UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

April 12, 2018, at 10:30 a.m.

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1. **16-90603-E-7** **HSM-2** | **MARK ONE CORPORATION** **Cecily Dumas** | **CONTINUED MOTION TO COMPROMISE CONTROVERSY/ APPROVE SETTLEMENT AGREEMENT WITH JOHN SIMS** **1-31-18 [76]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 31, 2018. By the court's calculation, 36 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted, and the transfer of the rights of the Bankruptcy Estate is authorized.

Irma Edmonds, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with John Sims, individually and as trustee of the G&M Baker 1994 Trust ("Settlor" or "Defendants").

MARCH 8, 2018 HEARING

At the hearing, the court noted that on February 21, 2018, the parties had filed a Stipulation agreeing to continue the hearing and setting a briefing schedule. Dckt. 82, 88. On February 28, 2018, the court approved that Stipulation, continuing the hearing to 10:30 a.m. on April 12, 2018, and setting a briefing schedule. Dckt. 85.

Pursuant to the court's February 20, 2018 Order, the parties were instructed to the address the following three issues in their supplemental pleadings:

1. Whether the claims and rights asserted in the Complaint in Adversary Proceeding No. 17-9021 are included in the provisions of 11 U.S.C. § 544(a) to be property of the bankruptcy estate under the control of the Chapter 7 Trustee in this bankruptcy case.

2. The extent to which the court may order the sale of any interest of the estate, whatever that may be, and the proper basis for a subsequent determination of such rights and interests in either federal or state court.

3. The effect of this court ordering unilaterally as a condition of the compromise and sale that any disputes as to what rights and interests are sold by the Chapter 7 Trustee, which are without warranty, that the court abstains from exercising jurisdiction pursuant to 28 U.S.C. § 1334(e) and expressly provides for such determination of whether such rights and interests are property of the bankruptcy estate and what rights and interests, if any, are transferred from the Chapter 7 Trustee to Defendants.

DEFENDANTS' SUPPLEMENTAL BRIEF

John Sims, co-defendant in Adversary Proceeding No. 17-9021, filed a document entitled "Opening Supplemental Brief Concerning Hearings on Motion to Approve Compromise and Adversary Proceeding Motions to Dismiss and Motion to Remand" on March 15, 2018. Dckt. 89. In response to the court's three identified issues, Defendants assert as follows:

1. Claims asserted by Burger Physical Therapy Services, Inc., plaintiff in the complaint in Adversary Proceeding No. 17-9021 ("Plaintiff") are not claims under 11 U.S.C. § 544(a).

2. The court may approve the proposed settlement and allow Movant to sell claims to Defendants without harming Plaintiff's claims, on the ground that Movant does not purport to assert claims that belong to creditors like Plaintiff.

3. A condition about a warranty of what claims are settled and transferred is not necessary in the court's order because any determination should be the same either in bankruptcy court or in state court based upon state law.

Defendants next proceed to argue several additional grounds that were not requested by the court. Defendants contend that the main issue before the court is whether Plaintiff has any claim to assert. Defendants argue that Plaintiff does not have such a claim. Instead, Defendants argue that Plaintiff could be replaced in the complaint by the name of any other creditor, and then, the situation would be clear that Plaintiff has not alleged any harm that is unique to it.

Defendants argue that Plaintiff has not established any particularized injury that it has suffered. Defendants cite the court to from a case out of the Southern District of New York as an example of a court finding that clever arguments do not trump the ultimate issue of whether an injury complained of resulted from direct harm to a plaintiff or general harm to other parties. *Id.* at 4:19.5–26.5 (citing *Solow v. Stone*, 994 F. Supp. 173, 179 (S.D.N.Y. 1998)). Defendants stress that Plaintiff is trying to "grab" claims of the Estate for its own benefit. *Id.* at 4:27.5–5:2.5.

The second argument presented by Defendants is that Plaintiff's various claims for aiding and abetting, conspiracy, tortious interference, and unfair competition fail under California law. Defendants argue that neither John Sims nor the Baker Trust are third parties, which is required by California law. Instead, Defendants present that only a corporation's officers, directors, and owners cannot be aiders and abettors or co-conspirators. *See id.* at 6:19–22 (citing *PM Group, Inc. v. Steward*, 154 Cal. App. 4th 55, 57, 58, 65 (Cal. Ct. App. 2007)).

Defendants argue that John Sims is an officer and director of Mark One Corporation ("Debtor"), and that Baker Trust is the sole shareholder, both owing fiduciary duties to Debtor. Because of that, Defendants argue that any breach of duty would be a claim that belongs to Movant and not to Plaintiff. *Id.* at 6:22–25.

Any claim that may exist for the Estate, Defendants argue is in the exclusive possession of Movant. *Id.* at 6:26–7:1 (citing *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006)).

Defendants assert that Plaintiff's claims are based upon a single set of facts that demonstrate only a claim for fraudulent conveyance, which would be within Movant's purview. *Id.* at 9:2–7.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on March 29, 2018. Dckt. 93. Plaintiff argues that if the proposed compromise stopped at settling Movant's preference claim against Settlor, then Plaintiff would not oppose. Nevertheless, Plaintiff argues that the settlement terms cover much more than is necessary, including Plaintiff's state court claims (removed to this court).

Plaintiff argues that the validity, priority, and extent of its claims cannot be resolved by the Motion but must be litigated through an adversary proceeding. Plaintiff proposes conditioning approval of the settlement agreement upon deleting certain provisions (addressed below).

As to the three issues raised by the court for the supplemental pleadings, Plaintiff responds as follows. Regarding 11 U.S.C. § 544(a), Plaintiff asserts that the Bankruptcy Appellate Panel for the Ninth Circuit has found before that a trustee does not have power under 11 U.S.C. § 544 "to seek damages on a claim for relief alleging aiding and abetting of fraudulent transfers under California law." *Id.* at 3:9–10 (citing *In re Viola*, 469 B.R. 1, 7 (B.A.P. 9th Cir. 2012)). FN.1. Plaintiff argues that such a holding is persuasive here because Plaintiff is the real party in interest and because the Estate does not hold an independent claim against Settlor.

FN.1. The court notes that the statements regarding 11 U.S.C. § 544 were filed with Plaintiff's responsive pleadings in Adversary Proceeding No. 17–9021 and incorporated in Plaintiff's Opposition to this Motion.

Regarding the court's ability to order a sale of an estate interest, Plaintiff argues that there is no dispute that a trustee may sell property of the estate under 11 U.S.C. § 363(b), including interest in any cause of action. Plaintiff counters, though, that any dispute about the validity, priority, or extent of interest in property must be resolved through an adversary proceeding.

For the present motion, Plaintiff argues that the limitation on selling disputed property of the estate means that this matter cannot be resolved unless there is an adversary proceeding to determine claim rights, unless Plaintiff is involved in any settlement, or unless a state court hears Plaintiff's claims on remand.

Regarding the condition that the court abstain from determining what rights and interests are sold, Plaintiff proposes that Movant and Settlor amend the settlement agreement to prevent court intervention. Plaintiff argues that the following three portions could be deleted:

RECITALS

. . . .

~~N. The Parties hereto agree that the Estate owns the Burger Alleged Claims asserted in the Removed Action and, therefore, that such Burger Alleged Claims are exclusively within the purview and control of the Trustee. Further, the Parties agree and assert that Burger, through prosecution of the Removed Action, is attempting to collect a debt allegedly owed to it outside of the Bankruptcy Court and in violation of the automatic stay.~~

O. The Parties hereto desire to negotiate a settlement for the resolution of the Dispute existing as between them~~, and for the purchase of the Burger Alleged Claims by Sims/Bank Trust from the Trustee/Bankruptcy Estate,~~ pursuant to this Agreement.

AGREEMENT

. . . .

1. Consideration/Payment Terms. Sims/Baker Trust shall pay to the Trustee the sum of $75,000 (the "Payment"), pursuant to the terms of this Agreement. The Payment shall be delivered and made payable to Irma C. Edmonds, Trustee of the Mark One Bankruptcy Estate within five (5) days of the complete execution of this Agreement by the parties.

The Payment shall be in exchange for the following: 1) settlement of the Trustee's Preference Claim against Sims/Baker Trust; and 2) the Trustee's assignment of any and all claims of the Estate, whatever they may be, which exist or may exist against Sims/Baker Trust~~, including but not limited to the Burger Alleged Claims~~. (Hereinafter, the "Dispute~~,~~" ***and*** the "Preference Claim" ~~and the "Burger Alleged Claims"~~ shall collectively be referred to as the "Claims.")

Plaintiff argues that the above changes make no material changes to the settlement agreement without creating contradictions or determining the ownership of Plaintiff's claims. If Movant and Settlor do not agree to the proposed changes, then Plaintiff argues that the Motion should be granted only with the above revisions. Finally, Plaintiff argues that the court's proposal to approve the settlement and abstain from determining claim ownership issues should be a last resort because the settlement contains language that Plaintiff believes would confusing with an order.

If the court elects to approve the settlement and abstain from determining claim ownership, then Plaintiff requests that the court include in its order that the court does determine what party owns the claims asserted by Plaintiff in the adversary proceeding.

SETTLOR'S REPLY

Settlor filed a Reply on April 5, 2018. Dckt. 95. Settlor argues that the proposed compromise should be approved as it is right now because Movant owns all of the Estate's claims and wishes to settle those claims with Settlor. Settlor believes that there is no claim that can be asserted against Settlor independent of Movant's preference claim.

Settlor reasserts the two grounds that were proposed in the first Supplemental Brief, using different language to present the same arguments. Settlor asserts that Plaintiff has not shown any particularized harm because none exists—each creditor in this case being injured by any alleged preferential transfer. Second, Settlor argues that claims can be asserted against it because Debtor acted through Settlor, thus removing Settlor from being a third party.

MOVANT'S REPLY

Movant filed a Reply on April 5, 2018. Dckt. 97. Movant notes immediately that Plaintiff would not object to granting the Motion if it included only the settlement of the preference claim, with part of the

bulk of the agreement that Plaintiff would agree to including that the settled claims are "whatever they may be and wholly without warranty, which exist or may exist." *Id.* at 2:1–2.

Movant directs the court to an unpublished Bankruptcy Appellate Panel decision with similar facts. *Kwai v. Wirum (In re Global Reach Inv. Corp.)*, No. NC-11-1187-SaDH, 2012 Bankr. LEXIS 1205 (B.A.P. 9th Cir. Mar. 20, 2012), *aff'd*, No. 12-60028, 2014 U.S. App. LEXIS 7564 (9th Cir. Apr. 22, 2014). In that case, a purchaser of corporate stock from a bankruptcy estate was found to be a good faith purchaser (11 U.S.C. § 363(m)) even though the purchaser was aware of disputes about ownership of the stock. The purchaser agreed to pay the trustee in the bankruptcy case $20,000.00 for a transfer of the estate's rights, if any, in the corporate stock. When the sole shareholder opposed and eventually appealed, the Bankruptcy Appellate Panel held for the trustee that the trustee was only selling whatever interest the estate had, and all of the parties involved were aware of that limitation.

Movant argues that this Motion is similar to *Kwai* because Settlor knows about Plaintiff's dispute about what claims it holds, and the court can approve the compromise with the Estate only transferring whatever interest it has, if any at all.

Movant argues that approving the compromise will allow Movant to administer this case either in a fully solvent fashion or as close to solvent as will be possible. Movant argues that this case will not generate any proceeds beyond the $75,000.00 that would be acquired through the settlement.

Movant states that revisions to the agreement do not offend her because all that is being sold is whatever interest the Estate may hold; Plaintiff may still exercise any claims that it has. Movant is unsure, though, whether Settlor will be willing to agree to Plaintiff's proposed revisions.

DISCUSSION

As originally presented, Movant and Defendants identified the rights and interests to be acquired by Defendants from the Bankruptcy Estate as follows:

> "The Settlement Payment shall be in exchange for the following: 1) settlement of the Trustee's Preference Claim against Sims/Baker Trust (the "Dispute"); and 2) the Trustee's assignment of any and all claims of the Estate, whatever they may be, which exist or may exist against Sims/Baker Trust, including but not limited to the Burger Alleged Claims. (Hereinafter, the "Dispute," the "Preference Claim" and the "Burger Alleged Claims" shall collectively be referred to as the "Claims.")"

Motion, p. 4:14–19. Movant and Defendants expressly acknowledge that the Chapter 7 Trustee is not making any warranties with respect to what the Chapter 7 Trustee is purporting to sell, including the existence of any such rights. *Id.*, p. 4:25–5:3.

The Motion and proposed Settlement goes further, purporting to have determined that the Chapter 7 Trustee has all possible rights in the Complaint, stating that the Chapter 7 Trustee is further required as follows:

> "e. Dismissal of Adversary Proceeding. Upon receipt of the full Settlement Payment, the **Trustee will cause to be dismissed with prejudice the Adversary Proceeding** related to the Trustee's Preference Claim."

Id., p. 5:15–17.

As the Parties have recognized in their supplemental pleadings, the above language might be improperly construed as the Chapter 7 Trustee purporting to sell claims and rights of Plaintiff. Even if the Chapter 7 Trustee is not making such a warranty, it could create the false impression that a federal court issued an order: (1) determining that all such claims asserted in the Complaint were rights and interests of the bankruptcy estates, (2) that federal court was exercising the exclusive federal jurisdiction over property of the bankruptcy estate (28 U.S.C. § 1334(e)), and (3) that such exercise of federal jurisdiction conclusively determined that Plaintiff had no rights left to assert in the Complaint.

Review of State Court Complaint, Exhibit C—17-9021, Dckt. 5.

A review of Plaintiff's Complaint demonstrates that there is an overlap of what is asserted therein between the rights of the Chapter 7 Trustee and Bankruptcy Estate, and possible personal rights of Plaintiff that are not subject to 11 U.S.C. § 544(a). From a review of the Complaint, such allegations include as follows.

Plaintiff's Complaint sets forth six causes of action: (1) intentional interference with prospective economic advantage, (2) negligent interference with prospective economic advantage, (3) conspiracy to intentionally interfere with prospective economic advantage, (4) civil conspiracy to commit a fraudulent transfer, (5) aiding and abetting a fraudulent transfer, and (6) Unfair Competition Law (Bus. & Prof. Code §§ 17200, et. seq.).

Paragraph 33 of the First Cause of Action states: "Defendant conspired to and did cause **a transfer** of [Debtor's] assets . . . for unreasonably low, if any, consideration and/or with the intent to hinder, delay or defraud Plaintiff." Dckt. 5, Exhibit C, at 11 (emphasis added).

Paragraph 42 in the Second Cause of Action states more explicitly that "Defendant conspired to and did carry out **a fraudulent transfer** by causing a transfer of [Debtor's] assets . . . ." *Id.*, Exhibit C, at 12 (emphasis added). The Third Cause of Action sets forth allegations based upon the same underlying transfer of assets. *See id.*, Exhibit C, at 12–13.

Paragraph 55 of the Fourth Cause of Action alleges that "Defendant agreed and knowingly and willfully conspired with others . . . to carry out, commit, or cause **a fraudulent transfer** and to defraud Plaintiff, among other creditors." *Id.*, Exhibit C, at 14. Paragraph 63 of the Fifth Cause of Action is identical to Paragraph 55. *See id.*, Exhibit C, at 15.

Plaintiff asserts claims in the State Court Complaint against John C. Sims, individually, ("Sims") and John C. Sims, Trustee of the Baker G&M 1994 Trust ("Trust"). In ¶ 8 of the Complaint, Burger alleges:

8. This case arises out of **Defendant's scheme to strip Mark One of its assets** to **avoid paying Mark One's creditors (including Plaintiff)** and to **increase the money paid to and collected by Defendant**. More specifically, Defendant John Sims is Trustee of the Baker Trust. As Trustee, Defendant appointed himself as the President and Secretary of Mark One. John Sims also appointed himself as the sole director of Mark One. **John Sims** then used his various roles and capacities **to maximize its own profits** and to **interfere with Plaintiff's ability to collect amounts due and owing from Mark One.**

. . .

11. When **Defendant** decided to **transfer Mark One's assets**, he concocted a scheme to ensure that **he** and his family members **received the proceeds and all amounts purportedly owed to the Baker Trust** (instead of the proceeds actually going to repay Mark One's creditors, like Plaintiff, who were owed money). In exchange fur agreeing to participate in this farce, the purchaser of Mark One- **Vista SNF Properties, LLC and Vista Del Sol Postacute Care ("Vista")** were able to **obtain Mark One's entire operating business**- patients, employees, personal property, administration, technology, billing histories, vendor relationsltips, **contracts-for NO PAYMENT to Mark One**.

. . .

26. At or around the **time of the transfer of assets from Mark One to Vista**, the Baker Trust also sold the real property on which certain convalescent hospitals were operating to Vista. Plaintiff is informed and believes that **John Sims, individually and as Trustee of the Baker Trust, structured the transaction to ensure that the Baker Trust received significant proceeds without subjecting the funds to creditor claims.** Structuring the transaction in this manner **interfered with and inhibited Plaintiff's ability to access Mark One's assets and property to collect on debts owed.**

27. Plaintiff is informed and believes, and on that basis alleges, that Defendant **John Sims**, individually, as President of Mark One, as the sole director of Mark One, and as Trustee of the Baker Trust, **conspired** with others, including but not limited to Vista, and devised the **scheme described herein to hinder, delay, or defraud Mark One's creditors**, including Plaintiff.

28. Defendant **John Sims and Vista** fully **executed the conspired plan to fraudulently transfer Mark One's assets** and Mark One was left entirely unable to pay its existing debt obligations to Plaintiff. Moreover, by and **through these transactions**, the Baker Trust received all amounts it was purportedly owed, while the **creditors were left with no recourse**. For example, with full knowledge of the amounts due and owing to Plaintiff, John Sims continued to receive a salary from Mark One, ensured that Mark One continued to pay rent to the Baker Trust, and also ensured that Mark One re-paid as much as possible to the Baker Trust without

even attempting to pay Plaintiff. Meanwhile, Mark One was still asking Burger to continue providing services.

29. **John Sims' self-dealing** and strategy of placing his own interests before Plaintiffs **interfered with Plaintiff's ability to collect the amounts due** and owing and defrauded Plaintiff as a creditor of Mark One.

First Cause of Action
(Intentional Interference with Prospective Economic Advantage

33. **Defendant conspired to** and did cause a **transfer of Mark One's assets to Vista** for unreasonably low, if any, consideration and/or **with the intent to hinder, delay or defraud** Plaintiff. **Defendant** also **ensured** that the Baker Trust was repaid **before repaying the creditors of Mark One**, including Plaintiff. Defendant also placed his own interests ahead of the creditors by engaging in the acts alleged herein.

34. In doing so, **Defendan**t intended to **interfere** with or disrupt the **relationship between Plaintiff and Mark One**, or knew that disruption of !he relationship was substantially certain to occur.

Second Cause of Action
Negligent Interference with Prospective Economic Advantage

42. Defendant acted wrongfully, negligently, and without reasonable care when **Defendant conspired to** and did **carry out a fraudulent transfer** by **causing a transfer of Mark One's assets** to Vista for unreasonably low, if any, consideration to Mark One, and making all payments to the Baker Trust before repaying creditors, including Plaintiff. Defendant also placed his own interests ahead of the creditors by engaging in the acts alleged herein.

Third Cause of Action
Conspiracy to Intentionally Interfere with Prospective Economic Advantage

50. Plaintiff is informed and believes, and on that basis alleges, that in furtherance of this conspiracy to intentionally interfere with Plaintiff's prospective economic advantage, **Mark One transferred its assets** to Vista for unreasonably low, if any, consideration. In doing so, **Defendant intended** to **interfere with** or disrupt the **relationship between Plaintiff and Mark One**, or knew that disruption of the relationship was substantially certain to occur.

Fourth Cause of Action
Civil Conspiracy to Commit a Fraudulent Transfer

55. Plaintiff is informed and believes, and thereon alleges that **Defendant** agreed and knowingly and willfully **conspired** with others as alleged herein **to carry out**, commit, or cause **a fraudulent transfer and to defraud** Plaintiff; among other **creditors**.

56. Plaintiff is informed and believes, and on that basis alleges, that under this conspiracy to commit a fraudulent transfer, **Mark One did not receive reasonably equivalent value** in exchange **for its transfer of assets**, and that Defendant knew, or reasonably should have known, that Mark One was insolvent or would become insolvent, and/or that Mark One was engaged in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction, and/or that Mark One would incur debts beyond its ability to pay as such debts became due.

57. In furtherance of this **conspired plan**, **Mark One transferred its assets** to Vista and, in turn, Mark One received no consideration or an unreasonably low consideration. Also in furtherance of this conspired plan, **John Sims**, as Trustee of the Baker Trust, **transferred** the real property on which Mark One operated certain facilities to Vista. Plaintiff is informed and believes that Vista ultimately paid consideration for the **assets of Mark One through this conspired scheme**, but did so under the guise purchasing the real property. Doing so ensured the sole shareholder of Mark One, the Baker Trust, would receive the full consideration paid while attempting to block the creditors' ability to collect against Mark One.

Fifth Cause of Action
Aiding and Abetting a Fraudulent Transfer

63. Plaintiff is informed and believes, and on that basis alleges, that **Defendant** agreed and knowingly and willfully **conspired** with others **to** carry out, commit, or **cause a fraudulent transfer** and **to defraud** Plaintiff, among other **creditors**.

64. Plaintiff is informed and believes, and on that basis alleges, that under this conspiracy to commit a **fraudulent transfer**, **Mark One did not receive reasonably equivalent value** in exchange **for its transfer of assets**, and that Defendant knew, or reasonably should have known, that Mark One was insolvent or would become insolvent, and/or that Mark One was engaged in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction, and/or that Mark One would incur debts beyond its ability to pay as such debts became due.

65. In furtherance of this conspired plan, **John Sims**, the Baker Trust, and Vista **aided and abetted the transfer of assets** to Vista **for no consideration to Mark One or an unreasonably low consideration**. Also in furtherance of this conspired plan, **John Sims**, as Trustee of the Baker Trust, **transferred** the real property on which Mark One operated certain facilities to Vista. Plaintiff is informed and believes that Vista ultimately paid consideration for the **assets of Mark One** through this conspired scheme, but did so under the guise of an inflated purchase price of the real property. Doing so **ensured** the sole shareholder of Mark One, the **Baker Trust, would receive the full consideration** paid while attempting **to block the creditors' ability to collect against Mark One**. Mark One then subsequently filed for bankruptcy.

. . .

68. As a result of **Defendant's actions** in aiding and abetting the fraudulent transfer, Plaintiff sustained damages and has been **harmed** in that it is **unable to access Mark One's assets and property in order to collect on debts owed by Mark One**.

Sixth Cause of Action
Unfair Competition Law Bus. & Prof. Code §§ 17200, et. seq.

71. **Defendant's acts and omissions**, as alleged herein, **constitute a violation of** the California's Unfair Competition Law (UCL), Business and Professions Code **Section 17200 *et seq.***

Relief Requested in Prayer

1. For an award of damages in an amount to be proven at trial including general damages, special damages, compensatory damages, consequential damages, exemplary and/or punitive damages;

[No paragraph 2 in Complaint]

3. For any and all relief available under the Uniform Fraudulent Transfer Act (Civil Code section 3439 et seq.) for conspiracy to commit a fraudulent transfer;

4. For an award of attorneys' fees and costs of suit herein, if proper; and

5. For such other relief as the Court may deem just and proper.

17-9021; Exhibit C, Dckt. 5 (emphasis added). The court can well envision the arguments and counter-arguments in connection with the Complaint if the Settlement is approved as originally proposed and anointing the Chapter 7 Trustee to dismiss with prejudice Plaintiff's Complaint..

Applicable Bankruptcy Law Re: Rights of the Estate

At the initial hearing, the Court requested the Parties to address the scope of 11 U.S.C. § 544(a), in significant part hoping that such would help the Parties identify what was and could be accomplished in this court pursuant to the Motion. As the court noted, it would not do the Parties any favor and would create a judicial mess for the state court judge or this court (if the Adversary Proceeding were not remanded) to issue an order saying that all claims in the Complaint were transferred, as a matter of a federal court order, to Defendants. Such would necessarily invite an appeal of that order, holding the litigation that Plaintiff and Defendants seek to diligently prosecute unnecessarily in abeyance.

Fortunately, the Parities recognize that the Chapter 7 Trustee can only compromise and transfer rights of the Chapter 7 Trustee and Bankruptcy Estate. It appears from the Supplemental Pleadings the Parties do agree on the court issuing an order so providing.

The Chapter 7 Trustee has unique federal law powers and rights arising under 11 U.S.C. § 547 and § 548 to avoid and recover preferential and fraudulent conveyance transfers for the benefit of the estate and ultimately the collective benefit of the creditors). The Chapter 7 Trustee is also give certain non-bankruptcy state law powers that the Chapter 7 Trustee can exclusively exercise for the benefit of the bankruptcy estate and creditors. Those powers are set forth in 11 U.S.C. § 544, which provides (emphasis added):

> "§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers
>
> (a) The **trustee shall have**, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, **or** may **avoid any transfer of property of the debtor** or any obligation incurred by the debtor that is voidable by—
>
> > (1) **a creditor** that extends credit to the debtor at the time of the commencement of the case, and **that obtains**, at such time and with respect to such credit, **a judicial lien** on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
> >
> > (2) **a creditor** that extends credit to the debtor at the time of the commencement of the case, and **obtains**, at such time and with respect to such credit, **an execution** against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
> >
> > (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)

(1) Except as provided in paragraph (2), the **trustee may avoid any transfer** of an interest of the debtor in property or any obligation incurred by the debtor **that is voidable** under applicable law **by a creditor holding an unsecured claim** that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title. . . ."

As discussed in Collier on Bankruptcy, 16th Edition, ¶ 544.01 (emphasis added), a general overview of the Chapter 7 Trustee's obtaining rights of individual creditors to be prosecuted for the benefit of the bankruptcy estate and all creditors includes:

"**Subsection (a) empowers the trustee to avoid certain prebankruptcy transfers that could have been avoided by certain types of creditors or a bona fide purchaser**, whether or not such creditors or a bona fide purchaser actually exist. To that end, **the trustee is vested with the rights and powers (including to power to avoid any transfer of the debtor's property or any obligation incurred by the debtor**) that could have been exercised by (1) a hypothetical creditor (a) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, a judicial lien on all property of the debtor that could have been obtained by a creditor on a simple contract; or (b) that advanced credit to the debtor at the instant that the title 11 case was commenced and obtained, at exactly the same time and with respect to such credit, an execution against the debtor that is returned unsatisfied; or (2) a hypothetical bona fide purchaser of real property (other than fixtures) from the debtor against whom applicable nonbankruptcy law permits such transfer to be perfected and that has, as of the commencement of the title 11 case, perfected such transfer.

Subsection (b)(1), on the other hand, arms the trustee with the powers of an actual creditor with an allowable unsecured claim that could have avoided a transfer of the debtor's property or any obligation of the debtor under applicable (generally nonbankruptcy) law.

As noted, the trustee's avoiding powers under section 544 come into existence as of the commencement of the title 11 case, whether the petition is voluntary or involuntary.

As is the case with other avoidance powers, the trustee's quantum of recovery is determined by section 550 and the transferee-defendant may have an unsecured claim under section 502(h).

These rights and powers are often referred to as the trustee's "strong arm powers."

> **Section 544 is limited to avoidance actions and does not give the trustee standing to pursue tort claims that were not the property of the estate at the commencement of the case.** This section "vests the trustee with the ability of a judgment lien creditor to attach or seize both tangible and intangible property transferred by the debtor to a third party prior to filing for bankruptcy, but it does not transform the trustee into a 'super creditor' with the ability to raise causes of actions separate from those possessed by the estate."
>
> The section 544(a) powers and section 544(b) powers are limited by their terms and may not be used by the trustee to avoid postpetition transfers. Avoidance of postpetition transfers is governed by section 549.

Exercise of Federal Judicial Power

As referenced above, Congress provides in 28 U.S.C. § 1334(e) that the federal courts have "exclusive" jurisdiction over property of the bankruptcy estate.

> "(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
> > (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
> >
> > (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327."

While "exclusive" over all property of the estate worldwide, the exercise of such jurisdiction is also subject to the discretionary abstention powers granted by Congress in 28 U.S.C. § 1334(c)(1):

> "(c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."

Here, the Parties all agree that they are not attempting to adjudicate the asserted rights of Plaintiff by the order approving the Settlement (notwithstanding the language in the Settlement as originally proposed). This court can, and will (as addressed below), grant the Motion and authorize the Chapter 7 Trustee to settle and transfer **all rights of the bankruptcy estate** to Defendants. However, the court does not determine what, if any, rights and interests remain in the Complaint for Plaintiff. Such will be left for the wise and good faith determination of the Defendants, Plaintiff, and their respective counsel.

Under the circumstances, the court recognizes that Defendants and Plaintiff may well want a California Superior Court judge making the initial determination of what rights, if any, Plaintiff may have

after the Chapter 7 Trustee settles the rights of the Bankruptcy Estate, including the rights transferred to the Chapter 7 Trustee by operation of federal law under 11 U.S.C. § 544.

Therefore, as set forth in a related motion, the court will remand the State Court Action back to the Superior Court and abstain from making a determination of what state law rights remain (are not property of the Bankruptcy Estate after the approved Settlement between the Chapter 7 Trustee and Defendants). The court does so in due regard for the expertise of the state court judges on the matters of state law, as well as the State's interest in making sure that all of the rights arising under state law have been addressed.

In remanding and abstaining, this court recognizes that it could exercise federal court jurisdiction for this determination. Out of further regard for the State Court judge to whom the matter is remanded, if that judge determines that such issues should properly be determined by a federal court judge, this court will exercise such jurisdiction if the State Court judge orders the parties to obtain such determination by supplemental motion for determination of the rights transferred by the Chapter 7 Trustee under the Settlement and what rights, if any, were not transferred (or such other proceeding as Plaintiff and Defendants determine proper).

Decision

Movant and Settlor have resolved their claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 79):

A. The terms of the proposed settlement include, as qualified by the court and in light of the Supplemental Pleadings of the Parties:

1. Settlor shall pay the Bankruptcy Estate $75,000.00.

2. The above payment:

i. Is in settlement of Movant's Preference Claim against Settlor.

ii. Movant shall assign any and all claims of the Bankruptcy Estate, whatever they may be, which claims of the Bankruptcy Estate exist or may exist against Settlor, including, such claims of the Bankruptcy Estate pursuant to 11 U.S.C. § 544 that may have been asserted by Plaintiff in Adversary Proceeding No. 17-9021.

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that while it is confident in its position, Settlor has asserted several defenses, including ordinary course of business and new value. Movant believes that those defenses will not be persuasive, but Movant cannot guarantee success in litigation.

Difficulties in Collection

Movant believes that a judgment against Settlor would be collectible, but the ability to recover would be subject to litigation expenses.

Expense, Inconvenience, and Delay of Continued Litigation

Movant states that its preference claim action is straightforward, but Movant notes that Plaintiff's claims are more complex, to the point of making any litigation economically infeasible for the Estate.

Paramount Interest of Creditors

Movant argues that creditors are benefitted because the Estate recovers $75,000.00 while avoiding costly litigation and delay.

Terms of Settlement Approved

The court approves the Settlement and transfer of the rights and claims of the Bankruptcy Estate against Defendants, which include such claims as may be asserted in the Complaint. To facilitate the clarity of this approval (in light of the ongoing disagreement as to the scope of such rights by Defendants and Plaintiff) the terms of the Settlement are modified and approved as follows:

1. Consideration / Payment Terms. Sims/Baker Trust shall pay to the Trustee the sum of $75,000.00 (the "Payment"), pursuant to the terms of this

Agreement. The Payment shall be delivered and made payable to Irma C. Edmonds, Trustee of the Mark One Bankruptcy Estate within five (5) days of the complete execution of this Agreement by the Parties.

The Payment shall be in exchange for the following: 1) settlement of the Trustee's Preference Claim against Sims/Baker Trust; and 2) the Trustee's assignment of any and all claims of the Estate, including the rights of the Trustee and Bankruptcy Estate pursuant to 11 U.S.C. § 544,whatever they may be, which exist or may exist against Sims/Baker Trust, ~~including but not limited to the Burger Alleged Claims~~. (Hereinafter, the rights and claims settled ~~"Dispute," the "Preference Claim" and the "Burger Alleged Claims"~~ shall collectively be referred to as the "Claims.")

2. Delivery of Estate's Interest in the Claims. Upon entry of the Bankruptcy Court's order approving the Trustee's compromise and sale motion, and payment of the Settlement Payment by Sims/Baker Trust, the Trustee shall deliver to Sims/Baker Trust an assignment of the Estate's interest in the Claims, in the standard forms therefor as reasonably approved by the parties.

~~5. Dismissal of Adversary Proceeding. Upon receipt of the full Payment, the Trustee will cause to be dismissed with prejudice the Adversary Proceeding related to the Trustee's Preference Claim.~~

6. Bankruptcy Court Approval. Within five (5) business days of the Trustee's receipt of the Settlement Payment. the Trustee shall file a motion with the Bankruptcy Court to approve this Agreement, as a compromise pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, and as a sale of assets pursuant to 11 U.S.C Section 363(b) (the "Motion").

This Agreement is explicitly conditioned upon entry of an order by the Bankruptcy Court approving the terms and conditions of this Agreement, as modified in the Order granting the Motion, in their entirety ("Approval Order), and such order becoming a "Final Order." If the Approval Order does not become a Final Order, this Agreement shall be null and void and of no force or effect.

For purposes of this Agreement, a "Final Order" is an order or judgment of the Bankruptcy Court, as entered on Its docket, which has not been reversed, stayed, modified or amended, and as to which (a) the time to appeal, petition for certiorari, or move for re-argument or rehearing has expired and as to which no appeal, petition for certiorari, or other proceedings for re-argument or rehearing shall then be pending or as to which any right to appeal, petition for certiorari, reargue, or rehear shall have been waived in writing, or (b) in the event that an appeal, writ of certiorari, or re-argument or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court or other applicable court shall have been affirmed by the highest court to which such order or judgment was appealed, or certiorari has been denied, or from which re-argument or rehearing was sought, and the time to take any further

appeal, petition for certiorari or move for re-argument or rehearing shall have expired.

. . .

FN.1.

22. Mutual General Release; Upon entry of a Final Order approving this Agreement, and excepting only the obligations Imposed by this Agreement, the Trustee, as bankruptcy estate representative of the Estate and on behalf of its respective agents, successors, administrators, principals, insurers, attorneys and any other representatives, on the one hand, and **Sims/**Baker Trust, **and each of them,** for itself and on behalf of its trustees, agents, successors, administrators, principals, insurers, attorneys and any other representatives, on the other hand, and each of them, as authorized by law, hereby fully release and discharge the other from all rights, claims, damages, losses and actions which either may have against the other, including those relating or pertaining to, or in any way arising out of, the disputes with the definition of "Claims" set forth in Paragraph 1 of the Agreement ~~recited in the Recitals herein (collectively, the "Claims")~~.

The Parties hereto expressly understand and agree that this full and final release covers and includes all claims of every kind or nature, past, present or future, known or unknown, suspected or unsuspected, that relate to the Claims described herein and in accordance therewith, waive Section 1542 of the Civil Code of the State of California. The Parties understand and agree that Section 1542 provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

FN1. In light of the Settlement Agreement stating that it is between John Sims individually and as trustee of the G&M Baker 1994 Trust on the one hand, and the Chapter 7 Trustee for the bankruptcy estate on the other hand, it appears that the release paragraph as drafted in the Settlement Agreement contained a typographical error, omitting John Sims from granting his release. Examples from other portions of the Settlement Agreement include:

> "This Settlement and Release and Sale Agreement ("Agreement") is made and entered into between JOHN SIMS (individually, "Sims"), trustee of THE G & M BAKER 1994 TRUST (the "Baker Trust") (collectively, "Sims/Baker Trust") and IRMA C. EDMONDS ("Trustee"), in her capacity as Chapter 7 Trustee for the Estate of Mark One Corporation ("Debtor"), Case No. 16-90603-E-7. Sims/Baker Trust and the Trustee are collectively referred to herein as the "Parties.""

Exhibit A, Settlement Agreement, p. 2; Dckt. 79

> "D. Sims/Baker Trust assert a claim against the Estate as a pre-petition creditor of the Debtor.
>
> F. On July 17. 2015, the Debtor transferred to Sims/Baker Trust the amount of $100,000.00 (the "Transfer") .
>
> G. The Trustee contends that the Estate Is entitled to avoid and set aside the Transfer pursuant to 11 U.S.C. § 547(b) (the "Preference Claim"), as alleged in the Adversary Proceeding entitled Irma C. Edmonds v. John Sims (Adv. No. 17-Q9007-E) (the "Adversary Proceeding").
>
> H. Sims/Baker Trust dispute the Trustee's Preference Claim (the "Dispute")."

Id.

> "O. The Parties hereto desire to negotiate a settlement for the resolution of the Dispute existing as between them, and for the purchase of the Burger Alleged Claims by Sims/Baker Trust from the Trustee / Bankruptcy Estate, pursuant to this Agreement."

Id.

At the hearing the Parties (defined in the Agreement to be Sims, the Baker Trust, and the Chapter 7 Trustee) can address whether such a typographical error exists or whether the Chapter 7 Trustee is allowing Sims to retain all of his possible claims and rights against the Bankruptcy Estate.

Consideration of Additional Offers

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

To the court, the scenario presented in this Motion is similar, but not exact, to the fact pattern presented by Movant in *Kwai v. Wirum (In re Global Reach Inv. Corp.)*. 2012 Bankr. LEXIS 1205. The key similar fact is that the trustee and the settling party are aware that a third-party opposes the settlement and asserts that it maintains claims that are separate from what the bankruptcy estate possesses. Knowing about the third-party claim, Movant and Settlor are still willing to settle for $75,000.00 and transfer whatever rights that the Estate possesses.

The court does not express any ruling on whether Plaintiff has valid claims. The court only approves the settlement and authorizes Movant to transfer whatever rights the Estate holds relating to its preference action against Settlor in exchange for payment of $75,000.00 from Settlor.

At the hearing, Settlor stated that it accepts the proposed revisions by Plaintiff. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Irma Edmonds, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and John Sims, individually and as trustee of the G&M Baker 1994 Trust ("Settlor"), as modified to provide the following replacement terms (strikeout for ~~deletions~~ and underline for additions) in the following numbered paragraphs of the Settlement Agreement,
>
> 1. Consideration / Payment Terms. Sims/Baker Trust shall pay to the Trustee the sum of $75,000.00 (the "Payment"), pursuant to the terms of this Agreement. The Payment shall be delivered and made payable to Irma C. Edmonds, Trustee of the Mark One Bankruptcy Estate within five (5) days of the complete execution of this Agreement by the Parties.
>
> The Payment shall be in exchange for the following: 1) settlement of the Trustee's Preference Claim against Sims/Baker Trust; and 2) the Trustee's assignment of any and all claims of the Estate, including the rights of the Trustee and Bankruptcy Estate pursuant to 11 U.S.C. § 544, whatever they may be, which exist or may exist against Sims/Baker Trust, ~~including but not limited to the Burger Alleged Claims~~. (Hereinafter, the rights and claims settled ~~"Dispute," the "Preference Claim" and the "Burger Alleged Claims"~~ shall collectively be referred to as the "Claims.")
>
> 2. Delivery of Estate's Interest in the Claims. Upon entry of the Bankruptcy Court's order approving the Trustee's compromise and sale motion, and payment of the Settlement Payment by Sims/Baker Trust, the Trustee shall deliver to Sims/Baker Trust an assignment of the Estate's interest in the Claims, in the standard forms therefor as reasonably approved by the parties.
>
> ~~5. Dismissal of Adversary Proceeding. Upon receipt of the full Payment, the Trustee will cause to be dismissed with prejudice the Adversary Proceeding related to the Trustee's Preference Claim.~~
>
> 6. Bankruptcy Court Approval. Within five (5) business days of the Trustee's receipt of the Settlement Payment. the Trustee shall file a motion with the Bankruptcy Court to approve this Agreement, as a compromise pursuant to Rule

9019 of the Federal Rules of Bankruptcy Procedure, and as a sale of assets pursuant to 11 U.S.C Section 363(b) (the "Motion").

This Agreement is explicitly conditioned upon entry of an order by the Bankruptcy Court approving the terms and conditions of this Agreement, as modified in the Order granting the Motion, in their entirety ("Approval Order), and such order becoming a "Final Order." If the Approval Order does not become a Final Order, this Agreement shall be null and void and of no force or effect.

For purposes of this Agreement, a "Final Order" is an order or judgment of the Bankruptcy Court, as entered on Its docket, which has not been reversed, stayed, modified or amended, and as to which (a) the time to appeal, petition for certiorari, or move for re-argument or rehearing has expired and as to which no appeal, petition for certiorari, or other proceedings for re-argument or rehearing shall then be pending or as to which any right to appeal, petition for certiorari, reargue, or rehear shall have been waived in writing, or (b) in the event that an appeal, writ of certiorari, or re-argument or rehearing thereof has been sought, such order or judgment of the Bankruptcy Court or other applicable court shall have been affirmed by the highest court to which such order or judgment was appealed, or certiorari has been denied, or from which re-argument or rehearing was sought, and the time to take any further appeal, petition for certiorari or move for re-argument or rehearing shall have expired.

. . .

22. Mutual General Release; Upon entry of a Final Order approving this Agreement, and excepting only the obligations Imposed by this Agreement, the Trustee, as bankruptcy estate representative of the Estate and on behalf of its respective agents, successors, administrators, principals, insurers, attorneys and any other representatives, on the one hand, and **Sims/**Baker Trust, **and each of them,** for itself and on behalf of its trustees, agents, successors, administrators, principals, insurers, attorneys and any other representatives, on the other hand, and each of them, as authorized by law, hereby fully release and discharge the other from all rights, claims, damages, losses and actions which either may have against the other, including those relating or pertaining to, or in any way arising out of, the disputes with the definition of "Claims" set forth in Paragraph 1 of the Agreement ~~recited in the Recitals herein (collectively, the "Claims")~~.

The Parties hereto expressly understand and agree that this full and final release covers and includes all claims of every kind or nature, past, present or future, known or unknown, suspected or unsuspected, that relate to the Claims described herein and in accordance therewith, waive Section 1542 of the Civil Code of the State of California. The Parties understand and agree that Section 1542 provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of

executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.;

is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 79), as modified above.

2. **16-90603-E-7** **MARK ONE CORPORATION** **CONTINUED MOTION FOR REMAND**
17-9021 **Cecily Dumas** **1-18-18 [13]**
DB-1
BURGER PHYSICAL THERAPY SERVICES, INC. V. SIMS

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

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

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants Attorney and Chapter 7 Trustee's Attorney on January 18, 2018. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Office of the United States Trustee has not been served. The latest United States Trustee guidelines request service of all pleadings and orders in Chapter 7 adversary proceedings. Given the court's decision in this matter, the court waives the service defect.

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

The Motion for Remand is granted.

Burger Physical Therapy Services, Inc. ("Plaintiff") moves the court for an order remanding this Adversary Proceeding to the Stanislaus Superior Court pursuant to 28 U.S.C. § 1452(b). Alternatively, Plaintiff moves for the court to abstain under 28 U.S.C. § 1334(c)(1) from hearing this Adversary Proceeding.

Plaintiff asserts that remand is appropriate because all of the causes of action stated in the Complaint are based upon state law and do not commonly arise in bankruptcy. Additionally, Plaintiff states that the Complaint does not assert any cause of action against the debtor in the underlying proceeding, Mark One Corporation ("Debtor"). Instead, the Complaint alleges two causes of action against two non-debtors.

Plaintiff argues that its claims are not asserted against Debtor, and any recovery will go to Plaintiff directly, not to the bankruptcy estate.

DEFENDANTS' OPPOSITION

John Sims, individually and as Trustee of the G&M Baker 1994 Trust ("Defendants") filed an Opposition on February 1, 2018. Dckt. 30. Defendants argue that Plaintiff's Complaint is a fraudulent conveyance action, disguised in other terms.

Defendants illustrate that Paragraphs 8 and 28 of the Complaint reference a scheme or plan to strip away and fraudulently transfer assets from Debtor. Debtor argues that as a fraudulent transfer action, this matter is authorized to be prosecuted by a trustee under 11 U.S.C. § 548.

Additionally, Defendants argue that he and Irma Edmonds ("the Chapter 7 Trustee") agree that Debtor's Bankruptcy Estate owns the claims alleged by Plaintiff, putting them exclusively within the Chapter 7 Trustee's control.

Defendants argue that he and the Chapter 7 Trustee have been negotiating a settlement to resolve the preference action that the Chapter 7 Trustee filed against Defendants, Adversary Proceeding No. 17-09007. A settlement and motion to approve the settlement have been presented to the court in Debtor's bankruptcy case, and the hearing is set for March 8, 2018. Case No. 16-90603, Dckt. 76.

Finally, Defendants argue that abstention is not applicable to cases that have been removed from state to federal court, and it is not applicable when there is no parallel state court proceeding. Dckt. 30 at 3:8–14 (citing *Security Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997) (stating that abstention is not applicable when a case has been removed from state to federal court); *Schulman v. California. (In re Lazar)*, 237 F.3d 967, 981–82 (9th Cir. 2001) (citation omitted) ("[A]bstention can exist only where there is a parallel proceeding in state court.")).

PLAINTIFF'S REPLY

Plaintiff filed a Reply on February 8, 2018. Dckt. 34. Plaintiff argues that Defendants have failed to address the legal standard set forth by Plaintiff. Now, Plaintiff asserts that the matter should be remanded because Defendants have not opposed remand.

Plaintiff argues that even if the Chapter 7 Trustee has standing to bring Plaintiff's claims, that does not mean that the bankruptcy court has jurisdiction. Plaintiff argues that the claims may be brought in state court.

Nevertheless, Plaintiff argues that the claims are his and not the Chapter 7 Trustee's to enforce because they are being asserted against Defendants personally. For most of the Reply, Plaintiff uses the same language that it has already asserted in the Motion, which the court addresses below.

FEBRUARY 15, 2018 HEARING

At the hearing, the court determined that the Motion should be continued to be addressed after the court addresses a pending motion to compromise. Dckt. 36. The court continued the hearing on the Motion to 10:30 a.m. on March 8, 2018. Dckt. 39.

STIPULATION AND ORDER CONTINUING

On February 21, 2018, the parties filed a Stipulation agreeing to continue the hearing to April 12, 2018. Dckt. 41. On February 28, 2018, the court approved that Stipulation, continuing the hearing to 10:30 a.m. on April 12, 2018. Dckt. 43.

MARCH 8, 2018 HEARING

At the hearing, the court noted that this matter had been continued to 10:30 a.m. on April 12, 2018, pursuant to the court's prior order. Dckt. 55.

DEFENDANTS' SUPPLEMENTAL BRIEF

Defendants filed a document entitled "Opening Supplemental Brief Concerning Hearings on Motion to Approve Compromise and Adversary Proceeding Motions to Dismiss and Motion to Remand" on March 15, 2018. Dckt. 57. In response to the court's three identified issues, Defendants assert as follows:

1. Claims asserted by Burger Physical Therapy Services, Inc., plaintiff in the complaint in Adversary Proceeding No. 17-9021 ("Plaintiff") are not claims under 11 U.S.C. § 544(a).

2. The court may approve the proposed settlement and allow Movant to sell claims to Defendants without harming Plaintiff's claims, on the ground that Movant does not purport to assert claims that belong to creditors like Plaintiff.

3. A condition about a warranty of what claims are settled and transferred is not necessary in the court's order because any determination should be the same either in bankruptcy court or in state court based upon state law.

Defendants next proceed to argue several additional grounds that were not requested by the court. Defendants contend that the main issue before the court is whether Plaintiff has any claim to assert. Defendants argue that Plaintiff does not have such a claim. Instead, Defendants argue that Plaintiff could be replaced in the complaint by the name of any other creditor, and then, the situation would be clear that Plaintiff has not alleged any harm that is unique to it.

Defendants argue that Plaintiff has not established any particularized injury that it has suffered. Defendants cite the court to from a case out of the Southern District of New York as an example of a court finding that clever arguments do not trump the ultimate issue of whether an injury complained of resulted from direct harm to a plaintiff or general harm to other parties. *Id.* at 4:19.5–26.5 (citing *Solow v. Stone*, 994 F. Supp. 173, 179 (S.D.N.Y. 1998)). Defendants stress that Plaintiff is trying to "grab" claims of the Estate for its own benefit. *Id.* at 4:27.5–5:2.5.

The second argument presented by Defendants is that Plaintiff's various claims for aiding and abetting, conspiracy, tortious interference, and unfair competition fail under California law. Defendants argue that neither John Sims nor the Baker Trust are third parties, which is required by California law. Instead, Defendants present that only a corporation's officers, directors, and owners cannot be aiders and abettors or co-conspirators. *See id.* at 6:19–22 (citing *PM Group, Inc. v. Steward*, 154 Cal. App. 4th 55, 57, 58, 65 (Cal. Ct. App. 2007)).

Defendants argue that John Sims is an officer and director of Mark One Corporation ("Debtor"), and that Baker Trust is the sole shareholder, both owing fiduciary duties to Debtor. Because of that, Defendants argue\s that any breach of duty would be a claim that belongs to Movant and not to Plaintiff. *Id.* at 6:22–25.

Any claim that may exist for the Estate, Defendants argue is in the exclusive possession of Movant. *Id.* at 6:26–7:1 (citing *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006)).

Defendants assert that Plaintiff's claims are based upon a single set of facts that demonstrate only a claim for fraudulent conveyance, which would be within Movant's purview. *Id.* at 9:2–7.

PLAINTIFF'S RESPONSE

Plaintiff filed a Response on March 26, 2018. Dckt. 59. Regarding 11 U.S.C. § 544(a), Plaintiff asserts that the Bankruptcy Appellate Panel for the Ninth Circuit has found before that a trustee does not have power under 11 U.S.C. § 544 "to seek damages on a claim for relief alleging aiding and abetting of fraudulent transfers under California law." *Id.* at 3:9–10 (citing *In re Viola*, 469 B.R. 1, 7 (B.A.P. 9th Cir. 2012)). FN.1. Plaintiff argues that such a holding is persuasive here because Plaintiff is the real party in interest and because the Estate does not hold an independent claim against Settlor.

Plaintiff asserts that its claims are ones that can only belong to it because of a specific economic relationship with Debtor. To Plaintiff, no other creditors can be substituted in its place to argue the claims. Plaintiff also distinguishes that California law allows "contract interference claims . . . against owners, officers, and directors of the company whose contract was the subjection of the litigation," but then (perhaps contradictorily), Plaintiff argues that it is asserting claims for interference with prospective economic advantage, not with contractual relations. *Id.* at 5:20–6:1 (citing *Woods v. Fox Broadcasting Sub., Inc.*, 28 Cal. Rptr. 3d 463, 472–73 (Cal. Ct. App. 2005)).

Plaintiff asserts that despite all of Defendants' arguments, 11 U.S.C. § 544(a) does not grant standing to the Chapter 7 Trustee, and the court should deny Defendants' motion to dismiss and grant the motion to remand to state court.

DEFENDANTS' REPLY

Defendants filed a Reply on April 5, 2018. Dckt. 63. Defendants argue that the proposed compromise should be approved as it is right now because the Chapter 7 Trustee owns all of the Estate's claims and wishes to settle those claims with Defendants. Defendants believe that there is no claim that can be asserted against Defendants independent of the Chapter 7 Trustee's preference claim.

Defendants reassert the two grounds that were proposed in the first Supplemental Brief, using different language to present the same arguments. Defendants assert that Plaintiff has not shown any particularized harm because none exists—each creditor in this case being injured by any alleged preferential transfer. Second, Defendants argue that claims can be asserted against it because Debtor acted through Defendants, thus removing Defendants from being a third party.

APPLICABLE LAW

28 U.S.C. § 1452(b) states: "The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." Defendants cite the court to *Security Farms v. Int'l Bhd. of Teamsters* for a proposition that abstention is not proper in a case removed from state court to federal. The Ninth Circuit's explanation contains more information than that simple rule. The Ninth Circuit held that requiring "a pendent state action as a condition of abstention eliminates any confusion with 28 U.S.C. § 1452(b), which provides district courts with the authority to remand civil actions properly removed to federal court, in situations where there is no parallel proceeding." 124 F.3d at 1010.

The grant of federal court jurisdiction pursuant to 28 U.S.C. § 1334 is very broad, bringing into federal court many non-federal law matters into federal court to allow parties to assert and have their rights and interests timely adjudicated in and through the bankruptcy laws enacted by Congress as provided in Article I of the U.S. Constitution. Because the grant of jurisdiction is so broad, Congress has also provided the statutory structure for bankruptcy judges and district court judges determining to abstain from determining issues, electing or being required to allow such matters to be adjudicated pursuant to non-bankruptcy jurisdiction. The abstention provisions created by Congress are:

> § 1334. Bankruptcy cases and proceedings
>
> (c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been

> commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c).

The decision to abstain is discretionary, except when the issues in the proceeding are only "related to" the bankruptcy case (not arising under the Bankruptcy Code or in the bankruptcy case), no federal jurisdiction would otherwise exist but for 28 U.S.C. § 1334, and if there is an action that has been commenced and could be timely adjudicated in a state court forum.

When evaluating whether to abstain, the Ninth Circuit Court of Appeals has established that the court considers twelve factors:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
>
> (2) the extent to which state law issues predominate over bankruptcy issues,
>
> (3) the difficulty or unsettled nature of the applicable law,
>
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
>
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
>
> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
>
> (7) the substance rather than form of an asserted "core" proceeding,
>
> (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
>
> (9) the burden on the bankruptcy court's docket,
>
> (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
>
> (11) the existence of a right to a jury trial, and
>
> (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, 912 F.2d 1162, 1167 (9th Cir. 1990).

DISCUSSION

Defendants have resolved the possible claims that the Chapter 7 Trustee could assert against them that may be stated in the Complaint. With that settlement approved, Plaintiff may amend its Complaint to state what remaining non-bankruptcy related claims it asserts would still exist against Defendants (if any). Plaintiff asserts that it has various personal tort claims against Defendants that arise from conduct in participating in the now-avoidable conveyances.

The court's review of the proposed compromise and the various supplemental pleadings has led it to conclude that the Chapter 7 Trustee is only settling whatever claims the Estate may have against Defendants, and any claims that Plaintiff believes that it holds independent of the Estate are not affected by the compromise.

As to abstention, there is no parallel matter that is pending in state court currently. This case was removed properly to federal court. As the Ninth Circuit has clarified, courts consider if there is a pending state court action when evaluating whether to abstain, but they evaluate removal when there is no parallel proceeding. *See Security Farms*, 124 F.3d at 1010. Here, there is no parallel case because this is the main case.

The matters as pertaining to the rights and interests of the Bankruptcy Estate having been resolved, it is proper to remand these parties to the Superior Court for the State of California, there being no apparent reason for this court to exercise federal court jurisdiction to determine the scope and existence of claims of Plaintiff, if any, against Defendants (who are not bankruptcy debtors).

As noted by the court in the ruling on the Motion to Approve the Settlement, though remanding this to the State Court for the determination of the remaining, if any, state law claims, this court recognizes that it has continuing jurisdiction to determine what is or was (prior to approving the Settlement) property and rights of the Bankruptcy Estate and the Chapter 7 Trustee, as well as the scope of the property and rights settled and transferred to Defendants pursuant to this court's order approving the Settlement with the Chapter 7 Trustee.

Therefore, if the State Court judge concludes that determination of what rights and property were acquired by Defendants from the Chapter 7 Trustee should be made by this federal court, upon order of said State Court judge, Plaintiff and Defendants may seek such determination by motion for supplemental order to the Order Approving the Settlement or such other federal court proceeding as proper under the Federal Rules of Bankruptcy Procedure.

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 Remand filed by Burger Physical Therapy Services, Inc. ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion is granted, and Adversary Proceeding No. 17-9021 is remanded to the Superior Court of California, County of Stanislaus, for further proceedings in the case filed as *Burger Physical Therapy Services, Inc. v. John C. Sims, individually and as Trustee of the G&M Baker 1994 Trust; and Does 1 through 20, inclusive*, Case No. 2027597, filed on November 13, 2017.

IT IS FURTHER ORDERED that the request for this court to abstain exercising federal court jurisdiction is denied. If the State Court judge concludes that determination of what rights and property were acquired by Defendants from the Chapter7 Trustee should be made by this federal court, upon order of said State Court judge, Plaintiff and Defendants may seek such determination by motion for supplemental order to the Order Approving the Settlement or such other federal court proceeding as proper under the Federal Rules of Bankruptcy Procedure.

3. **16-90603-E-7** **MARK ONE CORPORATION** **CONTINUED MOTION TO DISMISS**
17-9021 **Cecily Dumas** **ADVERSARY PROCEEDING**
WJS-1 **1-9-18 [9]**
BURGER PHYSICAL THERAPY SERVICES, INC. V. SIMS

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

Local Rule 9014-1(f)(1) Motion—No Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 9, 2018. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

John Sims, individually and as Trustee of the G&M Baker 1994 Trust, ("Defendants") moves for the court to dismiss all claims against it in Burger Physical Therapy Services, Inc.'s ("Plaintiff-Debtor") Complaint for lack of standing.

Defendants assert that Plaintiff's Causes of Action became property of the estate under 11 U.S.C. § 541(a)(1), and only Irma Edmonds ("the Chapter 7 Trustee") may prosecute the claims, pursuant to 11 U.S.C. § 323.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on February 1, 2018. Dckt. 28. Plaintiff argues that once this case is remanded back to state court, then the case will be back in its "rightful" location. Plaintiff also argues that Defendants are wrong to assert that this Adversary Proceeding is a fraudulent conveyance action solely within the Chapter 7 Trustee's authority.

Plaintiff argues that Defendants have noted only one section of the Complaint that references a fraudulent conveyance and insists that looking at the Complaint more broadly shows that the causes of action are for a scheme to frustrate the payments to Plaintiff.

Plaintiff asserts that for a cause of action based on conspiracy and aiding and abetting a fraudulent transfer, a creditor is the proper party to prosecute such claims. *Id.* at 5 (citing *In re Hamilton Taft & Co.*, 176 B.R. 895, 902 (Bankr. N.D. Cal. 1995)).

FEBRUARY 15, 2018 HEARING

At the hearing, the court determined that the Motion should be continued to be addressed after the court addresses a pending motion to compromise. Dckt. 37. The court continued the hearing on the Motion to 10:30 a.m. on March 8, 2018. Dckt. 40.

STIPULATION AND ORDER CONTINUING

On February 21, 2018, the parties filed a Stipulation agreeing to continue the hearing to April 12, 2018. Dckt. 41. On February 28, 2018, the court approved that Stipulation, continuing the hearing to 10:30 a.m. on April 12, 2018. Dckt. 45.

MARCH 8, 2018 HEARING

At the hearing, the court noted that this matter had been continued to 10:30 a.m. on April 12, 2018, pursuant to the court's prior order. Dckt. 56.

DEFENDANTS' SUPPLEMENTAL BRIEF

Defendants filed a document entitled "Opening Supplemental Brief Concerning Hearings on Motion to Approve Compromise and Adversary Proceeding Motions to Dismiss and Motion to Remand" on March 15, 2018. Dckt. 57. In response to the court's three identified issues, Defendants assert as follows:

1. Claims asserted by Burger Physical Therapy Services, Inc., plaintiff in the complaint in Adversary Proceeding No. 17-9021 ("Plaintiff") are not claims under 11 U.S.C. § 544(a).

2. The court may approve the proposed settlement and allow Movant to sell claims to Defendants without harming Plaintiff's claims, on the ground that Movant does not purport to assert claims that belong to creditors like Plaintiff.

3. A condition about a warranty of what claims are settled and transferred is not necessary in the court's order because any determination should be the same either in bankruptcy court or in state court based upon state law.

Defendants next proceed to argue several additional grounds that were not requested by the court. Defendants contend that the main issue before the court is whether Plaintiff has any claim to assert. Defendants argue that Plaintiff does not have such a claim. Instead, Defendants argue that Plaintiff could be replaced in the complaint by the name of any other creditor, and then, the situation would be clear that Plaintiff has not alleged any harm that is unique to it.

Defendants argue that Plaintiff has not established any particularized injury that it has suffered. Defendants cite the court to from a case out of the Southern District of New York as an example of a court finding that clever arguments do not trump the ultimate issue of whether an injury complained of resulted from direct harm to a plaintiff or general harm to other parties. *Id.* at 4:19.5–26.5 (citing *Solow v. Stone*, 994 F. Supp. 173, 179 (S.D.N.Y. 1998)). Defendants stress that Plaintiff is trying to "grab" claims of the Estate for its own benefit. *Id.* at 4:27.5–5:2.5.

The second argument presented by Defendants is that Plaintiff's various claims for aiding and abetting, conspiracy, tortious interference, and unfair competition fail under California law. Defendants argue that neither John Sims nor the Baker Trust are third parties, which is required by California law. Instead, Defendants present that only a corporation's officers, directors, and owners cannot be aiders and abettors or co-conspirators. *See id.* at 6:19–22 (citing *PM Group, Inc. v. Steward*, 154 Cal. App. 4th 55, 57, 58, 65 (Cal. Ct. App. 2007)).

Defendants argue that John Sims is an officer and director of Mark One Corporation ("Debtor"), and that Baker Trust is the sole shareholder, both owing fiduciary duties to Debtor. Because of that, Defendants argue that any breach of duty would be a claim that belongs to Movant and not to Plaintiff. *Id.* at 6:22–25.

Any claim that may exist for the Estate, Defendants argue is in the exclusive possession of Movant. *Id.* at 6:26–7:1 (citing *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006)).

Defendants assert that Plaintiff's claims are based upon a single set of facts that demonstrate only a claim for fraudulent conveyance, which would be within Movant's purview. *Id.* at 9:2–7.

PLAINTIFF'S RESPONSE

Plaintiff filed a Response on March 26, 2018. Dckt. 59. Regarding 11 U.S.C. § 544(a), Plaintiff asserts that the Bankruptcy Appellate Panel for the Ninth Circuit has found before that a trustee does not have power under 11 U.S.C. § 544 "to seek damages on a claim for relief alleging aiding and abetting of fraudulent transfers under California law." *Id.* at 3:9–10 (citing *In re Viola*, 469 B.R. 1, 7 (B.A.P. 9th Cir. 2012)). FN.1. Plaintiff argues that such a holding is persuasive here because Plaintiff is the real party in interest and because the Estate does not hold an independent claim against Settlor.

Plaintiff asserts that its claims are ones that can only belong to it because of a specific economic relationship with Debtor. To Plaintiff, no other creditors can be substituted in its place to argue the claims. Plaintiff also distinguishes that California law allows "contract interference claims . . . against owners, officers, and directors of the company whose contract was the subjection of the litigation," but then (perhaps contradictorily), Plaintiff argues that it is asserting claims for interference with prospective economic advantage, not with contractual relations. *Id.* at 5:20–6:1 (citing *Woods v. Fox Broadcasting Sub., Inc.*, 28 Cal. Rptr. 3d 463, 472–73 (Cal. Ct. App. 2005)).

Plaintiff asserts that despite all of Defendants' arguments, 11 U.S.C. § 544(a) does not grant standing to the Chapter 7 Trustee, and the court should deny Defendants' motion to dismiss and grant the motion to remand to state court.

DEFENDANTS' REPLY

Defendants filed a Reply on April 5, 2018. Dckt. 61. Defendants argue that the proposed compromise should be approved as it is right now because the Chapter 7 Trustee owns all of the Estate's claims and wishes to settle those claims with Defendants. Defendants believe that there is no claim that can be asserted against Defendants independent of the Chapter 7 Trustee's preference claim.

Defendants reassert the two grounds that were proposed in the first Supplemental Brief, using different language to present the same arguments. Defendants assert that Plaintiff has not shown any particularized harm because none exists—each creditor in this case being injured by any alleged preferential transfer. Second, Defendants argue that claims can be asserted against it because Debtor acted through Defendants, thus removing Defendants from being a third party.

APPLICABLE LAW

A motion to dismiss based on lack of standing is properly brought under Federal Rule of Civil Procedure 12(b)(1). *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND

PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Calhoun v. United States*, 475 F. Supp. 1 (S.D. Cal. 1977), *aff'd*, 604 F.2d 647 (9th Cir. 1979). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958).

DISCUSSION

The court begins with reading the actual Complaint and what is alleged therein. The claims and causes of action stated in the Complaint (Dckt. 1) are summarized by the court. Defendants assert that they are thinly disguised fraudulent conveyance actions in which Plaintiff seeks to strip the bankruptcy estate of the assets (or their monetary value) that were conveyed by Defendants and those assisting Sims.

However, the Complaint can be read as one in which various personal tort claims against Defendants are being asserted that arise from his conduct in participating in the now-avoidable conveyances. Those can be read as Defendants' personal obligations that may have caused damage to Plaintiff for which Defendants are personally responsible, not merely to strip away from him the assets of Debtor alleged to have been improperly transferred from Debtor.

The court has entered its order approving the settlement between Defendants and the Chapter 7 Trustee of the claims of the Bankruptcy Estate against Defendants, which includes the transfer of such claims to Defendants. What remains to be determined is what claims, if any, stated in the Complaint are personal to Plaintiff and not property or rights of the Bankruptcy Estate and Chapter 7 Trustee that were settled and assigned. This court has determined that such determination should properly be made by the State Court judge determining the rights of these three non-debtor parties, Defendants and Plaintiff.

The Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by John Sims, individually and as Trustee of the G&M Baker 1994 Trust, ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

4. **16-90603-E-7** **MARK ONE CORPORATION** **CONTINUED STATUS CONFERENCE RE:**
17-9021 **Cecily Dumas** **NOTICE OF REMOVAL**
BURGER PHYSICAL THERAPY SERVICES, INC. V. SIMS **12-20-17 [1]**

Plaintiff's Atty: Jamie P. Dreher
Defendant's Atty: Walter J. Schmidt

Adv. Filed: 12/20/17 [Notice of Removal of Lawsuit Pending in State Court]
Answer: none

Nature of Action:
Determination of removed claim or cause

The Status Conference is xxxxxxxxxxxxxxxxxxxxx.

Notes:
Continued by order dated 2/28/18 [Dckt 46] to be conducted in conjunction with the hearing on the Chapter 7 Trustees' Motion to Approve Compromise.

5. **18-90123-E-11** **LORENA ALVARADO** **MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR ADEQUATE PROTECTION**
AVN-3 **Anh Nguyen**
3-28-18 [23]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors, parties requesting special notice, and Office of the United States Trustee on March 28, 2018. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

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

The Motion to Use Cash Collateral is granted, and the hearing is continued to 10:30 a.m. on June 21, 2018.

Lorena Alvarado ("Debtor in Possession") moves for an order approving the use of cash collateral (in the form of rental income) from real property, known as 5019 Morgan Street, Salida, California ("Property"). Debtor in Possession requests the use of cash collateral for accrual for Property maintenance and to make adequate protection payments to Shellpoint Mortgage Servicing ("Creditor") until a Chapter 11 Plan is confirmed.

Debtor in Possession proposes to use $1,048.45 per month for the following expenses:

A. $998.45 per month paid to Creditor as interest-only adequate protection payments, and

B. $50.00 per month for maintenance expenses on the Property.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

Debtor in Possession has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for maintenance expenses to ensure that the Property can retain a tenant for continued income to the Estate. Additionally, the proposed expenses allow Debtor in Possession

to make monthly interest-only adequate protection payments to Creditor for its claim until a Chapter 11 Plan is confirmed.

Debtor in Possession deposits all rents received from the Property in a cash collateral debtor-in-possession account at Wells Fargo Bank identified as account number ending in 5641.

This case was filed on February 27, 2018, and no plan has been proposed yet. The court authorizes the use of cash collateral for the period of April 12, 2018, through June 30, 2018.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Use Cash Collateral filed by Lorena Alvarado ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, pursuant to this order, for the period April 12, 2018, through June 30, 2018, and the cash collateral may be used to pay the following expenses:
>
> A. $998.45 per month paid to Creditor as interest-only adequate protection payments, and
>
> B. $50.00 per month for maintenance expenses on the Property.
>
> **IT IS FURTHER ORDERED** that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.
>
> **IT IS FURTHER ORDERED** that Debtor in Possession shall begin to make monthly adequate protection payments of $998.45 to Shellpoint Mortgage Servicing, beginning April 2018.
>
> **IT IS FURTHER ORDERED** that the hearing on the Motion is continued to 10:30 a.m. on June 21, 2018, to consider a Supplement to the Motion to extend the authorization to use cash collateral. On or before June 7, 2018, Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the June 21, 2018 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

6. **17-90826-E-7** **JASON/MONIQUE SCHROER** **CONTINUED MOTION TO AVOID LIEN**
BSH-2 **Brian Haddix** **OF PORTFOLIO RECOVERY ASSOCIATES, LLC**
3-8-18 [32]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

MARCH 29, 2018 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on April 12, 2018, to allow Debtor an opportunity to file supplemental pleadings correcting the record and pleading the Motion correctly. Dckt. 52.

DISCUSSION

Debtor has not filed supplemental pleadings since the March 29, 2018 hearing.

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $3,876.76 and that an abstract of judgment was recorded with Stanislaus County on February 22, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

> 9. Debtor submits the following documents in support of the motion:
> a. ☒. Schedule C listing all exemptions claimed by Debtor
> b. ☒. Appraisal of the property
> c. ☒. Documents showing current balance due as to the liens specified in paragraph above
> d. ☒. Recorded Abstract of Judgment
> e. ☐ . Recorded Declaration of Homestead
> f. ☒. Declaration(s)
> g. ☐ . Other:

Unfortunately for Debtor, though, there appears to a filing error on the docket because no exhibits have been filed in support of this Motion. Debtor has not provided the court with a copy of the recorded abstract of judgment. Debtor has not provided the court with an appraisal and testimony by the appraiser. A review of the docket shows that one exhibit document was filed for BSH-3, and three identical exhibit documents were filed for BSH-4.

More significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury, signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion.

The court afforded Debtor an opportunity to supplement the record, but Debtor elected not to do so. Now, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

7. **17-90826-E-7** **JASON/MONIQUE SCHROER** **CONTINUED MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC**
BSH-3 **Brian Haddix** **3-8-18 [35]**

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $2,145.81 and that an abstract of judgment was recorded with Stanislaus County on March 2, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

9. Debtor submits the following documents in support of the motion:
a. ☒. Schedule C listing all exemptions claimed by Debtor

b. ☒. Appraisal of the property
c. ☒. Documents showing current balance due as to the liens specified in paragraph above
d. ☒. Recorded Abstract of Judgment
e. ☐ . Recorded Declaration of Homestead
f. ☒. Declaration(s)
g. ☐ . Other:

On March 8, 2018, Debtor filed the following Exhibits in Support of the Motion to Avoid Judicial Lien (using the paragraph numbering in the pleading cover sheet):

h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)

i. Unauthenticated Appraisal of the Property.

j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.

k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 28, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC. (This does not appear to be the alleged judgment in the Check Box Motion.)

Dckt. 43.

On March 8, 2018, Debtor filed a second set of exhibits in support of this Motion to Avoid Judicial Lien. Dckt. 45. These Exhibits are identified as (using the paragraph numbering in the pleading cover sheet):

h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)

i. Unauthenticated Appraisal of the Property.

j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.

k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a March 2, 2017 recording date, $2,145.81 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC. (This appears to be the alleged judgment in the Check Box Motion.)

MARCH 29, 2018 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on April 12, 2018, to allow Debtor an opportunity to file supplemental pleadings correcting the record and pleading the Motion correctly. Dckt. 54.

DISCUSSION

Debtor has not filed supplemental pleadings since the March 29, 2018 hearing.

Significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury, signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion.

The court afforded Debtor an opportunity to supplement the record, but Debtor elected not to do so. Now, the Motion is denied without prejudice.

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

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

8. 17-90826-E-7 BSH-4 — JASON/MONIQUE SCHROER — Brian Haddix — CONTINUED MOTION TO AVOID LIEN OF PORTFOLIO RECOVERY ASSOCIATES, LLC — 3-8-18 [38]

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

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on March 8, 2018. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Avoid Judicial Lien is denied without prejudice.

This Motion requests an order avoiding the judicial lien of Portfolio Recovery Associates, LLC ("Creditor") against property of Jason Schroer and Monique Schroer ("Debtor") commonly known as 566 E Springer Street, Turlock, California ("Property").

In Debtor's "check box" Motion, Debtor alleges that a judgment was entered against Debtor in favor of Creditor in the amount of $1,877.20 and that an abstract of judgment was recorded with Stanislaus County on July 26, 2017, that encumbers the Property.

The Motion continues, alleging that Debtor acquired the Property on March 25, 2005. Motion ¶ 6, Dckt. 32. In Paragraph 9 of the Motion, Debtor "Checks the Boxes" that the following documents have been filed in support of the Motion:

> 9. Debtor submits the following documents in support of the motion:
> a. ☒. Schedule C listing all exemptions claimed by Debtor
> b. ☒. Appraisal of the property
> c. ☒. Documents showing current balance due as to the liens specified in paragraph above
> d. ☒. Recorded Abstract of Judgment
> e. ☐ . Recorded Declaration of Homestead
> f. ☒. Declaration(s)
> g. ☐ . Other:

On March 8, 2018, Debtor filed the following Exhibits in Support of the Motion to Avoid Judicial Lien (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance.
>
> k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 26, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC.

Dckt. 41.

On March 8, 2018, Debtor filed a second set of exhibits in support of this Motion to Avoid Judicial Lien. Dckt. 46. These Exhibits are identified as (using the paragraph numbering in the pleading cover sheet):

> h. Schedule C listing exemptions (Amended Schedule C filed March 8, 2018)
>
> i. Unauthenticated Appraisal of the Property.
>
> j. September 8, 2017 Wells Fargo Loan Statement showing $332,143.34 loan balance; and an August 31, 2017 Ocwen Loan Servicing Statement showing a $50,576.97 loan balance.

k. Unauthenticated Abstract of Judgment with a County Recorder's stamp showing a July 26, 2017 recording date, $1,877.20 for the amount of judgment, and that the Plaintiff was Portfolio Recovery Associates, LLC.

Minutes before the March 29, 2018 hearing, Debtor filed a third set of exhibits in support of this Motion. Dckt. 51. That third set is identical to the second set filed on March 8, 2018. *See* Dckt. 46.

MARCH 29, 2018 HEARING

At the hearing, the court continued the matter to 10:30 a.m. on April 12, 2018, to allow Debtor an opportunity to file supplemental pleadings correcting the record and pleading the Motion correctly. Dckt. 53.

DISCUSSION

Debtor has not filed supplemental pleadings since the March 29, 2018 hearing.

Significantly, Debtor affirmatively states under penalty of perjury that as of the commencement of this bankruptcy case Debtor has no interest in this, or any, real property. Amended Schedule A, Dckt. 19 at 3. On Original Schedule A/B, however, Debtor stated under penalty of perjury that the two co-debtors owned the Property. Dckt. 15 at 3. Though Amended Schedule A/B may be in error (which Debtor did not catch when carefully reviewing it before signing that all of the information therein was true and accurate under penalty of perjury), Amended Schedule A/B is Debtor's latest statement under penalty of perjury, signed by Debtor, in which it is stated that as of the commencement of this case Debtor had no interest in the Property.

On Schedule D, Debtor lists unavoidable consensual liens that total $332,143.34 as of the commencement of this case. Dckt. 15 at 17–18. Debtor filed an Amended Schedule C on March 8, 2018, claiming an exemption pursuant to California Code of Civil Procedure § 703.140(b)(1) in the amount of $1.00. Amended Schedule C, Dckt. 48 at 3.

In his Declaration, Debtor provides his testimony under penalty of perjury as to the following facts:

1. He is the debtor and testifies based on his personal knowledge.

2. On Schedule A, Debtor stated that the value of the Property was $332,000.

3. Debtor reaffirms said statement of Value.

Dckt. 34 at 1. No testimony is provided as to the judgment, judgment lien, or to authenticate any documents.

This Motion fails for several reasons. First, Debtor has not provided a copy of the recorded abstract of judgment or any evidence of the judgment lien. Second, the controlling Amended Schedule A

states that Debtor has no interest in real property anyway. At least one of those may be an error that Debtor's counsel can correct in a new motion.

The court afforded Debtor an opportunity to supplement the record, but Debtor elected not to do so. Now, the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Jason Schroer and Monique Schroer ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

9. **17-90627-E-7** **DANIEL/JENNIFER DEIGAN** **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH DANIEL DEIGAN**
SCB-6 **Dean Feldman**
3-8-18 [42]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Gary Farrar, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with HYDAC Technology Corporation ("Settlor"). The claims and disputes to be resolved by the proposed settlement are part of a lawsuit brought by Co-Debtor Daniel Deigan alleging (among other things) improper termination on the basis of disability and violation of the Family Medical Leave Act.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 47):

A. Settlor shall pay $125,000.00 to the Estate, with a net of $83,013.95 after attorney's fees and costs;

B. Payment is to be made within twenty-one days of Settlor's receipt of an executed copy of the settlement agreement;

C. Within five days of receipt of the settlement amount, Daniel Deigan and Jennifer Deigan ("Debtor") shall execute and deliver a joint stipulation for dismissal of the pending adversary proceeding against Settlor;

D. The parties agree to a mutual release of claims against one another;

E. Debtor waives rights under Section 1542 of the California Civil Code; and

F. Debtor agrees to keep the settlement agreement confidential.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that success in the lawsuit is uncertain. He notes that Settlor raised numerous defenses about why it allegedly failed to comply with the Family Medical Leave Act. Movant states it is difficult to predict the manner in which these issues will resolve because of the disputed factual issues. He argues that there is no certainty of a more significant recovery in the lawsuit.

Difficulties in Collection

Movant argues that Settlor is a successful corporation and that recovery post-trial would not be an issue. However, he argues that the costs of litigation would consume much of any amount that would be recovered at trial, while the settlement offers a reasonable amount that allows the estate certainly of payment and recovery.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that the lawsuit is not certain, and that there could be further delay from discovery, trial, and potential post-trial motions and appeals, all diminishing the return for the Estate.

Paramount Interest of Creditors

Movant argues that the proposed settlement agreement allows the bankruptcy estate to collect $125,000.00 without the expense, uncertainty, or delay of costly litigation. He argues that this compromise represents significant savings in time and administrative expense by avoiding further litigation.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it allows the Estate to collect $125,000.00 and receive an amount that might not be awarded at trial. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Gary Farrar, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and HYDAC Technology Corporation ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 47).

10. **17-90627-E-7** **DANIEL/JENNIFER DEIGAN** **MOTION FOR COMPENSATION BY THE LAW OFFICE OF ARATA, SWINGLE, VAN EGMOND & GOODWIN FOR RAQUEL HATFIELD, SPECIAL COUNSEL(S)**
SCB-7 **Dean Feldman** **3-8-18 [49]**

Final Ruling: No appearance at the April 12, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Raquel Hatfield, Special Counsel ("Applicant") for Gary Farrar, the Chapter 7 Trustee ("Client"), makes a first and final Request for the Allowance of Fees and Expenses in this case.

The order of the court approving employment of Applicant was entered on December 17, 2017. Dckt. 31. Applicant requests fees in the amount of $41,500.75 and costs in the amount of $485.30.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (i) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913

n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include litigation of a wrongful termination action. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in a wrongful termination action, for which Client agreed to a contingent fee of 33% of the net after payment of expenses. In approving the employment of applicant, the court approved the contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). $124,514.70 of net monies (exclusive of these requested fees and costs) was recovered for Client. Applicant asserts a recovery of $41,500.75 in attorneys' fees.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $485.30 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Photocopying		$15.30
Service of Process		$55.00
Medical Records		$15.00

Filing Fee		$400.00
Total Costs Requested in Application		$485.30

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees of $41,986.05 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of $41,986.05 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case .

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$41,986.05
Costs and Expenses	$485.30

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an 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 Allowance of Fees and Expenses filed by Raquel Hatfield ("Applicant"), Special Counsel for Gary Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Raquel Hatfield is allowed the following fees and expenses as a professional of the Estate:
>
> Raquel Hatfield, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $41,986.05

Expenses in the amount of $485.30,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

11. 18-90128-E-7 STEPHANIE LABOVE
Matthew DeCaminada

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
3-14-18 [13]

Final Ruling: No appearance at the April 12, 2018 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on March 16, 2018. The court computes that 27 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on February 18, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

12. **18-90129-E-7** **SIMONA GARCIA** **ORDER TO SHOW CAUSE - FAILURE TO PAY FEES**
Matthew DeCaminada **3-14-18 [12]**

Final Ruling: No appearance at the April 12, 2018 hearing is required.

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 7 Trustee as stated on the Certificate of Service on March 16, 2018. The court computes that 27 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: $335.00 due on February 28, 2018.

The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has been cured.

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 Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

13. **17-90872-E-7** **ALBERT MCMILLAN AND SU KIERNAN-MCMILLAN** **MOTION TO AVOID LIEN**
RK-1 **Richard Kwun** **2-19-18 [16]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditor on February 19, 2018. By the court's calculation, 52 days' notice was provided. 28 days' notice is required.

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

The Motion to Redeem is xxxxxxxxxxxxxxxxxx.

Albert McMillan and Sue McMillan ("Debtor") seek to redeem a 2013 Toyota Camry SE ("Property") from the claim of One Main Inc. ("Creditor") pursuant to 11 U.S.C. § 722. Under that provision of the Bankruptcy Code, Debtor is permitted to redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, so long as the property is exempted under 11 U.S.C. § 522 or has been abandoned under 11 U.S.C. § 554. 11 U.S.C. § 722. The right to redeem extends to the whole of the Property, not just to Debtor's exempt interest in it. *See* H.R. Rep. No. 95-595, at 381 (1977). To redeem the Property, Debtor must pay the lien holder "the amount of the allowed secured claim of [the lien] holder that is secured by such lien in full at the time of redemption." 11 U.S.C. § 722. Payment must be made by a lump sum cash payment, not installment payments. *In re Carroll*, 11 B.R. 725 (B.A.P. 9th Cir. 1981). The court looks to 11 U.S.C. § 506 to determine the amount of the secured claim.

The Motion is accompanied by Debtor's Declaration. Debtor does not assert an opinion about the Property's value. No market report or other compilation of vehicle values commonly relied upon by the public and auto industry have been provided. Therefore, the court has no evidence of the vehicle's value.

Though unsupported by any evidence, the Motion alleges that the Kelley Blue Book value for the Property is $14,000.00. Exhibits A-1 and A-2 purport to be pages for a Kelley Blue Book trade

publication. No person has authenticated these Exhibits, and Debtor has not shown a basis for these exhibits to be self-authenticating. FED. R. EVID. 901 et seq. FN.1.

FN.1. Debtor's Declaration, which is not made under penalty of perjury, states that Exhibits A and B are part of Debtor having taken "[m]y car to an auto body shop and a dedicated Toyota car Mechanic." Exhibit A is purported to be copies of pages from Kelley Blue Book.

As to the Declaration, Debtor is willing to only state with respect to the "testimony" made in the Declaration that such testimony was given and the Declaration was,

> "Executed on February 17, 2018 at Keys, Stanislaus County, California."

Dckt. 18 at 2:7.5–8.5. That does not comply with the certification that must be made in a declaration as required under federal law. 28 U.S.C. § 1746.

Such an extreme reduction in value (69.46%) seems unreasonable without more explanation. The Motion does not allege that the vehicle was involved in an accident; instead, Debtor merely states that the Property "requires body work and parts for preexisting defects." Dckt. 16 at 2:4. It is unreasonable for Debtor to keep a vehicle that is in such disrepair, especially one that Debtor appears to allege has been defective since acquiring it. Additionally, the majority of the calculated repairs appear to be for cosmetic work to the vehicle, such as replacing "CAMRY" and "SE" nameplates, repairing a spoiler, and applying paint on various parts.

Unauthenticated Exhibits B and C are identified as Auto Body Repair Estimate and Mechanical Repair Estimate. Dckt. 19. For Exhibit B, on Page 04/05, the grand total of the preliminary estimate for body labor, paint, supplies, miscellaneous, and sales tax is $7,525.82. *Id.* at 7. It continues to state that the "Customer" (Debtor) is obligated to pay $0.00, which "Insurance" will pay $7,525.82. This indicates that the repairs are being made for damage done to the car and that the value of the car is as repaired, not unrepaired and Debtor pocketing the insurance money.

Exhibit C is purported to be the mechanical repair costs. It then restates the same amount as above, for the same work, as being what will be paid by "Insurance," with the "Customer" (Debtor) paying $0.00 for the repairs.

The Motion to Redeem pursuant to 11 U.S.C. § 722 and Federal Rule of Bankruptcy Procedure 6008 is denied without prejudice. Debtor may file the Motion again, providing actual testimony of Debtor's opinion of value and of the repairs and their necessity, as well as properly authenticating any exhibits Debtor wishes to use and properly stating grounds with particularity.

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

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

The Motion to Redeem filed by Albert McMillan and Sue McMillan ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

14. 09-90877-E-7 SCB-3 | **VINCENT/VICKI MARTINEZ** **John Kyle** | **MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH VINCENT A. MARTINEZ AND VICKI L. MARTINEZ** **3-8-18 [44]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Approval of Compromise is granted.

Gary Farrar, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Vicki Martinez ("Settlor"). The claims and disputes to be resolved by the proposed settlement concern the Estate's interest in the settlement related to injuries Settlor allegedly suffered as a result of the implantation of defective transvaginal mesh products.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (a ledger of the payment terms are set forth in the Settlement Ledger Summary filed as Exhibit A in support of the Motion, Dckt. 48):

A. Settlor shall receive a gross settlement amount of $125,000.00.

B. After the payment of the MDL Fee Assessment of $6,250.00, the medical liens of $587.24, and case specific administration expenses of $981.00, the net settlement award to the bankruptcy estate shall be $117,181.76.

DISCUSSION

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

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Movant argues that the four factors have been met.

Probability of Success

Movant argues that the probability of success in the lawsuit is uncertain due to the difficult factual and legal issues that would have to be litigated, especially because the defendant in the District Court case denied all allegations against it and raises numerous defenses. Causation would be particularly difficult to prove because Settlor's injuries include pain and urinary dysfunction which could also be caused by medical conditions Settlor suffered from prior to the transvaginal mesh implantation. Additionally, though thousands of cases have been pending against the defendant, the Special Counsel in the matter is aware of fewer than twenty cases involving similar claims that have been tried to verdict.

Difficulties in Collection

While Movant is not aware of any difficulties that may arise if he were to obtain a judgment at trial, recovery would be limited due to the cost of litigation because of the necessity of numerous medical expert witness reviews. Further, even if a trial resulted in recovery, it is likely that the defendant would appeal and any recovery would be reduced by further litigation. The compromise in this case would allow for a reasonable and certain recovery and payment to the Estate.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that the compromise will avoid expense, inconvenience, and delay because it will result in the immediate payment to the Estate of $116,326.76. FN.1. This immediate payment would eliminate the costs to litigate the matter. Because no trial date is yet set, any possible recovery would be delayed until the yet-to-be-determined trial date, and possibly later due to post-trial motions and appeals.

FN.1. While the Memorandum of Points and Authorities asserts that the Estate will receive $116,326.76, the Motion alleges that the Estate will receive $117,181.76 (which is confirmed by the Settlement Ledger).

Paramount Interest of Creditors

Movant argues that the immediate recovery of $116,326.76 (again, it appears to actually be $117,181.76) for the Estate will avoid the expense, uncertainty, or delay of litigation, thus resulting in a savings in time and administrative expenses.

Representation of Debtor

This bankruptcy case was filed on March 31, 2009, with the two debtors granted their discharges on July 15, 2009, and the case originally closed on July 17, 2009. Debtor's counsel in the case was John Kyle. The California State Bar reports that Mr. Kyle is deceased. FN.2.

FN.1. http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=john+kyle&SoundsLike=false

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Today's settlement is the bankruptcy estate enforcing a claim of Debtor that was not disclosed on the Schedules filed in this case. The court does not have any information as to why such a claim was not disclosed. The Chapter 7 Trustee served the current Motion on the two debtors, as well as Mr. Kyle's former law firm address. Proof of Service, Dckt. 50.

Consideration of Additional Offers

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

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it reflects a reasonable and certain recovery for the Estate that avoids the expense, inconvenience, delay of litigating a case with serious uncertainty regarding the outcome. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Gary Farrar, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Vicki Martinez ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 48).

15. 09-90877-E-7 SCB-4 | **VINCENT/VICKI MARTINEZ** **John Kyle** | **MOTION FOR COMPENSATION BY THE LAW OFFICE OF THE CURTIS LEGAL GROUP FOR ANDREW MENDLIN, SPECIAL COUNSEL(S)** **3-8-18 [51]**

Final Ruling: No appearance at the April 12, 2018 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on March 8, 2018. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

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

The Motion for Allowance of Professional Fees is granted.

Smith Stag, L.L.C.; LawCo USA, PLLC; The Curtis Legal Group; and Aylstock, Bailey, Burnett, Junell, Potts & Witkin, PLLC, the special litigation counsel ("Applicant") for Gary Farrar, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period January 16, 2018, through April 12, 2018. The order of the court approving employment of Applicant was entered on January 16, 2018. Dckt. 43. Applicant requests fees in the amount of $53,437.50 and costs in the amount of $3,187.99.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (i) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). An attorney must "demonstrate only that the services were reasonably likely to benefit the estate at the time rendered," not that the services resulted in actual, compensable, material benefits to the estate. *Ferrette & Slatter v. United States Tr. (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005) (citing *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000)). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis cab be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913

n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include the continued litigation of a multi-district product liability lawsuit. The Estate has $117,181.76 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant does not provide a task billing analysis, however the Merritt Cunningham Declaration explains that the representation of the bankruptcy estate was subject to the same terms and conditions of the Applicant's Fee Agreement with Debtor. Dckt. 53. This Fee Agreement provides for legal fees in the sum of forty-five percent of all amounts collected from the Claim, plus the reimbursement of costs, only if recovery occurs. Dckt. 53. Specifically, Smith Stag L.L.C., LawCo USA, PLLC, and The Curtis Legal Group will receive eighty-five percent of the legal fees, and Aylstock, Bailey, Burnett, Junell, Potts & Witkin, PLLC will receive fifteen percent of the legal fees. Dckt. 53.

Case Litigation and Settlement: In the Claim at hand, and all of the transvaginal mesh lawsuits the firm is handling, the Applicant reviewed and analyzed over 100,000 pages of documents, deposed key fact witnesses including treating physicians and the defendant's executives, hired experts necessary to establish negligence and causation, and prepared them for depositions, deposed the defendant's expert witnesses, and prepared and defended evidentiary motions and motions for summary judgment. After substantial litigation activity, Applicant negotiated a proposed settlement of this Claim as part of an aggregate settlement of the multiple lawsuits Applicant is also handling.

Applicant computes the fees for the services provided as a percentage of the monies recovered for Client. Applicant represented Client in litigation to resolve Vincent Martinez and Vicki Martinez's ("Debtor") claim for personal injuries and medical expenses incurred as a result of defective implanted transvaginal mesh products. For these services, Client agreed to a contingent fee of 45% of the gross amount collected, in addition to incurred costs. In approving the employment of applicant, the court approved the

contingent fee, subject to further review pursuant to 11 U.S.C. § 328(a). $62,124.51 of net monies (exclusive of these requested fees and costs) was recovered for Client.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $3,187.99 pursuant to this application.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copy Charges & Mailing Supplies		$18.30
Court Costs and Filing Fees		$350.00
Delivery & Courier Charges		$35.67
Legal Research		$1.60
Medical Record Retrieval		$1,014.99
Postage Charges		$6.34
Miscellaneous Litigation Expenses		$80.09
Case-specific administration expenses		$981.00
The Settlement Alliance QSF Trustee Administration Fee		$700.00
Total Costs Requested in Application		$3,187.99

FEES AND COSTS & EXPENSES ALLOWED

Fees

The court finds that the fees computed on a percentage basis recovery for Client are reasonable and a fair method of computing the fees of Applicant in this case. Such percentage fees are commonly charged for such services provided in non-bankruptcy transactions of this type. The court allows Final Fees

of $53,437.50 pursuant to 11 U.S.C. § 330 for these services provided to Client by Applicant. The Chapter 7 Trustee is authorized to pay from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

Costs & Expenses

First and Final Costs in the amount of $3,187.99 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and costs allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$53,437.50
Costs and Expenses	$3,187.99

pursuant to this Application as final fees pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an 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 Allowance of Fees and Expenses filed on behalf of Smith Stag, L.L.C., LawCo USA, PLLC, The Curtis Legal Group, and Aylstock, Bailey, Burnett, Junell, Potts & Witkin, PLLC ("Applicant"), Attorney for Gary Farrar, the Chapter 7 Trustee, ("Client") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Smith Stag, L.L.C., LawCo USA, PLLC, The Curtis Legal Group, and Aylstock, Bailey, Burnett, Junell, Potts & Witkin, PLLC is allowed the following fees and expenses as a professional of the Estate:
>
> Smith Stag, L.L.C., LawCo USA, PLLC, The Curtis Legal Group, and Aylstock, Bailey, Burnett, Junell, Potts & Witkin, PLLC, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $53,437.50
> Expenses in the amount of $3,187.99,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

IT IS FURTHER ORDERED that the Chapter 7 Trustee is authorized to pay the fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7.