

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

April 6, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

- 2. The court will not continue any short cause evidentiary hearings scheduled below.**
- 3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**
- 4. If no disposition is set forth below, the matter will be heard as scheduled.**

1. 11-48111-D-7 OSCAR RIOS CONTINUED MOTION TO SUBSTITUTE
DNL-2 REAL PROPERTY IN INTEREST TO
PURSUE AVOIDANCE ACTION
2-8-16 [71]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

2. 11-48111-D-7 OSCAR RIOS CONTINUED MOTION TO AVOID LIEN
DNL-3 OF JAMES LENAU
2-8-16 [76]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

3. 15-28911-D-7 WANNISHA SIMPSON
APN-1
SANTANDER CONSUMER USA, INC.
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-8-16 [20]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on February 23, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

4. 15-29718-D-7 LEILA MONDARES
CJO-1
PHH MORTGAGE CORPORATION VS.

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
2-18-16 [11]

Tentative ruling:

This is PHH Mortgage Corporation's ("PHH") motion for relief from stay. PHH asserts that there is no equity in the real property that is the subject of the motion and, as this is a Chapter 7 case, the property is not necessary for an effective reorganization. Based on the foregoing, PHH asserts relief from stay is appropriate under Bankruptcy Code § 362(d)(2). The debtor has filed an opposition, (1) disagreeing with PHH's accounting as to the amount of the arrearages; (2) asserting the motion is unclear as to what stage PHH's foreclosure is in; and (3) asserting that the debtor and PHH have discussed, or are in the process of negotiating, a loan modification. Pursuant to Bankruptcy Code ("Code") § 362(g) the moving party has the burden of proof to demonstrate that there is no equity in the property, and the debtor has the burden of proof on all other issues.

The debtor's opposition regarding the amount of the arrears, status of the foreclosure, and a possible modification of the loan are not meritorious defenses to the relief from stay motion. Stay litigation is limited in scope to issues of adequate protection, equity in the property, and whether the property is necessary for an effective reorganization. The validity of the claim, or contract underlying the claim, is not litigated during a relief from stay hearing. In re Johnson, 759 F.2d 738 (9th Cir. 1985). Stay relief hearings do not involve a full adjudication on the merits of the claims, defenses, or counter-claims, but simply a determination as to whether creditor has a colorable claim. In re Robins, 310 B.R. 626 (9th Cir. BAP 2004).

PHH has established that there is no equity in the property, and as this is a Chapter 7 case, the property is not necessary for an effective reorganization; accordingly, PHH is entitled to relief from stay. As the debtor has not offered any meritorious defense to the motion, the court will grant relief from stay under Code § 362(d)(2) by minute order.

The court will hear the matter.

5. 16-20418-D-7 JOSE CHAVEZ-TORRES AND MOTION FOR RELIEF FROM
KAZ-1 ANGELA JIMENEZ-ESTRADA AUTOMATIC STAY
BANK OF AMERICA, N.A. VS. 2-25-16 [16]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

6. 14-27519-D-12 LOEK VAN WARMERDAM MOTION TO MODIFY CHAPTER 12
WW-17 PLAN
3-3-16 [187]

7. 14-25820-D-11 INTERNATIONAL MOTION TO COMPROMISE
DMC-21 MANUFACTURING GROUP, INC. CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH ALLEN WALDROP
AND/OR MOTION FOR COMPENSATION
BY THE LAW OFFICE OF DIAMOND
MCCARTHY, LLP FOR CHRISTOPHER
D. SULLIVAN, SPECIAL COUNSEL
3-3-16 [820]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to Chapter 11 Trustee and Diamond McCarthy LLP's Motion and Application for Approval of (I) Settlement with Allen Waldrop and (II) Earned Contingency Fee From the Related Settlement, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, Chapter 11 Trustee and Diamond McCarthy LLP's Motion and Application for Approval of (I) Settlement with Allen Waldrop and (II) Earned Contingency Fee From the Related Settlement is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

8. 15-23524-D-7 EDISON/MARIA SONGCO MOTION TO COMPROMISE
ICE-2 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH EDISON A SONGCO
AND MARIA T SONGCO
3-3-16 [20]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

9. 14-22526-D-7 DAVID JONES CONTINUED OBJECTION TO DEBTOR'S
PA-10 CLAIM OF EXEMPTIONS
6-1-15 [130]

Final ruling:

Pursuant to the trustee's request, the hearing on this objection is continued to April 20, 2016 at 10:00 a.m. No appearance is necessary on April 6, 2016.

10. 15-28427-D-7 MOHAMMED/AYESHA HUSSAIN MOTION TO SELL
ADJ-2 3-3-16 [30]

11. 15-29428-D-7 MARIA FLORES ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
3-9-16 [50]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

12. 15-29031-D-7 OKSANA KOPCHUK
DNL-2

MOTION TO EXTEND DEADLINE TO
FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
2-29-16 [53]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to extend deadline from February 29, 2016 to April 29, 2016 to file a complaint objecting to discharge of the debtor is supported by the record. As such the court will grant the motion and set the deadline to object to discharge of the debtor as April 29, 2016. Moving party is to submit an appropriate order. No appearance is necessary.

13. 15-21638-D-7 AMANDA ARANDA-ORDAZ
SCB-2

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF SCHNEWEIS-COE &
BAKKEN, LLP FOR LORIS L.
BAKKEN, TRUSTEE'S ATTORNEY(S)
3-8-16 [26]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

14. 15-29247-D-7 WENDY OWENS
JHW-1
TD AUTO FINANCE, LLC VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-8-16 [17]

Final ruling:

This matter is resolved without oral argument. This is TD Auto Finance LLC's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

15. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION TO LIMIT NOTICE
CDH-10 7-3-13 [414]

This matter will not be called before 10:30 a.m.

16. 15-28060-D-11 ACADEMY OF PERSONALIZED CONTINUED MOTION TO ENFORCE
RAL-5 LEARNING, INC. AUTOMATIC STAY AND/OR MOTION
FOR CONTEMPT
2-24-16 [233]

17. 16-21060-D-7 IRYNA YARMOLICH MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
2-25-16 [5]

18. 14-20064-D-7 GLENN GREGO CONTINUED MOTION TO DISMISS
15-2231 BHS-1 ADVERSARY PROCEEDING
GREGO V. WHATLEY ET AL 12-30-15 [10]

Final ruling:

The hearing on this motion is continued to April 20, 2016 at 10:00 a.m. to be heard with a motion to approve a global settlement of a numbers of matters pending in this case. No appearance is necessary.

19. 16-20569-D-7 5065 PASADENA TRUST MOTION FOR RELIEF FROM
BHT-1 AUTOMATIC STAY
VENTURES TRUST 2013-I-H-R 2-24-16 [16]
VS.

DEBTOR DISMISSED:02/19/2016

20. 15-28474-D-7 CAMILLE TURNER MOTION FOR RELIEF FROM
AP-1 AUTOMATIC STAY
BANK OF AMERICA, N.A. VS. 2-25-16 [26]

Final ruling:

This matter is resolved without oral argument. This is Bank of America, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

21. 11-47176-D-7 NICK/KIMBERLY DUGGINS MOTION FOR COMPENSATION BY THE
DNL-6 LAW OFFICE OF DESMOND, NOLAN,
LIVAICH & CUNNINGHAM FOR J.
LUKE HENDRIX, TRUSTEE'S
ATTORNEY(S)
3-9-16 [78]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

22. 15-29890-D-11 GRAIL SEMICONDUCTOR CONTINUED MOTION TO REJECT
FWP-5 EMPLOYMENT AGREEMENT WITH
RONALD W. HOFER
1-27-16 [61]

Tentative ruling:

This is the debtor's motion to reject an employment agreement with Ronald W. Hofer, the debtor's Chief Executive Officer. Mr. Hofer has filed opposition and the debtor has filed a reply. As explained below, the court concludes that the decision

to reject the agreement meets the test of the business judgment rule, and but for the issue of the authority of Michael Burkart, the debtor's Chief Resolution Officer, to bring the motion, the court would be prepared to grant it. However, Mr. Hofer has raised that issue and the court is not satisfied Mr. Burkart has sufficiently demonstrated that he has that authority. Thus, the court intends to deny the motion without prejudice or continue the hearing to permit the debtor to supplement the record.

A motion to reject an executory contract is subject to the business judgment rule. Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Medical Group, Inc.), 476 F.3d 665, 670 (9th Cir. 2007). Under that rule, the court "should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." Id. The motion should be denied only if the court finds that the decision to reject "is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice." Id. In this case, no such findings are appropriate.

The court finds that the decision to reject the agreement was based on the exercise of sound business judgment and is in the best interest of the estate. The court is especially concerned that the continued retention of Mr. Hofer under the terms of the agreement would give rise to a \$240,000 per year base salary accruing as an administrative expense while the estate receives no benefit from his retention due to his conflicts with the debtor's board of directors and his challenge to the authority of Michael Burkart, whom the debtor has retained to "lead its efforts" in this case. It is also significant that the debtor's board of directors revoked Mr. Hofer's corporate authority to act on behalf of the debtor before this case was filed and that Mr. Hofer then sued the debtor and its then board members, two of whom remain the sole board members today. Those circumstances do not lend themselves to a determination that Mr. Hofer should continue as the debtor's Chief Executive Officer.

Mr. Hofer's opposition raises three principal arguments: (1) that he is "the only person with the knowledge necessary to the successful resolution of this case" (Hofer Opposition, filed March 9, 2016 ("Opp."), at 7:25-8:1); (2) that the only means of removing a debtor's management is a motion to appoint a trustee; and (3) that the debtor's Chief Resolution Officer, Michael Burkart, at whose direction the motion was apparently filed, brought the motion without authority. The first of these contentions is really in the nature of an aside and is conclusory and unsupported by any evidence. In addition, it is virtually always the case that when a bankruptcy trustee is appointed, he or she has no knowledge of the debtor's history or operations, yet a successful resolution is often achieved.

As to the second, the court is at a loss to understand Mr. Hofer's citation to In re 1031 Tax Group, LLC, 2007 WL 2085384, 2007 Bankr. LEXIS 2484 (Bankr. S.D.N.Y. 2007) for the proposition that "[w]hen a party or the Debtor seeks to replace management, the result is the appointment of a trustee under the Bankruptcy Code, not the removal of management in favor of a resolution consultant." Opp. at 5:15-17. Mr. Hofer has not provided a pin cite, and the court is unable to locate anything in the decision that would support the proposition. Mr. Hofer's citation from Collier suggests the courts do not have the power to "oust management and appoint other management." 7 Collier on Bankruptcy ¶ 1104.04[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). However, that is not what the court did when it approved the debtor's continued retention of Mr. Burkart, whose employment by the debtor occurred pre-petition, as did the board's revocation of Mr. Hofer's corporate

authority. What the court would be doing here is to approve the debtor's rejection of its executory contract with Mr. Hofer, just as with Mr. Burkart, the court approved the debtor's assumption of its contract with him.

Turning to the third issue raised by Mr. Hofer - the question of Mr. Burkart's authority to cause the debtor to bring this motion - the court does have concerns. Because Mr. Hofer has specifically put this issue into play, the court has revisited the documents governing Mr. Burkart's employment. The Engagement Contract between the debtor and Mr. Burkart (in the record at DN 8) defines Mr. Burkart's powers as the power to evaluate and resolve claims against the debtor and to manage and direct litigation. It does not purport to assign him the full authority of a bankruptcy trustee or debtor-in-possession to control the complete administration of the case. The motion to continue Mr. Burkart's employment includes additional itemized duties and powers that do not appear in the contract itself, at least not the copy filed with the court.¹ However, the court is not satisfied the list expands the scope of Mr. Burkart's powers to include the filing of this motion.

The expanded list includes serving as the debtor's Vice President, Assistant CFO, and Assistant Secretary; handling cash flow and budget matters; the nebulous "assist[ing] Grail in fulfilling its duties and obligations under the law to creditors, shareholders and other parties-in-interest" (Empl. Mot. at 6:15-16), and "perform[ing] such other advisory services as required consistent with the role of a financial advisor and not duplicative of services provided by other professionals, including selecting the plan or strategic alternative(s) that the CRO deems (in the exercise of his sole and absolute discretion) to be prudent or reasonable under the circumstances." *Id.* at 6:23-26. The first two of these obviously do not provide the authority to file this motion, and the third, although it appears broad at first glance, really does nothing more than authorize Mr. Burkart to assist the debtor, not to act as the debtor. The last category purports to give Mr. Burkart the power, in his sole discretion, to select the plan or alternative strategy for the case. However, the authority that sentence purports to provide is curtailed by the court's order authorizing Mr. Burkart's continued employment, which provides that "Burkart shall be retained as the debtor's CRO upon the express approval thereof by an independent board of directors whose members are performing their duties and obligations as required under applicable law ("Board"), and will act under the direction, control and guidance of the Board" Order filed Jan. 29, 2016, at 2:18-19. That provision overrides Mr. Burkart's ability to act in his sole discretion.²

The Engagement Contract refers to the board's resolution authorizing the debtor's bankruptcy filing as further defining Mr. Burkart's duties. The resolution, in turn, authorizes him to "take any and all actions and execute any and all documents deemed necessary or desirable to carry out and perform all acts and deeds in connection with the Corporation's bankruptcy case in accordance with the Contract." Resolution filed Dec. 30, 2015 with the petition, DN 1. The use of the words "in accordance with the Contract" means the resolution does not expand the scope of Mr. Burkart's powers beyond those granted by the Engagement Contract (in turn, as restricted by the court's order).

Finally, the Engagement Contract leaves an opening for the debtor to "further define" Mr. Burkart's duties.³ This indicates there are duties Mr. Burkart does not already have, and there is no evidence to demonstrate the debtor's governing body has assigned him duties beyond those listed in the Engagement Contract. This conclusion is reinforced by this language in the contract: "With respect to all matters of the Engagement, the CRO will coordinate closely with the Company as to

the nature of the services that he will render and the scope of his engagement." Id. at numbered page 3.

In observing the administration of this case, it appears to the court that Mr. Burkart has assumed the role of a chapter 11 trustee or the CEO, CFO, and COO of a corporate debtor-in-possession. That is, he appears to have taken charge of all aspects in administering the case. While the court appreciates Mr. Burkart's experience and professionalism as a trustee, the Engagement Contract, as limited by the court's order, does not provide him with such unlimited authority to act. Mr. Burkart testifies he has informed the board members and their attorneys of his decision to seek to reject Mr. Hofer's employment agreement and has received no objections. That is not the equivalent of the Board affirmatively granting such authority to Mr. Burkart or of acting "under the direction, control and guidance of the Board," as required by the order authorizing Mr. Burkart's continued employment.

If the debtor has a functioning board of directors, the court will give the debtor an opportunity to demonstrate that the board has granted Mr. Burkart either the specific authority to bring this motion or the broad scope of authority that would be exercised by an individual in complete control of the administration of this case on behalf of the debtor. If the debtor does not have a functioning board that can expand Mr. Burkart's authority, that alone is cause for concern about the administration of the case.

To conclude, the court finds that the decision to reject Mr. Hofer's employment agreement was made in the exercise of sound business judgment. However, Mr. Hofer has called into question Mr. Burkart's authority to direct the filing of the motion on the debtor's behalf, and the debtor has not made a sufficient record for the court to conclude he had that authority; therefore, the motion will be denied. In the alternative, the court will continue the hearing to permit the parties to supplement the record. The court will hear the matter.

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- 1 The copy on file appears to be incomplete as it skips from page 1 to page 3, with no numbered page 2. The court will assume without deciding that the additional powers listed in the motion are listed on the missing page 2 of the Engagement Contract; if they are not, Mr. Burkart does not have those additional powers and duties. The motion states: "This summary is provided solely for convenience purposes. The terms of the engagement shall be governed by the Engagement Contract. To the extent that this summary conflicts with the Engagement Contract, the Engagement Contract shall govern." Motion filed Dec. 30, 2015 ("Empl. Mot."), at 5:27-28.
 - 2 The order provides that the Engagement Contract is approved except as otherwise inconsistent with the order.
 - 3 As Chief Resolution Officer, Mr. Burkart is to "lead the Company's restructuring efforts with the duties as defined for this management role in this Agreement, the December 10, 2015[] Board Minutes, and as further defined by the Company." Trustee's Ex. A, filed Dec. 30, 2015, ¶ 2(A).

23. 15-29890-D-11 GRAIL SEMICONDUCTOR CONTINUED MOTION TO REJECT
FWP-6 EMPLOYMENT AGREEMENT WITH BRAD
 A. WOODS
 1-27-16 [66]
24. 15-29890-D-11 GRAIL SEMICONDUCTOR CONTINUED MOTION FOR RELIEF
MMS-1 FROM AUTOMATIC STAY
GRAIL SEMICONDUCTOR, INC. 2-10-16 [102]
VS.
25. 15-29099-D-7 RAJINDER/MEENA WALIA MOTION TO AVOID LIEN OF GCFS,
FF-3 INC.
 3-8-16 [51]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

26. 15-29099-D-7 RAJINDER/MEENA WALIA MOTION TO AVOID LIEN OF MIDLAND
FF-4 FUNDING
 3-8-16 [56]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

27. 16-21308-D-7 FORREST BECK MOTION FOR RELIEF FROM
SCF-1 AUTOMATIC STAY
VALLEY FIRST CREDIT UNION 3-23-16 [9]
VS.

28. 15-25526-D-7 AR BUSINESS GROUP, INC. MOTION FOR ADMINISTRATIVE
HMS-1 EXPENSES
3-11-16 [44]

29. 16-21233-D-7 GLENDA BREWER ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
3-14-16 [11]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

30. 16-21234-D-7 BRENDA TERRY ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
3-14-16 [11]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

31. 10-47536-D-7 DOUGLAS KIRKWOOD
CDH-5

MOTION TO PAY FUNDS TO DEBTOR
AS AN ADMINISTRATIVE EXPENSE
3-16-16 [99]

Tentative ruling:

This is the trustee's motion for approval of an administrative expense to be paid to the debtor. The motion was noticed pursuant to LBR 9014-1(f)(2); thus, ordinarily, the court would entertain opposition, if any, at the hearing. However, the motion was not properly served and proof of service of the motion is insufficient. The moving party served the motion, notice of hearing, declaration, and exhibits on the debtor, the United States Trustee, and Matthew Mellen, who is identified in the proof of service as the debtor's attorney. Mr. Mellen, however, was the trustee's special counsel, not the debtor's counsel. The moving party failed to serve the debtor's attorney, Aaron Koenig. In addition, the proof of service states that the notice of hearing was served on "the individuals on the attached service list," but there is no service list attached.

The court will continue the hearing to permit the moving party to file a notice of continued hearing and serve it on all creditors and to serve the entire set of moving papers on the debtor's attorney, along with the notice of continued hearing. The court will hear the matter.

32. 10-47536-D-7 DOUGLAS KIRKWOOD
CDH-4

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF HUGHES LAW
CORPORATION FOR CHRISTOPHER
HUGHES, TRUSTEE'S ATTORNEY(S)
3-16-16 [94]

Tentative ruling:

This is the motion of the trustee's counsel for approval of compensation. The motion was noticed pursuant to LBR 9014-1(f)(2); thus, ordinarily, the court would entertain opposition, if any, at the hearing. However, the motion was not properly served and proof of service of the motion is insufficient. The moving party served the motion, notice of hearing, declaration, and exhibits on the debtor, the United States Trustee, and Matthew Mellen, who is identified in the proof of service as the debtor's attorney. Mr. Mellen, however, was the trustee's special counsel, not the debtor's counsel. The moving party failed to serve the debtor's attorney, Aaron Koenig. In addition, the proof of service states that the notice of hearing was served on "the individuals on the attached service list," but there is no service list attached.

The court will continue the hearing to permit the moving party to file a notice of continued hearing and serve it on all creditors and to serve the entire set of moving papers on the debtor's attorney, along with the notice of continued hearing. The court will hear the matter.

33. 10-47536-D-7 DOUGLAS KIRKWOOD
MDM-2

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF MELLEN LAW FIRM
FOR MATTHEW D. MELLEN, SPECIAL
COUNSEL
3-16-16 [103]

Tentative ruling:

This is the motion of the trustee's special counsel for approval of compensation. The motion was noticed pursuant to LBR 9014-1(f) (2); thus, ordinarily, the court would entertain opposition, if any, at the hearing. However, the motion was not properly served and proof of service of the motion is insufficient. The moving party served the motion, notice of hearing, declaration, and exhibits on the debtor, the United States Trustee, and Matthew Mellen, who is identified in the proof of service as the debtor's attorney. Mr. Mellen, however, was the trustee's special counsel, not the debtor's counsel. The moving party failed to serve the debtor's attorney, Aaron Koenig. In addition, the proof of service states that the notice of hearing was served on "the individuals on the attached service list," but there is no service list attached.

The court will continue the hearing to permit the moving party to file a notice of continued hearing and serve it on all creditors and to serve the entire set of moving papers on the debtor's attorney, along with the notice of continued hearing. The court will hear the matter.

34. 10-42050-D-7 VINCENT/MALANIE SINGH
CDH-18

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH CLASS H AND I
CONTROVERSIES
3-11-16 [623]

This matter will not be called before 10:30 a.m.

35. 10-42050-D-7 VINCENT/MALANIE SINGH
CDH-19

MOTION TO APPROVE WITHDRAWAL OF
PROOFS OF CLAIM
3-16-16 [627]

This matter will not be called before 10:30 a.m.

36. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2315
BURKART V. LAL

HEARING TO CONSIDER GOOD FAITH
ISSUE
3-2-16 [151]

This matter will not be called before 10:30 a.m.

Tentative ruling:

At a continued pretrial conference held February 25, 2016, the court set a schedule for the parties to brief a particular issue concerning the good faith component of the defense that the defendants took the payments challenged by the trustee in good faith and for value.¹ The briefing schedule, together with a precise statement of the issue to be addressed, was set forth in the court's order filed March 2, 2016. Briefing was optional, and the issue has now been briefed by the parties wishing to do so.

The issue is phrased well by the defendant in Adv. No. 12-2367, who states his position as follows:

The good faith defense is established under both Cal. Civ. Code § 3439.08(a) and 11 U.S.C. § 548(c) because Defendant will show that a diligent investigation by a similarly situated investor would not have led to discovery of the fraud or insolvency. The standard to be applied here is that of an immigrant, an unsophisticated and inexperienced investor, and one whose culture dictates that they do business based on trust.

Defendant's brief entitled "Continuing Pretrial Conference," filed March 14, 2016 ("Defendant's Brief"), Adv. No. 12-2367, DN 161, at ¶¶ 21, 22. As explained below, the court disagrees, concluding instead that, for purposes of the good faith component of the "good faith and for value" defense, under the objective standard applied in the Ninth Circuit, the court is not to consider the personal circumstances of the particular defendant in the adversary proceeding or the group of defendants in the trustee's various adversary proceedings filed in this case.

In the Ninth Circuit, the seminal case on the issue of good faith in the fraudulent transfer context is In re Agricultural Research & Tech. Group, Inc. ("Agretech"), 916 F.2d 528 (9th Cir. 1990). The court first quoted an early case in which the United States Supreme Court held that "a transferee's 'knowledge or actual notice of circumstances sufficient to put him, as a prudent man, upon inquiry as to whether his brother intended to delay or defraud his creditors . . . should be deemed to have notice . . . as would invalidate the sale as to him.'" Agretech, 916 F.2d at 535, quoting Shauer v. Alterton, 151 U.S. 607, 621 (1894). The Ninth Circuit then held, "courts look to what the transferee objectively 'knew or should have known' . . . , rather than examining what the transferee actually knew from a subjective standpoint." 916 F.2d at 535-36. The court reiterated its holding later in the decision, emphasizing the objective nature of the standard: "[I]t is important to bear in mind that appellants carry the burden of demonstrating their objective good faith at trial." Id. at 539 (emphasis in original).

The court then cited In re Polar Chips Int'l, Inc., 18 B.R. 480, 484 (Bankr. S.D. Fla. 1982), as holding that "if the circumstances would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a diligent inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." Agretech,

916 F.2d at 536 (emphasis omitted). Although the Agretech court did not expressly adopt this two-step approach, the court clearly applied it in arriving at its conclusions in the case. Id. at 538-40.

The Agretech court was very clear - the test is an objective one and the court is to consider whether the circumstances would place "a reasonable person" on inquiry notice, not a reasonable person with the same or a similar background as the defendant. The defendant in Adv. No. 12-2367 cites Agretech for the objective standard, but then cites several other cases as supporting the propositions that (1) an objective analysis "necessarily involves subjective components, including the sophistication level of the investor and whether the investor actually knew of the fraud or insolvency"; (2) "the objective standard applied is that of a similarly situated person"; and (3) the objective standard "is one that matches the circumstances of the actual investor." Defendant's Brief, Adv. No. 12-2367, DN 161, at ¶19. In this court's view, those cases either applied a subjective standard while reciting an objective one or permitted the consideration of certain circumstances of the defendants other than the personal circumstances advanced by the defendants here. In the first category are Kriegman v. Romani (In re LLS America, LLC), 2014 U.S. Dist. LEXIS 87186 (E.D. Wash. 2014); Field v. Hinahara (In re Maui Indus. Loan & Fin. Co.), Adv. No. 12-90009 (Bankr. D. Hawaii), filed July 11, 2014; O'Cheskey v. Hous. for Texans Charitable Trust (In re American Housing Foundation), 2012 Bankr. LEXIS 4721 (Bankr. N.D. Tex. 2012), and Jobin v. McKay (In re M & L Bus. Mach. Co.), 84 F.3d 1330 (10th Cir. 1996).

In the first group of cases - LLS America, American Housing, and M & L Business Machine, the courts held that good faith is to be measured by an objective standard,³ but in this court's view, clearly went on to apply a subjective standard. The Maui Industrial Loan court was equivocal about whether an objective or a subjective standard is the correct one, but like the others, proceeded to apply a subjective standard. None of these cases overrides the binding effect of the Agretech decision, and no party has cited a case binding on this court that construes the objective standard in a way that would allow the court to consider the personal circumstances of each defendant in applying an objective standard.

In a second group of cases cited by the defendant in AP No. 12-2367, courts have defined the objective standard to encompass consideration of "the customary practices of the transferee's industry" or "the reality of a transferee's market and industry," referring also to "routine business practices." In Goldman v. Capital City Mortg. Corp. (In re Nieves), 648 F.3d 232 (4th Cir. 2011), the Fourth Circuit held that "the objective good-faith standard probes what the transferee knew or should have known taking into consideration the customary practices of the industry in which the transferee operates." 648 F.3d at 239-40. In Gold v. First Tenn. Bank Nat'l Ass'n (In re Taneja), 743 F.3d 423 (4th Cir. 2014), the court reaffirmed that holding (743 F.3d at 430), adding that "in evaluating whether a transferee has established an affirmative defense under Section 548(c), a court is required to consider whether the transferee actually was aware or should have been aware, at the time of the transfers and in accordance with routine business practices, that the transferor-debtor intended to hinder, delay, or defraud" a creditor. Id.

The debtor in Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund, LLC (In re Bayou Group, LLC), 439 B.R. 284 (S.D.N.Y. 2010), was "a hedge fund that served large, primarily institutional investors." 439 B.R. at 291. While holding that the standard for good faith was an objective one (id. at 313), the court also referred to "similarly situated investors," and in particular, to the alleged "red flag" information that would put a "reasonable hedge fund investor" on inquiry

notice. Id. at 315, n.29. The court held that, "[w]hile the tests for inquiry notice and diligent investigation are objective, they are informed by the reality of a transferee's market and industry." Id. And in Bear, Stearns Sec. Corp. v. Gredd (In re Manhattan Inv. Fund Ltd.), 397 B.R. 1 (S.D.N.Y. 2007), in applying an objective standard, the court held it appropriate to consider what "a reasonable prime broker in [the defendant's] position" would do. Id. at 23.

Although these decisions are not controlling here, the court nonetheless sees a significant difference between "the customary practices of the industry in which the transferee operates" or "routine business practices," on the one hand, and the status of a particular investor or group of investors as immigrants, their cultural background, understanding of English, investment experience, and similar matters, on the other hand. It may be appropriate, even under a strictly objective standard, which applies in this circuit under Agretech, to consider the industry in which the transferee operates; as, for example, to distinguish between a bank that operates as a warehouse lender, as in Taneja, and an individual consumer investor, as here. But to consider the immigration, cultural, and educational circumstances and prior investment experience of particular individuals or a group of similarly-situated individuals, would simply undercut the objective standard required under Agretech.

For the reasons stated, in applying the good faith component of the good faith and fair value defense in these adversary proceedings, the court will use an objective standard (what a reasonably prudent consumer investor would have discovered), and not such personal factors as the immigration, cultural, and educational circumstances and prior investment experience of particular defendants or a group of similarly-situated defendants. The court will hear the matter.

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- 1 The issue is one of law, not fact. Thus, the court's ruling for all the adversary proceedings on this calendar is the same. References to "the defendants" in this ruling are to the defendants in all of these adversary proceedings. The court will refer to statements and arguments made by a defendant in a particular adversary proceeding for the sake of convenience and clarity, although the same statements and arguments may not have been presented in the same fashion in all the adversary proceedings.
 - 2 The defendant cites this case as 2014 Bankr. LEXIS 2996 (Bankr. D. Hawaii July 11, 2014). The court has been unable to locate the case by that citation; however, it appears to be the bankruptcy court's proposed findings and conclusions in Field v. Hinahara (In re Maui Indus. Loan & Fin. Co.), Adv. No. 12-90009 (Bankr. D. Hawaii), filed July 11, 2014, to be submitted to the district court, which the court has located on PACER.
 - 3 LLS America, 2014 U.S. Dist. LEXIS 87186, at *15-16; American Housing, 2012 Bankr. LEXIS 4721 at *48; M & L Business Machine, 84 F.3d at 1338.

37. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2317 ISSUE
BURKART V. PRATAP 3-2-16 [146]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

38. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2319 ISSUE
BURKART V. SHARMA 3-2-16 [113]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

39. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2321 ISSUE
BURKART V. ATHWAL 3-2-16 [106]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

40. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2354 ISSUE
BURKART V. CHEN ET AL 3-2-16 [96]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

41. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2356 ISSUE
BURKART V. MAHABIR 3-2-16 [133]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

42. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2359 ISSUE
BURKART V. MAHARAJ 3-2-16 [152]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

43. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2360 ISSUE
BURKART V. NARAYAN 3-2-16 [131]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

44. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2362 ISSUE
BURKART V. NARAYAN 3-2-16 [99]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

45. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2365 ISSUE
BURKART V. PANDEY 3-2-16 [142]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

46. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2367 ISSUE
BURKART V. PRASAD 3-2-16 [159]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

47. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2368 ISSUE
BURKART V. PRASAD 3-2-16 [195]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

48. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2385 ISSUE
BURKART V. PRASAD 3-2-16 [64]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

49. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2386 ISSUE
BURKART V. RAM 3-2-16 [143]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

50. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2395 ISSUE
BURKART V. PRASAD ET AL 3-2-16 [157]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

51. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2399 ISSUE
BURKART V. SHARMA 3-2-16 [116]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

52. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2413 ISSUE
BURKART V. HONG 3-2-16 [69]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

53. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2415 ISSUE
BURKART V. NAIDU 3-2-16 [141]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

54. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2433 ISSUE
BURKART V. SINGH 3-2-16 [155]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

55. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2451 ISSUE
BURKART V. BUZUAYONE 3-2-16 [84]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

56. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2458 ISSUE
BURKART V. GUO 3-2-16 [96]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

57. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2475 ISSUE
BURKART V. KAIWAI 3-2-16 [69]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

58. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2482 ISSUE
BURKART V. LUO 3-2-16 [69]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

59. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2491 ISSUE
BURKART V. MAHARAJ 3-2-16 [135]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

60. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2492 ISSUE
BURKART V. PRASAD 3-2-16 [144]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

61. 10-42050-D-7 VINCENT/MALANIE SINGH HEARING TO CONSIDER GOOD FAITH
12-2357 ISSUE
BURKART V. LAL 3-2-16 [148]

This matter will not be called before 10:30 a.m.

See tentative ruling posted at item no. 36.

62. 15-28370-D-7 JOHN COOKE MOTION TO SUBSTITUTE ATTORNEY
JAC-1 3-18-16 [29]

63. 15-27284-D-11 CONSOLIDATED RELIANCE, MOTION TO DISMISS CASE
RMY-4 INC. 3-23-16 [340]

64. 15-27284-D-11 CONSOLIDATED RELIANCE, MOTION FOR RELIEF FROM
SW-1 INC. AUTOMATIC STAY AND/OR MOTION
ENTERPRISE FM TRUST VS. FOR ADEQUATE PROTECTION
3-15-16 [327]

65. 15-27284-D-11 CONSOLIDATED RELIANCE, MOTION TO COMPEL
SW-2 INC. 3-15-16 [334]

66. 16-20086-D-7 MARLON QUINTANILLA ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
3-18-16 [49]