UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street, Fifth Floor
Department A, Courtroom 11
Fresno, California

WEDNESDAY

APRIL 1, 2015

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. 15-10107-A-7 STEPHANEY/REGINALD BELYEU — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1
HYUNDAI MOTOR FINANCE/MV
AUSTIN NAGEL/Atty. for mv.
RENOTICED FOR 4/15/15
2-26-15 [22]

Final Ruling

The motion renoticed for April 15, 2015, at 9:00 a.m., this matter is dropped as moot.

2. 15-10628-A-7 BONIFACIO PENA AND ADRIANA SERRANO — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
3-9-15 [11]

ORDER 3/12/15

Final Ruling

This matter resolved by an order granting debtor's application for waiver of the chapter 7 filing fee, ECF #15, the order to show cause is discharged.

3. 13-11829-A-7 TRINIDAD CORTEZ — MOTION FOR COMPENSATION FOR JAMES SALVEN, ACCOUNTANT(S)
JES-2
JAMES SALVEN/MV
3-7-15 [79]
TIMOTHY SPRINGER/Atty. for dbt.

Final Ruling

Application: Compensation and Expenses
Disposition: Denied without prejudice
Order: Prepared by moving party

The applicant, James Salven, did not serve the application on the U.S. Trustee or on the case trustee, Peter Fear. Rule 9034 requires that the application itself be transmitted to the U.S. Trustee. Local Rule 9014-1(d)(4) requires that the application be served on the case trustee and on the debtor if there is a solvent estate that could yield a surplus to the debtor. (Local Rule 9001-1 defines "motion" to include applications, and this definition applies in the context of the local rules.) There also appears to be a typographical error in the billing statement as to the first date on which services were performed (2/11/14).

4. 13-16236-A-7 MARIO TALAMANTES
TGM-3

MOTION FOR COMPENSATION FOR
TRUDI G. MANFREDO, TRUSTEES
ATTORNEY(S)
3-2-15 [40]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Applicant Trudi G. Manfredo, attorney for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of $3390.50 and reimbursement of expenses in the amount of $129.47.

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Trudi G. Manfredo’s application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $3390.50 and reimbursement of expenses in the amount of $129.47.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the

distribution priorities of § 726.

5. 11-17945-A-7 KRIKOR/LENA ATACHIAN
ALG-4
JANINE ESQUIVEL/MV

MOTION FOR COMPENSATION FOR JANINE ESQUIVEL, TRUSTEE'S ATTORNEY(S), FEE: $4766.66, EXPENSES: $0.00
5-17-13 [32]

PETER BUNTING/Atty. for dbt.

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

Applicant Janine Esquivel, also known as Janine Oji, attorney for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of $4766.66 and reimbursement of expenses in the amount of $0.00.

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Janine Esquivel’s application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $4766.66 and reimbursement of expenses in the amount of $0.00.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

6. 14-15850-A-7 DANIELLE LAMBERT — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1
WELLS FARGO BANK, N.A./MV
DAVID JENKINS/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.
3-2-15 [14]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2010 Ford Fusion

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

7. 08-17157-A-7 PHILIP/SOLA OGBEIDE
DRJ-2
PHILIP OGBEIDE/MV
IRMA EDMONDS/Atty. for dbt.

MOTION TO AVOID LIEN OF DAN GABRIELSON
3-8-15 [32]

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Continued to April 29, 2015, at 9:00 a.m.; no later than April 15, 2015, the motion shall be served on the trustee; further, unless opposition is filed at the continued hearing, the court will adopt the following tentative ruling at the continued hearing excluding the paragraph entitled "Service on Trustee,"
Order: Prepared by moving party

SERVICE ON TRUSTEE

The motion has not been served on the trustee. Rule 9013 requires service of the motion on the trustee. The hearing will be continued to allow service of the motion. If the trustee has been served, and no opposition is filed, then the court will adopt this tentative ruling as the ruling at the continued hearing date, with the exception of this paragraph concerning service.

BACKGROUND FACTS

The motion seeks to avoid the judicial lien of Dan Gabrielson on two parcels of real property in which the debtor has a 1/4 interest. The first parcel is located at 1870 Pisa Cir., Stockton, CA ("Pisa Property"). The second parcel is located at 727 Astor Street, Stockton, CA ("Astor Property"). The judicial lien sought to be avoided is Gabrielson's lien totaling $32,408.23 plus interest from February 19, 2008 at 10% per year (motion at p. 1).

PISA PROPERTY

Liens Plus Exemption: $33,408.23
Property Value: $0.00
Judicial Lien Avoided: $32,408.23 plus 10% interest per annum running from February 19, 2008 until the date of issuance of the order avoiding the judicial lien

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's

interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

If a debtor who co-owns a fractional interest in property moves to avoid the judicial lien on the property under § 522(f), then the court applies a common sense approach that varies somewhat from a strict mechanical application of the formula under § 522(f)(2)(A). "Under this approach, one nets out consensual liens against the entire fee in co-owned property before determining the value of a debtor's fractional interest and excludes those liens from the calculation of 'all other liens on the property' under § 522(f)(2)(A)(ii)." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 90 (B.A.P. 9th Cir. 2007).

Applying the *Meyer* rule as to co-owned property, as well as § 522(f)(2)(A), the court finds that the moving party's interest in the absence of liens is $0.00. The consensual lien exceeds the value of the property by a substantial amount.

Accordingly, the respondent's judicial lien, regardless of its accrued amount after adding interest at 10% per annum, plus the amount of the $1000.00 exemption, exceeds the value of the movant's 1/4 interest in the Pisa Property by an amount greater than the judicial lien. Relief is warranted.

ASTOR PROPERTY

Liens Plus Exemption: $33,408.23
Property Value: $0.00
Judicial Lien Avoided: $32,408.23 plus 10% interest per annum running from February 19, 2008 until the date of issuance of the order avoiding the judicial lien

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390–91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

If a debtor who co-owns a fractional interest in property moves to avoid the judicial lien on the property under § 522(f), then the court applies a common sense approach that varies somewhat from a strict mechanical application of the formula under § 522(f)(2)(A). "Under this approach, one nets out consensual liens against the entire fee in co-owned property before determining the value of a debtor's fractional interest and excludes those liens from the calculation of 'all other liens on the property' under § 522(f)(2)(A)(ii)." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 90 (B.A.P. 9th Cir. 2007).

Applying the *Meyer* rule as to co-owned property, as well as § 522(f)(2)(A), the court finds that the moving party's interest in the absence of liens is $0.00. The consensual lien exceeds the value of the property by a substantial amount.

Accordingly, the respondent's judicial lien, regardless of its accrued amount after adding interest at 10% per annum, plus the amount of the $1000.00 exemption, exceeds the value of the movant's 1/4 interest in the Pisa Property by an amount greater than the judicial lien. Relief is warranted.

8. 15-10558-A-7 NAOMI SMITH

NAOMI SMITH/MV

NAOMI SMITH/Atty. for mv.

MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
2-18-15 [5]

No tentative ruling.

9. 12-19661-A-7 JORGE/MARY LOU SANTOS
PFT-2
PETER FEAR/MV

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH FARM CREDIT WEST, FLCA AND FARM CREDIT WEST, PCA
3-4-15 [515]

RILEY WALTER/Atty. for dbt.
PETER FEAR/Atty. for mv.

Final Ruling

Motion: Approve Compromise or Settlement of Controversy
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and

inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

Based on the motion and supporting papers, the court finds that the compromise is fair and equitable considering the relevant *A & C Properties* factors. The compromise will be approved.

10. 13-11665-A-7 DENNIS MCGOWAN — TRUSTEE'S FINAL REPORT
JES-3 — 2-13-15 [91]
PETER BUNTING/Atty. for dbt.
PETER FEAR/Atty. for mv.

Final Ruling

Application: Approval and Payment of Chapter 7 trustee's Compensation
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Continued to April 29, 2015, at 9:00 a.m.
Order: Civil minute order

Chapter 7 trustee James E. Salven seeks compensation of $12,170.85 and costs of $402.10.

DISCUSSION

When a Chapter 7 trustee seeks compensation for services in excess of $10,000, the trustee must seek and obtain court approval of that compensation by noticed application. *See In re Scoggins*, 517 B.R. 206 (Bankr. E.D. Cal. 2014); General Order 14-05. In such instances, the trustee must support his application with itemized time records. General Order 14-05. Salven has not done so. Trustee's Narrative Report and Application for Compensation p. 2, ¶ 7, filed February 13, 2015, ECF #96 ("it is estimated that in excess of 40 hours were expended). If contemporaneous time records were not kept, the trustee may estimate the time spent but must itemize his estimates.

The matter will be continued to April 29, 2015, at 9:00 a.m. Not later than April 15, 2015, Salven will file a supplemental declaration, which includes an itemized statement or estimate of his time expended on the case.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

IT IS ORDER THAT: (1) the application is continued to April 29, 2015, at 9:00 a.m.; and (2) not later than April 15, 2015, trustee James E. Salven will file a supplemental declaration, which includes an itemized statement or estimate of the time expended as a trustee on this case.

11. 14-15668-A-7 JEANETTE YLARREGUI
RCO-1
THE GOLDEN 1 CREDIT UNION/MV
TIMOTHY SPRINGER/Atty. for dbt.
KRISTI WELLS/Atty. for mv.
NON-OPPOSITION, DISCHARGED

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-18-15 [16]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 800 Williams Avenue, Madera, California

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.,* 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

12. 14-11270-A-7 MARCOS/DOLORES GONZALEZ
JES-6
JAMES SALVEN/MV
OVIDIO OVIEDO/Atty. for dbt.

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT(S)
11-5-14 [50]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

James E. Salven, accountant for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of $1800.00 and reimbursement of expenses in the amount of $279.02.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James E. Salven's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $1800.00 and reimbursement of expenses in the amount of $279.02.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

13. 10-12576-A-7 SHERMAN FUJIOKA
SSA-1
SHERMAN FUJIOKA/MV

RICHARD HARRIS/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO EMPLOY BRADLEY A. POST AS SPECIAL COUNSEL
11-17-14 [33]

Tentative Ruling

Motion: Nunc Pro Tunc Employment
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied with prejudice
Order: Civil minute order

Borton Petrini, LLP seeks to be employed nunc pro tunc as special counsel for Sheryl Strain, Chapter 7 trustee. At the request of the

applicant, the matter was continued to allow the applicant to augment the record. Having considered the further filings in support of the motion, the court is that nunc pro tunc employment is not appropriate.

FACTS

On May 24, 2009, debtor Sherman Fujioka was injured in an automobile accident. His injuries were severe; among others, his injuries included a herniated disc.

On March 12,2010, Sherman Fujioka filed a Chapter 7 petition. Sheryl Strain was named the trustee. Fujioka's schedules disclosed the existence of the personal injury claim.

On May 5, 2011, Fujioka hired Borton Petrini LLP on a contingent fee basis to represent him in connection with the injuries sustained in the automobile accident. Borton Petrini LLP and Fujioka signed a contingent fee provided for payment of Borton Petrini LLP in the following amounts: (1) 33-1/3% if the matter was settled prior to the filing of a civil action; (2) 40% if the matter is resolved after the first judicial settlement conference (sic); and (3) 45% if the matter is appealed or requires arbitration. The agreement also provided Borton Petrini LLP a lien against settlement proceeds. The agreement stated, "Client hereby grants to attorney, a lien on any recovery by settlement, arbitration and/or judgment obtain in this matter as security for payment of said attorney's fees and/or costs and disbursements ...incurred to the extent of said obligation as set forth above...." Borton Petrini LLP Fee Agreement Letter, p. 3, ¶ 5, May 5, 2011. Throughout Borton Petrini's representation of Fujioka the file was handled by Benjamin Tryk, an associate of the firm.

On May 16, 2011, Tryk acting for Borton Petrini LLP--and on behalf of Fujioka--filed a complaint to protect the statute of limitations. *Fujioka v. Anzures*, No. 1380930 (Santa Barbara County Superior Court, May 16, 2011).

On June 4, 2011, trustee Strain sent Borton Petrini, LLP and Tryk a letter notifying them of the estate's interest in the cause of action. Among other things, the letter stated, "Please be advised that I am the duly appointed, qualified and acting Trustee for the above-referenced estate. As Trustee, I am entitled to receive and take into my possession and control, all property and financial information of the estate. (11 U.S.C. § 541). It is my understanding that you represent the debtor, in a claim against 21st Century Insurance. Be advised that a portion of this claim may be property of the bankruptcy estate. Any claims (ie medical) incurred post injury will not be paid directly from any settlement. It is for me, as Trustee, to determine whether or not the bankruptcy estate has any interest in this claim, the following information is required...By cc of this letter to the debtor, you are hereby advised again that since the estate currently owns this cause of action, you (the debtor) have no authority to settle, negotiate, or in any way pursue this action without my approval...." Trustee's Motion for Order Approving Compromise, Exh. A, filed November 14, 2014, ECF #27. The letter warned Borton Petrini LLP that employment by the Bankruptcy Court was required. "Please be advised that if the estate takes an interest in this property you may be required to be employed under an order of the U.S. Bankruptcy Court in order to receive payment for your services. *Id.*

On June 7, 2011, using letterhead of Borton Petrini LLP, Tryk wrote Strain and provided Strain with an evaluation of the case. The letter

closed with the sentence, "....Please inform me at your earliest convenience once this firm and I are approved as counsel for Mr. Fujioka as we have and continue to incur costs and attorneys fees and time in pursuing the litigation of this matter."

Neither Strain, nor the Borton firm (including Tryk), sought employment.

Seven months later, on January 13, 2012, Robert Hawkins, Strain's general counsel, wrote Tryk and stated, "I represent Sheryl Strain, the duly appointed and acting Chapter 7 trustee in the above case. Ms. Strain has previously correspondence (sic) with your office in assessing the debtor's personal injury case. As you know, Ms. Strain is the real party in interest. However, the debtor does retain an interest in the case in the form of an exemption. As Trustee in this case, the lawsuit is essentially vested in Ms. Strain, with full control. She has required, and you have provided an assessment of the case, strengths and weaknesses, status, and your estimate for recovery. Your firm will need to be employed by Ms. Strain (same terms as debtors) (sic), and the employment will have to be approved by the Bankruptcy Court in order for your office to receive fees and costs at a later date. *My office will obtain approval for employment. A retainer agreement should be sent to Ms. Strain. Once executed, I will submit an application to the court.* Any settlement would require her approval, and thereafter approval by the United States Bankruptcy Court. Again, my office would obtain approval of any accepted settlement. You should endeavor to keep my office and Ms. Strain appraised (sic) of the status of the case on a regular basis. Your immediate attention to the matter is appreciated." (emphasis added).

Borton Petrini LLP did not provide Strain a fee agreement. And neither Strain, nor the Borton firm, sought employment.

Instead, on April 12, 2012, the firm and Tryk settled the case for $225,000. Strain was not consulted about the settlement. The settlement was paid to Borton Petrini LLP. Borton Petrini LLP deposited those funds into its trust account and, again without consulting Strain, disbursed those funds: (1) Borton Petrini-$80,180.08 ($75,000 in fees calculated at 33-1/3% + $5,180.08 in costs); and (2) debtor Fujioka-$74,819.92. The remaining amount, $70,000, remained in trust "pending lien resolution."

On June 20, 2012, Tryk resigned his employment with Borton Petrini LLP.

Borton Petrini contends it first learned of the Chapter 7 filing on August 13, 2013, when it received an email from trustee Strain. Strain contacted Borton Petrini LLP and demanded turnover of the remaining funds. Bradley Post, managing partner, took over the handling of the case.

On August 22, 2013, Borton Petrini paid the $70,000 held in trust for resolution of the medical lien to Strain in her capacity as trustee. Borton Petrini did not at that time, however, (1) recover the funds paid to the debtor, $74,819.92; or (2) disgorge its own fee and costs, $80,180.08.

Over the next five months Strain made further demands for the settlement funds. On December 20, 2013, Strain wrote Bradley Post at Borton Petrini LLP and stated, "This is my formal demand that your office turnover $155,000 representing the funds from the settlement of

$225,000 for which the estate has only received $70,000. In order to receive back any fees and costs due to your firm, you must file a nunc pro tunc application for employment and a fee application in the Bankruptcy Court. If you fail to turnover the funds, I will have no choice but to instruct general counsel to file a complaint in the Bankruptcy Court. If you have any questions pleases do not hesitate to contact me."

Strain's demand letter did not work. On February 6, 2014, Strain wrote Post again. She stated, "I sent you a demand for turnover of the balance of the gross proceeds that were collected in the case of 'Fujioka v. Anzures.' This is my final demand for turnover of $155,000, representing the balance of the proceeds from the un-approved settlement that has not been turned over to the estate. If I do not receive these funs by February 26, 2014, I will instruct estate counsel to file a complaint for turnover."

In response, on February 10, 2014, Borton Petrini LLP disgorged its fees and costs of $80,180.08 to Strain. Funds distributed to Fujioka have never been recovered.

In November 2014, 15 months after the entity applicant contends it first learned of the bankruptcy, Borton Petrini, LLP filed its application for nunc pro tunc employment by the estate to the date of its employment by Fujioka. In explanation, Borton Petrini contends: (1) Tryk has since left the firm and has been unresponsive to requests for information about the matter; (2) Borton Petrini LLP had no knowledge of the bankruptcy until August 13,2013; and (3) has fully cooperated with the Chapter 7 trustee to the extent of its ability since learning of the bankruptcy.

The application for nunc pro tunc employment first scheduled for hearing in conjunction with two other motions: (1) Strain's motion to approve the compromise with the defendants in *Fujioka v. Anzures*, No. 1380930 (Santa Barbara County Superior Court, May 16, 2011) for $225,000 (but for which the estate only recovered $150,180.08), negotiated by Tryk; and (2) Borton Petrini's motion for compensation of $75,000 (based on the one-third contingent fee agreement with Fujioka) and costs of $5,180.08. At the hearing on the motion for approval of compromise the court approved the compromise with the *Anzure* defendants for $225,000, but no other relief was awarded. Both the motion for nunc pro tunc employment and the motion for compensation were continued to allow the applicant to augment the record.

LEGAL STANDARDS

A Chapter 7 trustee may employ counsel to assist the trustee in performance of her duties. 11 U.S.C. § 327. Section 327(a),(e) control employment of counsel for a special purpose. "The applicant bears the burden of proving that the standards for appointment have been met." *Official Comm. Of Unsecured Creditors v. ABC Capital Mkts. Grp. (In re Capitol Metals Co.)*, 228 B.R. 724, 727 (B.A.P. 9th Cir. 1998).

"The bankruptcy courts in this circuit possess the equitable power to approve retroactively a professional's valuable but unauthorized services." *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973 (9th Cir. 1995) (citing *Halperin v. Occidental Fin. Grp. (In re Occidental Fin. Grp.)*, 40 F.3d 1059, 1062 (9th Cir. 1994)). *Nunc pro tunc* approval of an attorney's unauthorized services under § 327(e)

requires two distinct showings. First, a showing must be made that the applicant "does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed," and that the employment is "in the best interest of the estate." 11 U.S.C. § 327(e); *see also Mehdipour v. Marcus & Millichap (In re Mehdipour),* 202 B.R. 474, 479 (B.A.P. 9th Cir. 1996) ("Applying for nunc pro tunc approval does not alleviate the professional from meeting the requirements of § 327 . . . ."). The attorney must continually qualify under the statutory conflict-of-interest standards throughout the entire period of representation. *See* 11 U.S.C. §§ 327(e), 328(c); *see also Rome v. Braunstein,* 19 F.3d 54, 57-58, 60 (1st Cir. 1994) (holding that compensation may be disallowed if at any time a disqualifying conflict arises and recognizing the need for counsel to avoid such conflicts throughout their tenure). Second, the applicant must show "exceptional circumstances" that justify *nunc pro tunc* approval. *Atkins*, 69 F.3d at 974; *Mehdipour,* 202 B.R. at 479. "To establish the presence of exceptional circumstances, professionals seeking retroactive approval must . . . (1) satisfactorily explain their failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the bankrupt estate in a significant manner." *Atkins,* 69 F.3d at 975-76; *accord Occidental Fin. Grp.*, 40 F.3d at 1062; *In re Gutterman,* 239 B.R. 828, 830 (Bankr. N.D. Cal. 1999)." *In re Grant*, 507 B.R. 306, 309-310 (Bankr. E.D. Cal. 2014).

DISCUSSION

The Borton firm held the reasonable expectation that Strain would expeditiously seek approval of its employment. *See e.g.*, Hawkins letter January 13, 2012 ("My office will obtain approval for [Borton Petrini's] employment."). Having filed the personal injury action in Santa Barbara County to protect the statute of limitations, the Borton firm was not free to simply cease work on the case, thereby leaving the estate and Fujioka's residual interest in the action unprotected. Other than notifying the Borton firm, both personally and through counsel, of her interest in the action, Strain took no action on the matter from June 2011 (when she learned of the Borton firm's involvement) through April 2012 (when the case settled). It is the prerogative of the trustee, not the professional, to seek employment approval. 11 U.S.C. § 327(a) ("the trustee...may employ..."); Fed. R. Bankr. P. 2014(a) ("An order approving the employment of attorneys...shall be made on the application of the trustee..."). And to that extent the Borton firm believed that Strain would seek approval of its employment, the firm's request for nunc pro tunc relief is a sympathetic one. And if delay by the trustee were the only problem, the court might well grant the motion. Unfortunately, it is not. Borton Petrini LLP is not eligible for employment because of: (1) adversity of interests during the representation; (2) absence of extraordinary circumstances to support the nunc pro tunc application; and (3) untimeliness of the nunc pro tunc application.

<u>Adverse Interests</u>

Special counsel who seeks nunc pro tunc employment must show that at all pertinent times that it did not hold or represent an interest adverse to the estate. Unfortunately for it, during the period for which it seeks employment, Borton Petrini LLP held or represented several species of adverse interests. Borton Petrini's actions in creating - - and then accepting payment under - - its own charging lien created an adverse interest. As this court observed in *In re Grant*, 507 B.R. 306 (Bankr. E.D. Cal. 2014), "Undefined by the Code,

the term "adverse interest" used in § 327 means the possession or assertion of an interest that lessens the value of, creates a dispute with, or engenders bias against the estate. *See Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 149 (B.A.P. 9th Cir. 2006). [The applicant firm's] efforts to secure and retain its fee and costs in the...action resulted in a disqualifying adverse interest precluding employment by the estate. [The applicant firm] both possessed and asserted an economic interest that created a dispute with the estate and that tended to lessen its value." Borton Petrini attempted to create a charging lien against the estate funds by executing a fee agreement. Using that lien and without consulting Strain or obtaining court approval, Borton Petrini LLP paid itself $80,180.08 from the settlement proceeds. It retained these funds for 21 months (May 2012, through February 2014), and six months after it learned of the bankruptcy–and then only when Strain threatened suit.

Beyond that, Borton Petrini asserted an interest adverse to the estate by paying Fujioka $74,819.92 (which the estate has never recovered). This does, indeed, lessen the value of the estate. Argument might be made that these funds were exempt or that the estate is solvent, such that they would have ultimately gone to the debtor. The point is a fair one. But it is the trustee's responsibility in the first instanced to speak for the estate and to control disposition of its proceeds. 11 U.S.C. §§ 323, 704(a). And by distributing these funds directly to the debtor without the trustee's acquiescence or the court's approval, Borton Petrini LLP deprived the trustee of the opportunity to speak for the estate and diminished its size. That the act may turn out to be of no consequence to creditors does not cleanse the act.

Finally, the retention of funds, i.e. $70,000, to settle the medical lien placed Borton Petrini LLP in a position of adversity to the estate, at least until those funds were surrendered to the trustee. These funds are estate property. 11 U.S.C. § 541(a). Retaining the funds for the purpose of settling this lien is adverse to the estate because it is the prerogative of the trustee, not personal injury counsel, to resolve these issues. 11 U.S.C. §§ 704(a)(5), 725. For each of these reasons, Borton Petrini LLP cannot satisfy the lack of adverse interest qualification of § 327.

Absence of Extraordinary Circumstances

The applicant has not sustain its burden as to a satisfactory explanation for the reason prior judicial approval was not obtained. At least 9 months prior to the settlement, Borton Petrini received actual knowledge of the bankruptcy and its absence of authority to settle this case. The applicant's only explanation is that a rogue associate settled the case without its knowledge. The problem is that the representation is not supported by the evidence. Trustee Strain's letter was specifically addressed to Benjamin Tryk at the offices of Borton Petrini, LLP. This letter imparted actual knowledge to both Tryk and to the firm. Moreover, even if it had not, the firm is charged with it's attorney's knowledge. *See In re Grant*, 507 B.R. 306 (Bankr. E.D. Cal. 2014). And Tryk, and by extension the firm, unquestionably knew of the bankruptcy. As a consequence, the firm's claim of ignorance does not sufficiently explain its failure to seek employment in a timely fashion.

Unexplained Delay

Finally, the applicant has not adequately explained its own delay in

seeking approval once it learned of the problem. *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 105-106 (3rd Cir. 1988)(nunc pro tunc employment application filed one year after commencement of services denied). Bradley A. Post, managing partner, admits knowledge of the bankruptcy and the trustee's demand as of August 13, 2013. Declaration of Bradley A. Post ¶ 13, filed November 17, 2014, ECF #35. But the firm did not move for nunc pro tunc employment until November 20145, some 15 months later. Failure to seek employment nunc pro tunc employment in a timely fashion, once the need is discovered, is a factor in considering retroactive employment.

For each of these reasons, the application will be denied without prejudice.

CIVIL MINUTE ORDER

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

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

The motion for nunc pro tunc employment filed by Borton Petrini, LLP having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that motion is denied with prejudice.

14. 10-12576-A-7 SHERMAN FUJIOKA
SSA-2
SHERMAN FUJIOKA/MV

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF BORTON PETRINI, LLP SPECIAL COUNSEL(S)
11-17-14 [39]

RICHARD HARRIS/Atty. for dbt.

Tentative Ruling

Motion: First and Final Application for Compensation
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied with prejudice
Order: Civil minute order

DISCUSSION

Chapter 7 estates may only compensate professionals who have been employed. 11 U.S.C. § 330(a)(1). The applicant, Borton Petrini, LLP's employment was not approved by this court and, as a consequence, the application is denied.

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

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

The First and Final Application for Compensation filed by Borton Petrini, LLP having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the First and Final Application for Compensation is denied with prejudice.

15. 13-15581-A-7 JULIO/ANGELA MILLAN
JES-2
JAMES SALVEN/MV
DAVID JENKINS/Atty. for dbt.

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, ACCOUNTANT
11-8-14 [53]

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

James E. Salven, the accountant for the trustee in this case, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of $1665.00 and reimbursement of expenses in the amount of $296.32.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James E. Salven's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $1665.00 and reimbursement of expenses in the amount of $296.32.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

16. 14-15982-A-7 WILLIAM/JENNIFER STIMPEL — CONTINUED MOTION TO COMPEL ABANDONMENT
SL-2
WILLIAM STIMPEL/MV
SCOTT LYONS/Atty. for dbt.
2-3-15 [28]

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted only as to the business and such business assets described in the motion
Order: Prepared by moving party pursuant to the instructions below

Business Description: Visalia Remodeling and 100 shares of stock of Central Valley Services, Inc., dba Simple Plumbing

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." *See* 11 U.S.C. § 554(a)–(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

17. 15-10484-A-7 KATHY FEE

MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
2-12-15 [5]

KATHY FEE/MV

MARK ZIMMERMAN/Atty. for dbt.
ORDER 2/20/15
$86 INSTALLMENT FEE PAID
3/20/15

Final Ruling

Application: Waiver of Filing Fee
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

DISCUSSION

Title 28 U.S.C. § 1930(f)(1) authorizes the court to waive fees for Chapter 7 debtors: (1) whose income is "less than 150 percent of the income official poverty line...applicable to a family of the size

involved"; and (2) who is otherwise unable to pay the filing fee in installments. The debtor bears the burden of proving by a preponderance of the evidence that both prongs of § 1930(f)(1) have been satisfied. *In re Ross*, 508 B.R. 777 (Bankr. N.D. Ga. 2014).

Here, the Application to Have the Chapter 7 Filing Fee Waived contains representations that cannot be reconciled. The Application ¶¶ 12, 16 states that the debtor, and not someone on her behalf, paid an attorney $1,000.00 for representation in this Chapter 7 case. But the Application ¶¶ 2, 6 states that the applicant's income is $0.00 per month and expenses are $390.00 per month. Payment of attorneys fees in the amount specified does not logically follow from the disposable income stated. Without more, the applicant has not sustained her burden of proof on the question.

Noting these problems, the court set this matter for hearing and offered the applicant the opportunity to augment the record 14 days prior to the hearing. Scheduling Order ¶¶ 1-2, filed February 20, 2015, ECF #13. The debtor has not done so, but instead sought - - and received - -an order authorizing payment of the filing fee in installments. As a result, the debtor has not sustained her burden of entitlement to the fee waiver the application will be denied.

CIVIL MINUTE ORDER

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

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

The Application for Waiver of the Filing Fee filed by Kathy Fee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

It is hereby ordered that the Application for Waiver of Filing Fee is denied.

18. 15-10089-A-7 MIRIAM ZEPEDA
APN-1
FORD MOTOR CREDIT COMPANY/MV
VARDUHI PETROSYAN/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-2-15 [14]

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2014 Ford Focus

Unopposed motions are subject to the rules of default. Fed. R. Civ. P.55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court

considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

19. 14-10893-A-7 JERALD/ROXY SCHMIDT — MOTION FOR COMPENSATION FOR
JES-2 — JAMES SALVEN, ACCOUNTANT(S)
JAMES SALVEN/MV — 3-7-15 [41]
STEVEN SIEVERS/Atty. for dbt.

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Approved
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

James E. Salven, the accountant for the trustee, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of $1125.00 and reimbursement of expenses in the amount of $307.31.

Section 330(a) of the Bankruptcy Code authorizes “reasonable compensation for actual, necessary services” rendered by a trustee, examiner or professional person employed under § 327 or § 1103 and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. *See id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James E. Salven's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of $1125.00 and reimbursement of expenses in the amount of $307.31.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

9:15 a.m.

1. 14-11089-A-7 DONALD ATKINS — PRE-TRIAL CONFERENCE RE: COMPLAINT
14-1061
PRIMERICA LIFE INSURANCE COMPANY V. ATKINS ET AL
OPHIR JOHNA/Atty. for pl.
RESPONSIVE PLEADING
6-11-14 [1]

Tentative Ruling

The parties have not filed the status report required by the Pretrial Order § 7.0, filed September 30, 2014, ECF #21. The parties should be prepared to address the issues described in § 7.0 of the Pretrial Order at the pretrial conference.

10:00 a.m.

1. 14-12200-A-7 ALVIN SOUZA, JR. AND ROBYN SOUZA HAR-1 — MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
14-1077
WESTERN MILLING, LLC V. SOUZA, JR.
HILTON RYDER/Atty. for mv.
3-5-15 [16]

Final Ruling

Motion: Requesting Dismissal of Adversary Proceeding
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party pursuant to the instruction below

The parties seek to dismiss this adversary by agreement pursuant to Rule 7041 and Rule 41(a)(1)(A)(ii). Notice to the trustee and U.S. trustee has been given as required by Rule 7041. Notice has also been sent to all creditors and parties in interest. Upon submission of an appropriate form of order, the court will dismiss the case. Attached to the order shall be an exhibit with the settlement agreement between the parties that is attached to the motion.

2. 15-10157-A-7 LAWRENCE PARKER — STATUS CONFERENCE RE: COMPLAINT
15-1011 — 1-27-15 [1]
U.S. TRUSTEE V. PARKER
GREGORY POWELL/Atty. for pl.

Final Ruling

The status conference is continued to June 10, 2015, at 10:00 a.m. to allow the plaintiff to seek a default judgment.

10:30 a.m.

1. 14-15821-A-7 GUSTAVO FIERRO — REAFFIRMATION AGREEMENT WITH SPRINGLEAF FINANCIAL SERVICES, INC.
3-2-15 [15]

THOMAS GILLIS/Atty. for dbt.

No tentative ruling.

2. 14-15821-A-7 GUSTAVO FIERRO — REAFFIRMATION AGREEMENT WITH JPMORGAN CHASE BANK, N.A.
3-2-15 [16]

THOMAS GILLIS/Atty. for dbt.

No tentative ruling.

3. 15-10147-A-7 ALBERTO/AURORA CALLEROS — REAFFIRMATION AGREEMENT WITH TOYOTA MOTOR CREDIT CORPORATION
3-11-15 [18]

GEORGE LOGAN/Atty. for dbt.

No tentative ruling.

4. 14-15885-A-7 NORA VARGAS — PRO SE REAFFIRMATION AGREEMENT WITH JPMORGAN CHASE BANK, N.A. 3-16-15 [21]

No tentative ruling.

1:30 p.m.

1. 13-17744-A-11 SREP V, LLC — MOTION TO APPROVE LEASE AGREEMENT 2-27-15 [235]
PLF-3
SREP V, LLC/MV
PETER FEAR/Atty. for dbt.

Final Ruling

Motion: Approve Lease Agreement
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The movant requests authorization to enter into a lease of movant's real property located at 41873 Elderberry Road, Shaver Lake, CA. The confirmed plan contemplates rent from the lease of this property to fund the plan payment. The projected rent from this property described in the plan is $1500 per month. The movant has proposed a lease with Thornton Davidson under which the movant will receive $2500 per month for five years with an option for an additional five years at $3500 per month. The lease will be approved.

2. 15-10164-A-11 VALLEY MEDICAL SYSTEMS, INC. — CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 1-20-15 [1]

PERRY POPOVICH/Atty. for dbt.

No tentative ruling.

3. 15-10164-A-11 PDP-1 VALLEY MEDICAL SYSTEMS, INC./MV
VALLEY MEDICAL SYSTEMS, INC.
PERRY POPOVICH/Atty. for dbt.

MOTION TO DISMISS CASE
3-9-15 [30]

Tentative Ruling

Motion: Dismiss Chapter 11 Case
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by the movant

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

Unless a creditor or the U.S. Trustee appears at the hearing to oppose the motion or present argument why conversion is in the best interest of creditors, the court will dismiss this case. *See* 11 U.S.C. § 1112(b)(1). The debtor's debts are primarily unsecured, priority and non-priority tax debts. A small proportion of the debtor's debts are unsecured debts and secured debts.

Given the potential for continued operation of the business outside of bankruptcy, and the possibility of an offer in compromise with the IRS that would stabilize the debtor's tax debt payments, the debtor's cash flow might allow it to pay all outstanding debt without the added administrative cost of a chapter 11 proceeding. A chapter 7 case, by contrast, could result in less than full payment given that claims exceed assets by a substantial amount based on the latest amended schedules summary filed. Thus, the court will dismiss rather than convert this case.

4. 15-10366-A-11 FLG-4 ELLIOTT MANUFACTURING COMPANY, INC./MV
ELLIOTT MANUFACTURING COMPANY, INC.
PETER FEAR/Atty. for dbt.

CONTINUED MOTION FOR INTERIM CHANGES TO COLLECTIVE BARGAINING AGREEMENT PURSUANT TO 11 U.S.C 1113(E)
3-6-15 [51]

Final Ruling

At the suggestion of the parties, the matter is continued to April 29, 2015, at 1:30 p.m. Not later than 7 days prior to the continued hearing, the parties shall file a joint status report.

5. 13-13284-A-11 NICOLETTI OIL INC.
LRP-8
EXXONMOBIL OIL CORPORATION/MV
DAVID GOLUBCHIK/Atty. for dbt.
MICHAEL GOMEZ/Atty. for mv.

MOTION TO EXTEND TIME TO FILE PROOFS OF CLAIM
3-18-15 [425]

Tentative Ruling

Motion: Extend Time to File Proofs of Claim
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Granted
Order: Prepared by the movant pursuant to the instructions below

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987).

The court will grant the motion. The deadline for ExxonMobil to file proofs of claim is extended from March 31, 2015 to and including June 30, 2015 without prejudice to ExxonMobil seeking future extensions.

2:00 p.m.

1. 10-12709-A-11 ENNIS COMMERCIAL
15-1009 PROPERTIES, LLC
ENNIS COMMERCIAL PROPERTIES,
LLC ET AL V. UNITED SECURITY
MICHAEL GOMEZ/Atty. for pl.

STATUS CONFERENCE RE: COMPLAINT
1-23-15 [1]

No tentative ruling.

2. 10-12709-A-11 ENNIS COMMERCIAL
15-1009 PROPERTIES, LLC HTP-1
ENNIS COMMERCIAL PROPERTIES,
LLC ET AL V. UNITED SECURITY
HANNO POWELL/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
2-19-15 [8]

Tentative Ruling

Motion: Dismiss Under Rule 12(b)(6)
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied, United Security Bank to file responsive pleading not later than 14 days after service of the civil minute order
Order: Civil minute order

Defendant United Security Bank moves under Rule 12(b)(6) to dismiss the adversary proceeding filed by Ennis Commercial Properties, Inc.

and Chapter 11 Plan Administrator David Stapleton. Ennis Commercial Properties and Stapleton are the assignees of the rights, if any, of Rabobank, N.A. and Citizens Business Bank and have filed an adversary proceeding alleging state law statutory and common law fraudulent transfer claims. Defendant prays dismissal, arguing the action is barred by the applicable statute of limitations. The motion will be denied.

LEGAL STANDARDS

Rule 12(b)(6) motions

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003*); accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Time Limitations Applicable to State Law Fraudulent Transfers

California recognizes statutory and common law causes of action for fraudulent transfers. Cal. Civ. Code § 3439.01; Cal. Civ. Code 3439.10; *Fidelity Nat'l Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834, 849 (2009). Whether created by statute or arising from common law, each such cause of action is subject to two different time limitations: (1) the statute of limitations, i.e., Cal. Civ. Code § 3439.09(a) (4 years or 1 year after discovery of transfer or obligation if later), § 3439.09(b) (4 years), Cal. Code of Civ. Proc. 338(d) (3 years); and (2) a statute of repose, see Cal. Civ. Code § 3439.09(c) (7 years); *Macedo v. Bosio Revocable Trust*, 86 Cal.App.4th 1044, 1051 (2001); *In re JMC Telecom LLC*, 416 B.R. 738, 743 (Bankr. C.D.Cal. 2009) (statute of repose applies to common law fraudulent transfer claims).

Statutes of limitations may be tolled, and thus extended; statutes of repose are not tolled, and thus serve as maximum periods of time in which are fraudulent transfer action may be commenced. *Id.* Moreover, in appropriate circumstances, the time within which an action must be brought may be further shortened under the doctrine of laches to periods otherwise within the applicable statutes of limitations and repose. Cal. Civ. Code § 3939.10.

DISCUSSION

Plaintiffs' complaint prays relief, as assignee of Rabobank N.A. and of Citizens Business Bank, under (1) two causes of action for constructive fraudulent transfer under California's version of the Uniform Fraudulent Transfer Act, Cal. Civ. Code §§ 3439.04(a)(2) and 3439.05; and (2) one cause of action for common law fraudulent transfer. Each cause of action arose from Ennis Commercial Properties' grant of a deed of trust in favor of the defendant bank against 21 acres in Tulare County offered as additional collateral for a loan taken by a sister company, Ennis Land Development, Inc. The deed of trust that forms the basis of these actions was executed November 5, 2008, and was recorded January 26, 2009. Ennis Commercial Properties filed its Chapter 11 petition on March 16, 2010. The stay expired on the effective date of the plan, July 10, 2013. Order Confirming Plan IB (effective date), VC (vesting of property), filed June 25, 2013, ECF #961. This adversary proceeding was filed January 23, 2015.

Defendant has not argued that the action is barred by the statute of repose, nor could it do so. The transfer was made when the deed of trust was recorded on January 26, 2009, *see* Cal. Civ. Code § 3439.06(a)(1), and the present adversary proceeding was filed January 23, 2015, nearly six years after such transfer. Since the statute of repose is operative only after seven years, the statute of repose is inapplicable. Rather, this dispute turns on the applicable statutes of limitations.

Statute of Limitations and Civil Code §§ 3439.04(a)(2), 3439.05

California Civ. Code § 3439.09(b) sets a four-year statute of limitations for constructive fraudulent transfers under California's version of the Uniform Fraudulent Transfer Act. It provides: "A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought . . . (b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred." Cal. Civ. Code § 3439.09(b); *see also Monastra v. Konica Bus. Machines, U.S.A., Inc.* 43 Cal.App.4th 1628, 1645 (1996).

Defendant correctly points out that a cause of action for a fraudulent transfer arising out of a deed of trust accrues, and the statute of limitations begins to run, on the recordation date. See Cal. Civ. Code § 3439.06(a)(1). As pled, that date was January 26, 2009 and, as a result, absent tolling, the statute of limitations expired January 26, 2013.

But on March 16, 2010, prior to the expiration of the statute of limitations, Ennis Commercial Properties Inc. filed its petition under Chapter 11. And by doing so, it tolled the running of the statute of limitations on the statutory constructive fraudulent transfer cause of actions. That tolling is expressed in both federal and state law.

11 U.S.C. § 108(c) provides, "Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim." California law provides, "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." Cal. Civ. Proc. Code § 356. California state courts have long understood this to apply to the stay imposed by 11 U.S.C. § 362(a). *See Hoff v. Funkenstein*, 54 Cal. 233 (1880); *Union Collection Co. v. Soule*, 141 Cal. 99, 100 (1903); *Schumacher v. Worcester*, 55 Cal. App. 4th 376, 379-80 (1997).

Cal. Civ. Proc. Code § 356 applies independently to the facts of this case, but it also works together with § 108(c) of the Bankruptcy Code. Paragraph (1) of § 108(c) includes within any applicable statute of limitations period "any suspension of such period occurring on or after the commencement of the case." *See* 11 U.S.C. § 108(c)(1). Section 356 of the California Code of Civil Procedure suspends any statutory limitations period for commencing an action during any period in which an injunction or statutory prohibition stays the commencement of an action. *See* Cal. Civ. Proc. Code § 356. California law recognizes that the automatic stay is a statutory prohibition within the meaning of § 356 of the California Code of Civil Procedure. *See Schumacher v. Worcester*, 55 Cal. App. 4th 376, 380 (1997). Because section 356 of the California Code of Civil Procedure suspends the applicable state statutes of limitations period in this case during the time the automatic stay was in effect, and because the bankruptcy petition was filed well before the statute of limitations period expired, the period described in § 108(c)(1) is the later of the two periods described in § 108(c). *See* 11 U.S.C. § 108(c)(1)–(2). Assuming notice of termination of the automatic stay was given with respect to the claims assigned to Plaintiffs on the same date that the automatic stay was terminated, 30 days after such date, see 11 U.S.C. § 108(c)(2), is not later than the date when the four-year statute of limitations under Cal. Civ. Code § 3439.09(b) expired when accounting for the tolling effected by federal and state law.

Here, Rabobank and Citizens Business Bank, the then-holders of these claims, were impeded by the automatic stay from prosecution of an action against the Defendant from the petition date, i.e. March 16, 2010, see Compl. ¶ 30, filed January 23, 2015, ECF # 1, to the Effective Date of the Plan, i.e., July 10, 2013, Order Confirming Plan IB (effective date), VC (vesting of property); see Complaint ¶¶ 34, 35, filed January 23, 2015, ECF # 1; see also, 11 U.S.C. § 362(c)(1)(stay terminates as to property of the estate when that property is no longer property of the estate). This impediment lasted 1,212 days or approximately 3 years, 3 months and 27 days. Extending the four-year statute of limitations by 3 years, 3 months and 27 days would extend the date to file such an action to approximately May 22, 2016. This adversary was filed on January 23, 2015, within the four-

year statute of limitations under Cal. Civ. Code section 3439.09(b).

The statute of repose, moreover, cuts off the right to bring such an action on January 26, 2016. Cal. Civ. Code § 3439.09(c). Since the adversary proceeding was filed more than one year prior to the last date possible under the statute of repose, it is timely under such statute.

Defendant's argument that the stay did not trigger the tolling provisions of § 108(c) or § 356 because filing the bankruptcy merely changed the identity of the party entitled to bring the fraudulent transfer action is not well taken. The rights of a trustee under the Bankruptcy Code to avoid a transfer under § 544(b) based on state fraudulent transfer law should not be conflated with the rights of a creditor to avoid a transfer based on fraudulent transfer law. "A trustee or debtor in possession's right to bring a state-law fraudulent transfer action under § 544(b) is a creation of the Bankruptcy Code; it is not an action to assert an independent state law created right." *Rund v. Bank of Am. Corp. (In re EPD Inv. Co., LLC)*, 523 B.R. 680, 685 (B.A.P. 9th Cir. 2015). Furthermore, if a state-law fraudulent transfer claim is still viable on the petition date, state statutes of limitations cease to have any effect and the statute of limitations for bringing a federal claim under § 544(b) based on state law is the federal statute of limitations provided in § 546(a). *Id.* at 686.

As a consequence, the petition in the underlying bankruptcy case did not merely transfer to the debtor in possession the right to bring a state law fraudulent transfer action from creditors to the debtor in possession. Instead, it gave the debtor in possession a distinct federal right to bring a § 544(b) claim for fraudulent transfer that incorporates state fraudulent transfer laws.

At different points in time, moreover, two distinct parties have the right to pursue relief that is based on state fraudulent transfer law: (1) the trustee or the debtor in possession exercising the rights and powers of a trustee, 11 U.S.C. §§ 544(b) and 1107(a), Cal. Civ. Code § 3439.07; and (2) injured creditors, most notably Rabobank, N.A. and Citizens Business Bank in this case, Cal. Civ. Code § 3439.07. During the bankruptcy and until the property is abandoned by the estate, the debtor in possession/trustee has exclusive standing to pursue the action and that standing precludes other creditors from exercising their right to do so. *Estate of Spirtos v. One San Bernardino Cnty. Superior Court Case No. SPR 02211*, 443 F.3d 1172, 1175-76 & n.3 (2006) (debtor's ex-wife did not have standing to pursue RICO actions belonging to the estate). And though the trustee may authorize others to bring suit on his or her behalf, the decision to do so belongs to trustee. *Avalanche Mar., Ltd. v. Parkekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999) But such an authorization by the trustee permits the creditors to bring the federal avoidance actions on the trustee's behalf. *See id.* (holding that creditors had standing to bring avoidance actions "where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation."). Once the trustee fails to avail the estate of the applicable federal avoidance power, that right evaporates, *Trimble v. Woodhead*, 102 U.S. (12 Otto) 647, 649-50 (1880), and by extension, reinstates the creditors' right to do so under applicable state law. *See Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal.App.4th 1828, 1844-45 (1994) (apparently applying California fraudulent transfer law).

Statute of Limitations and Common Law Fraudulent Transfers

California common law fraudulent transfers are subject to a three year statute of limitations. "Within three years…(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Cal. Code of Civ. Proc. 338(d). Defendant United Security Bank phrases the rule this way, "[U]nder the discovery rule, 'the statute of limitations does not begin to run until the plaintiff either (1) actually discovers the injury and its cause or (2) could have discovered the injury and its cause through the exercise of reasonable diligence. (citations omitted), quoting *Gordon v. Bindra*, 2014 U.S. Dis. LEXIS 77620, at 26 (C.D. Cal. 2014)." Mem. of P. & A. in Support of Motion to Dismiss IV p. 7, filed February 19, 2015, ECF #10.

Defendant reasons that Plaintiffs, and their assignors, were on notice either (1) on January 26, 2009, when the Ennis Commercial Properties deed of trust was recorded; or (2) on September 22, 2010, when Defendant moved for stay relief. And that under either scenario the 3-year statute of limitations expired prior to the filing of the adversary proceeding on January 23, 2015.

Defendant's argument does not fully account for two matters of import. First, neither the recordation of the deed of trust, nor the motion for stay relief clearly and unequivocally put plaintiff's assignees on notice of both the injury and the cause, i.e. the existence of a constructively fraudulent transfer. This court is mindful of the teaching of *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (1995), "Because the applicability of the equitable tolling doctrine often depends on matters outside the pleadings, it "is not generally amenable to resolution on a Rule 12(b)(6) motion." *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir.1993). A motion to dismiss based on the running of the statute of limitations period may be granted only "if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). For this reason, we have reversed dismissals where the applicability of the equitable tolling doctrine depended upon factual questions not clearly resolved in the pleadings. *See Cervantes*, 5 F.3d at 1277; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir.1988); *Donoghue v. Orange County*, 848 F.2d 926, 931 (9th Cir.1987)." The plaintiff's discovery from these events of the alleged facts constituting the fraud is not so beyond doubt that the court will dismiss the adversary under Rule 12(b)(6). What creditors knew or reasonably should have known are questions of fact and, absent the most unequivocal of facts, should be resolved at trial.

Second, even if the court used the earliest date suggested by Defendant for the commencement of the statute of limitations, i.e., the date of recordation of the transfer on January 26, 2009, Ennis Commercial Properties, Inc.'s bankruptcy on March 16, 2010, tolled the statute of limitations. See 11 U.S.C. § 108(c); Cal. Code of Civ. Proc. 356. But in this case, Rabobank and Citizens Business Bank, the then holders of these claims, were impeded from prosecution of an action against Defendant from the petition date, i.e. March 16, 2010, see Complaint ¶ 30, filed January 23, 2015, ECF # 1, to the Effective

Date of the Plan, i.e. July 10, 2013, Order Confirming Plan IB (effective date), VC (vesting of property); see Complaint ¶¶ 34, 35, filed January 23, 2015, ECF # 1; see also, 11 U.S.C. § 362(c)(1)(stay terminates as to property of the estate when that property is no longer property of the estate). The impediment lasted 1,212 days or approximately 3 years, 3 months and 27 days. Extending the statute by 3 years, 3 months and 27 days would extend the date to file such an action to approximately May 22, 2015.

For each of these reasons the motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

United Security Bank's motion to dismiss under Rule 12(b)(6) has been presented to the court and for the reasons stated in the civil minutes for the hearing,

IT IS ORDERED that: (1) the motion is motion is denied; (2) United Security Bank shall file a responsive pleading not later than 14 days from service of the civil minute order hereon; (3) absent order of this the parties shall not enlarge the time for filing a responsive pleading; and (4) if United Security Bank does not file a timely responsive pleading, the plaintiffs shall forthwith and without delay seek entry of United Security Bank's default.

3. 10-12709-A-11 ENNIS COMMERCIAL PROPERTIES, LLC
15-1010
ENNIS COMMERCIAL PROPERTIES, LLC ET AL V. HERITAGE OAKS
MICHAEL GOMEZ/Atty. for pl.
ORDER CONTINUING TO 5/6/15

STATUS CONFERENCE RE: COMPLAINT
1-23-15 [1]

Final Ruling

The status conference continued by Order, ECF #8, to May 6, 2015, at 2:00 p.m., this matter is dropped as moot.