UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

May 14, 2015 at 10:30 a.m.

1.	**14-29231-E-11 RLC-16**	**MIZU JAPANESE SEAFOOD BUFFET, INC. Stephen M. Reynolds**	**OBJECTION TO CLAIM OF WIN WOO TRADING, INC., CLAIM NUMBER 7 3-24-15 [161]**

Final Ruling: No appearance at the May 14, 2015 hearing is required.

Local Rule 3007-1 Objection to Claim - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on the Creditor, Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2015. By the court's calculation, 50 days' notice was provided. 44 days' notice is required. (Fed. R. Bankr. P. 3007(a) 30 day notice and L.B.R. 3007-1(b)(1) 14-day opposition filing requirement.)

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(b)(1)(A) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the 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 Objection to Proof of Claim number 7 of Win Woo Trading, Inc. is sustained and the claim is disallowed an administrative expense.

Mizu Japanese Seafood Buffet, Inc., the Plan Administrator/Former Debtor in Possession, requests that the court disallow the claim of Win Woo Trading, Inc. ("Creditor"), Proof of Claim No. 7 ("Claim"), Official Registry of Claims in this case as an administrative expense. Creditor filed its Proof of Claim No. 7 on December 11, 2015.

Creditor claims an administrative expense for this claim pursuant to 11 U.S.C. § 503(b)(9) in the amount of $31,805.55. FN.1.

FN.1. The court notes that the Debtor had not been actively running the restaurants since prior to filing, nor the Debtor in Possession after this case was filed. As noted in the Debtor-in-Possession's Status Conference Report filed on October 15, 2014, the Debtor,

> [E]ntered into a short term lease of the restaurant equipment and fixtures prior to the filing of the present case. The [Debtor] was unable to operate the restaurant and pay the ongoing costs of operation; the short term lease was required to avoid incurring post-petition liabilities as well as breaching the lease of the premises where the restaurant is located. The lease of the business premises is not an asset of the [Debtor or estate] but it is held by principals and former principals of the [Debtor].

Dckt. 45.

The court questions how the Creditor can claim an administrative expense under 11 U.S.C. § 503(b)(9) "for goods sold to the Debtor" when the Debtor had not been running the restaurant during the period immediately preceding the filing of this case.

In its Objection, the Plan Administrator/Former Debtor-in-Possession argues that the Creditor failed to notice and set a hearing within the deadline set by the court. Therefore, the Debtor-in-Possession asserts that the Creditor's administrative expense priority for this claim should be disallowed and should be treated as a general unsecured claim.

APPLICABLE LAW

11 U.S.C. § 503(b) states, in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including–
>
> > (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

Section 503(b) requires that an administrative expense under this section must actually be allowed by court order. *In re Fullmer*, 962 F.2d 1463 (10th Cir. 1992). For a creditor to assert a valid 11 U.S.C. § 503(b)(9) administrative claim, the debtor must have physically received the goods and not merely the value of the goods within the 20-day period before commencement of the case. 4 COLLIER ON BANKRUPTCY ¶ 503.16[1] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

DISCUSSION

On February 6, 2015, the court ordered that the date to file a proof of administrative claim was March 2, 2015. Dckt. 131. The Creditor filed its Proof of Claim No. 7 on December 11, 2015 but failed to file a motion to approve the administrative claim under 11 U.S.C. § 503(b)(9). As required by the statute, any administrative expense under 11 U.S.C. § 503(b) must be allowed by the court after notice and hearing. The court set March 2, 2015 as the date for any creditor to assert an administrative expense. Here, the Creditor filed to file a motion by the March 2, 2015 deadline.

Without an order from the court granting the Creditor's claim as an administrative expense under 11 U.S.C. § 503(b)(9), the Objection to Proof of Claim No. 7 is sustained and the claim is disallowed as an administrative expense.

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 Objection to Claim of Win Woo Trading, Inc., Creditor, filed in this case by Mizu Japanese Seafood Buffet, Inc., the Plan Administrator/Former 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 objection to Proof of Claim Number 7 of Win Woo Trading, Inc. is sustained and the claim is disallowed as an 11 U.S.C. § 503(b)(9) administrative expense.

2. 11-36470-E-13 WASIF/IRUM ASGHAR
WW-3 Mark A. Wolff

CONTINUED OBJECTION TO CLAIM OF STATE BOARD OF EQUALIZATION, CLAIM NUMBER 29 AND/OR MOTION TO CONDITIONALLY DETERMINE THE VALUE OF THE CLAIM PENDING RESOLUTION OF THE APPEAL
7-15-13 [73]

Final Ruling: No appearance at the May 14, 2015 hearing is required.

The Evidentiary Hearing Scheduling Conference is continued to 10:30 a.m. on July 9, 2015.

PROCEDURAL HISTORY

At the September 10, 2013 hearing on the Objection to Claim, the court continued the hearing so that the Objection could be heard after the State Board of Equalization's review of Debtor's appeal. Dckt. No. 85. The court further stated that if the review had not been completed in a timely manner, this court would have to determine the issue as a necessary proceeding for the administration of federal law.

At the March 4, 2014 hearing, the parties reported that an offer for settlement in being reviewed by the State Board of Equalization and requested an additional 60 day continuance. The court continued the hearing.

A review of the case docket for the May 6, 2014 hearing showed that nothing was filed by either the Debtors or the Board of Equalization, to show whether the determination on the appeal has been made. The court continued the Objection to Proof of Claim No. 29 of the State Board of Equalization to this hearing date to bring the objection to conclusion pursuant to 11 U.S.C. § 505.

REVIEW OF OBJECTION

The Proof of Claim at issue, listed as claim number 29 on the court's official claims registry, asserts a $37,470.60 claim alleging a priority tax debt for the tax period of July 1, 2007 through June 30, 2008 and indicates the debt is contingent upon dual determination from account no. SR KH 100-713773.

The Debtor objects to the Proof of Claim on the basis that he was not the responsible party during the time period for which the tax claim is asserted. Debtor Wasif Asghar asserts that he was involved in an accident and due to the illness relating thereto was not involved in the operation of the business during that period.

Debtor asserts that the former business partner Qamaruddin Shaikh was in fact operating the business during the relevant time period. Debtor states that the State Board of Equalization has not yet completed its review and investigation with respect to the dual determination but that their claim

should be disallowed in its entirety as Debtor was not the responsible party and should not be held liable for the claim.

CREDITOR'S OPPOSITION

Creditor California State Board of Equalization ("SBE") states that Debtors scheduled a disputed SBE 2008 tax claim in Schedule "E," in the amount of $1.00 allegedly incurred by QS Ventures, Inc., for which Debtor, Wasif Asghar, disclosed an ownership interest in Paragraph 18 of his Statement of Financial Affairs. SBE timely filed its Proof of Claim No. 29-1 in the amount of $37,470.60 (the "Claim"), which is asserted as a priority, but contingent, tax claim.

Although SBE does not oppose Debtors' request in Paragraph 11 of the Claim Objection for a six-month temporary suspension in Chapter 13 plan distributions on SBE's Claim pending administrative review, SBE questions and opposes Debtors' concurrent request in Paragraph 11 of the Claim Objection for a bankruptcy court adjudication of SBE's tax-based Claim on its merits under Federal Rule of Bankruptcy Procedure 9014.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Debtor seeks the this court to disallow the claim of SBE through a determination that he was not the "responsible party" and his therefore not personally liable for the tax obligation. Both parties agree that the tax appeal is currently pending, which addresses the same issues.

AUGUST 8, 2014 STATUS REPORT BY THE STATE BOARD OF EQUALIZATION

Tax creditor, the California State Board of Equalization (identified as the "SBE") submits a Status Report on the Debtors' Objection to Claim of State Board of Equalization, or in the Alternative, to Conditionally Determine the Value of the Claim Pending Resolution of the Appeal.

On July 15, 2013, the Debtors filed their Claim Objection against the SBE. This was because Chapter 13 Trustee, in compiling a list of timely filed claims, indicated that the plan may not be feasible, and that case dismissal may be warranted. Dckt. No. 51. The Court continued the original September 10, 2013 hearing on the Claim Objection to March 4, 2014. Dckt. No. 87, then to May 6, 2014, Dckt No. 90, then to August 19, 2014, Dckt. No. 93, so that the Debtors may engage in out of court settlement discussions with the SBE, and pursue their administrative appeals rights with the SBE's Appeals Division for a re-determination of tax.

On April 13, 2012, the contested tax was billed to Debtor, Wasif Asghar, in his capacity as a "responsible person" for the now-ceased QS Ventures, Inc., because its tax debts to the SBE remain outstanding. Cal. Rev. & Tax. Code § 6829; Cal. Code Regs., tit. 18 § 1702. The federal counterpart "responsible person" tax statute is at 26 U.S.C. § 6672, and is frequently litigated in bankruptcy courts. 11 COLLIER ON BANKRUPTCY TAXATION §TX15.02 (2014).

SBE states that on or about April 2, 2014, the SBE informed the Debtors' counsel that the SBE rejected the Debtors' written tax settlement proposal under the guidelines of Cal. Rev. & Tax. Code § 7093.5(c).

The Debtors currently have a scheduled conference with a hearing officer with the SBE's Appeals Division on September 4, 2014, designated as Case Id. 611390. See Cal. Code Regs., tit. 18 § 5264. Because this multi-level appeals process has not yet concluded, this contested "responsible person" tax remains contingent for bankruptcy purposes. Notwithstanding this upcoming conference, the SBE states that it concurs with the Court's discussion in its previous minute orders that the Court has permissive jurisdiction under 11 U.S.C. § 505(a) for a determination of a contingent state tax liability, as a necessary proceeding for the administration of federal law.

Creditor again asserts that the Debtors have not met their burden of proof in objecting to the state tax claim. As briefed in the SBE's August 22, 2013 Opposition to the Debtors' Objection to the Claim of the California State Board of Equalization, or in the Alternative, to Conditionally Determine the Value of the Claim Pending Resolution of the Appeal ("Opposition"), Dckt. No. 82, in the context of a claim objection to a state tax, the burden of proof is determined by state tax law. *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000).

Under California law, a tax assessment billing by a revenue agency is presumed to be correct, and the burden of proof to show otherwise stays with the taxpayer. Flying Tiger Line v. State Bd. of Equalization, 157 Cal. App. 2d 85, 99 (1958); 67B AM. JUR. 2D Sales and Use Taxes § 214 (2013). A taxpayer who objects to his or her "responsible person" tax liability bears the burden of proof. *Latin v. State Bd. of Equalization* (*In re Latin*), 2009 Bankr. LEXIS 4523 *23-24 (B.A.P. 9th Cir. 2009) (explaining that Sales and Use Tax Regulation 1702.5 requires that a taxpayer provide evidence that he or she lacked responsibility or willfulness).

SBE argues that Debtor Wasif Asghar has was not sufficiently controverted the contention that he was the responsible person for taxes of the QS Ventures, Inc, during the relevant time period. As explained in SBE's Opposition to the Objection, Debtors' proof consisted only of a single Kaiser Permanente doctor's visit on or about July 31, 2007. SBE asserts that his in and of itself does not demonstrate that Debtor, Wasif Asghar, at all relevant times, was not a person responsible for payment of California sales taxes on behalf of QS Ventures, Inc. The Debtors have not met their burden of proof. Thus, SBE requests that the Objection be overruled.

SCHEDULING OF AN EVIDENTIARY HEARING

This bankruptcy case was filed on July 1, 2011 (three years ago). Creditor filed its proof of claim on November 30, 2011 (two years and eight

months ago). Proof of Claim No. 29. This Objection to Creditor's Claim was filed on July 15 2013 (now more than one year ago).

The parties, now more than three years into this case, have been unable to resolve this dispute. The court has continued and re-continued the hearing to afford good faith, bona fide settlement discussions to be conducted. After such good faith efforts, there is no resolution. Therefore, the court determines that it is necessary for the claims objection process to proceed and this court determine what claim, if any, is allowed in this case.

NOVEMBER 18, 2014 SCHEDULING CONFERENCE

The California State Board of Equalization filed a Status Report on November 12, 2014. Dckt. 99. The Board reports that written discovery has been exchanged with the Debtors' tax counsel. Further, that the discovery and ongoing communications have narrowed the issues and the parties believe that discovery should be completed by November 24, 2014.

The Board requests that the court set a further status conference, rather than setting the matter for an evidentiary hearing, to allow the parties to continue their good faith negotiations and focus on settling this matter.

The Parties are represented by their respective knowledgeable counsel. Affording these Parties and their counsel the opportunity to attempt and achieve an agreed resolution of this dispute is warranted as part of the diligent prosecution of this objection.

JANUARY 21, 2015 SCHEDULING CONFERENCE

At the hearing, the court continued the Scheduling Conference to 2:30 p.m. on April 1, 2015. Dckt. 112.

APRIL 1, 2015 SCHEDULE CONFERENCE

Pursuant to a stipulation filed by the parties, the court issued an order granting a continuance of the Scheduling Conference to 10:30 a.m. on May 14, 2015. Dckt. 126. The court also ordered that the deadline for filing and service of any discovery motions in connection with the Debtors' Objection is April 16, 2015.

MAY 11, 2015 STIPULATED STATUS REPORT

The parties filed a stipulated status report in connection with the instant Objection. Dckt. 135. The status report states that the parties have continued to engage in good faith settlement discussions and have recently reached an agreement. The parties request that the court continue the hearing to allow the parties to complete drafting the settlement.

DISCUSSION

In light of the parties' stipulated status report which states that a settlement has been reached, the court continues the hearing to 10:30 a.m. on July 9, 2015.

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 Evidentiary Hearing Scheduling Conference 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 Evidentiary Hearing Scheduling Conference is continued to 10:30 a.m. on July 9, 2015.

3. 11-36557-E-7 MARTHA RAMIREZ
HCS-5 C. Anthony Hughes

MOTION TO SELL AND/OR MOTION FOR COMPENSATION FOR COLDWELL BANKER NORTHERN CALIFORNIA, REALTOR(S)
4-23-15 [277]

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

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

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

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 23, 2015. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. (Fed. R. Bankr. P. 2002(a)(2), 21 day notice.)

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

The Motion to Sell Property is granted.

The Bankruptcy Code permits the Trustee ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363. Here Movant proposes to sell the "Property" described as follows:

A. 5727 Riverside Drive, Olivehurst, California

The proposed purchaser of the Property is Susan and Raul Segura (“Buyers”) and the terms of the sale are:

1. Purchase price is $75,00.00.

2. The purchase is of the Property is on an “as-is” basis.

3. The Buyers shall pay for smoke alarm, carbon monoxide and water heater bracing.

4. The initial deposit is $7,500.00.

5. The Trustee will pay the $21,514.02 property tax lien held by Yuba County Tax Collector from the proceeds of the sale, through escrow.

6. The Trustee will pay a 6% realtor commission to be spilt between Coldwell Banker Northern California Elk Grove Office (Trustee’s agent) and Coldwell Banker Northern California Auburn Office (Buyers’ agent) which totals $4,500.00 ($2,250.00 for each agent).

The Trustee also requests the court waive the 14-day stay period pursuant to Fed. R. Bankr. P. 6004(h).

At the time of the hearing the court announced the proposed sale an requested that all other persons interested in submitting overbids present them in open court. At the hearing the following overbids were presented in open court: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The terms of the sale allow for the Trustee to bring approximately $47,485.98 into the estate for the benefit of creditors. The proposed sale also satisfies the property tax lien levied on the Property.

Furthermore, the Trustee has pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay after the authorization of the sale required under Fed. R. Bankr. P. 6004(h), and this part of the requested relief 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 Sell Property filed by Alan Fukushima, the Chapter 7 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Alan Fukushima, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Susan and Raul Segura or nominee (“Buyer”), the Property

commonly known as 5727 Riverside Drive, Olivehurst, California ("Property"), on the following terms:

1. The Property shall be sold to Buyer for $75,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 281, and as further provided in this Order.

2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.

3. The Trustee be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.

4. The Trustee be and hereby is authorized to pay a real estate broker's commission in an amount equal to six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to: (1) the Trustee's agent Coldwell Banker Northern California Elk Grove Office in the amount of $2,250.00 and (2) the Buyers' agent Coldwell Banker Northern California Auburn Office in the amount of $2,250.00.

IT IS FURTHER ORDERED that the fourteen (14) day stay provided in Rule 6004(h), Federal Rules of Bankruptcy Procedure, is waived for cause.

4. 14-29361-E-7 WALTER SCHAEFER
DNL-3 Douglas B. Jacobs

MOTION TO APPROVE LIQUIDATION AGREEMENT
4-16-15 [92]

Tentative Ruling: The Motion to Approve Liquidation Agreement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 16, 2015. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion For Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the respondent and other parties in interest are entered.

The Motion for Approval of Compromise is denied.

Kimberly Husted, the Trustee, requests that the court approve a compromise and settle competing claims and defenses with Bank of the West, Ryan Bauer, and Ashman Company Auctioneers and Appraiser, Inc. ("Settlors"). The claims and disputes to be resolved by the proposed settlement are interests in:

(1) Almanor Manufacturing, Inc. and AMI Precision Inc.;

(2) commercial real property and improvements commonly known as 763 Main Street, Chester, California (the "Property:); and

(3) equipment used by the Debtor in a sheet metal fabrication business, last known as Almanor Precision, that the Debtor operated.

The Debtor, on Schedule A, values the Property at $800,000.00 subject to Bank of the West's secured claim in the amount of $360,730.00.

Debtor's amended Schedule B identifies interests in the equipment used in the Debtor's sheet metal fabrication business including:

A. five Amada CNC Turret Punch Presses,
B. three Amada CNC Press Brakes,
C. an Amada Sheer,
D. an Amada Corner Notcher,
E. two Diacro Press Breaks,
F. three Hager Insertion Presses,
G. Fedal and Kitamura CNC Machining Centers,
H. a Miyano CNC Lathe,
I. a HYDMECH Automatic Horizontal Band Saw,
J. Bridgeport Mills,
K. a Victor Lathe,
L. Atlas Capo and Kaeser Air Compressors,
M. Miller Welders,
N. a Welding Department,
O. a Paint Department,
P. Trucks, Support Equipment, and
Q. Perishable Tooking

(the "Equipment"). The Debtor does not claim an exemption in any of the Property or Equipment.

The Trustee states that Bank of the West asserts a first lien against the Property and the Equipment in the amount of $448,864.31 (almost $100,000.00 greater than listed by Debtor on Schedule D).

Mr. Bauer asserts a second lien against the Equipment based on a settlement with the Debtor on an insured occupational injury in the amount of $42,893.12.

The Trustee reports that on February 9, 2015, without court authority or consent of the Trustee, Bank of the West, Mr. Bauer, and the Debtor agreed to sell the equipment to Ashman Company Auctioneers and Appraiser, Inc. for $220,00.00 and permit Ashman Company Auctioneers and Appraiser, Inc. to use the Property to conduct an in place auction.

On February 17, 2015, the Trustee states that the Debtor received from Ashman Company Auctioneers and Appraiser, Inc. a $220,000.00 wire transfer and used the funds to pay scheduled and unscheduled obligation other than the obligations of Bank of the West and Mr. Bauer.

On February 25, 2015, Ashman Company Auctioneers and Appraiser, Inc. removed one of the Amada CNC Turret Punches and sold it to Manufacturing Solutions fo $23,500.00. The Trustee states that she is in possession of the Property and the Equipment, with the exception of the Punch.

Ashman Company Auctioneers and Appraiser, Inc. asserts claims against the Equipment (except the Punch), the $220,000.00, the Debtor and his transferees.

Trustee and Settlor has resolved these claims and disputes, subject to

approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement is set forth in the Settlement Agreement filed as Exhibit H in support of the Motion, Dckt. 96):

A. Bank of the West shall be allowed a claim secured by a first lien against the Property and Equipment (except for the Punch) in the amount of $448,864.31 plus interest thereon at the rate of $39.78058 per day and reasonable attorney fees incurred after March 31, 2015;

B. Mr. Bauer shall be allowed a claim secured by a second lien against the Shop and Equipment (except for the Punch) in the amount of $42,893.12 plus interest thereon at the rate of $2.99 per day and reasonable attorney fees incurred after March 31, 2015.

C. Except for the Punch and the $23,500.00 received by the sale of the Punch, the Trustee shall liquidate the Property and the Equipment and the proceeds shall be disbursed as such:

1. First, to reasonable costs and professional fees incurred by the Trustee in liquidating the assets.

2. Second, to Bank of the West on account of its allowed claim until paid in full.

3. Third, to Mr. Bauer on account of his allowed claim until paid in full.

4. Fourth, to Ashman Company Auctioneers and Appraiser, Inc. The lesser of 50% of the remainder and $196,500.00 on account of the trust claim.

5. Fifth, to the Trustee the remainder.

D. Bank of the West, Mr. Bauer, and Ashman Company Auctioneers and Appraiser, Inc. assign to the Trustee all claims against the $220,000.00 from Ashman Company Auctioneers and Appraiser, Inc.

E. Bank of the West and Mr. Bauer consent to the Trustee's employment of Ashman Company Auctioneers and Appraiser, Inc. to liquidate the Equipment, subject to court approval.

F. Releases shall be exchanged between the Trustee, Bank of the West, Mr. Bauer, and Ashman Company Auctioneers and Appraiser, Inc. in connection with the above claims.

DISCUSSION

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

the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

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

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

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

Under the terms the Settlement all claims of the Estate, including any pre-petition claims of the Debtor, are fully and completely settled, with all such claims released. Settlors have granted a corresponding release for the Estate and provides for a system for disbursement following the sale of the Property and the Equipment.

Probability of Success

The Trustee asserts that this favor weighs in favor of approving the settlement because it appears that Bank of the west and Mr. Bauer have perfected their liens which would give them priority over the bankruptcy estate's claims. The settlement allows for a clear distribution scheme as well as provides the estate with the parties' rights to recover the $220,000.00 from the Debtor. As to Ashman Company Auctioneers and Appraiser, Inc.'s claims, it heavily disputes the Trustee's claims that it was not a good faith purchaser.

Difficulties in Collection

The Trustee states that this factor is neutral since it is a dispute involving the distribution of sale proceeds.

Expense, Inconvenience and Delay of Continued Litigation

Trustee argues that litigation would result in significant costs in litigating the priority of interests of the parties. The Trustee estimates that if the matter went to trial, litigation expenses would consume a substantial amount of an expected recovery. Trustee projects that the proposed settlement nets approximately the same or a grater recovery for the Estate then if the case proceed to trial, but without the costs of litigation.

Paramount Interest of Creditors

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

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested

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

Review of Case

The Trustee presents the court with a motion to approve a "Liquidation Agreement." The Trustee then couches the proceedings for review as approving a compromise. If the Trustee is seeking approval of a compromise, by which the respective parties are settling, and *compromising* their respective rights, then the motion should so "less creatively" be titled.

Walter Schaefer commenced this bankruptcy case by filing a voluntary Chapter 13 Petition on September 17, 2014. Bank of the West is listed on the Master Mailing List. Dckt. 4. On October 4, 2014, Bank of the West filed a Request for Special Notice. Dckt. 21. Bank of the West, as shown on the Request for Special Notice is represented by Tierney, Watson & Healy in this case. There is no doubt that as late as October 4, 2014, Bank of the West had full knowledge of this bankruptcy case.

On March 5, 2015, Ryan Bauer filed Proof of Claim No. 7 in this case. The Proof of Claim is signed by Stewart Altemus, of Altemus & Wagner, as the attorney for Mr. Bauer. Debtor, under penalty of perjury, does not list Mr. Bauer as a creditor. Schedules D, E, and F; Dckt. 12. On Amended Schedule F filed on March 6, 2015 (after this case was converted to one under Chapter 7), Debtor lists, under penalty of perjury, Altemus & Wagner, as collection attorney for Mr. Bauer, as having a general unsecured claim for $45,000. Dckt. 68 at 10.

Review of Bauer Claim

The Trustee has provided the court; as Exhibits E, F, and G; copies of the Promissory Note, UCC-1, and Security Agreement by which she requests the court allow Bauer a secured claim in this case. Dckt. 96. (Within the approval of the "Liquidation Agreement" is the request for allowance of a claim.) Exhibit E is a document titled "Promissory Note," in the amount of $45,000.00 and dated October 31, 2013. Pertinent information from the plain language of the Promissory Note includes:

A. AMI Precision, Inc., dba Almanor Precision, promised to pay Mr. Bauer $45,000.

B. Debtor is not a promisor on the Promissory Note and it does not purport to bind him personally to any obligation to pay the $45,000.00.

C. Walt Schaefer, with the title "Mgr." executed the Promissory Note for AMI Precision, Inc. dba Almanor Precision.

Exhibit E, *Id.*

The next Exhibit is a copy of a UCC Financing Statement which was filed on December 23, 2013. Exhibit F, *Id.* The Financing Statement includes the following pertinent information:

A. AMI Precision, Inc. dba Almanor Precision, is the Debtor.

B. Walt Schaefer is an Additional Debtor.

C. Ryan Bauer is the Secured Party.

D. The Collateral that is the subject of the Financing Statement is detailed on two attached pages to the Financial Statement.

Exhibit F, *Id.*

The Security Agreement, by which the actual security interest was granted (the filed Financing Statement merely being the notice that a possible security interest may exist, and not the grant of a security interest in and of itself; Cal. Comm. Code §§ 9203 and 9502, et seq.), is filed as Exhibit G. The information provided in the Security Agreement includes the following:

A. AMI Precision, Inc. dba Almanor Precision is the "debtor who owes an obligation to the secured party."

B. Walt Schaefer is a party to the Security Agreement "individually."

C. The security interest is granted to secure the obligations of AMI Precision, Inc. under the Promissory Note.

D. Walt Schaefer gives his "consent," "individually," to AMI Precision, Inc. granting the security interest.

E. To secure the obligation of AMI Precision under the Promissory Note, AMI Precision wants a security interest in Collateral, which includes the items listed on the attachments to the UCC Financing Statement.

F. The Representations and Warranties paragraph of the Security Agreement states,

1. Walt Schaefer, and not AMI Precision, Inc. is the owner of, and has title to, all of the Collateral.

2. The information about the Collateral is true.

G. The Security Agreement is signed by AMI Precision, Inc., by Walt Schaefer as "Owner/President," and Walt Schaefer, "Individually."

Exhibit F, *Id.*

While the Trustee quickly, and without discussion, states that Mr. Bauer has an allowed secured claim, the documents provided by Trustee belay that "fact." First, The Debtor did not sign the Promissory Note, only AMI Precision, Inc. Second, the Debtor did not purport to grant a security interest in any of the Collateral, only AMI Precision, Inc. granted a security interest. Walt Schaefer, the Debtor in this bankruptcy case, only consented to AMI Precision, Inc. granting a security interest, to the extent it had any

interests and rights in the Collateral. Finally, Debtor, AMI Precision, Inc., and Mr. Bauer all acknowledge that it is Walt Schaefer, the Debtor in this bankruptcy case, who owned all of the Collateral for which Mr. Ryan obtained a grant a security interest for AMI Precision, Inc.'s interest in the Collateral.

It appears there is a massive defect in the security interest asserted by Ryan Bauer. The Trustee fails to take that into account when blithely stating as fact that Mr. Bauer has an allowed secured claim. The "compromise" of this situation is that Mr. Bauer wins and the bankruptcy estate loses – Pay Mr. Bauer Everything.

Conversion of the Case and Possible Violation of Automatic Stay

The underlying claims to be "settled" by this proposed agreement raises some very serious issues for the court and relate to some egregious violations of rights of the bankruptcy estate and violation of the automatic stay. The documents presented to the court do not address these issues. This lack of information precludes the court making an informed, intelligent decision on whether to approve, or not approve, the proposed settlement.

On January 5, 2015, Bank of the West filed a motion to dismiss or convert the bankruptcy case. Dckt. 34. On February 1. 2015, the court filed the order granting the motion and converting the case to one under Chapter 7. Dckt. 48. At the Bank's own request a chapter 7 trustee was appointed to take control of all property of the estate.

Notwithstanding the filing of this bankruptcy case, Bank of the West, Mr. Bauer, and the Debtor agreed to sell the equipment to Ashman Company Auctioneers and Appraiser, Inc. Effectively, they got together to "steal" property of the bankruptcy estate for their respective benefits. The Creditors and auction company aided and abetted Debtor in stealing these assets.

The Trustee states that this equipment is property of the bankruptcy estate and is to be sold by the Trustee. This is consistent with the statements in the Security Agreement obtained by Mr. Bauer stating that Walt Schaefer, the Debtor in this bankruptcy case, who owns all of the equipment which is the Collateral (for which Mr. Bauer obtained a security interest from AMI Precision, Inc.

Bank of the West has chosen not to filed a Proof of Claim in this case. The court has not been provided with copies of any documents by which is has the "secured claim" which the Trustee throws into the "Liquidation Agreement" to be allowed. While the Trustee has not provided copies of the Bank's loan documents and security documents, it has provided the court with a copy of the "Conditions, Covenants & Requirements" for the loan by which Bank of the West could be asserting a claim in this case. These "Conditions, Covenants & Requirements" include the following:

A. The "Borrower" is Walter Schaefer, the Debtor in this bankruptcy case.

B. There are limitations on the sale or transfer of equipment or other assets by Walter Schaefer, the Debtor in this bankruptcy

case.

C. The business may not be sold by Walter Schaefer, the Debtor in this bankruptcy case, without the consent of the creditor bank.

D. The "Collateral" is real property and "Machinery, Equipment, Furniture, Inventory, and Accounts."

E. Annual financial statements for a "corporation" (undefined entity) are to be provided.

F. Walter Schaefer, the Debtor in this bankruptcy case, executed the document personally, not in any corporate or representative capacity.

Exhibit D.

Though Bank of the West was aware of the this bankruptcy case, had actively participate in this bankruptcy case, and obtained an order converting this case to one under Chapter 7, the Bank, Mr. Bauer, and the Debtor, after the case was converted, worked together to sell property of the estate. By the "Liquidation Agreement," the Bank, Mr. Bauer, and the Trustee appear to agree, and admit, all of the equipment sold was property of the estate (which is consistent with the Representations in Mr. Bauer's security agreement) and that it is, and was, the Chapter 7 Trustee who had the sole right to possess, control, and sell such property of the bankruptcy estate.

As the court reads the proposed "Liquidation Agreement," the Trustee having caught Bank of the West, Mr. Bauer, the Debtor, and Ashman Company Auctioneers and Appraiser, Inc. in their attempt to steal the assets and violate the automatic stay, the two creditors agree to a "compromise" in which they will get paid in full on their claims, including interest, and Ashman Company Auctioneers and Appraisers will be "bonused" by now getting to sell the property recovered from it by the Trustee and to be paid monies for the equipment it "purchased" from someone who had no right, power, or interest in selling property of the bankruptcy estate – the Debtor. No reference is made with respect to how the Trustee intends to address the improper conduct of the Debtor and how this settlement impacts those rights.

Bankruptcy is not a process by which the law is ignored, and when caught violating the law, the "terrible consequences" are merely that one will then have to comply with the law, be paid everything they demanded, be paid monies for entering into invalid contracts, and be "bonused" by being given additional work by the Trustee. The Trustee has not provided the court with any basis for Ashman Company Auctioneers and Appraisers can have any claim against the bankruptcy estate from apparently being defrauded by Walter Schaefer, the bankruptcy debtor, who purported to sell property of the estate.

The sum and substance of the Trustee's Motion is that there is no settlement, there is no compromise, and there is no enforcement of the rights of the bankruptcy estate. Rather, if Bank of the West and Mr. Bauer (who may have no claim in this case) will allow the Trustee to sell the equipment and generate monies from which the Trustee may be paid fees and her professionals paid, the Trustee will pay whatever Bank of the West and Mr. Bauer demand.

That is not consistent with the fiduciary duties of a bankruptcy trustee.

If this is a situation in which a dispute exists as to whether the estate owns the equipment or it is owned by AMI Precision, Inc., then another set of issues exist. Merely because the Trustee, Bank of the West, and Mr. Bauer agree to ignore the fact that AMI Precision, Inc. is a separate legal entity and they want to loot that entities assets, such is not the basis for a "looting order" from the court. Taking another legal entities assets is not one of the powers of a bankruptcy trustee. AMI Precision, Inc. is not a party to the "Liquidation Agreement." As the Trustee surely knows, federal judicial power may be exercise only against the parties who have an actual claim or controversy, there is a basis for federal court jurisdiction, and that all parties have been properly served for the court to have *in personam* jurisdiction. U.S. Const. Art. III, Sec. 2. If such a bona fide, disputed exits, then the Trustee must address that issue (whether substantive consolidation, litigation, changing corporate management, and notification of AMI Precision, Inc.'s creditors). Failure to do so could cause the court to be mislead into entering a void order and the Trustee committing the same wrongful act as Walter Schaefer, the Debtor in this case, in purporting to sell assets in which the Trustee had no interest or right.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court cannot determine that the compromise is in the best interest of the creditors and the Estate. The motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Kimberly Husted, the Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Approve "Liquidation Agreement" between Trustee and Bank of the West, Ryan Bauer, and Ashman Company Auctioneers and Appraiser, Inc. is denied.

5. 15-22182-E-13 RUTH CLARK
15-2084 PGM-3
CLARK V. EL DORADO SAVINGS BANK ET AL

MOTION FOR PRELIMINARY INJUNCTION
5-4-15 [19]

No Tentative Ruling: The Motion for Preliminary Injunction was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

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

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Defendants, parties requesting special notice, and Office of the United States Trustee on May 4, 2015. By the court's calculation, 10 days' notice was provided.

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

The Motion for Preliminary Injunction is xxxxx.

Ruth V. Clark ("Plaintiff-Debtor"), the fiduciary of the bankruptcy estate in Plaintiff-Debtor's underlying Chapter 13 case, filed the instant Motion for Preliminary Injunction on May 4, 2015. Dckt. 19. The Plaintiff-Debtor seeks a preliminary injunction restrain and enjoin El Dorado Savings Bank and Joshua Road Investments, Inc. ("Joshua Road"), (collectively "Defendants") from proceeding with the eviction of the Plaintiff-Debtor from her residence commonly known as 6646 Citabria Lane, Georgetown, California (the "Property"). Plaintiff-Debtor asserts that the Property was, has been, and continues to be property of the Chapter 13 bankruptcy estate.

FACTUAL BACKGROUND AND ALLEGATIONS

The Plaintiff-Debtor filed a Chapter 13 bankruptcy on March 19, 2015. Case No. 15-22182.

On March 19, 2015, the Clerk of the Court issued a "Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are Not Timely Filed." Case No. 15-22182, Dckt. 3. The note to the docket entry states that "[a] copy of this notice was returned to the pro se debtor(s) via hand delivery."

On March 20, 2015, the Clerk of the Court issued an "Amended Notice of Incomplete Filing and Notice of Intent to Dismiss Case if Documents are Not Timely Filed." Case No. 15-22182, Dckt. 9. One of the notes to the docket entry for the Notice is: "A copy of this notice was returned to the debtor(s) by mail. (kwis)." The Certificate of Service states that it was sent to the Property. Case No. 15-22182, Dckt. 12. The only notable difference between the original Notice and the Amended Notice is that the Plaintiff-Debtor's middle name was spelled out on the Amended Notice but abbreviated in the original Notice.

On March 30, 2015, an order dismissing the case for failure to timely file documents was issued. Case No. 15-22182, Dckt. 17. The Order states that since the Plaintiff-Debtor failed to file the missing documents, did not file a motion to extend time to file the documents for cause, and did not file a Notice of Hearing on the Court's Notice of Intent to Dismiss Case, the case was dismissed. *Id.*

The Plaintiff-Debtor's master mailing list was filed on March 31, 2015, five days after the deadline. Case No. 15-22182, Dckt. 19.

Defendant El Dorado Savings Bank is alleged to hold a first deed of trust encumbering the Property in the amount of $72,028.80. Case No. 15-22182, Proof of Claim No. 1-1. The Plaintiff-Debtor values the Property at $170,000.00 on Schedule A. Case No. 15-22182, Dckt. 1.

On April 6, 2015, after the order dismissing the bankruptcy case, Defendant El Dorado Savings Bank allegedly held a foreclosure sale of the Property and sold to Defendant Joshua Road. FN.1.

FN.1. While Debtor states that the Bank "sold" the property to Defendant Joshua Road, if a foreclosure sale were held under the deed of trust, it was the trustee under the deed of trust who conducted and completed the sale.

Motion to Vacate Dismissal Order

On April 10, 2015, the Plaintiff-Debtor filed a Motion to Vacate the Dismissal, stating that she neglected to file the Verification and Master Mailing list when she filed the case. Case No. 15-22812, Dckt. 26. The Plaintiff-Debtor had until March 26, 2015, pursuant to the Amended Notice of Incomplete Filing, to file the missing documentation. The Plaintiff-Debtor states that the completed the necessary documentation on March 25, 2015 at 5:00 p.m. but due to her disability and lack of transportation, she would be unable to deliver them in person by the deadline. The Plaintiff-Debtor states that she contacted the clerk who informed here that if she sent it by mail by March 26, 2015 there would be no dismissal. The Plaintiff-Debtor states that she mailed

the document but that she inputted the wrong address and the package was returned to her. The Plaintiff-Debtor admits that she received the Notice of Dismissal on April 6, 2015.

The court granted the Plaintiff-Debtor's Motion to Vacate on April 14, 2015. Case No. 15-22182, Dckt. 35.

Unlawful Detainer

On April 14, 2015, Defendant Joshua Road allegedly filed a complaint for Unlawful Detainer against Plaintiff-Debtor in the Superior Court for the County of El Dorado, case no. PCU20150087. A Notice to Vacate was allegedly issued on April 14, 2015 which demanded that the Plaintiff-Debtor turn over the Property on or before Thursday, April 30, 2015 at 5:00 a.m. Exhibit 2, Dckt. 8. The court has not been provided with a copy of the judgment for possession or the writ of possession.

Adversary Proceeding

On April 29, 2015, the Plaintiff-Debtor filed the instant Adversary Proceeding alleging that the initial dismissal of the underlying bankruptcy case was void because the Plaintiff-Debtor did not receive notice that the case was going to be dismissed in violation of her statutory and due process rights. The Plaintiff-Debtor alleges four causes of actions against the Defendants: (1) declaratory relief; (2) violation of the automatic stay; (3) damages pursuant to 11 U.S.C. § 362(k); and (4) temporary restraining order.

MOTION

The Plaintiff-Debtor argues in her motion that the March 30, 2015 order dismissing the underlying bankruptcy case was a void order, and that all subsequent acts against the Plaintiff-Debtor in foreclosing the Property and removing the Plaintiff-Debtor from title have been in violation of the automatic stay. However, the Motion states no grounds with particularity upon which the relief is requested. FN.2.

FN.2. Federal Rule of Civil Procedure 7(b), as incorporated by Federal Rule of Bankruptcy Procedure 7007, governs motion practice in adversary proceedings. Rule 7(b) requires that the motion itself state with particularity the grounds, the same language used by the Supreme Court in Federal Rule of Bankruptcy Procedure 9013). This state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions is more demanding than the "short and plain statement" standard for a complaint. Though Plaintiff-Debtor has elected to not state with particularity the grounds in the Motion, but assign the court the task of canvassing all the pleadings to determine what grounds Plaintiff-Debtor would have stated, state those for Plaintiff-Debtor, and then rule on the Motion, the court will not deny the Motion for this pleading deficiency. Plaintiff-Debtor and her counsel should not accept this one exception as a signal that the Rules may be ignored with impunity if a "sad enough tale is told." The court can adequately address, if necessary, such deficiencies later in this Adversary Proceeding.

The Plaintiff-Debtor states the grounds and justification for the

relief sought in the Memorandum of Points and Authorities. Dckt. 21.

The Plaintiff-Debtor argues that she prepared the Verification and Master Address List by March 26, 2015, but did not have the transportation means to drop them off at the courthouse. The Plaintiff-Debtor argues that she called the court and spoke with a female clerk who "advised her that she had time to submit the Verification and Master Address List, Amended Schedules, and Amended Statement of Current Monthly Income via physical mail if sent by the U.S.P.S by March 26, 2015." The Plaintiff-Debtor also alleges that the clerk advised her that the clerk would note this conversation on the Plaintiff-Debtor's file.

Plaintiff-Debtor's specific testimony provided in support of the Motion states:

> "7. Realizing that I would be unable to timely deliver the required documents to the Bankruptcy Courthouse in person, I called the Court and spoke with a female clerk for the Court who advised that I had time to submit the Verification and Master Address List, Amended Schedules, and Amended Statement of Current Monthly Income via physical mail if I send it by USPS by March 26, 2015. This clerk additionally advised me that she would note this conversation on my file.
>
> 8. I was advised by this clerk that if I sent the Verification and Master Address List, Amended Schedules, and Amended Statement of Current Monthly Income as stated above, then my Chapter 13 bankruptcy case would not be dismissed pursuant to the Notice of Incomplete Filing."

Declaration, Dckt. 23.

The Plaintiff-Debtor states that at 3:30 p.m. on March 26, 2015, she deposited the missing documents at the post office in Georgetown, California.

The Declaration of Thomas Carey is filed in support of the Motion. Declaration, Dckt. 24. He testifies he personally witnessed the Plaintiff-Debtor deposit the documents in the U.S. Mail. Mr. Carey further testifies that he drove the Plaintiff-Debtor to the post office and assisted her in making sure the correct postage was on the envelope.

The Plaintiff-Debtor testifies under penalty of perjury, in addition to the facts above, that she did not receive the order dismissing until April 6, 2015, stating,

> 14. The Order Dismissing was initially mailed to the incorrect address before being re-routed to me by the Postal Carrier, causing a total of seven (7) calendar days to elapse before I was aware that my case had been dismissed.

Id. The Plaintiff-Debtor argues that this delay is a "violation of her due process rights as a Chapter 13 Debtor." Dckt. 21, pg. 6, paragraph 19.

The Plaintiff-Debtor further alleges that on April 25, 2015, Plaintiff-Debtor's counsel sent the Defendants a Safe Harbor Notice which stated that the

foreclosure of the Property was allegedly in violation of the automatic stay and that an immediate recession of the foreclosure sale would be necessary.

One basis argued by the Plaintiff-Debtor's argument that the order dismissing the Plaintiff-Debtor's bankruptcy case is that she did not receive notice that her case was going to be dismissed on March 30, 2015. Therefore, she was not afford her statutory and due process rights of notice prior to dismissal. However, the Plaintiff-Debtor does not cite to any constitutional, statutory, or precedential authority concerning the alleged due process violation. Additional, as discussed below, in making this argument Plaintiff-Debtor appears to ignore the two notices she received, one hand delivered to her on March 19, 2015, and the other mailed.

Plaintiff-Debtor asserts that the Defendant El Dorado Savings Bank had a "duty to review the docket after filing their request for special notice, and further have a duty to ensure that the dismissal was proper prior to conducting a foreclosure" of the Property. Dckt. 21, paragraph 28. While so arguing, Plaintiff-Debtor offers no "point and authorities" for this alleged duty. Further, Plaintiff-Debtor makes no assertion as to what the Bank would have, or should have, seen from reviewing the file in this case which would indicate that the order dismissing the case was void.

Finally, Plaintiff-Debtor argues that the clerk orally telling Plaintiff-Debtor to mail in the document, and then no notice that the Clerk had not received the document before dismissing the case renders the dismissal void. Therefore, the automatic stay never terminated, the foreclosure sale of the Property was void, and the Defendants violated the stay by conducting the sale. FN.3.

FN.3. It should be noted that the automatic stay can be innocently violated. Even without notice of the bankruptcy case, the automatic stay is just that, automatic and protecting the debtor and all property of the bankruptcy estate. Just because a violation of the stay occurs does not mean that damages and sanctions flow. It depends upon what the person violating the stay learns of the bankruptcy case and, as here, a contention that there is a stay violation.

JOSHUA ROAD INVESTMENTS, INC.'S OPPOSITION

Joshua Road filed an opposition to the instant Motion on May 8, 2015. Dckt. 28.

Joshua Road first argues that Plaintiff-Debtor did receive notice that the case would be dismissed based on the Notice of Incomplete Filings which she admits to have received which stated that if the Plaintiff-Debtor failed to file the missing documents by March 26, 2015, that her case would be dismissed. This admission, Joshua Road argues, defeats any due process violation claims. Furthermore, Joshua Road argues that the alleged statement made by the clerk when the Plaintiff-Debtor called the court is inadmissible hearsay and that the clerk has no authority to extend deadlines without providing notice to other parties. Additionally, Joshua Road highlights that the Verification of Master Address List filed by Plaintiff-Debtor is dated March 27, 2015. This is the day after the missing documents were due.

Joshua Road next argues that since the foreclosure sale took place after the automatic stay was terminated, following the dismissal, the Property was no longer part of Plaintiff-Debtor's bankruptcy estate. No longer being part of the estate, the vacating of the dismissal did not bring the Property back into the estate.

Joshua Road alleges that vacating the dismissal does not make the automatic stay retroactive. Joshua Road argues that no notice or indication in reviewing the docket at the time of the foreclosure sale that the bankruptcy case would be reinstated. Additionally, Joshua Road argues that even if the automatic stay applied, it only applies to pre-petition claims. Here, the unlawful detainer action filed by Joshua Road took place post-petition and that any automatic stay would not prohibit the prosecution of the unlawful detainer action.

Any retroactive application of the automatic stay would create uncertainty according to Joshua Road because it would require the creditor to sit and wait to see if a dismissed case will be reinstated, even though it was rightfully dismissed and reflected on the docket.

Discussion of Hardship

As to the balance of hardship, Joshua Road argues that the balance favors the denial of a preliminary injunction because a preliminary injunction would force Joshua Road to be an involuntary landlord and would leave them vulnerable to potential decline in real estate value while the parties await adjudication of Plaintiff-Debtor's claims. However, Joshua Road does not address how this "hardship" is balanced against its stated intention to immediately sell the Property and put it in the hands of a third-party, away from persons who are parties to this litigation.

Joshua Road presents an extensive argument that it suffers much greater hardship than Plaintiff-Debtor if the preliminary injunction is issued. This is premised on Joshua Road's legal conclusion that it, and not the bankruptcy estate, is the owner of the Property. Thus, Joshua Road asserts that a preliminary injunction would create an "involuntary landlord-tenant relationship." Possibly that would be true, if there was not a dispute as to whether Joshua Road or the bankruptcy estate was the owner of the Property. If the preliminary injunction is not issued, then the Plaintiff-Debtor could make exactly the same argument. Further, that failure to issue the preliminary injunction would allow, according to the Plaintiff-Debtor, Joshua Road to improperly misrepresent that it was the owner of the Property and transfer title to some third-parties.

Joshua Road further asserts that if the preliminary injunction is issued, the "the court [would be put] in the position of having to be a property manager as every dispute between [Joshua Road and Plaintiff-Debtor] would need to be resolved by the court." Further, the court would have to determine who pays for repairs and maintenance.

Joshua Road provides the declaration of Lee Dodgson (an officer and shareholder of Joshua Road) ("Dodgson"). Dckt. 29. The testimony under penalty of perjury provide by Dodgson includes:

"5. Joshua Road Investments, Inc., does not currently have any

properties occupied by tenants and has never had occupants longer than a few months, usually as a result of the prior occupant needing additional time to vacate the property."

"6. Joshua Road Investments, Inc., does not have any policies or procedures in place to allow it to effectively manage a rental property."

"8. Joshua Road Investments, Inc., does not want anybody occupying the Subject Property and does not want to rent the Subject Property."

"9. If the court were to grant the preliminary injunction in this matter, it would create a hardship on Joshua Road Investments, Inc., in that personnel would need to be paid, hired, and trained. Further, Joshua Road Investments, Inc., would need to incur the time and expense necessary to put policies and procedures in place."

"10. Further, it would create a hardship by forcing Joshua Road Investments, Inc., to enter the landlord/tenant business they do not want to enter."

"14. I have been involved in real estate investing over 15 years. I vividly recall the economic downturn and the detrimental effect on the real estate prices. As nobody can predict where real estate prices are going, it is impossible to determine what the value of the property will be six months or a year from now. Should the property decline in value and the court ultimately confirms Joshua Road Investments, Inc.'s, ownership of the property, they would have no adequate remedy to compensate them for that loss."

"15. One of the primary reasons that Joshua Road Investments, Inc., does not hold property is because of the potential for real estate to decline rapidly, as happened in the past 10 years."

Declaration, Dckt. 29.

The gist of this argument is that Joshua Road's business model is not one in which it can litigate a dispute concerning the ownership of the Property. It does not have the ability, expertise, or knowledge to deal with the management of the Property while the disputed legal rights and interests are being determined. Therefore, it will suffer a hardship if the court does not allow it to immediately sell the property and transfer it to someone who is not a party to this litigation and take the money from such sale.

Joshua Road's arguments concerning the possible decline in real estate values is a risk equally applicable to Plaintiff-Debtor. If the preliminary injunction was not issued, Joshua Road obtained and disposed of the property, and in two years property values have increased and the court determines that the bankruptcy estate actually owns the property (because the foreclosure sale was void), the list of horribles gets worse:

A. Joshua Road may be liable for a monetary judgment at the higher value if property values rise;

B. Joshua Road may be liable for a monetary judgment for the current value if property values drop;

C. The interests of any potential purchaser may well be invalid, in light of the foreclosure trustee's deed being in violation of the automatic stay and void;

D. The Plaintiff-Debtor and the Bankruptcy Estate face a possibly insolvent Joshua Road, being unable to pay a monetary judgment for the higher value of the Property; and

E. Protracted, multi-party litigation concerning the title to the Property and whether possible infirmities in the title being transferred by Joshua Road were disclosed to immediate and subsequent purchasers (in light of the representations and warranties given to obtain fair market value from the sale of property).

As discussed below, these arguments and issues may well weigh more heavily in issuing the preliminary injunction to maintain the status quo rather than allowing Joshua Road to immediately transfer to the Property to a purchaser, who may or may not be acquiring good title.

EL DORADO SAVINGS BANK OPPOSITION

El Dorado Savings Bank filed a response to the instant Motion on May 8, 2015. Dckt. 31. El Dorado Savings Bank states that it is not arguing for either party due to the conflicting claims of Plaintiff-Debtor and Joshua Road.

APPLICABLE LAW

Preliminary Injunction

The Ninth Circuit sets forth the following standard for determining whether a court should grant an injunction:

> [Movant must] demonstrate either a combination of probability of success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in [its] favor. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases.

Associated General Contractors of California, Inc. v. Coalition for Economic Equality, 950 F.2d 1401, 1410 (9th Cir. 1991)(quotations and internal citations omitted).

In a subsequent ruling, a Ninth Circuit panel expressly disapproved prior Ninth Circuit decisions suggesting a lesser, sliding scale standard than the plaintiff being likely to prevail both on the merits and suffer irreparable harm. *American Trucking Associations, Inc. v. City of Los Angeles, et. al.*,

559 F.3d 1046, 1052 (9th Cir. 2009).

However, another Ninth Circuit Panel, *Alliance For the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), determined that a sliding scale standard remains under Winter. Joining the Second and Seventh Circuits in interpreting *Winter*, this Ninth Circuit Panel ruled that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable. In the Ninth Circuit, this test is stated as, "A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance For the Wild Rockies v. Cottrell*, 632 F.3d at 1134-35, quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). The plaintiff must also establish the other two prongs for the issuance of a preliminary injunction – that the balance of the equities tips in his favor, and that an injunction is in the public interest.

Due Process, Notice Requirements, and Dismissals

Procedural due process requires a notice and an opportunity to be heard. *See Muessel v. Pappalardo* (*In re Muessel*), 292 B.R. 712, 717 (BAP 1st Cir. 2003). The Bankruptcy Appellate Panel for the Ninth Circuit has found that:

> A dismissal without notice and an opportunity to be heard would not be appropriate where substantive issues are to be determined, but if a case involves only very narrow procedural aspects, a court can dismiss a Chapter 13 case without further notice and a hearing if the debtor was provided "with notice of the requirements to be met." Thus, a procedure is "perfectly appropriate" that notifies the debtor of the deficiencies of his petition and dismisses the case sua sponte without further notice and a hearing when the debtor fails to file the required forms within a deadline.

In re Tennant, 318 B.R. 860, 870-71 (BAP 9th Cir. 2004) (internal citations omitted). In applying these principles to the facts in *Tennant*, the Bankruptcy Appellate Panel found that when it is solely a procedural matter, the debtor is notified that failure to file missing documents would lead to a dismissal without further notice, and the debtor had an opportunity to requires an extension, the dismissal of the case did not require any more warnings and that the debtor's due process rights were not violated. *Id.* at 871.

In *Winer v. Krueger* (*In re Krueger*), 88 B.R. 238 (B.A.P. 9th Cir. 1988), the Bankruptcy Appellate Panel for the Ninth Circuit addressed this distinction between a void order purporting to dismiss a bankruptcy case and a valid order dismissing the bankruptcy case which was later vacated under Federal Rule of Civil Procedure 60(b) or reversed on appeal. The Panel was presented with a situation where the bankruptcy court dismissed the debtor's bankruptcy case at a hearing for which no notice was provided to the debtor. When the order dismissing the case was entered, a creditor proceeded with a non-judicial foreclosure sale. Learning of the dismissal, the debtor sought and obtained from the court (after the non-judicial had occurred) an order vacating the order dismissing the bankruptcy case. The Bankruptcy Appellate Panel first concluded that the order dismissing the case, having been issued from a hearing at which the debtor was not provided notice that the case could

be dismissed, was void. The Appellate Panel concluded,

> Moreover, notice is not only a statutory requirement, but a constitutional requirement as well. *See Blumer*, 66 B.R. at 113. The due process clause of the Fifth Amendment requires that due process be provided before property can be taken. *Id. See also In re Gregory*, 705 F.2d 1118, 1122-23 (9th Cir. 1983) (acknowledging that notice of a Chapter 13 confirmation hearing must meet due process standards). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). Here, because the Debtors were not informed that their confirmation hearing had been rescheduled, they clearly were not afforded due process.
>
> An order is void if it is issued by a court in a manner inconsistent with the due process clause of the Fifth Amendment. *See, e.g., Blumer*, 66 B.R. at 113; *In re Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (citing 11 C. Wright and A. Miller, Federal Practice and Procedure, section 2862, page 200, (1973)). Accordingly, in this case Judge Elliott properly vacated the dismissal order that had been issued in violation of the Debtor's due process rights.

Id. at 241.

The order dismissing the case being void, the bankruptcy case had not been dismissed and the automatic stay continued in full force and effect.

> We disagree with this analysis [the trial court conclusion that the non-judicial foreclosure sale could not violate the automatic stay because vacating the order could not make the automatic stay retroactively effective]. In our view, because the order dismissing the case was void, the stay was continuously in effect from the date the petition was filed. Therefore, the foreclosure sale was held in violation of the stay. Acts taken in violation of the automatic stay are generally deemed void and without effect. *Kalb v. Feuerstein*, 308 U.S. 433, 443, 60 S. Ct. 343, 348, 84 L. Ed. 370, 376 (1940); *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 816 (9th Cir. 1985); *In re Albany Partners Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984). Accordingly, the foreclosure sale should have been set aside on this basis.

Id. at 241-242.

Recently, the United States Supreme Court confirmed this principal concerning a void order, stating,

> "A void judgment is a legal nullity. See Black's Law Dictionary 1822 (3d ed. 1933); see also id., at 1709 (9th ed.

> 2009). Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See Restatement (Second) of Judgments 22 (1980); see generally id., § 12. The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule."

United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010).

The Ninth Circuit Court of Appeals discussed the effect of the automatic stay when a bankruptcy case has been dismissed without notice in *Turtle Rock Meadows Homeowners Association v. Slyman* (In re Slyman), 234 F.3d 1081 (9th Cir. 2000). The Appellate Court considered a situation where the bankruptcy case was dismissed based on a debtor's failure to appear at hearings. The bankruptcy court subsequently vacated the order dismissing the case because that debtor was not provided notice of the hearings at issue. The bankruptcy court order vacating the dismissal in *Slyman* also expressly stated that the automatic stay was retroactively given full force and effect through the date of the dismissal order. The Ninth Circuit concluded in *Slyman* that because the order dismissing the bankruptcy case was void, the acts taken by the creditor (requiring payment of monies to prevent a foreclosure sale) violated the automatic stay and were void.

ANALYSIS

The facts surrounding the instant Motion based on the evidence so far presented are extra-ordinary and revolve around actions taken during a very small window of time. Between the eight days from the dismissal order being filed and the court vacating that dismissal order, the foreclosure sale was conducted, an eviction was noticed, and the Plaintiff-Debtor filed her missing documents.

The Plaintiff-Debtor argues that her due process rights were violated due to the failure of receiving notice of the dismissal. Joshua Road directs the court to the Plaintiff-Debtor admitting that she received the Notice of Incomplete Filing which explicitly stated that:

> **NOTICE IS FURTHER GIVEN** that the Court, ***without further notice, may dismiss this case*** unless the debtor does one of the following on or before the date specified above (if two dates are shown, the debtor must do the following on or before the earlier of the two dates):
>
> 1. Files all missing documents with the Clerk, U.S. Bankruptcy Court, by mail or in person at the address shown below; OR
>
> 2. Files a motion for an extension of time to file the missing documents with the Clerk, U.S. Bankruptcy Court, by mail or in person at the address shown below. . . OR
>
> 3. Files a Notice of Hearing on the Court's Notice of Intent to Dismiss Case supported by a statement of the issue and evidence with the Clerk, U.S. Court by mail or in person. . .

.

Case No. 15-22182, Dckt. 9 (emphasis added).

However, while admitting receiving this Notice, Plaintiff-Debtor argues that the court, acting through one of the deputy clerks (whom she cannot identify) told her that if she mailed the document by the March 26, 2015 deadline that Plaintiff-Debtor's bankruptcy case would not be dismissed.

As noted by Joshua Road, the Verification that the Plaintiff-Debtor states under penalty of perjury was sent on March 26, 2015 at 3:30 p.m. is signed by the Plaintiff-Debtor on March 27, 2015, a day after the deadline. This is not consistent with Plaintiff-Debtor's testimony, or the corroborating testimony of Thomas Carey (Case No. 15-22182, Dckt. 24), that Plaintiff-Debtor mailed the document to the court on March 26, 2015.

Plaintiff-Debtor also testifies under penalty of perjury that, "[t]he Order Dismissing was initially mailed to the incorrect address...." Declaration, 15-22182, Dckt. 23. In making this statement under penalty of perjury, Plaintiff Debtor provides no indication as to how she has any personal knowledge of this "fact." Fed. R. Evid. 601, 602. Second, the Certificate of Service for the order dismissing the case states that it was served on the Plaintiff-Debtor as the following address: "6646 Citabria Ln, Georgetown, CA 95634-9555." 15-22182, Dckt. 21. This is exactly the same address as listed on the Petition for the Debtor in the Chapter 13 case. 15-22182, Dckt. 1. It appears that Plaintiff-Debtor's testimony that the order dismissing the Chapter 13 Case was "mailed" to an incorrect address is itself incorrect.

El Dorado Savings Bank points out to the court that this was not Plaintiff-Debtor's first bankruptcy case which has been filed to stay the foreclosure on the Property. Plaintiff-Debtor filed a Chapter 7 case on October 21, 2013. Bankr. E.D. Cal. No. 13-33549 ("Prior Bankruptcy Case"). The Prior Bankruptcy Case was dismissed on December 10, 2013. That dismissal was more than fourteen months before the March 19, 2015, filing of the Plaintiff-Debtor's current Chapter 13 case. While providing testimony that Debtor was substantially delinquent, which resulted in the notice of default and notice of sale, the amount of the default is not stated.

Plaintiff-Debtor filed a Chapter 13 Plan on May 11, 2015. Case No. 15-22182, Dckt. 67. In the Plan Debtor states that the pre-petition arrearage to be cured is $7,628.17 and there is a $541.52 post-petition default in the month and one-half since the commencement of the Chapter 13 case. By Plaintiff-Debtor's own account, she has defaulted in approximately 14 monthly payments to El Dorado Savings Bank, notwithstanding the modest monthly payment amount of $541.52 (using the information provided by Plaintiff-Debtor in the proposed Chapter 13 Plan).

It is clear that Plaintiff-Debtor had notice that the failure to file the missing documents by March 26, 2015, could result in the dismissal of her bankruptcy case. Based on that Notice, the dismissal would not have been an unnoticed, secret dismissal which was void. *See Sillman v. Walker* (*In re Sillman*), No. 09-22188-E-13, 2014 WL 223099 at *1 (Bankr. E.D.Cal., Jan. 21, 2014), *affrm. Sillman v. Walker* (*In re Sillman*), No. 09-22188-E-13, 2015 WL 1291427, at *1 (E.D.Cal., March 20, 2015). But Plaintiff-Debtor's contentions do not end there. She alleges, and testifies, that a deputy clerk of the court

advised her that the case would not be dismissed if the Plaintiff-Debtor deposited the documents with the U.S. Postal Service by March 26, 2015.

The court notes that March 26, 2015, was a Thursday. By not depositing the documents in the mail until late on the afternoon of March 26, 2015, Debtor was insuring that the court would not received the documents until at least Monday March 30, 2015, the first business day after the intervening weekend. The documents were not filed until March 31, 2015. None of the parties have provided the court with any evidence concerning when the documents were received, whether there is any record of when the documents were received by the court.

Application of Automatic Stay

While Joshua Road argues that the automatic stay is not retroactively put in effect when a dismissal is vacated, it glosses over the effect if the dismissal order was void and, if not void, the effect of the automatic stay which was in effect on and after April 14, 2015. Joshua Road argues that since any rights it has arise after the commencement of the bankruptcy by virtue of the foreclosure sale, then it cannot be a creditor and the automatic stay is of no moment to it.

> "Since the foreclosure sale took place after the automatic stay was terminated, the Subject Property was no longer part of CLARK's estate. As a result, even if the automatic stay was revived on April 10, 2015, when the dismissal order was vacated, it did not apply to the Subject Property because the Subject Property was "no longer property of the estate." 11 U.S.C. § 362(c)(1). Therefore, anything that took place regarding the Subject Property after the foreclosure sale is not subject to any automatic stay and the purchaser could pursue their state law remedies."

Opposition, p. 5:14-20; Dckt. 28. *See also* Opposition, p. 7:3-4, stating, "The automatic stay only applies to claims against the debtor 'that arouse before the commencement' of the bankruptcy case. 11 U.S.C. § 362(a)(6)." This subparagraph does not limit or qualify the scope of all of the other subparagraphs, nor limit the scope of 11 U.S.C. § 362(a) in general.

This manifests a misunderstanding of not only the actual grounds being asserted (though hidden in the points and authorities by Plaintiff-Debtor), but the plain statutory language of the automatic stay itself. First, Plaintiff-Debtor asserts that the order dismissing the automatic stay is void, of no force and effect. If void, the automatic stay never terminated and the purported foreclosure sale is a nullity, even if all the parties thought the dismissal order was valid.

Second, even if the dismissal order was not void, this court's April 14, 2015 order vacating the dismissal (Dckt. 35) resulted in the automatic stay roaring back into life in full force and effect. That automatic stay not only enjoins creditors from enforcing pre-petition claims, but also

> "(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;..."

11 U.S.C. § 362(a)(3). Even if the foreclosure sale occurred and title to the real property was transferred, all of the personal property of the Plaintiff-Debtor located on the real property continues to be "property of the bankruptcy estate." 11 U.S.C. § 541(a). The estate, through the Plaintiff-Debtor, is in possession of the Property. The court cannot identify any exceptions to the automatic stay for the facts as presented. This conundrum has existed for creditors and other parties seeking to enforce their rights when the target of their actions files bankruptcy. At the very least, any actions taken, orders issued, notices given, and acts of Joshua Road after the April 14, 2015 order vacating the dismissal are void, with no action of the Debtor required to vacate such non-bankruptcy court orders or actions.

Knife Edge Issues

As Judge Klein, Chief Bankruptcy Judge in this District, has often said, "being on the cutting edge means somebody, or everybody, ends up bleeding." Here, the parties present the court with a knife edge issue concerning the dismissal and vacating the dismissal of the bankruptcy case with respect to the foreclosure sale. Additionally, the court is presented with limited evidence as to the conversation which Plaintiff-Debtor asserts occurred with the deputy clerk of the court.

Further, if the court ultimately determines that the order dismissing the case was void, then the automatic stay remained in full force and effect. In such an event, Joshua Road's conduct in taking, controlling, and disposing of property of the Bankruptcy Estate might be characterized as a knowing, intentional violation of the stay. That would also render the trustee's deed by which Joshua Road asserts it right to the Property void. This could then result in an avalanche of litigation concerning subsequent transferees, as well as litigation over an asserted violation of the automatic stay.

Joshua Road presents the court with evidence that it is unable to, and does not intend to, maintain the status quo so that the litigation can be ultimately resolved by the court and an effective judgment issued between the two parties determining the ownership issue. Joshua Road's business model requires that it immediately sell the property another person.

In considering the "bleeding edge" nature of this knife, it appears that not issuing the injunction subjects Joshua Road and the court to great potential loss, work, and hardship if the court ultimately determines that the dismissal order is void and therefore the trustee's deed is void. It also subjects the Plaintiff-Debtor and Bankruptcy Estate to losing the Property, having to take on extensive multi-party litigation, and possibly having a money judgment against an empty shell defendant once the property has been quickly disposed of that then the process disbursed by Joshua Road.

CONCLUSION

At the hearing, ------

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 Preliminary Injunction filed by Plaintiff-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 xxxxx.