UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

May 4, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. **Matters resolved without oral argument:**

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

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

2. **The court will not continue any short cause evidentiary hearings scheduled below.**

3. **If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**

4. **If no disposition is set forth below, the matter will be heard as scheduled.**

1.	14-32410-D-7 15-2025 MONEYGRAM PAYMENT SYSTEMS, INC. V. VUE	MELISSA VUE RR-1	MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT 4-1-16 [43]

Tentative ruling:

This is the plaintiff's motion to dismiss the § 727(a)(3) and (a)(5) claims for relief in its complaint. The motion was brought pursuant to LBR 9014-1(f)(1) and no opposition has been filed. However, the court is not prepared to grant the motion because the moving party failed to serve the defendant's counsel. The moving party served the trustee in the defendant's underlying chapter 7 case, the United States Trustee, and the creditors in the underlying case. The moving party served the attorney for the debtor in the underlying case; however, the debtor, in her capacity as the defendant in this adversary proceeding, has a different attorney, whom the moving party failed to serve. If the defendant's attorney appears at the hearing, the court will hear from him. If he does not appear, the court will continue the hearing and require the moving party to file a notice of continued hearing and serve it on the defendant's attorney. The court will hear the matter.

2.	16-20313-D-7	EDWARD/JERI SCHROEDER	MOTION FOR RELIEF FROM
EAT-1	AUTOMATIC STAY
U.S. BANK, N.A. VS.	4-5-16 [27]

Final ruling:

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

3.	16-21014-D-7	JOSEFINA CARRERAS	MOTION FOR RELIEF FROM
EAT-1	AUTOMATIC STAY
U.S. BANK, N.A. VS.	4-6-16 [13]

Final ruling:

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

4.	14-25820-D-11	INTERNATIONAL	MOTION TO COMPROMISE
DMC-22	MANUFACTURING GROUP, INC.	CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH WESTERN ALLIANCE
BANK
4-6-16 [831]

5.	10-35944-D-7	DARA MINOIEFAR AND	MOTION TO AVOID LIEN OF
RAH-3	RAMOUNA MINOOEIFAR	CSW/STUBER-STROEH ENGINEERING
GROUP, INC.
4-4-16 [103]

Final ruling:

This matter is resolved without oral argument. This is the debtors' motion to avoid a judicial lien apparently previously held by CSW/Stuber-Stroeh Engineering Group, Inc. ("CSW") against real property the debtors owned when they filed their

petition commencing this case, on June 17, 2010, which property they have since lost to foreclosure.[1] The motion was noticed pursuant to LBR 9014-1(f)(1) and no opposition has been filed. However, that does not by itself entitle the debtors to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Thus, the court will consider the merits of the motion. As discussed below, the motion is not accompanied by evidence establishing its factual allegations and demonstrating that the moving parties are entitled to the relief requested, as required by LBR 9014-1(d)(6).

"There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be … a judicial lien. 11 U.S.C. § 522(f)(1)." Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added, internal quotation marks omitted).

Here, the debtors did not claim any interest in the property as exempt. Thus, they have not satisfied the second test. For the same reason, they have not satisfied the first test in that they have not shown there was, at the time this case was filed,[2] an exemption to which they would have been entitled in the absence of the lien. The third test is not satisfied because the court cannot determine from the evidence whether the lien (if one existed – see below) would have impaired an exemption to which the debtors would have been entitled if they had claimed one. Although the debtors scheduled the value of the property as $525,000, they scheduled the amounts due on three deeds of trust against the property as "unknown." Thus, the court is unable to apply the formula required to determine whether the lien would have impaired an exemption, if the debtors had claimed one. See § 522(f)(2)(A). The court takes judicial notice that one creditor filed a proof of claim in this case – First Tennessee Bank for $248,829, claimed to be secured by the property. That amount is not sufficient to permit the court to conclude the lien impaired an exemption to which the debtors may have been entitled.

Finally, the debtors have not shown that CSW ever had a judicial lien; thus, they have not satisfied the fourth test. In order to avoid a judicial lien, "the debtor must make a competent record on all elements of the lien avoidance statute, 11 U.S.C. § 522(f)." Mohring, 142 B.R. at 391. Here, there is insufficient evidence of a judicial lien held by CSW, as created by an abstract of judgment recorded in the county in which the property is located. The motion states that a copy of the recorded abstract of judgment has been filed as an exhibit, but that is not the case. The only document purporting to evidence the lien is a copy of CSW's judgment; there is no copy of an abstract of judgment, recorded or not.

"The operative principle here is that although bankruptcy confers substantial benefits on the honest but unfortunate debtor, including a discharge of debts, the ability to retain exempt property, and the ability to avoid certain liens that

impair exemptions, there is a price." Mohring, 142 B.R. at 396. Obtaining a copy of the recorded abstract of judgment seems a small price to pay to avoid an otherwise valid and enforceable property interest.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

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1 The motion states that although the debtors no longer have an interest in the property, the recorded abstract of judgment is affecting their credit and preventing them from purchasing a home. If the debtors had satisfied the elements necessary to avoid a judicial lien, which, as discussed below, they have not, it appears they would be entitled to avoid the lien despite the fact that they no longer own the property. See Culver, LLC v. Kai-Ming Chiu (In re Kai-Ming Chiu), 304 F.3d 905, 908 (9th Cir.2002).

2 A debtor's exemption rights and lien avoidance rights are both determined as of the petition date. Goswami, 304 B.R. at 391-92.

6.	12-31648-D-12 PPR-1 WELLS FARGO BANK, N.A. VS.	RONALD/TINA BOX	MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION 3-30-16 [91]

Final ruling:

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

7.	15-28060-D-11 RAL-5	ACADEMY OF PERSONALIZED LEARNING, INC.	CONTINUED MOTION TO ENFORCE AUTOMATIC STAY AND/OR MOTION FOR CONTEMPT 2-24-16 [233]

Tentative ruling:

This is the debtor's motion "to enforce the automatic stay"and for a finding of contempt against Academy of Personalized Learning Education Association ("APLEA") and California Teachers Association ("CTA"). APLEA and CTA filed opposition, and following an initial hearing, which was held on shortened time, the Public Employment Relations Board filed a brief, APLEA and CTA filed supplemental opposition, and the debtor filed a reply. The court has now issued a tentative ruling on APLEA's and CTA's motion for relief from stay and to annul the stay, which the court intends to grant. For the reasons stated in that ruling, also on this calendar, this motion, to the extent it seeks to enforce the stay, is moot, and to the extent it seeks a finding of contempt, is denied. The court will hear the matter.

8. 15-28060-D-11 ACADEMY OF PERSONALIZED MOTION FOR RELIEF FROM
SW-1 LEARNING, INC. AUTOMATIC STAY
CALIFORNIA TEACHERS 4-5-16 [278]
ASSOCIATION VS.

Tentative ruling:

This is the motion of Academy of Personalized Learning Education Association ("APLEA") and California Teachers Association ("CTA") for relief from the automatic stay to permit the continuation of proceedings before the Public Employment Relations Board (the "Board" or "PERB") and for annulment of the stay to validate post-petition proceedings already conducted before the Board. The debtor has filed opposition and the moving parties have filed a reply. For the following reasons, the motion will be granted.

At various times in 2015, the Board's Office of the General Counsel issued complaints against the debtor alleging unfair labor practices, based on charges brought by APLEA.. A formal evidentiary hearing before an administrative law judge (in Board matters, the equivalent of a trial) was set for October 19-23, November 3-5, and December 1-3, 2015. The debtor filed its petition commencing this chapter 11 case on October 15, 2015. Its counsel in the Board matters advised the administrative law judge the next day of the debtor's position that the Board hearing was stayed by operation of § 362(a) of the Bankruptcy Code. CTA, in turn, advised the administrative law judge of its position that the proceedings fell within the exception of § 362(b)(4). Having considered the positions of both parties, the administrative law judge vacated the hearing date set to begin on October 19, 2015 and rescheduled the hearing to begin February 8, 2016. The purpose of the continuance was "to give [the debtor] time to seek an order from the bankruptcy court regarding the status of PERB's proceedings" (Moving Parties' Ex. E, p. 3), more specifically, for the debtor to seek "the bankruptcy court's determination whether PERB proceedings are covered by the automatic stay." <u>Id.</u> at n.4.

The debtor took no action to obtain such a determination from this court. Instead, the debtor's counsel for the Board proceedings issued several subpoenas duces tecum, requiring the debtor's former teachers to attend the hearing before the administrative law judge to testify and produce a wide variety of documents, and two of the debtor's attorneys attended the first three full days of the evidentiary hearing, on February 8-10, 2016. APLEA and CTA assert, and the debtor does not dispute, that at no time during that evidentiary hearing did the debtor object to the hearing going forward or assert that the hearing was covered by the automatic stay. The hearing was scheduled to resume on March 3, 2016. On February 24, 2016, the debtor filed in this court a motion "to enforce the automatic stay" and to hold APLEA and CTA in contempt for violating the stay. That was the first action the debtor had taken to involve this court in a determination as to whether the automatic stay applies to the proceedings before the Board.

APLEA and CTA continue to maintain that the Board proceedings are excepted from the automatic stay under § 362(b)(4); the debtor disagrees. The court need not determine that issue. The court concludes instead that to the extent the stay applies, it should be lifted on a go-forward basis and annulled nunc pro tunc to validate the post-petition actions taken by the debtor, APLEA and CTA, and the Board. The debtor filed its bankruptcy petition on the eve of the evidentiary hearing and immediately asserted that the hearing was stayed by operation of the

automatic stay. CTA immediately asserted the stay did not apply, and the administrative law judge immediately (the day after the bankruptcy petition was filed) vacated the hearing date for the express purpose of allowing the debtor to seek a determination from this court as to the whether the stay applied. For the next four months, the debtor failed to seek a determination from this court, instead using the estate's resources for extensive legal research, document review, and preparation for the Board hearing, culminating in three long days of testimony at that hearing, followed by yet more preparation for the next hearing, even after the debtor filed its contempt motion.[1] Not once during that time did the debtor follow the administrative law judge's suggestion that it seek this court's determination as to the applicability of the stay. Instead, the debtor proceeded with the evidentiary hearing as if the stay did not apply, finally seeking relief in this court only in the middle of the evidentiary hearing.

Except for the first three weeks of this chapter 11 case, the debtor has been represented in this case by not one but two bankruptcy firms, one of whose attorney has extensive experience in bankruptcy, who must have known of the important principle, well-known among bankruptcy practitioners, that actions taken in violation of the automatic stay are void, not voidable. See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). In fact, the administrative law judge pointed out this principle in a ruling issued December 14, 2015, noting that governmental agency proceedings that are later determined to be not excepted from the automatic stay are void. The judge stated that a governmental agency that proceeds with its hearing without obtaining relief from the automatic stay does so at its own risk, and that "[i]f it is later determined that the agency was not excepted from the stay, the entire proceeding is void." Ex. I to Moving Parties' Ex. A, p. 4 (citation omitted). In its reply in support of its motion to enforce the automatic stay, the debtor responds that "[h]ere, nothing has been decided, so there is nothing to render void." Debtor's Reply, DC No. RAL-5, DN 334, at 6:7-8. The response is cavalier at best. If the post-petition proceedings before the Board were declared void, as the debtor seeks, the entire post-petition exercise would have been a waste of everyone's time, as well as the resources of all the parties and the state's administrative resources.

The debtor relies heavily on the fact that it did not know until after the claims bar date in this case, February 10, 2016, the upper limit of the monetary damages it faced in the Board proceedings. Now that the claims bar date has passed, the debtor has made a cost-benefit analysis and determined that continuing with the hearing before the Board "will cost far more to litigate than the amounts now known to be at stake." Debtor's Opp., DN 308, at 4:1-2. "Stated simply, the Debtor cannot afford to litigate [] with a statewide union for no less than nine court days over the liability for claims that total only $100,000." Id. at 6:2-3. The problems with this argument are at least three-fold. First, assuming without deciding that the debtor could not have made a reasonable estimate of the amounts of the dismissed teachers' claims earlier, the cost of seeking a stay determination in this court would have been low, at least relative to the amount of fees the debtor incurred in the proceedings before the Board. Second, the debtor states it plans not to object to the claims filed by its former teachers in this case on the basis of liability. Why then could the debtor not simply stipulate to liability in the Board proceeding? Why, if the stay is lifted, would the debtor have to "litigate with the union for no less than nine court days over the liability for claims that total only $100,000"? Third, although the debtor says it will not contest its liability for the teachers' claims, it may still "object to causation or the quantum of each such claim." Id. at 3:22-23. Why should those objections not be determined by the Board rather than by this court?

The debtor also contends that resolution of the cases before the Board is unnecessary because the "[t]he Debtor's plan will address payment of the claims and discharge Debtor's PERB regulatory obligations, which are dischargeable claims . . . ." Debtor's Opp., DN 308, at 6:6-7. The argument is a red herring, and has little, if any, bearing on the present motion. The treatment of claims, including their dischargeability, are issues that will be determined in connection with plan confirmation. Further, even if the argument were pertinent here, the debtor merely assumes, without support, that any regulatory obligations based on non-monetary remedies the Board might impose, such as injunctions, are dischargeable.

The debtor's reliance on Ohio v. Kovacs, 469 U.S. 274 (1985), and FCC v. NextWave Pers. Communs. Inc., 537 U.S. 293 (2003), is misplaced. Those cases dealt with a debtor's ability to discharge claims arising from environmental clean-up obligations, including clean-up injunctions. It appears the debtor is analogizing those types of claims to obligations the debtor may be determined to have as a result of the Board's regulatory functions concerning the debtor's relations with its employees, including obligations based on injunctive relief. However, a key element of the Kovacs holding, which the debtor fails to mention, is that a right to an equitable remedy for breach of performance is a claim, as defined in § 101(5)(B), and is therefore dischargeable, only if the breach gives rise to a right to payment. Kovacs, 469 U.S. at 280.[2] Here, the debtor has not demonstrated that injunctive or other non-monetary remedies the Board might impose would give rise to the "right to payment" necessary to render the obligations based on those remedies dischargeable. The NextWave case involved a claim for indemnity for environmental clean-up costs; that is, a claim based on a "right to payment." The case does not support the proposition for which the debtor cites it – that regulatory obligations to a governmental agency, such as the Board, are necessarily dischargeable.

Finally, the debtor contends the burden was on CTA to bring a motion for relief from stay. This would likely have been a good argument if raised by the debtor immediately in this court, as creditors obviously have a duty not to violate the stay. But the debtor did not bring the matter to this court's attention. Instead, it ignored the administrative law judge's invitation to file a motion in this court and instead the debtor affirmatively proceeded with the litigation before the Board; in fact, it apparently continued to advise the administrative law judge of its intention to seek a determination from this court, while at the same time failing to do so.[3]

In assigning the blame to CTA for not filing a motion in this court, the debtor claims "there is no ambiguity about the scope of the automatic stay." Debtor's Reply, DC No. RAL-5, DN 334, at 8:16-17. But at the same time, while seeking to excuse its own delay, the debtor claims "this is a complex case of first impression: there is no authority directly on point" (id. at 5:27-28) as to the applicability of the automatic stay. And in opposition to this motion, the debtor concedes CTA's "legal contentions and authorities . . . appeared at first blush to support its contentions that Section 362(b)(4), an exception to the stay, applied." Debtor's Opp., DN 308, at 10:3-5.

The debtor's view of the proceedings is this:

> As it became apparent that CTA's pacing and resultant cost of the PERB litigation was disproportionate to the claims at stake and if continued, would threaten Debtor's existence, the issue was revisited, the nature of the PERB process became better understood by bankruptcy counsel, and authorities were identified that compel the application of the automatic

> stay and the inapplicability of the regulatory exception in this unique factual and regulatory setting. In essence, CTA and APLEA are trying to blame the victim.

Id. at 10:5-10. The court does not view the debtor as the victim here. First, the pacing of the proceedings should have come as no surprise to the debtor or its attorneys. The Board's Office of the General Counsel filed its complaints against the debtor beginning March 11, 2015; the cases were originally set for hearing on August 31 and September 1-2, 2015. On August 25, 2015, the administrative law judge issued a ruling granting APLEA's request to consolidate the cases and granting the debtor's request to continue the hearings. It was at that time that the hearing was scheduled to begin on October 19, 2015. Second, it was not CTA's or APLEA's job to identify the authorities favorable to the debtor on the stay issue. Instead, those parties made it clear from the beginning they did not believe the stay applied, and the debtor had every opportunity to brief the issue; in fact, it did so.

CTA's briefing of its position for the administrative law judge, as early as October 16, 2015, reveals that the debtor's counsel had already cited case law they believed ruled out the § 362(b)(4) exception to the stay, asserting to the administrative law judge that it would be "in the best interest" of the Board to "abstain from ruling on the issue over whether or not an automatic stay is in place" and suggesting the issue should be resolved in "the proper jurisdiction"; namely, the bankruptcy court. See Ex. D to Moving Parties' Ex. A, p. 1, quoting the debtor's brief. The delay of the debtor's bankruptcy counsel in "better understanding the PERB process," the failure to identify favorable authorities and to bring the issue to this court's attention, and the debtor's decision instead to devote its resources to preparing for and proceeding with the evidentiary hearing before the Board – resources far greater than those that would have been required to address the stay issue in this court – are all attributable to the debtor, not CTA or APLEA.

The court can only conclude that the debtor's strategy was deliberate: the facts strongly suggest that the debtor simply wanted its cake and to eat it too; if the outcome of the hearing before the Board were satisfactory to the debtor, the debtor would keep quiet, whereas it would have the motion for contempt in its back pocket if the Board outcome was unfavorable. Simply put, this is inappropriate gamesmanship and evinces a disregard for the availability of this court's resources, and is a waste of the state's administrative resources, as well as the debtor's own resources and those of its opponents. That is a result the court cannot countenance.

For the reasons stated, to the extent the automatic stay applies to the proceedings before the Board, the stay will be lifted to allow the proceedings to go forward and annulled to validate the proceedings that have taken place post-petition. The stay will be lifted to permit the parties' claims to be liquidated but not collected or otherwise enforced. The court will hear the matter.

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1 In the post-petition period, the debtor's counsel for the Board matters incurred fees and costs totaling $170,397, including $47,690 in January and $79,164 in February.

2 "There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money." Id. at 281.

3 **The administrative law judge's December 14, 2015 ruling was in response to APLEA's request for an interlocutory appeal to the Board itself from the administrative law judge's decision to continue the evidentiary hearing. The debtor opposed APLEA's request as follows (as described by the administrative law judge): "[The debtor] opposes the interlocutory appeal. [The debtor] continues to assert that the automatic stay applies to PERB, and concurs in the determination to continue the hearing to allow it to obtain a ruling from the bankruptcy court on the status of the PERB proceedings." Ex I to Ex. A, p. 3.**

9.	16-20760-D-11	ADA CONSTRUCTION SERVICES, INC.	CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 2-11-16 [1]

10.	15-26465-D-7 GJH-1	SCOTT POMEROY	AMENDED OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 4-6-16 [37]

Tentative ruling:

This is the trustee's amended objection to the debtor's claim of exemption of an asset described by the debtor as an "ERISA Qualified Retirement Account" named the "Pomeroy Retirement Trust" (the "Plan"). The trustee filed his original objection to the exemption of this asset on February 18, 2016. After the debtor filed an amended Schedule C to include an additional statute under which he claims the asset as exempt, the parties agreed to a continuance of the hearing for the trustee to amend his objection to address the additional statute. The trustee did so; the debtor has filed opposition and the trustee has filed a reply. For the following reasons, conditioned on the debtor providing certain supplemental evidence, the objection will be overruled.

There are three assets alleged by the debtor to be in the Plan: (1) a vacant lot in Truckee, California; (2) an account at Wells Fargo Bank; and (3) an account at Scottrade. The debtor claims the Plan as exempt under (1) Cal. Code Civ. Proc. § 703.140(b)(10)(E); and (2) § 522(b)(3)(C) and (4) of the Bankruptcy Code.[1] The court concludes the exemption is properly claimed under § 522(b)(3)(C) of the Bankruptcy Code; thus, the court need not reach the § 703.140(b)(10)(E) question.

<u>The Vacant Lot</u>

Subdivisions 522(b)(3)(C) and (4) were added to the Bankruptcy Code effective in 2005 to "supplement[] the exemptions an opt-out state debtor may take." <u>Mullen v. Hamlin (In re Hamlin)</u>, 465 B.R. 863, 870 (9th Cir. BAP 2012). They permit a debtor to exempt "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain sections of the Internal Revenue Code. The trustee contends the term "retirement funds," as used in the statute,

includes only "sums of money" and not real property. He relies exclusively on an incomplete dictionary quotation in Clark v. Rameker, 134 S. Ct. 2242 (2014), and the general rule of statutory construction that Congress says what it means in its statutes and means what it says. The trustee interprets Clark as having "adjudicated the plain meaning of the term 'retirement funds.'" Trustee's Memo., DN 42, at 15:18-19. That is not the case. The language the trustee relies on is not even dicta; it is an ellipsis in a dictionary definition as quoted by the Court.

The court will begin with what Clark actually adjudicated, as it sheds light on just how misplaced the trustee's reliance on the ellipsis is. The Court held that inherited IRAs are not exempt under § 522(b)(3)(C). Clark,134 S. Ct. at 2244. The Court's analysis was devoted exclusively to the notion that traditional IRAs are accounts that are "set aside for the day when an individual stops working" (id. at 2246), whereas funds in inherited IRAs "are not objectively set aside for the purpose of retirement." Id. at 2247. The Court considered three distinctions between traditional and inherited IRAs.

> First, the holder of an inherited IRA may never invest additional money in the account. Inherited IRAs are thus unlike traditional and Roth IRAs, both of which are quintessential "retirement funds." For where inherited IRAs categorically prohibit contributions, the entire purpose of traditional and Roth IRAs is to provide tax incentives for accountholders to contribute regularly and over time to their retirement savings.
>
> Second, holders of inherited IRAs are required to withdraw money from such accounts, no matter how many years they may be from retirement. . . . That the tax rules governing inherited IRAs routinely lead to their diminution over time, regardless of their holders' proximity to retirement, is hardly a feature one would expect of an account set aside for retirement.
>
> Finally, the holder of an inherited IRA may withdraw the entire balance of the account at any time – and for any purpose – without penalty. Whereas a withdrawal from a traditional or Roth IRA prior to the age of 59½ triggers a 10 percent tax penalty subject to narrow exceptions – a rule that encourages individuals to leave such funds untouched until retirement age – there is no similar limit on the holder of an inherited IRA. Funds held in inherited IRAs accordingly constitute "a pot of money that can be freely used for current consumption," not funds objectively set aside for one's retirement.

Id. (citations omitted).

The entire focus of the decision was on the purpose of traditional IRAs, as opposed to inherited IRAs – to encourage saving for retirement. The decision has nothing to do with what types of assets may be held in IRAs or other retirement plans for purposes of the definition of "retirement funds" in § 522(b)(3)(C). It is significant that the court referred to traditional and Roth IRAs as "quintessential 'retirement funds.'" There is no reason to suppose the Court intended to exclude from the definition of "retirement funds" real property, stocks, bonds, gold, or any other type of asset often, if not commonly, held in traditional and Roth IRAs. The court agrees with another department of this court on the issue:

> [T]he court is not prepared to conclude that "retirement funds" exclude

> real property assets. All IRAs have some form of investment assets. Most often, IRAs hold liquid assets, including stocks and/or bonds. But IRAs rarely have only "funds" in the strictest sense of that word. Thus, to construe "retirement funds" to exclude assets, whether stocks, mutual funds, bonds, or real estate, would make the § 522(b)(3)(C) exemption largely unusable.

In re Williams, 2011 Bankr. LEXIS 5584, *24 (Bankr. E.D. Cal. 2011) (J. McManus).

Returning to the language the trustee relies on in Clark, it is this:

> The Bankruptcy Code does not define "retirement funds," so we give the term its ordinary meaning. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. ___, ___, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014). The ordinary meaning of "fund[s]" is "sum[s] of money . . . set aside for a specific purpose." American Heritage Dictionary 712 (4th ed. 2000). And "retirement" means "[w]ithdrawal from one's occupation, business, or office." Id., at 1489. Section 522(b)(3)(C)'s reference to "retirement funds" is therefore properly understood to mean sums of money set aside for the day an individual stops working.

Clark, 134 S. Ct. at 2246 (emphasis added). The trustee relies on this language for his definition of "retirement funds" as "sum[s] of money" and nothing else. This interpretation hinges on the ellipsis – the missing words in the dictionary definition as quoted by the Court – the words represented by ". . .". The actual definition of "fund" in the dictionary the Court used is: "sum of money or other resources set aside for a specific purpose." "fund." AHDictionary.com. American Heritage Dictionary, 2016. Web. 30 April 2016. The Supreme Court could not have intended to announce, by nothing more than omitting the words "or other resources" from a dictionary quotation, a definition of "retirement funds" that excludes entire categories of assets frequently held in IRAs, Roth IRAs, and other retirement plans. If the Court had intended to exclude from the definition of "retirement funds," as used in § 522(b)(3)(C), all types of assets other than money – stocks, bonds, interests in mutual funds, commodities, real property – it would have been far more explicit.

The Wells Fargo Bank and Scottrade Accounts

The trustee contends the funds in the Wells Fargo Bank and Scottrade accounts are not exempt because they are not part of the Plan to begin with. The trustee relies on (1) the Business Account Application under which the Wells Fargo account was opened (the "Application"); and (2) two checks drawn on that account which the debtor used to open and later transfer additional funds to the Scottrade account. (Thus, if the Wells Fargo account is not part of the Plan, the Scottrade account is not either, as the funds in that account were drawn from the Wells Fargo account.) In the trustee's view, the Application demonstrates that the debtor opened the account in his individual name, and thus, the account is a personal account and not an account belonging to the Plan. The debtor has submitted a copy of the check he used to open the Wells Fargo account – it is drawn on an account at U.S. Bank entitled, as imprinted on the check, Pomeroy Retirement Trust, Scott C. Pomeroy, Trustee. The trustee does not admit, but he also does not dispute, that the funds transferred by way of that check were funds belonging to the Plan.[2]

The Application is confusing. It is on a Wells Fargo pre-printed form and, as the typed or printed information added to the form includes numbers that would have been known only to the bank, it was presumably typed or printed from information entered by the bank's representative, not the debtor. Page 1 of the form includes blanks for information about "Customer 1" and "Customer 2," which were completed as follows:

Customer 1 Name:	Scott C. Pomeroy
Account Relationship:	Sole Owner
Customer 2 Name:	Pomeroy Retirement Trust
Account Relationship:	Associated Party

These entries suggest the account belongs to the debtor, not the Plan. However, page 2 of the Application has blanks for "Customer 1 Information," which includes the following:

Customer Name:	Pomeroy Retirement Trust
Account Relationship:	Associated Party
Taxpayer Identification Number:	XXXX4667 [the Plan's TIN]
Business Type:	Sole Proprietorship
Date Originally Established:	01/01/1994 [the date the Plan was created]

At the bottom of page 2, for "Bank Use Only," are these entries (among others):

Name/Entity Verification:	Other Agreement
Filing State:	CA
Customer 1 Name:	Pomeroy Retirement Trust

Page 3 has blanks for "Sole Proprietor 1 Information," which includes the following:

Customer Name:	Scott C. Pomeroy
Position/Title:	real estate
Taxpayer Identification Number:	XXXX8236 [the debtor's social security number]

Finally, Page 4 is the signature page; it reads:

Certified/Agreed To	
Owner/Key Individual 1 Name:	Scott C. Pomeroy
Position/Title:	real estate

And it bears the debtor's signature; the word "trustee" does not appear behind the signature.

Thus, these facts support the trustee's position: (1) the debtor signed the application without using the word "trustee"; (2) the Application refers to the debtor as the customer in two places – under "Customer 1 Name" and "Customer Name"; and (3) the Application refers to the debtor's Account Relationship as "Sole Owner." On the other hand, (1) the Application refers to the debtor as "Owner/Key Individual" (on page 4), which reasonably should be construed to mean the debtor is the owner of the account or the key individual in the entity that owns the account; (2) the Application refers to the Plan twice as the "Customer," albeit one of those times as "Customer 2"; (3) the pre-printed portion of the Application states that "[t]he Customer has approved this Certificate of Authority or granted each person who signs the 'Certified/Agreed To' section of this Application the authority to do so on the Customer's behalf by: . . . the signature of each of the Customer's trustee(s), if the Customer is a trust . . .," which lessen the significance of the debtor's signature without "Trustee" behind it; and (4) the reference to "Other Agreement" under "Name/Entity Verification," which suggests the bank representative reviewed the agreement under which the Plan was created. If the debtor were to be the owner of the new account, the bank representative would not have required that verification.

In addition, the debtor made the U.S. Bank check by which he opened the account payable to Pomeroy Retirement Trust, signed it as Scott C. Pomeroy, Trustee, and endorsed it as Scott C. Pomeroy, Trustee. On the deposit slip, under "For Deposit to the Account of," the debtor wrote Pomeroy Retirement Trust. The checks on the account are imprinted "Pomeroy Retirement Trust, Scott C. Pomeroy, Trustee," and of the six checks submitted by the trustee, the debtor signed five of them "Scott C. Pomeroy, Trustee." He testifies he omitted "Trustee" after his signature on the sixth check because he was in a hurry. His habit is to sign with "Trustee." He adds that the only checks he has written from the account have been for property taxes and association dues on the vacant lot and to make the two transfers to open and then add to the Scottrade account. The Scottrade account statements are issued to "Scott C. Pomeroy TTEE, Pomeroy Retirement Trust Plan, U/A DTD 1/01/1994."

Finally, the debtor has submitted declarations of Ben Eastman, who created, administered, and advised the debtor on the management of the Plan since its creation in 1994, and David M. Kahn, a Pennsylvania attorney who has specialized for 25 years in ERISA compliance, including as an investigator and manager with the U.S. Department of Labor's Employee Benefit Security Administration. Both are well-qualified to offer the opinions they testify to, and the trustee makes no serious argument to the contrary.[3] The trustee has not requested an evidentiary hearing or suggested any need to examine Mr. Eastman's or Mr. Kahn's qualifications. Mr. Eastman and Mr. Khan have both examined the Application. Mr. Eastman notes Wells Fargo accepted the debtor's signature on the Application without the "Trustee" suffix, and testifies it is common for a bank to accept a trustee's signature without the suffix. Mr. Kahn testifies the use of the Plan's tax ID number as well as the individual's for the creation of the account is uniform in his experience. Based on this testimony and the court's own analysis, above, the court concludes that the Wells Fargo and Scottrade accounts are assets of the Plan.

Both Mr. Eastman and Mr. Kahn testify the Plan is tax-exempt. The trustee complains that "[n]owhere does the Debtor or any of his experts even identify the specific statute on which qualification [as tax-exempt] could be based." Reply at 8:23-24. He concludes, "[i]t is thus impossible to determine whether the Plan complies with that statute." Id. at 8:24-25. It is true that both declarations refer to "Section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code of 1986" in Mr. Eastman's and Mr. Kahn's conclusions that the Plan is a qualified retirement plan.[4] However, that is likely attributable to drafting by the debtor's attorney; it does not support the conclusion that it is impossible to determine whether the plan is tax-exempt within the meaning of § 522(b)(3)(C).

Mr. Eastman authenticates a copy of an IRS letter addressed to Pension Services, Inc., and testifies as follows concerning it:

> I can positively identify Exhibit G as the "Volume Submitter Determination Letter" from the Internal Revenue Service, which authorizes the plans created by my services as qualified retirements under the

> requirements of Section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code of 1986 as a qualified retirements exempt from taxation. The Scott Pomeroy Retirement [Plan] falls under this specific letter of determination and is a qualified retirement [plan].

Eastman Decl., DN 45, at 3:19-24. The letter from the IRS is addressed to Pension Services, Inc., regarding "Plan Description: Volume Submitter Profit Sharing Plan with CODA." It begins, "In our opinion, the form of the plan identified above is acceptable under section 401 of the Internal Revenue Code for use by employers for the benefit of their employees." Debtor's Ex. G. The letter also states, "an employer that adopts this plan may rely on this letter with respect to the qualification of its plan under Code section 401(a) . . . ." Id.

The copy of the Plan submitted by the trustee includes documents entitled "Resolution Adopted by Unanimous Written Consent of Owner(s)/Partner(s)" and "Adoption Agreement Volume Practitioner 401k Profit Sharing Retirement Plan and Trust," which refer to the IRS letter and by which Scott Pomeroy, as the "Owner" of the "Company" and as the "Employer," adopts the Plan and Trust referred to in the IRS letter. These documents, together with the testimony of Mr. Eastman and Mr. Kahn, convince the court that one of the following is true. Either the Plan has received a favorable determination from the IRS or if it has not received a favorable determination, then the Plan is in substantial compliance with the applicable requirements of the Internal Revenue Code.

Thus, the debtor has submitted almost enough evidence to make the necessary showing under § 522(b)(3)(C) and (4). If the IRS letter in fact constitutes a favorable determination within the meaning of § 522(b)(4)(A), the debtor must demonstrate the determination was in effect as of the date of his bankruptcy petition, August 14, 2015. If the IRS letter does not constitute such a favorable determination, the debtor must demonstrate that no prior determination to the contrary has been made by a court or the Internal Revenue Service. § 522(b)(4)(B)(i). The burden is on the debtor to make the necessary showing. Diamond v. Trawick (In re Trawick), 497 B.R. 572, 585 (Bankr. C.D. Cal. 2013). Thus, the court will continue the hearing to permit the debtor to provide the necessary proof.

The trustee cites Carter v. Anderson (In re Carter), 182 F.3d 1027 (9th Cir. 1999), for his proposition that the standard of proof the debtor must satisfy is "unequivocal" evidence. Discussing Fed. R. Bankr. P. 4003(c) and citing a bankruptcy court decision from the Northern District of Illinois that had used the term "unequivocal," the court stated that when the party objecting to an exemption has produced evidence sufficient to overcome the presumptive validity of an exemption claim, the debtor must "come forward with unequivocal evidence to demonstrate that the exemption is proper." Carter, 182 F.3d at 1029 n.3.

The Bankruptcy Appellate Panel in Kelley v. Locke (In re Kelley), 300 B.R. 11 (9th Cir. BAP 2003), quoted this same language from Carter (300 B.R. at 16), and then held that the trustee's burden of proof to overcome the presumptive validity of an exemption is preponderance of the evidence. Id. at 17. The panel quoted an earlier decision as holding that, "[i]n civil cases, the objecting party need only provide proof sufficient to meet the 'preponderance of the evidence' standard, as opposed to the more stringent 'clear and convincing evidence' standard." Id. at 16. The panel cited United States ex rel. Farmers Home Admin. v. Arnold & Baker Farms, 177 B.R. 648, 654 (9th Cir. BAP 1994), which held that the debtor's standard of proof on plan confirmation is preponderance of the evidence. Id.

The panel in Arnold & Baker, in turn, noted that the U.S. Supreme Court and the Tenth Circuit had held, respectively, that the standard of proof for the creditor in non-dischargeability and bar to discharge cases is preponderance of the evidence (citing Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991), and In re Serafini, 938 F.2d 1156, 1157 (1991)). The panel concluded that "[a]lthough the holdings in Grogan and Serafini could arguably be limited in its application to creditors, we find no sufficient justification for imposing a heightened burden of proof on the debtor in plan confirmation." Arnold & Baker, 177 B.R. at 655.

This court finds no sufficient justification for holding a debtor to an "unequivocal" evidence standard of proof on an objection to exemptions when the standard for the trustee is preponderance of the evidence, and there is no binding authority for an "unequivocal" evidence standard.[5]

Finally, the court rejects the trustee's conclusion that the debtor has "deliberately create[d] ambiguities with respect to his retirement assets, in the hope that he will be able to remove them from his account without anyone realizing what he has done, and without paying taxes on the withdrawn funds." Reply at 12:9-12. The lynchpin of the argument is the debtor's amended Schedule C, on which the Wells Fargo Bank and Scottrade accounts were dropped from the list of assets appearing under the Plan heading in the description column. On the original Schedule A, the description of the Plan was:

ERISA Qualified Retirement Account managed
by Pension Services Inc. agent Ben Eastman,
CPA, account named the Pomeroy Retirement Trust
The retirement account includes:

1. Property titled to the account with an address
of 10646 Tudor Lane, Truckee, CA 96161 Lot
#4, valued at $185,000.

2. Retirement acct held with Wells Fargo acct
ending ...5137 balance $170,780.74

3. Retirement acct held with Scottrade acct
ending...5500 balance $53,602.27

On the amended Schedule C, the Plan was described as:

ERISA Qualified Retirement
Account managed by Pension Services
Inc. agent Ben Eastman, CPA, account
named the Pomeroy Retirement Trust
The retirement account includes:

1. Property titled to the account with an
address of 10646 Tudor Lane, Truckee,
California

In both schedules, the "Value of Claimed Exemption" and the "Current Value of Property Without Deducting Exemption" were listed as $409,383.01. The court accepts the debtor's contention that he intended his amended Schedule C as a claim of exemption of all three assets, and rejects the following contention of the trustee:

> The effect of [dropping the Wells Fargo account] was arguably to acknowledge that the bank account had in fact been distributed to him and was no longer part of his retirement plan. Presumably he was hoping that no one would require him to pay taxes on the distributed property. Then, when the Trustee accepted the view that the funds had been distributed to the Debtor, he took the position that the Trustee should have realized that he still intended to claim an exemption for the funds, on the basis that they were retirement funds. In other words, it was only when the problem was identified that he asserted that the funds were still retirement assets.

Reply at 11:21-28. The trustee's interpretation does not explain why the value of the claimed exemption and the value of the asset without the exemption were both listed on the amended Schedule C as $409,383.01 or how either he or the IRS was likely to be mislead.

As support for his conclusion that the debtor has exhibited a nefarious pattern of conduct, the trustee also cites the ambiguous nature of the Application, which the court found a bit confusing but not nearly sufficient to prove the account is the debtor's personal account, and complains about a loan the debtor made from the Plan as carrying a usurious interest rate and as providing income to the debtor he did not report on his tax returns. The trustee has not supported this argument with evidence or analysis.

For the reasons stated, conditioned on the debtor submitting the additional evidence described above, the objection will be overruled. The court will hear the matter.

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1 The debtor also claimed the Plan as exempt under § 522(p) of the Bankruptcy Code, but has since conceded that was a mistake. That claim of exemption will be considered to have been withdrawn.

2 "The source of the deposited funds may have been the Plan, but the account [at Wells Fargo] was opened by the Debtor in his individual name . . . ." Memo. at 12:21-22.

3 His only reference to the declarations is this: "[E]xcept for conclusory and ambiguous statements contained in declarations from professionals in the field, who may or may not be qualified to provide expert testimony, there is nothing to show that the Debtor's plan is qualified under the Internal Revenue Code." Trustee's Reply, DN 50 ("Reply"), at 1:1-4.

4 Section 401 governs qualified pension, profit-sharing, and stock bonus plans; section 403 governs employee annuities; section 408 govern IRAs; and section 408A governs Roth IRAs.

5 The reference to unequivocal evidence in Carter was dicta. "There was no real dispute in the bankruptcy court or the BAP concerning these burdens in the abstract. Rather, the parties disputed the relationship between a subchapter S corporation and a shareholder/employee under C.C.P. § 706.011, which was reflected in the disagreement about burdens of proof, production, and persuasion." Carter, 182 F.3d at 1029 n.3.

11. 14-25369-D-7 REBECA FORTEZA MOTION TO COMPROMISE
DNL-2 CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH REBECCA M. FORTEZA
4-6-16 [22]

Final ruling:

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

12. 15-29882-D-7 CEDRIC WILLIAMS MOTION FOR ENTRY OF DEFAULT
16-2019 SDB-1 JUDGMENT
WILLIAMS V. UNITED STATES OF AMERICA INTERNAL REVENUE
3-31-16 [14]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for entry of default judgment against the IRS regarding the dischargeability of certain tax liabilities is supported by the record. As such the court will grant the motion for entry of default judgment against the IRS regarding the dischargeability of certain tax liabilities. Moving party is to submit an appropriate form of judgment. No appearance is necessary.

13. 15-91087-D-11 SPYGLASS EQUITIES, INC. CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
11-10-15 [1]

14. 15-91087-D-11 SPYGLASS EQUITIES, INC. MOTION TO CONVERT CASE TO
UST-1 CHAPTER 7
3-18-16 [115]

15. 15-27790-D-7 ASHA KING
APN-1
SANTANDER CONSUMER USA, INC.
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-1-16 [32]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The debtor received her discharge on February 16, 2016 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

16. 16-21490-D-7 ALEJANDRA IRIGOYEN AND
PEE-1 ALEX RAMIREZ
MARCH WEST COMMONS, LP VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-1-16 [11]

Final ruling:

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

17. 14-25094-D-7 BRIAN PORTER
BHS-4

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH BANK OF AMERICA,
N.A. AND RECONTRUST COMPANY,
N.A. AND/OR MOTION TO SELL
3-24-16 [93]

18. 15-20600-D-11 SAEED ZARAKANI
MHK-11

CONTINUED MOTION TO DISMISS
CASE
2-22-16 [231]

19. 15-20600-D-11 SAEED ZARAKANI
MHK-9

CONTINUED MOTION FOR APPROVAL OF POST-PETITION SECURED FINANCING
2-22-16 [226]

20. 15-21503-D-7 CAROL/TODD HARVEY
DBL-2

MOTION TO AVOID LIEN OF FIRESIDE BANK
4-8-16 [26]

Tentative ruling:

This is the debtors' motion to expunge an alleged judicial lien held by Fireside Bank (the "Bank"). The motion was noticed pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

"There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be … a judicial lien. 11 U.S.C. § 522(f)(1)." Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added, internal quotation marks omitted). A debtor's exemption rights and lien avoidance rights are both determined as of the petition date. Goswami, 304 B.R. at 391-92.

Here, the debtors admit in their motion they did not own any real property at the time the Bank recorded its abstract of judgment, on May 1, 2006, or at the time the debtors filed their petition commencing this case, on February 27, 2015. (The motion does not indicate whether the debtors own any real property now.) They did not list any real property on their schedules and did not claim any interest in real property as exempt. Thus, they have not satisfied the second test. They have not satisfied the first test because there was no exemption in real property to which they would have been entitled in the absence of the lien. They have not satisfied the third test because the alleged lien did not impair an exemption to which the debtors would otherwise have been entitled. Finally, the debtors have not satisfied the fourth test – that the lien must be a judicial lien. Under California law, a judicial lien on real property is created by the recording of an abstract of judgment with the county recorder of the county in which the property is located. Cal. Code Civ. Proc. §§ 697.310(a), 697.340(a). The Bank recorded an abstract of judgment in Shasta County, California, whereas at the time the abstract was recorded, the debtors owned no real property in that county (or any other). Thus, there was no property for a judgment lien to attach to and no judgment lien was created. Thus, the Bank does not hold a judicial lien that is subject to avoidance.

The debtors rely on § 105(a) of the Bankruptcy Code and In re Thomas, 102 B.R. 199 (Bankr. E.D. Cal. 1989). Taking these in order, the debtors quote § 105(a) as

follows:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. . . . No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Debtors' Motion, filed April 8, 2016, at 2:21-23, quoting § 105(a) (emphasis added by the debtors). The debtors take the position that this section "enables the Court to prevent an abuse of process by ruling that the Creditor's pre-petition judgment lien cannot attach to real property acquired by the Debtors post-Discharge . . . ." Id. at 2:14-16.[1]

The debtors have not articulated how avoiding an alleged judicial lien that is not, and was not when the petition was filed, a judicial lien and that does not, and did not when the petition was filed, impair an exemption of the debtors, is necessary to carry out any provision of the Bankruptcy Code. The court is not free to use § 105(a) to create a new right where the matter is covered by other sections of the Code, such as, in this case, § 522(f)(1)(A). That section provides that a debtor may avoid certain judicial liens and it specifies the circumstances under which he or she may do so. The court is not free to use § 105(a) to create a new right in the debtors to avoid an alleged lien in other circumstances.

"[Section] 105(a) is not a 'roving commission to do equity.'" Willms v. Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013) (citation omitted). "A court's inherent power must not be used to create substantive rights that are not available under applicable law." Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 14 (9th Cir. BAP 2002), citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."). As the Ninth Circuit has put it, permitting courts to utilize § 105 to create new substantive rights "would put us in the business of legislating." Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002). "[I]t is not up to us to read other remedies into the carefully articulated set of rights and remedies set out in the Bankruptcy Code. . . . [T]he 'provisions of this title' [in § 105] simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them." Id.

As for In re Thomas, the debtors miss one of the key points of the decision, which was that in order for a lien to exist, there must be an enforceable underlying obligation and an underlying attachable "res," or property. Thomas, 102 B.R. at 201; see also Imagine Fulfillment Servs., LLC v. DC Media Capital, LLC (In re Imagine Fulfillment Servs., LLC), 489 B.R. 136, 152 (Bankr. C.D. Cal. 2013) ["In In re Thomas, the . . . court . . . found that even when a judgment creditor properly recorded an abstract of judgment, no judgment lien was created as a matter of law where a debtor had no attachable property as of the petition date."]. It is true that, in Thomas, the court declared void a judgment purportedly encumbering certain escrowed proceeds of sale of the debtors' property acquired after their bankruptcy discharge was entered, and ordered the alleged judgment lien expunged from the record. However, it did so in the context of an adversary proceeding (the case numbers listed in the case caption are in the format of adversary proceeding numbers), not a § 522(f) motion.

In In re Davis, 2007 Bankr. LEXIS 3169 (Bankr. D. Idaho 2007), the court faced the same procedural situation that is presented to this court: a motion to avoid an alleged lien where the debtors had no real property when the creditors' judgments were recorded, when the debtors' petition was filed, or when their § 522(f) motion was filed. The court held that "Debtors' attempt to avoid judicial liens that do not yet exist on property they do not yet own is not authorized by the Code" (2007 Bankr. LEXIS 3169, at *3), and "the provisions of § 522(f)(1)(A) are not available to them." Id. at *4. The court noted that the debtors' discharge would, to the extent the debts underlying the creditors' judgments were discharged, operate as an injunction to prevent enforcement of the judgments. Id. at *4-5. The court also cited a United States Supreme Court decision in which the Court stated that the bankruptcy laws do not permit a discharged debt to be the basis of an enforceable lien on property that did not exist when the bankruptcy case was filed. Id. at *6-7, citing Local Loan Co. v. Hunt, 292 U.S. 234, 243 (1934).

In light of those two points, the Davis court determined that the "preemptive" order sought by the debtors before it, in circumstances identical to those presented here, appeared to be unnecessary. Davis, 2007 Bankr. LEXIS 3169, at *7. "In this case, there are no judgment liens because there is no real property; Debtors' personal liability has been discharged, and future efforts to collect on the judgments are prohibited by the discharge injunction. Should a creditor make such collection efforts against after-acquired property, that creditor could be subject to sanctions." Id. at *7-8. In this case, the debtors have submitted no evidence a preemptive order of the type they are seeking is or will be necessary, and have not suggested the recording of copies of their petition and discharge would not suffice to overcome the effect, if any, of the Bank's recorded abstract of judgment. If an order becomes necessary, the debtors may seek the appropriate relief through an adversary proceeding to determine the validity or extent of a lien (Fed. R. Bankr. P. 7001(2)) and/or for declaratory relief (Rule 7001(9)).

For the reasons stated, the motion will be denied. The court will hear the matter.

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1 The motion also refers to preventing the Bank from continuing with a wage garnishment. However, there is no evidence the Bank has a lien on the debtors' wages. No such lien was created by the recording of the abstract of judgment – that procedure is for the creation of liens on real property only, not personal property. The debtors state in their supporting declaration that they have "recently learned that the judgment lien recorded by Fireside Bank can attach[] to after-acquired real property and the wage garnishment has re-started." Debtors' Decl., filed April 8, 2016, at 2:3-4. If the Bank has begun garnishing the debtors' wages, the debtors may have some remedy, but the avoidance of the lien allegedly created by the abstract of judgment is not an appropriate remedy.

21.	16-20221-D-7 JCB-2 CARITAS ACQUISITIONS I, LLC VS.	WESLEY COX	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-20-16 [52]
22.	13-31529-D-7 KR-1 VEROS CREDIT VS.	TANESIA WILLIAMS-ALLEN	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-15-16 [85]