra, the first time the Debtor claims Pinehurst Property as his residence and street address is on January 18, 2016 in the amendment to the Petition. Dckt. 330. This amendment still lists the mailing address of the Debtor as Rua Esperanza Property. The Debtor did not amend or supplement his Schedules B, C, nor Statement of Financial Affairs to indicate that any property other than Rua Esperanza was his residence. The Debtor does not indicate any prior addresses on the Statement of Financial Affairs, even though the Debtor claims to have moved to Pinehurst on November 18, 2014. See Emergency Application for Order Authorizing the Debtor in Possession to Receive Early Disbursement of Estimated Remaining Funds from Sale, Dckt. 85.

This is in direct conflict with the Debtor's repeated representation in connection with the instant Objection that Pinehurst Property has been the residence of the Debtor since, at the latest, October 2014. Dckt. 331, pg. 3, lines 7-10.

The Debtor does not provide any explanation why, since September 17, 2014, the Debtor has not ever stated that Pinehurst Property has been his residence. In fact, as seen supra, the Debtor has made repeated representations, under the penalty of perjury, that the Debtor and the family had not moved into Pinehurst until November 18, 2014. The Debtor stated that the Pinehurst Property was vacant following the eviction of the former tenants earlier in 2014. Nowhere prior to the opposition had the Debtor indicated that Mr. Alexander or Mr. Scribner lived at Pinehurst Property. The court is curious as to how both Mr. Alexander or Mr. Scribner was able to live at Pinehurst Property when the Debtor declared that there were no furnishing at the house.

In fact, the Debtor has continued to represent that all the Debtor's personal belongings, including clothes, jewelry, and cars, were located at Rua Esperanza and that him and his family were actually still residing at the Rua Esperanza Property

For instance, in the Debtor's first Motion to Sell the Rua Esperanza Property, the Motion stated: "Debtor In Possession ***intends to vacate the [Rua Esperanza Property] upon closing and move to 9285 Pinehurst Drive, Roseville California 95747.*** This address was formerly used as a rental by the Debtor in Possession but is currently vacant as of the date of this motion and the date of filing." Dckt. 41, ¶ 9.

The Debtor's declaration in support of the Motion to Sell the Rua Esperanza Property stated "The buyer intends to occupy [Rua Esperanza] and therefore I will be moving myself and my family (Wife and two sons) to a house that we formerly used as a rental property located at 9285 Pinehurst Drive, Roseville, California 95747 hereinafter 'Pinehurst'." Dckt. 43, ¶ 14.

The language of the Motion and the Declaration unequivocally indicate that the Debtor was residing at Rua Esperanza Property. The Debtor indicates that he and his family will move following the closing of the sale; not that the Debtor has already moved and intended to live at Pinehurst with his family.

Further indicating that the Debtor did not "reside" at the Pinehurst Property at the time of the petition to qualify for the homestead exemption pursuant to California Code of Civil Procedure § 703.740, the Debtor declared "I recently evicted the former tenants who had not paid their rent for many

months. This however has left the home in a state of disrepair and dilapidation. This coupled with the proposed sale of all furnishings, contents, decorations, and accouterments will leave the Pinehurst home empty and in poor living condition." Dckt. 43, ¶ 16. This statement is in direct conflict with the testimony now given by the Debtor that since September 2014, the Debtor had constantly been working on and improving the house, with the assistance of "guests" who were living at Pinehurst at the time, allegedly with Debtor.

While it is true that California courts, when determining whether a property qualifies for a homestead exemption, have found that even if a debtor did not physically occupy a house all the time, a debtor may be entitled to claim a homestead exemption if being temporarily absent for a few days at a time was due to employment, California courts have also found that a debtor cannot create a "sham" to qualify for homestead exemption. Compare *In re Dodge*, 138 B.R. 602 (Bankr. E.D. Cal. 1992) with *Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, 16 Cal. Rptr. 588 (Ct. App. 1961).

Specifically, courts have found that "the word 'actually,' to show that the residence must be real, and not sham or pretended." *Ellsworth v. Marshall*, 196 Cal. App. 2d 471, 474, 16 Cal. Rptr. 588 (Ct. App. 1961).

The California courts have long held that the debtor must actually reside at the property for it to be a homestead residence. The California Supreme Court in 1878 held that merely temporarily spending the night on a property and then undertaking the construction to create a habitable structure did not suffice to have the property become a homestead as a matter of California law. It was only when the person actually moved permanently into the house could it be claimed a homestead. *Babcock v. Gibbs*, 52 Cal. 629 (1878). In 1984, the California Court of Appeal described the homestead residence to be,

"The home is the center of domestic, social and civil life: the principal place of residence. Where the establishment of a home requires actual residence, the requirement is strictly construed and is not fulfilled by temporary or part-time occupation. "

*Nadler v. Cal. Veterans Bd.*, 152 Cal. App. 3d 707, 714 (1984). With respect to an intention for there to be a different residence as a homestead, the court further stated,

"This does not necessarily mean that a person must spend all of his time at a location to establish it as his home, but it does mean that a person cannot establish a certain location as the center of his domestic, social and civil life, spend most of his time there, and yet claim another location as his actual residence or home."

Here, the Debtor's claim that Pinehurst Property is the debtor's actual residence appears to be akin to a sham. Namely, the Debtor, throughout the life of the case, has indicated numerous times that: (1) the Debtor and his family live with him; (2) the Debtor's address is the Rua Esperanza Property; (3) all of the Debtor's and family's property is located at Rua Esperanza; (4) the Debtor's business is located at Rua Esperanza. Further, it is undisputed that Debtor's spouse and children continued to live at the Rua Esperanza property

and held themselves out as living at the Rua Esperanza property. While it is argued at this was the Debtor and his family merely "putting on airs" for the community, it demonstrates that the Debtor and his family did, and continued to, reside at Rua Esperanza when the bankruptcy case was filed.

The Debtor cannot, in hindsight, attempt to claim the intention to reside elsewhere when the statements made by the Debtor under the penalty of perjury. In fact, the Debtor's wife's own declaration indicates that the family continued to reside and host at the Rua Esperanza to "keep up appearances." This undercuts the intention argument.

What seems more akin to the factual scenario in the instant case is that the Debtor's "stay" at the Pinehurst Property was to rehabilitate the property, which, at the time of the Motion to Sell, was allegedly empty and in disrepair. This "temporary purpose" (here being the repairs to a rental property) indicates that it was not the residence of the Debtor. In fact, the Debtor in both the Motion to Sell and his Declaration in support indicate that the Pinehurst Property is uninhabitable at the time of the alleged "intention" to reside at the Pinehurst Property. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.

Both the Trustee and Debtor lose sight of the underlying contention - whether the Debtor was residing at Pinehurst at the time of filing to qualify for a homestead exemption. The Debtor and Trustee get "sidetracked" in arguing whether the sale of Rua Esperanza Property was pursued appropriately by the Trustee and the truthfulness of Mr. Alexander's testimony.

#### Sports Memorabilia

The next asset in contention is the various sports memorabilia, including sports jerseys, football, helmets, and autographed sports equipment as listed on Debtor's Amended Schedule B.

The court finds that the sports memorabilia is not "household furnishings that can be exempt pursuant to California Code of Civil Procedure § 704.020.

California law clearly defines "collectible" as :

an autographed sports item, including, but not limited to, a photograph, book, ticket, plaque, sports program, trading card, item of sports equipment or clothing, or other sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more.

Cal. Civ. Code § 1739.7 (West).

First thing of note, is that the Debtor lists the sports memorabilia as "Books, Pictures and Other Art Objects; Collectible" on the Debtor's Schedule B, which is a separate category from Household Goods and Furnishings. Dckt. 118. In fact, the Debtor states that he has "collectable sports memorabilia: 15 signed jerseys, 7 signed helmets, one signed foot ball [sic] and one signed basketball" before referencing the attached itemized list. Dckt. 118.

Second, the Debtor's sports memorabilia does correctly fit within the definition of "collectible" as defined by California. The sports memorabilia are "sports memorabilia sold or offered for sale in or from this state by a dealer to a consumer for five dollars (\$5) or more." The Debtor's own valuations indicate that each item of sports memorabilia is valued far higher than \$5.00.

Third, Debtor's argument that these are not of value because lack of authentication, were not actually worn at events, and the lack of them constitutes them as household decorations is unpersuasive. The court is not convinced that the estimated \$25,315.00 in sports memorabilia is not a consistent theme. The Debtor attempts to split hairs by asserting that since there is not a unified team or sport that they are nothing more than decorations. Given the quantity of the sports memorabilia and the substantial value of the goods, the court does not find that the memorabilia fits any other definition than "collectible."

The Debtor attempts to create a definition of "memorabilia" that requires that the item itself holds a "memory" of an event. This is far too narrow of a definition and one that the Debtor does not give any support.

As an aside, assuming *arguendo*, that the Debtor's residence was, in fact, Pinehurst Property (which the court does not so determine) and that the memorabilia could be considered "household furnishings", the Debtor would be ineligible to claim an exemption in the memorabilia. California defines "household goods" as:

(a) Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt in the following cases:

(1) If ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family **at the judgment debtor's principal place of residence.**

If the Debtor wishes to claim that the sports memorabilia is exemptible as household furnishings, the Debtor would need to concede that the Debtor's residence, at the time of filing, was Rua Esperanza, since that is where the sports memorabilia was stored. See Schedule B, Dckt. 118. As such, the Debtor is making conflicting arguments that he is entitled to both the homestead exemption on the Pinehurst Property and the household furnishings exemption on the sports memorabilia. This is not permissible on its face under California law.

#### Go-Kart

The final exemption in contention is the one claimed pursuant to California Code of Civil Procedure § 704.020 on the Go-Kart.

The Debtor filed an amended Statement of Financial Affairs on January 18, 2016, amending question 14 to indicate that the Debtor is holding the Go-

Kart on behalf of the Debtor's minor son. The Debtor reiterates that he is holding the Go-Kart for his son in his opposition.

To qualify for exemption under California Code of Civil Procedure § 704.020, the good must be "ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence."

The Debtor fails this in two ways: (1) the Debtor admits that the Go-Kart is not his possession and is thus not "necessary to, and personally used or procured for use by" the Debtor and (2) the Debtor has not shown how a Go-Kart is ordinary and necessary as a household furnishing.

**FEBRUARY 25, 2016 HEARING**

The Parties having read the court's tentative ruling for the February 25, 2016 hearing, they requested that the matter be continue to an evidentiary hearing scheduling conference. This will allow the parties to consider the tentative ruling, their respective positions, further research the law, and determine the merits of their respective positions. This may lead to a settlement or the Debtor electing a different exemption scheme (which would include a wildcard exemption).

The court continued the hearing to 10:30 a.m. on March 24, 2016 which the court shall use as an evidentiary hearing scheduling conference, if such hearing is necessary.

**MARCH 24, 2016 HEARING**

No supplemental papers have been filed in connection with the instant Motion.

The court shall issue an Evidentiary Hearing Order setting the following dates and deadlines:

(1) Testimony and exhibits shall be presented to the court pursuant to Local Rule 9017-1. Presentation of witnesses at the hearing is required.

(2) Debtors shall lodge with the court and serve their direct testimony statements and exhibits on or before -----.

(3) Trustee shall lodge with the court and serve their direct testimony statement on or before -----.

(4) Evidentiary objections and confirmation hearing briefs shall be filed and served on or before -----.

(5) Oppositions to evidentiary objections shall be filed and served on or before -----.

(6) The Evidentiary Confirmation Hearing shall be conducted at -----.

5. [14-29284-E-7](#) CHARLES MILLS  
DNL-19 Lucas Garcia

MOTION TO COMPROMISE  
CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH TONY MANNING  
2-18-16 [[357](#)]

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

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

**Below is the court's tentative ruling.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 18, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

**The Motion for Approval of Compromise is ~~XXXXXXXXXXXX~~.**

Kimberly Husted, the Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Tony Manning ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the Movant's assertion that the Deed of Trust and Writ of Attachment are avoidable as preferences and that the Lis Pendens should be withdrawn.

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit B in support of the Motion, Dckt. 361):

- A. Settlor shall be allowed a claim against the estate in the total amount of \$115,000.00 on account of his Proof of Claim No. 17-1, the Deed of Trust, the Writ of Attachment, the Lis Pendens, and any other claims that Settlor has asserted or could assert against the bankruptcy estate. Settlor's claim shall be allowed as a secured claim against 25% of the net sale proceeds resulting from a sale of the Pinehurst Property by the Trustee, as defined and provided below, and the balance of Settlor's claim not satisfied from his 25% of the net sale proceeds of the Pinehurst Property shall be allowed as a general unsecured claim payable under the distribution provisions of 11 U.S.C. § 726.
  
- B. Settlor consents to the Movant's sale of the bankruptcy estate's interest in the Pinehurst Property free and clear of any liens, encumbrances, and claims of interest of Settlor in the Pinehurst Property pursuant to 11 U.S.C. § 363(f)(2). Settlor shall cooperate with the Movant's efforts to market and sell the Pinehurst Property, including withdrawing the Lis Pendens and executing and recording a release of the Deed of Trust and Writ of Attachment or any other necessary escrow documents in conjunction with a sale of the Pinehurst Property by the Movant through the escrow for the sale of the Pinehurst Property which shall be void and of no force and effect if the escrow for the sale of the Pinehurst Property does not close. Any sale of the Pinehurst Property shall only occur after a duly noticed hearing and an order of the Bankruptcy Court approving such sale. The sale proceeds from any sale of the Pinehurst Property by the Trustee shall be distributed as follows:
  - 1. To the holders of any undisputed liens against the Pinehurst Property; taxes (including real property taxes; transfer taxes, and resulting capital gains, if any); HOA dues, fees, costs, penalties;; and closing costs (including real estate commissions, prorations, escrow fees, transfer fees, title fees, recording fees, etc);
  
  - 2. From the remaining balance (i.e. net proceeds), 75% to the Trustee for the benefit of the Debtor's bankruptcy estate and 25% to Settlor on account of his secured claim as allowed under the settlement and up to the amount of \$115,000.
  
- C. As further and separate consideration for the settlement, within 15 days of entry of the court's order approving the settlement, the Movant shall assign to Settlor the bankruptcy estate's interest in the Jeep. The Movant makes no representations or warranties regarding the condition of the

**March 24, 2016 at 10:30 a.m.**

Jeep. Settlor acknowledges that the Movant does not have knowledge of the condition of the Jeep and is not in a position to make any disclosures to Settlor concerning the condition of the Jeep. Settlor agrees to take the Jeep "as is," "where is" and subject to any and all claims of lien, encumbrance, and interest, including the claim of the Debtor and his spouse that the Jeep is the sole and separate property of the Debtor's spouse. The Movant shall have no obligation to deliver to Settlor title to the Jeep or possession of the Jeep. Settlor shall be solely responsible for any and all transfer fees and transfer taxes and any and all litigation fees and expenses incurred by Settlor in connection with the Jeep.

- D. The Settlor and Movant exchange mutual releases with respect to the Deed of Trust, Writ of Attachment, Lis Pendens, and Preference Claim.

## **DISCUSSION**

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

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

### **Probability of Success**

The Movant asserts that this factor weighs in favor of settlement because the outcome is ultimately unknown. With respect to the Lis Pendens, the Movant does not dispute that the Lis Pendens was recorded outside the preference period and that the relation back language extends beyond judgments, which may lead to the Movant not prevailing on the Preference Claim. As to the Jeep, the Movant states that while the schedules are not probative evidence as against third-parties, the facts of the instant case makes such settlement beneficial to all parties.

**Difficulties in Collection**

The Movant asserts that this factor does not apply since the recovery would come from the sale of the Pinehurst Property.

**Expense, Inconvenience and Delay of Continued Litigation**

Movant argues that litigation would result in significant costs which are projected based on the unsettled nature of the claim, given the questions of law and fact which would be the subject of a trial. Formal discovery would be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

**Paramount Interest of Creditors**

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

**Interests of Creditors in Avoidable Liens**

The Chapter 7 Trustee asserts that the Deed of Trust and Writ of Attachment may be avoided pursuant to 11 U.S.C. § 547(b) as a preferential transfer. Such an avoided transfer is preserved for the benefit of the bankruptcy estate, affording the estate the rights to the value of the asset in the same priority as existed for the secured creditor. 11 U.S.C. § 551. This protects the estate from junior liens and interests which encumber or may be claimed against the asset subject to the avoided lien.

The Settlement Agreement does not appear to clearly state the resolution of the Trustee's rights to avoid the lien. The Agreement does state that the Settlor will retain the lien if the Trustee does not administer the Pinehurst Property. FN.1.

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FN.1. On Schedule A Debtor states that the Pinehurst Property has a value of \$600,000.00. Dckt. 50 at 6. On Schedule D Debtor lists Wells Fargo Bank, N.A. as having a senior deed of trust (purchase money) securing a \$380,000.00 debt and Settlor having a junior lien securing a \$100,000.00 obligation. *Id.* at 13. Therefore, by Debtor's calculation, the lien preserved for the benefit of the estate provides for the estate the full amount of that obligation. Under the terms of the Settlement, the court understands those net proceeds to be divided 75% to the estate and 25% to Settlor for a compromise amount distribution on his secured claim for the avoidable lien. Debtor has asserted the right to claim a homestead exemption in the Pinehurst Property, which is an indication that Debtor continues to believe that the value of the property is sufficient to pay Settlor's and Wells Fargo Bank, N.A.'s secured claims, costs of sale, and leave value for Debtor.  
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The agreement also includes a general release provision as between the Trustee and Settlor, without releasing any obligations of the Debtor.

**Explanation at Hearing of Settlement Terms as They Relate to the Estate's Interest In Avoidable Transfers**

At the hearing, ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

**Consideration of Additional Offers**

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is ~~{in the best interest of the creditors and the Estate. The Settlement allows for the satisfaction of claims arising as to the status of the Pinehurst Property. The settlement ensures there will be a benefit to the estate at the time of selling the Property as well as avoids any litigation to determine the viability and priority of the Settlor's claim.}~~ The motion is granted.

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

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

The Motion to Approve Compromise filed by Kimberly Husted, Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Approve Compromise between Movant and Tony Manning ("Settlor") is ~~XXXXXXXXXXXX~~.

6. [12-34690-E-7](#) FAUSTO VILLALOBOS  
TAA-1 Scott Sagaria

MOTION TO COMPROMISE  
CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH ALAN S.  
FUKUSHIMA  
2-23-16 [[164](#)]

**Final Ruling: No appearance at the March 24, 2016 hearing is required.**  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on February 23, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

**The Motion for Approval of Compromise is granted.**

Thomas Aceituno, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Alan Fukushima, Trustee for the Bankruptcy Estate of Ernest Madigal Villalobos ("Settlor"). The claims and disputes to be resolved by the proposed settlement are those arising from the dispute from the liquidation of Franklin Property.

#### **Summary of Claims in Dispute**

The two Debtors are brothers, with each estate asserting 50% beneficiary interest in the Josefina Villalobos Trust. The trust provides that upon the death of Josefina Villalobos (Debtors' mother), the trust is to dissolved and the assets distributed to the two beneficiaries (now the two bankruptcy estate). Though Josefina Villalobos died in 1999, the trust has not been dissolved. Fausto Villalobos serves as the trustee of the trust.

In January 2009, Fausto Villalobos obtained a loan in the amount of \$110,000.00, for which trust property consisting of real property located at 6301 Franklin Boulevard, Sacramento, California, was given as security. The deed of trust was executed by Fausto Villalobos individually and as the trustee

of the trust. Ernest Villalobos was not a party to the loan transaction and did not receive any of the proceeds. The Motion states that Fausto Villalobos received all of the loan proceeds for personal and business purposes.

The obligation on the loan is now computed to be in excess of \$161,000.00, based on Proof of Claim No. 7 filed in this bankruptcy case. The Franklin Property has been transferred by the Trustee of the Josefina Villalobos Trust to the two bankruptcy trustees.

### **Summary of Settlement**

Movant and Settlor has resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 167):

- A. Within 14 days of entry of an order approving the Agreement, the Movant will convey the Fausto Estate's interest in the Franklin Property to the Ernest Trustee who shall have exclusive authority to sell the Franklin Property.
- B. Upon sale of the Franklin Property, the net proceeds shall be divided as follows:
  - 1. First to the Secured Creditors on account of their claim.
  - 2. Second to the Ernest Estate in an amount equal to the amount paid to the Secured Creditors; and
  - 3. Third, one-half to the Ernest Estate and one-half to the Fausto Estate.
- C. The two estates will exchange releases.

### **DISCUSSION**

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

- 1. The probability of success in the litigation;
- 2. Any difficulties expected in collection;
- 3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
- 4. The paramount interest of the creditors and a proper deference to their reasonable views.

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlor has granted a corresponding release for Debtor and the Estate.

**Probability of Success**

The Movant states that both estates run a risk in litigation. The agreement avoids the litigation risk by acknowledging that the secured party must be paid first from the sale proceeds, but allows for division between the estates if the sale proceeds are higher than anticipated.

**Difficulties in Collection**

While the collection is not complicated, the continued control and liquidation of the Franklin Property is problematic. Turning the property over to a single trustee will allow for the expedited sale of the property.

**Expense, Inconvenience and Delay of Continued Litigation**

Movant argues that litigation would result in significant costs. Formal discovery would be required. The Movant estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Movant projects that the proposed settlement nets approximately the same or a greater recovery for the Estate than if the case proceed to trial, but without the costs of litigation. Furthermore, if this was to continue to trial, new attorneys would need to be hired due to potential conflicts arising from the shared representation of the estates.

**Paramount Interest of Creditors**

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

**Consideration of Additional Offers**

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The compromise provides for the efficient and equitable settlement of claims arising in the Franklin Property and provides for the best mechanism to avoid any issues over each estate's interest. The compromise will allow a single trustee to concentrate on selling the property without the need to worry about the litigation over what proceeds go where if this settlement was not approved. The motion is granted.

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

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

The Motion to Approve Compromise filed by Thomas Aceituno, Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Approve Compromise between Movant and Alan Fukushima, Trustee for the Bankruptcy Estate of Ernest Villalobos ("Settlor") is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion(Docket Number 167).